

## **ANALYSIS OF THE BROADCASTING SERVICES AMENDMENT BILL 2002 & ZBC COMMERCIALISATION ACT 2001**

### **INTRODUCTION & OVERVIEW**

Until the latter part of 2000, broadcasting in Zimbabwe was regulated by the Broadcasting Act [Chapter 12:01]. By virtue of s 27 of that Act, the Zimbabwe Broadcasting Corporation held a monopoly over the provision of broadcasting services. The constitutionality of this dispensation was subject to successful challenge in **Capital Radio (Pvt) Ltd v Minister of Information (1) 2000 (2) ZLR 243 (S)** in which matter the Supreme Court went on to hold that other legislation<sup>1</sup> prohibiting the possession or operation of radio stations by persons other than the Zimbabwe Broadcasting Corporation was equally unconstitutional. The litigation in this regard was relatively uncomplicated, as the Respondent Minister had in fact conceded that the legislation was unconstitutional.

The offending provisions having been declared invalid, there appeared a lacuna in the law: the impediment to private participation in the broadcasting industry had been removed, but there was yet to be established any regulatory framework to govern their operations. In the **Capital Radio** case, the Respondent Minister was found to have been somewhat dilatory in causing the establishment of a regulatory authority. Four months had passed from the time of the making of the Minister's concession that the challenged provisions were unconstitutional up to the hearing of the matter and yet he had not done that which was required of him in the light of the concession. Agreement could not be reached as to a time limit for the establishment of the necessary regulatory framework and it followed that in the absence of this framework, Capital Radio (or anyone else for that matter) was at liberty to establish and run a broadcasting service. Armed with an order to that effect from the highest court in the land, Capital Radio proceeded to do just that. Learning of this development, the Respondent Minister was quoted in the media describing Capital Radio as a "pirate station" and warning that he would soon take "appropriate action".

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<sup>1</sup> ss 14(1) and (2) of the Radiocommunication Services Act [Chapter 12:04].

Fearing that the Minister may interfere with or confiscate its equipment, Capital Radio urgently sought an order interdicting such action. The application was laid before a judge in chambers who granted that relief as armed agents of the State maintained a blockade of the station's premises through the night of 4 - 5 October 2000.<sup>2</sup> In defiance of the order, police details broke down the door and seized the equipment.<sup>3</sup> The judge who dealt with the urgent application, Chatikobo J, was in time to come described by the Minister as a "night judge" dispensing "night justice" in a "night court". This was said amid a flurry of remarks about the "abuse" of the Constitution by a minority.

Against this background there appeared as a supplement to a Government Gazette Extraordinary dated 4 October 2000 the Presidential Powers (Temporary Measures) (Broadcasting) Regulations, 2000.<sup>4</sup> These Regulations made provision for the establishment of the Broadcasting Authority of Zimbabwe, licensing of operators in the industry and the regulation of operations generally. By virtue of the provisions of the enabling statute, these regulations had a life span of six months from the date of promulgation,<sup>5</sup> but their expiry was preceded by the promulgation of the Broadcasting Services Act [Chapter 12:06].<sup>6</sup> The operation of this Act was backdated to the date of commencement of the Regulations, and indeed many of the provisions of the Regulations were retained in the Act. Accordingly, activities in connection with broadcasting in Zimbabwe on and after 4 October 2000 are governed by the Broadcasting Services Act.

The Act provides for the establishment of a Broadcasting Authority of Zimbabwe composed of persons appointed by the Minister of State for Information and Publicity in the President's Office, subject to the direction of the President. The Act constitutes the Minister as the licensing authority of broadcasting services and sets out the different classes of licence and the requirements to be satisfied by applicants. Provision is made for the development of codes of conduct for broadcasting services and limitations on the ownership of broadcasters and other mass media are set out. The Act also creates a broadcasting fund and provides for certain general

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<sup>2</sup> *Capital Radio (Pvt) Ltd v Minister of Information a.o.* (2) 2000 (2) ZLR 265 (H).

<sup>3</sup> The officer responsible was convicted of contempt of court: ***Capital Radio (Private) Limited v Minister of Information & Ors (3): In re Ndlovu*** 2000 (2) ZLR 289 (H).

<sup>4</sup> Statutory Instrument 255A of 2000.

<sup>5</sup> Presidential Powers (Temporary Measures) Act [Chapter 10:20], s 6(1).

<sup>6</sup> Act 3 of 2001.

matters such as the regulatory powers of the Minister. Rather significantly, the Act amends the Broadcasting Act [Chapter 12:01] by amending its title to the Zimbabwe Broadcasting Corporation Act [Chapter 12:01] and by amending s 27 to confirm the breaking of Zimbabwe Broadcasting Corporation's monopoly.

In a related development, Parliament later passed the Zimbabwe Broadcasting Corporation (Commercialisation) Act, 2001.<sup>7</sup> This Act in essence provides for "the formation of successor companies to take over the functions, assets, liabilities and staff of the Zimbabwe Broadcasting Corporation."<sup>8</sup> This Act also amends the Broadcasting Services Act to import the essence of certain provisions of the Zimbabwe Broadcasting Corporation Act. Provision is also made for the repeal of the Zimbabwe Broadcasting Corporation Act so soon as the President is satisfied as to certain matters. Further amendments to the Broadcasting Services Act are proposed in the Broadcasting Services Amendment Bill, 2002.<sup>9</sup>

We have been instructed to prepare and do hereby furnish an analysis of the Broadcasting Services Amendment Bill and of the Zimbabwe Broadcasting Corporation (Commercialisation) Act. Having regard to the chronology narrated above, this paper will commence with a consideration of the Zimbabwe Broadcasting Corporation (Commercialisation) Act incorporating, where relevant, a testing of its provisions and effect against the Declaration of Rights. The Broadcasting Services Amendment Bill will thereafter receive similar treatment and in both cases a comparison between these instruments and comparable measures in other jurisdictions will be made. Should this prove to be necessary, and subject to the reservations expressed regarding the diction employed in our instructions, we might then make recommendations as to amendments which might be appropriate in the light of the observations we shall make.

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<sup>7</sup> Act 6 of 2001.

<sup>8</sup> These words appear in the long title of the Act.

<sup>9</sup> No 14 of 2002

# **ZIMBABWE BROADCASTING CORPORATION (COMMERCIALISATION) ACT, 2001**

## **INTRODUCTION**

As a point of departure in the examination of the Zimbabwe Broadcasting Corporation (Commercialisation) Act ("the Commercialisation Act"), the status of the Zimbabwe Broadcasting Corporation ("ZBC") at the time of its promulgation must be established. As has been set out above, the ZBC was a creature of statute (the then Broadcasting Act) which had as its executive organ a board of governors appointed by the Minister responsible for Information<sup>10</sup> subject to the direction of the President. The core functions of the Corporation were to carry on broadcasting services for the information, education and entertainment of listeners in Zimbabwe and, if so required by the Minister and for such purposes as he may specify, for reception by listeners outside the country.<sup>11</sup> The State funded<sup>12</sup> Corporation was also the licensing authority with regard to diffusion services and had certain other powers (such as the licensing of listeners) that were spelt out in the Act. Very significantly, the ZBC had the monopoly of broadcasting in Zimbabwe by virtue of s 27 of the Broadcasting Act.

The Broadcasting Services Act amended s 27 of the Broadcasting Act to provide that no person "other than the [ZBC] or a person licensed in terms of the Broadcasting Services Act" may provide a broadcasting service. The Broadcasting Services Act also amended the title of the Act to Zimbabwe Broadcasting Corporation Act.<sup>13</sup> The original Act, and therefore the identity and capacities of the ZBC, was otherwise left intact. In so far as licensing was concerned, the new Act provided that the ZBC was deemed to be licensed to provide every class of broadcasting service that it provided immediately before the commencement of the Act and had reserved to it all frequencies allocated to it immediately before the date of commencement.<sup>14</sup> This state of

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<sup>10</sup> At the time, the Minister of Information, Posts and Telecommunications. The relevant functions are now those of the Minister of State for Information and Publicity in the Office of the President and Cabinet.

<sup>11</sup> s 14 of the then Broadcasting Act.

<sup>12</sup> s 19(b) of the Broadcasting Act.

<sup>13</sup> s 48 of the Broadcasting Services Act

<sup>14</sup> ss 37(1) and 38 of the Broadcasting Services Act

affairs was to persist for a period of three months from the date of commencement;<sup>15</sup> that is, until 4 July 2001. The Act somewhat equivocally required the Minister to act "without delay" in causing a license to be issued to the ZBC,<sup>16</sup> which, given the unambiguous three month time limit appearing elsewhere in the Act, ought to be interpreted to mean before the expiry of this deadline. The date came and went before the issuance of the licence by the Minister and a problem arose.

To solve this problem, recourse was once again had to the Presidential Powers (Temporary Measures) Act. By s 2 of the Presidential Powers (Temporary Measures) (Amendment of Zimbabwe Broadcasting Corporation Act and Broadcasting Services Act) Regulations, 2001,<sup>17</sup> the three-month deadline was extended by six months. However, the Regulations were only published on 12 July 2001 which was over a week after the expiry of the original three-month deadline. For that week, therefore, ZBC was an unlicensed broadcaster operating in apparent<sup>18</sup> contravention of s 27 of the Zimbabwe Broadcasting Act [Chapter 12:01].

Now at the time the Regulations were promulgated it was thought

"desirable to make provision for the establishment of a signal carrier company that is separate from the Zimbabwe Broadcasting Corporation to ensure that the Corporation concentrates on its core business of radio and television broadcasting whilst the signal carrier company concentrates on transmission so as to enable broadcasters to get an efficient signal transmission service."<sup>19</sup>

The Regulations accordingly provided for the establishment of two successor companies to the ZBC to ensure separation of these functions. There is, however, no evidence that this was done immediately.<sup>20</sup> As will now be appreciated,<sup>21</sup> these Regulations expired on the one hundred and eighty-first day after their commencement; to wit, on 9 January 2002. The legislation provides that upon the expiry of such regulations, any amended enactments revert to their original form.<sup>22</sup> The significance of this in the present case is that on and after 10 January 2002 ZBC was no

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<sup>15</sup> s 47(3) of the Broadcasting Act

<sup>16</sup> s 37(2) of the Broadcasting Act

<sup>17</sup> Statutory Instrument 220E of 2001

<sup>18</sup> For reasons which need not be canvassed here, certain aspects of the provisions relating to licensing appear to be tautologous.

<sup>19</sup> See the preamble to the Regulations

<sup>20</sup> See further, below.

<sup>21</sup> cf footnote 5 above

<sup>22</sup> Presidential Powers (Temporary Measures) Act, s 7.

longer deemed to be a licensed broadcaster since, on any view of the facts, the time limit prescribed by s 47(3) of the Broadcasting Act had expired, again. The Commercialisation Act was then published on 1 February 2002.

From this it will be seen that at the time of the promulgation of the Commercialisation Act, the ZBC was a State corporation which appears not to have been a licensed broadcaster. The Act rectifies this and goes on to provide for the establishment of successor companies to the ZBC and to effect certain amendments to the Broadcasting Services Act. Having placed the legislation in context, we shall now proceed to examine the provisions of the Commercialisation Act, commenting where relevant on any provisions of the Declaration of Rights which might have a bearing on the enactment.

## **ANALYSIS**

For the sake of completeness, we propose to examine the Act on a section by section basis.

### **1. Short title**

This section merely sets out the short title of the Act, namely, the Zimbabwe Broadcasting Corporation (Commercialisation) Act, 2001.

### **2. Interpretation**

This section sets out the definitions of certain terms used in the Act, which definitions prevail over the ordinary meaning of the terms unless the context requires otherwise.<sup>23</sup> Subsection (2) of this section incorporates by reference the interpretation sections of the Broadcasting Services Act.

### **3. Formation of digital convergence signal carrier and broadcasting companies**

This section requires the Minister of State for Information and Publicity to form two successor companies to the ZBC which are to be incorporated in terms of the Companies Act [Chapter 24:03] and limited by shares. This is in itself evidence that the acts originally required of the Minister under the Amendment of the Zimbabwe Broadcasting Corporation Act and

Broadcasting Services Act Regulations were not in fact taken before the expiry of those Regulations.<sup>24</sup>

It will be recalled that similar measures (framed in almost identical terms) have been taken in the past with regard to such institutions as the former Air Zimbabwe Corporation,<sup>25</sup> the Agricultural Finance Corporation<sup>26</sup> and the Post and Telecommunications Corporation.<sup>27</sup> In the present case, it was found to be necessary

"that broadcasting and signal transmission services be run on a commercial basis not only to enable ZBC to compete effectively and efficiently but also to comply with the new law and the new broadcasting environment."<sup>28</sup>

It may accordingly be inferred that the intention of the legislature and the spirit of the legislation was to take measures aimed at confirming ZBC's position as a player under a new dispensation (as opposed to the alter ego of the State and the holder of a statutory monopoly) and to equip it to be equal to commercial challenges. That being the case, certain provisions will be seen to occupy a rather awkward position within the Act.

#### 4. **Objects of Companies**

The first two subsections of this section set out the objects of the successor companies and provides for the assignment of further functions by the memoranda of association of the companies.

Subsection (3) of this section reads:

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<sup>23</sup> Interpretation Act [Chapter 1:01], s 12

<sup>24</sup> In this regard it is noteworthy that when the Act was in Bill form (22 of 2001), the proposed section required the Minister to either form the companies or perform certain functions in relation to companies already in existence. The dropping of this alternative tends to confirm that it was known the companies had not been formed.

<sup>25</sup> Air Zimbabwe Corporation (Repeal) Act, 1998 (No 4 of 1998)

<sup>26</sup> Agricultural Finance Corporation Amendment Act, 1999 (No 14 of 1999)

<sup>27</sup> Postal and Telecommunications Act [Chapter 12:05] (Act No 4 of 2000)

<sup>28</sup> These words are taken from the memorandum to the Bill. With regard to the status of such sources, the reader is reminded that the common law obstacle to reliance upon such sources and *travaux preparatoires* was removed by s 15B of the Interpretation Act [Chapter 1:01] inserted by s 2 of the General Laws Amendment (No 2) Act, 2002 (No 14 of 2002).

"In the performance of their functions, the successor companies shall give priority to serving the needs of the State, to the extent that it is compatible with sound business practice to do so."

In this single sentence we find support for the proposition that it is proposed to establish a State broadcaster rather than a "public broadcaster" in the true sense.<sup>29</sup> The implications of this warrant closer consideration.

As one knows, the Bill of Rights in the Constitution of Zimbabwe, 1980, guarantees the right to freedom of expression. Section 20(1) reads:

"Except by his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence."

Our Courts are known to attach great importance to the right to freedom of expression. In an often quoted passage from **In re Munhumeso & Ors** 1994 (1) ZLR 49 (S) at 56F - H<sup>30</sup> the then Chief Justice expressed it thus:

"The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be underestimated. They lie at the foundation of a democratic society and are 'one of the basic conditions for its progress and for the development of every man'."

In the **Capital Radio** matter the Supreme Court thus found without hesitation and without opposition from the State that the monopoly of broadcasting, the exclusion of other participants in the industry, was unconstitutional as it amounted to an interference with the means of expression. The enquiry arising from a testing of the subsection under consideration however involves a more subtle enquiry: does the mere giving of priority to the needs of the State in the operations of the public broadcaster (not being an outright denial of access) amount to an interference with the means of expression?

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<sup>29</sup> The successor companies to the ZBC will presently be shown to be public broadcasters within the meaning assigned to the phrase in the Broadcasting Services Act.

<sup>30</sup> Also reported in 1995 (1) SA 551 (ZS) at 557C - D; 1995 (2) BCLR 125 (ZS) at 130B - C.



In the first place it is to be borne in mind that the public broadcaster does not have imposed upon it any special obligations under the Broadcasting Services Act<sup>31</sup> or any other legislation for that matter. The formulation of this phrase seems only to have been a matter of convenience given the practical need to make special provisions with regard to the licensing of broadcasters falling within the definition. This may be perceived to constitute a shortcoming in the Act. Part II of the African Charter on Broadcasting, 2001, which deals with public broadcasting specifically provides that "[t]he public service mandate of public broadcasters shall be clearly defined."<sup>32</sup> It is submitted that this public service mandate should ideally incorporate an element of accessibility and accountability.<sup>33</sup> For example, s 8(e) of the South African Broadcasting Act expressly requires the South African Broadcasting Corporation "to be responsive to audience needs and account on how to meet those needs". In this respect therefore, the Commercialisation Act may be held to fall short of the standard required by the African Charter.

Whilst outside our brief, the Broadcasting Services Act (Chapter 12:06), with its requirement for between 70 and 80% of "local content"<sup>34</sup> falls short of standards in other jurisdictions. For instance, s 3(i) of the Canadian Broadcasting Act, 1991, provides that programming provided by the Canadian broadcasting system (and this includes both public and private broadcasters) should, *inter alia*, be:

“..varied and comprehensive, providing a balance of information, enlightenment and entertainment....be drawn from local, regional, national and international sources....provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern and include a significant contribution from the Canadian independent production sector.”

In the absence of special obligations resting on the public broadcaster in terms of the legislation, in investigating the constitutional issue just highlighted, regard can only be had to the obligations of **the State** itself (for the "public broadcaster" has no specific mandate) under the Constitution.<sup>35</sup>

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<sup>31</sup> s 36 of the Act confirms that the provisions of the Act apply to public broadcasters.

<sup>32</sup> African Charter on Broadcasting, Part II paragraph 3.

<sup>33</sup> See, for instance, paragraph 1 of Part II of the Charter.

<sup>34</sup> Sixth schedule. A requirement unheard of in any of the legislation considered and which would surely be considered parochial.

<sup>35</sup> More will be said on this below when we turn to the instruction regarding the Act being "democratic" or otherwise.

The question posed on the previous page must accordingly be reformulated thus: does the State have an obligation to provide the subject with the wherewithal to enjoy the right to freedom of expression?

Having defined the issue more precisely, we conclude that the matter is to be resolved in the negative. Nowhere in s 20 is there a positive obligation placed upon the State to act to secure for the subject **the means** of expression. The Supreme Court has defined the "major elements" of the right to freedom of expression as being:

- "(a) no person shall be **hindered**
  - (b) in the **enjoyment**
  - (c) of his **freedom of expression**; which includes-
- ....<sup>36</sup>

There being no hindrance (as was the case in the days of the monopoly) it cannot be convincingly argued that the right to freedom of expression is infringed by s 6(3) of the Commercialisation Act. Of course, as the Supreme Court has held

"an enactment neutral on the face of it may, in its application, nonetheless offend the constitutional mandate if it denies, or unduly burdens, the exercise of a protected freedom."<sup>37</sup>

but it ought to be conceded that the effect of the ZBC's successor companies giving priority to the needs (as opposed to "policies"<sup>38</sup> or "interests") of the State only "to the extent that it is compatible with sound business practice to do so" is not "likely"<sup>39</sup> to contravene the Declaration of Rights.

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<sup>36</sup> *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation & Anor* 1995 (2) ZLR 199 (S) at 209G - H

<sup>37</sup> *United Parties v Minister of Justice, Legal and Parliamentary Affairs* 1997 (2) ZLR 254 (S) at 268E.

<sup>38</sup> As to which see the *Australian Capital Television (Pty) Ltd v Commonwealth of Australia* (1992 - 1993) 177 CLR 106 (HC of A) at 139 quoted with approval in the *United Parties* case; and, with the facts of that case in mind, paragraph 2 of the Fifth Schedule to the Broadcasting Services Act which requires that reasonable and equal opportunities be given to all political parties in the broadcasting of election material.

<sup>39</sup> This is the standard set by s 24 of the Constitution which governs the justiciability of the Declaration of Rights.

It might, however, be argued that a duty to provide the means of expression may perhaps be inferred from the African Charter on Broadcasting. Paragraph 1 of Part II of the Charter reads as follows:

"All State and government controlled broadcasters should be transformed into public service broadcasters, that are accountable to all strata of the people as represented by an **independent** board, and that serve the overall public interest, avoiding **one-sided** reporting and programming in regard to religion, political belief, culture, race and gender."

The Act, once again, falls short of the requirements of the Charter. Having drawn attention to this, it is readily conceded that some objection might remain, but it must equally be conceded that the local legislation elsewhere addresses these obligations to some extent. Whilst it may be difficult to predict the nature of such, it is thought that such actions as would lead to an abridgement of rights would not be sanctioned by s 6(3) of the Commercialisation Act and would probably be in contravention of the Broadcasting Act which requires, for instance, that every broadcaster **shall**

"when providing an information service, provide a fair, balanced, accurate and complete service."<sup>40</sup>

That being the case, the unlawfulness of such acts as may be feared would arise from the Broadcasting Services Act itself and not the Constitution.

At first blush, as we have sought to demonstrate, s 4 of the Commercialisation Act is open to some objections. However, none of these have led us to the conclusion that the provision is unconstitutional. It may nevertheless be found that the section falls short of the measures provided for by the African Charter on Broadcasting. It also does not compare favourably with the measures provided in other jurisdictions such as South Africa and Canada.

## 5. Initial shareholding in successor companies

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<sup>40</sup> Broadcasting Services Act, s 39(4). It would be interesting to investigate the extent of the ZBC's compliance with this provision! The consequences of any apparent neglect of or disregard for this duty could well be investigated separately.

This section provides that the State shall be the sole shareholder in the successor companies, holding its shares through nominees. The successor companies would accordingly fall within the definition of "public broadcaster" by virtue of being a "broadcasting entity established by law which is wholly owned or controlled by the State."<sup>41</sup>

It may be argued that read together ss 4(3) and 5 of the Commercialisation Act offend against one of the fundamental principles of company law; namely, the separation of ownership (by the shareholders) and control (by the directors). To quote Tett and Chadwick:

"The relationship between a general meeting and a directors' meeting has been likened to the relationship between the legislature and its executive."<sup>42</sup>

However, this objection may be answered by highlighting the qualification to the successor companies' duty to "give priority" to the needs of the State; namely that they need only do so in so far as such is compatible with sound business practice. This simple, commonsense qualification serves to safeguard the freedom of the boards of directors to act sensibly in the management of the affairs of the companies without irrationally or prejudicially succumbing to political expedience. There is the possible further contention that due consideration ought to be given to the fact that in the event of a falling out between the companies' boards of directors and the State, the State (relying rightly or wrongly on s 4(3)) would prevail. However, this contention takes the matter little further as this is the case with any other company:

"Where the shareholders do not approve of the board's actions, they have the right to alter the articles in order to restrict the board's powers."<sup>43</sup>

Accordingly, we can find no objection in law to the effect of this section. Having said this, it may be of interest to note that the South African legislation contains a similar provision.<sup>44</sup> However, and recalling the African Charter's requirement that there be established an "independent board" to represent society, we submit that the mechanisms for the appointment of the members of the South African Broadcasting Authority are more satisfactory from the perspective of safeguarding

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<sup>41</sup> Broadcasting Services Act, s 2(1) s.v. "public broadcaster".

<sup>42</sup> N Chadwick and P L Volpe, Tett and Chadwick on **Zimbabwe Company Law** (2 ed), p 107. See also, J C Nkala and T J Nyapadi, **Company Law in Zimbabwe**, p 236.

<sup>43</sup> Nkala and Nyapadi, *op cit*, p 263.

<sup>44</sup> s 7(8) of the South African Broadcasting Act.

the independence of the body. Regrettably, a close consideration of these matters falls outside our present mandate.

**6. Transfer of assets and obligations of Corporation to successor companies**

**8. Minister may give directions to Corporation**

These sections provide for the assumption of the functions, assets and liabilities of the ZBC (including licences and rights of action) by the appropriate successor company subject to the supervision and direction of the Minister. Measures sanctioned by the provisions are largely administrative in nature and are apparently intended to ensure continuity in the dealings of and with the ZBC.

**7. Transfer of employees to successor companies and conditions of service of transferred employees**

The provisions made in this section are also typical of such arrangements as that provided for by the Act. This section provides for the transfer of the employees of the ZBC in compliance with the provisions of s 16 of the Labour Act [Chapter 28:01]. One objection to this might be that the Act only requires the recruitment of "such of the employees . . . as the Minister and the companies' boards of directors might mutually agree" as opposed to all of the employees of the ZBC. An infringement of the rights of the employees might be perceived. This objection would exaggerate the effect of the provision as the termination of the employment of those employees not engaged by the appropriate successor company can only be effected in compliance with the Labour Relations (Retrenchment) Regulations, 1990,<sup>45</sup> which apply to the cases in which enterprises are restructuring for whatever reason and afford adequate protection to the rights of the parties.

**9. Successor companies deemed to be licensed**

**10(f). Amendment of s 47(3) of the Broadcasting Act**

Section 9 provides that the successor companies shall be deemed to be licensed to carry out their respective functions and that the Minister shall "without delay" cause the relevant licences to be issued. These licences are to be subject to the provisions of Part III of the Broadcasting Act. Meanwhile, s 10(f) amends s 47(3) once again by further extending the deadline for the licensing

of existing broadcasters to 28 February 2002. Read together therefore, the sections authorised the successors to ZBC to operate until 28 February 2002 by which time the Minister was to have issued them with licences. Nothing is done by these measures to address the ZBC's contravention of s 27 of the Act to which it owes its very existence. This contravention is an offence.<sup>46</sup>

We further suggest that it is doubtful that the licences have been issued even at the time of writing. The Regulations which provide for the form of applications for licences rather curiously do not prescribe the form of the licence nor provide for any publication of the details of the licensees. In any event, the very formation of the successor companies is in doubt.<sup>47</sup> An investigation of the consequences of this state of affairs and the consequences thereof would be a most interesting one which regrettably falls outside the ambit of our present mandate. Accordingly, putting aside these matters as we must, we can find no object in law to these provisions.

#### **10(a). Amendment of title**

This section merely amends the short title of the Broadcasting Services Act by altering its citation to the conventional mode.

#### **10(b), (c). Amendment of s 8 of the Broadcasting Act**

Section 10(c) (supported by the definition inserted by s 10(b)) repealed and replaced s 8(6) to extend the list of classes of persons disqualified from being licensed as broadcasters to include persons wholly or partly funded by foreign donations or contributions. Also now included are subsidiaries or agents as well as persons convicted of certain offences. As the last mentioned was already covered by the original s 8(6) we shall, as instructed, consider only the disqualification of foreign sponsored applicants and of subsidiaries.

"Foreign donation or contribution is defined as:

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<sup>45</sup> Statutory Instrument 404 of 1990.

<sup>46</sup> Zimbabwe Broadcasting Act, s 39(1)(h)(i). The penalty attendant upon this offence is however doubtful on account of bad draftsmanship in the Criminal Penalties Amendment Act.

<sup>47</sup> See further the analysis of the Broadcasting Services Amendment Bill.

"a donation or contribution made other wise (*sic*)<sup>48</sup> than for commercial reasons alone by-

- (a) a person who is not a permanent resident of Zimbabwe domiciled in Zimbabwe; or
- (b) a company which is not incorporated in Zimbabwe or, if so incorporated, does not carry on business in Zimbabwe; or
- (c) any association of persons, where incorporated or unincorporated, that does not exist exclusively of permanent residents or citizens of Zimbabwe domiciled in Zimbabwe".

The definition is most exhaustive and is clearly intended to exclude all manner of foreign funding in the broadcasting industry. This complements other provisions of s 6 of the Broadcasting Services Act to entirely exclude foreign participation in any form, whether or not in association with Zimbabweans. The other side of this coin is that those Zimbabweans who happen to receive and funding, however small, from outside the country are entirely precluded from participating in broadcasting. To assess the propriety of this dispensation, the rights to freedom of association and freedom of expression must thus be investigated in turn.

Section 21(1) of the Constitution reads:

"Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to freely associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests."

Relying on this provision it may be argued that potential broadcasters are entitled to receive funding from such persons as they may choose to associate with. The requirement that they cease or refrain from doing so would thus offend against this right. Alternatively, even this question should be answered in the negative, it may be that the requirement in any event unduly burdens their exercise of the right to freedom of expression.

By guaranteeing the right of the subject to associate with whomsoever he wishes, we submit that in this context the Constitution in effect guarantees the right of the potential broadcaster to source funding from whomsoever is prepared to offer such; whether for commercial or other reasons. In this regard, the extent of the demands upon the resources of the would-be broadcaster should be given their due weight. Zimbabwe's is a developing economy within which capital

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<sup>48</sup> See below in the examination of the Broadcasting Services Amendment Bill.

tends to be scarce. In a capital intensive enterprise such as broadcasting, the importance of (if not need for) foreign direct investment to ensure the vibrancy and dynamism of this industry through which the subject may exercise his right to freedom of expression cannot be underestimated. By denying him access to such funding, surely the State unduly burdens his right to freedom of expression?

We accordingly submit that the prohibition of foreign funding is contrary to the subject's right to freedom of association guaranteed by s 20(1) of the Constitution. Alternatively, even if this should be found not to be the case, the prohibition of foreign funding unduly burdens the subject's exercise of the right to freedom of expression and therefore falls foul of s 20(1) of the Constitution. Authority for these propositions is found in case law.<sup>49</sup> Interestingly, none of the foreign legislation<sup>50</sup> considered prohibits access to foreign funding in any way. We submit that this is so because such prohibitions would fall foul of the constitutions of these countries<sup>51</sup>.

#### **10(d) New Part VIIIA in Broadcasting Services Act**

This section inserted a new Part VIIA comprised of sections of the Zimbabwe Broadcasting Corporation Act into the Broadcasting Services Act. These sections provide for the licensing of listeners by the broadcasting company in the manner which was practised by the ZBC. Provision is made for inspections by the company's inspectors or police officers. Fees paid in connection with such licences are to be paid to the broadcasting company and will form part of the funds of the company. There may be objections raised to the effect of this Part.

The effect of this Part is that what the legislation holds out to be a mere competitor in the broadcasting industry is given the power to police the possession of equipment by members of the public for its own account. This is not the mere charging of fees for services rendered by a broadcaster but the licensing of apparatus. This has two important consequences. Firstly, other competitors are placed at a disadvantage as the broadcasting company is given access to

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<sup>49</sup> *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation* 1996 (1) SA 847; *Libman v Quebec (Attorney General)* [1997] 3 S.C.R.; *I.M. Young ao v United Kingdom* [1980] E.C.C 332; *S.A Sigurjonsson v Iceland* E.C.H.R 24/1992/369/443.

<sup>50</sup> Namely South Africa, Canada, Australia and the United Kingdom.

<sup>51</sup> In the case of South Africa, for example, ss 16, 18 and 22 of the 1996 Constitution (Act 108/96) would be violated.



considerable funding which others will never access. Secondly, members of the listening public are compelled to subsidise the operations of a broadcaster whose services they may (in theory at least) never access. With this in mind, these measures will now be examined in relation to the right to equality before the law (in so far as other broadcasters are concerned) and the right to freedom of expression as well as the right to protection from deprivation of property (from the perspective of the listener).

Section 18(1) of the Constitution reads as follows:

"Subject to the provisions of this Constitution, every person is entitled to the protection of the law."

It may be argued that the provisions empowering the broadcasting company to collect and spend funds from the listening public at large afford it a protection which other competitors are denied and thus offend against this provision. We do not believe that this argument will succeed because there is no protection, simply an unfair advantage, and neither the listener or the broadcaster are deprived the protection of the law in any way.

Section 20(1) of the Constitution has been set out above and is of application to the provisions now under investigation, which may be shown to "unduly burden the exercise of a protected freedom."<sup>52</sup> As has been stated above, the listener is required to subsidise the operations of a competitor in the market; a competitor from whose services the listener may never benefit. In the alternative, it may be argued that a legal requirement that a listener part with his funds for the exclusive benefit of a particular broadcaster amounts to an unlawful deprivation of property contrary to the provisions of s 16 of the Constitution.

However, the argument of the State will undoubtedly be that the impugned provisions fall within the ambit of s 20(2)(a) of the Constitution, which exempts from the operation of s 20(1) measures taken, *inter alia*, in the interests of "the economic interests of the State."<sup>53</sup> Section 16(7)(a) of the Constitution provides that payments made in satisfaction of "any tax or rate will

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<sup>52</sup> cf footnote 33.

<sup>53</sup> It will be recalled that the State is the only shareholder in the broadcasting company. The financial wellbeing of the broadcasting company is thus a matter in the economic interests of the State.

not fall foul of s 16(1). These exemptions will be of no application if the measure "is shown not to be reasonably justifiable in a democratic society."

The counter to this argument is that the payments are not a "tax or rate". The public are required to pay license fees to a company and not the State. It is well settled in law that, as a juristic person, a company is a separate legal entity apart from its members with its own property and debts and has perpetual succession.<sup>54</sup> Accordingly we submit that the requirement to pay license fees to the company violates s16 of the Constitution in that it amounts to an unlawful deprivation of property, namely the money of the public.

For the sake of completeness, and lest this argument should fail, we turn to the question of whether the measure is reasonably justifiable in a democratic society. In determining this question, a court will ask itself three questions in turn. It will ask itself whether:

- "(i) the legislative object is sufficiently important to justify limiting a fundamental right;
- (ii) the measures designed to meet the legislative object are rationally connected to it; and
- (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."<sup>55</sup>

We accordingly proceed to consider these questions.

**(I) IS THE LEGISLATIVE OBJECT SUFFICIENTLY IMPORTANT TO JUSTIFY PAYMENT OF LICENCE FEES TO THE BROADCASTING COMPANY?**

We start out with the concession that it is difficult to impute motives in this regard to the State. We nevertheless believe it to be a reasonable inference that the present measure was taken to safeguard the financial interests of the State. The State may, of course seek to defend the measure by arguing that it was taken with the object of "regulating the . . . general efficiency of

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<sup>54</sup> *Salomon v Salomon and Co. Ltd* 1897 AC 22; *Oakes v Turquand* 1867 L.R. 2 H.L. 325

<sup>55</sup> *Nyambirai v National Social Security Authority & Anor* 1995 (2) ZLR 1 (S) at 13D - E.

broadcasting or television."<sup>56</sup> However, this argument fails when one bears in mind the creation of the Broadcasting Authority of Zimbabwe within the very same enactment. Surely, given the objects and powers of this body, or indeed those of the Posts and Telecommunications Board, it is more properly the function of this institution to act in this regard.

In considering this question, it is to be borne in mind that what is being regulated here is not the terms upon which recourse to the services of the ZBC may be had but the very possession of the means by which to benefit from them or any services like them. An anomaly thus arises when one considers the position of the owner of a television set who may never have recourse to these services. Similar questions arose in **Nyambirai v NSSA**<sup>57</sup> in which the constitutionality of compulsory contributions to the National Social Security Authority was subject to challenge on the basis that the contributions amounted to an unlawful deprivation of property. The effect of the Court's finding was that much as it may be within the capacity of some persons to make alternative and even superior arrangements with regard to such benefits as are offered by NSSA, it was reasonably justifiable in a democratic society for the State to make provision for those not so affluent as to benefit from such alternatives. By parity of reasoning, a court may find that even though the owner of a receiver may be in a position to access the commercial services of a private broadcaster, many are not. Accordingly, it would be in the public interest and reasonably justifiable in a democratic society for provision to be made for the provision of public funding to the only provider of free to air services given that such services allow the subject to exercise his right to receive ideas without hindrance.

The consequence of this reasoning, which, it is submitted, would be sound in law, is that there can be little scope for objection to the broadcasting company's access to public funds. What nevertheless remains doubtful is the entitlement of the broadcasting company to receive these funds directly from the public (some of whom may have no interest in its services) and to directly superintend the collection thereof. Surely, the collection of funds, the licensing of listeners and even the allocation of funds to the broadcasting company should, as is the case in South Africa, Australia, Canada and the United Kingdom, fall within the operations of some

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<sup>56</sup> This is another matter covered by s 20(2).  
<sup>57</sup> cf footnote 51

independent body which is in some way accountable to the listening public.<sup>58</sup> This submission is inspired by the comparison which may be drawn between the broadcasting company licensing the possession of use of receivers on the one hand and an airline (as opposed to the Civil Aviation Authority) licensing the possession and use of aircraft. We accordingly submit that this aspect of the broadcasting company's regulatory powers should rather have been reserved to the Broadcasting Authority if, as we have assumed in favour of the State, the measure was adopted in order to assist the subject in the exercise of his right to freedom of expression through the provision of free broadcasting services.

Of the remaining grounds, the protection of the economic interests of the state is the only one of reasonable application. As has been pointed out, it is not the interests of the State that are being protected but those of a separate legal entity, namely the broadcasting company. This proviso would thus be of no comfort to the State in seeking to justify the impugned provision. We accordingly conclude find that the measure falls at the first hurdle and it is therefore unnecessary to proceed further with the enquiry.

#### **10(e) Insertion of provisions empowering broadcasting company to govern operations of dealers**

This section inserts additional paragraphs into s 46(2) which provide for the regulatory powers of the Minister. The new paragraphs empower the Minister to promulgate regulations which provide for the registration with the broadcasting company of dealers in receivers of broadcast services much in the way that the registration of listeners is governed by the new Part VIIIA. The failure to promulgate regulations may be unconstitutional. As there are no regulations, no person may set up a private broadcasting company. The rights guaranteed by ss 20(1) and 21(1) of the Constitution have been infringed.

In this regard, we submit that the observations made in the preceding section would be of application to regulations made under these provisions, with the changes made necessary by the context. We stress that it is the regulations passed under this provisions and **not the existing provisions** which may be subject to attack. Adapting that which was said by the Supreme Court in the **United Parties** case:

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<sup>58</sup> cf African Charter, remarks at pages 11 and 12.

"There is extant no statutory instrument made by the [Minister providing for these matters]. Until such a statutory instrument is made, the issue of constitutionality does not arise. It is prematurely raised. A law that does not exist cannot be impugned. The power to make the law must be implemented before it, or anything done under it, becomes open to challenge."<sup>59</sup>

We accordingly conclude that although the provisions may not themselves be unconstitutional, the exercise of powers granted by them might offend against certain protected rights.

### **11. Repeal of Cap 12:01**

This section provides for the repeal of the Zimbabwe Broadcasting Corporation Act so soon as the President is satisfied as to certain matters. This section, in common with ss 6 and 8 seems intended to ensure continuity and rational management of the transition.

### **RECAPITULATION**

In the above analysis it will have been seen that although on the face of it fairly "administrative" in nature, the Commercialisation Act contains certain provisions which fall foul of its stated objective and possibly ss 16, 20 and 21 of the Constitution of Zimbabwe. For instance, broadcasters are not permitted to receive funding from or participate in the industry in association with foreign persons. This may be held to offend against their right to freedom of association.

Furthermore, the Act seems to give the left hand (by providing for the commercialisation of the ZBC as a broadcasting company) and take away with the right (by giving it the right to collect licence fees; a function more properly performed by the Broadcasting Authority of Zimbabwe). It may be argued that these provisions offend against competing broadcasters' right to protection of the law by giving the ZBC's successor the statutory and State enforced power to licence the possession of apparatus while others may simply raise fees for services. As for the listener, he may argue that the raising of the fee by the broadcasting company amounts to an unlawful deprivation of property or an undue burden upon the exercise of his right to freedom of expression.

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<sup>59</sup> *United Parties v Minister of Justice*, op cit, at 260G.

Our instructions direct that we "give recommendations on changes that might be considered as necessary for the Act to be democratic." At this time, therefore, we register our reservations as to the use of the term "democratic". Not only is democracy not a strictly legal concept, but also there is an element of subjectivity in the definition thereof. We accordingly believe it to be preferable to confine ourselves to the legal merit or otherwise of the measures under consideration, hoping that there may be a measure of intersection between this and the perceptions of "democracy" adopted by those instructing us.

That having been said, in so far as the supplementary powers of the broadcasting company are concerned (which powers are of a regulatory nature) we reiterate our suggestion that these functions are more properly exercised by an Independent Broadcasting Authority.

# **BROADCASTING SERVICES AMENDMENT BILL, 2002**

## **INTRODUCTION**

After the promulgation of the Commercialisation Act, the Minister of State for Information and Publicity in the President's Office presented to Parliament the Broadcasting Services Amendment Bill, 2002<sup>60</sup> ("the Bill"). This Bill proposes further amendments to the Broadcasting Services Act, consisting essentially in the incorporation of certain provisions of the Zimbabwe Broadcasting Corporation Act and the correction of "certain omissions and errors". According to the memorandum, the intention of these amendments is to "improve" the Broadcasting Services Act.

## **ANALYSIS**

Once again, for the sake of completeness, we shall examine the provisions of the Bill clause by clause.

### **1. Short title**

This clause merely sets out the short title of the Bill; namely, the Broadcasting Services Amendment Bill, 2002.

### **2. Amendment of s 2 of the Broadcasting Services Act**

This clause proposes amendments which would correct typographical errors in the definitions inserted by s 10(b) of the Commercialisation Act.<sup>61</sup> Their effect is to merely eliminate doubt.

### **3. Insertion of new definitions**

This clause proposes to repeal the definition of "broadcasting company" and "Corporation" inserted by the Commercialisation Act. It is further proposed to insert definitions of the

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<sup>60</sup> 14 of 2002, published as a supplement to the Government Gazette Extraordinary dated 9 December 2002.

<sup>61</sup> cf footnote 43.

expressions "former corporation" (a reference to the ZBC) and "Zimbabwe Broadcasting Corporation."

Of particular note is the definition of the latter term:

"'Zimbabwe Broadcasting Corporation' means the national broadcasting service formed as the successor to the former Corporation in terms of section 3 of the [Commercialisation Act]."

In effect, therefore, it seems to have been decided that the broadcasting company formed in terms of the Commercialisation Act is to be known as the Zimbabwe Broadcasting Corporation. At this time, it cannot be definitively determined whether this is merely an expression convenient for use in the Bill or whether this is in fact to be the true name of the company. In regard to the latter proposition we highlight the provisions of ss 8(1) and 26 of the Companies Act which provide that a company must use "Limited" as the last word in its name unless a licence authorising it to dispense with that word has been granted by the Minister of Justice, Legal and Parliamentary Affairs. It would be interesting to investigate the ZBC's compliance with this section should the company be incorporated as such.

This clause also contains definitions of "inspector", "listener" and "receiver" which are terms encountered in the provisions proposed to be inserted by the Bill.

#### **4, 5 Removal of expression "broadcasting company"**

These clauses propose the amendment of ss 38B and 38C of the Broadcasting Services Act<sup>62</sup> to insert the phrase "Zimbabwe Broadcasting Corporation" in place of "broadcasting company" wherever it occurs. The substituted s 38C would also eliminate an erroneous reference to a non-existent s 49.

The substantive provisions of the sections of the Broadcasting Services Act which may be proposals embodied in the Bill have been commented upon above and we do not propose to repeat these remarks as the changes proposed here would not alter the substance of the sections.



## **6. Appointment of inspectors**

This clause proposes the amendment of the heading of s 38D of the Broadcasting Services Act and the insertion of provisions for the appointment of licence inspectors by the ZBC. This clause would also correct an incorrect cross-reference in the Broadcasting Services Act. This clause merely sets out to rectify an omission, in that although s 38D contains references to the powers of inspectors it does not explicitly provide for their appointment. The faulty cross-reference is a source of confusion in this regard which would be eliminated by the proposed amendments.

As to the substance of the provision (the amendments proposed here being largely clerical) we again simply incorporate by reference that which has been said above regarding these provisions.

## **7 and 8. Offences and Penalties**

These sections deal with offences and penalties for failure to comply with provisions of the Act. They are designed to ensure the smooth operation of the Act and no comment is necessary.

## **9. Registration of dealers with the corporation**

While complementing measures previously commented upon, this clause proposes the insertion of a section which would govern the registration of dealers in apparatus which receive broadcast signals, much in the manner in which listeners are currently required to obtain licenses. The bulk of the provisions proposed thereunder are largely administrative or procedural, and we accordingly confine ourselves to the substantive issue; namely, the very requirement that a dealer register at all.

In favour of the State, it may be assumed that it has an interest in the extent of the reception of broadcasting signals for reasons ranging from the strategic<sup>63</sup> to the academic.<sup>64</sup> It may be further concluded that there is a need to complement the enforcement of the requirement that listeners be licensed. Both these interests of the State are almost inextricably bound in that should the licensing requirement be strictly enforced, the possession of receivers will have been adequately

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<sup>62</sup> As we have already seen, these sections deal with the licensing of listeners and the collection of fees by the broadcasting company.

<sup>63</sup> For instance, for the making of informed decisions regarding the expansion of the relevant infrastructure.

accounted for and vice-versa. This would account for the present requirement that a dealer in receivers must call for the production of a listeners license before supplying the would-be customer. That being said, it is submitted that any interest the State may have is adequately served by this requirement as this requirement alone ensures that only licensed listeners come to be in possession of the necessary apparatus. For this reason, it may be argued that the need for the dealer to register with the ZBC is superfluous. In this regard, we in any event reiterate earlier contentions that the ZBC goes beyond the limits of its proper competence in exercising regulatory powers. On these grounds, the registration requirement may be challenged.

Our view is that the requirement to register with a dealer and for the dealer to keep a register violates s 21(1) of the Constitution<sup>65</sup>. It may be further argued that the requirement that a dealer register at all (even if with the Broadcasting Authority) is dubious. To suggest that the public security concerns arising from the possession of such innocuous equipment as television sets and radios is limited might be an understatement. We are not dealing here with firearms,<sup>66</sup> medication<sup>67</sup> or some noxious or deleterious substance, but rather with one of the most conventional features of any household. Even if this were an overstatement of the ubiquity televisions and radios, or an understatement of their impact on society and the interests of the State by which it is governed, surely it may be found that that the Broadcasting Authority or even the Posts and Telecommunications Broad<sup>68</sup> has a more legitimate interest in the extent of the possession of such apparatus than an entity which hold itself out to be a mere competitor in the industry. That being the case, we have sought to show the requirement that dealers register with the ZBC or at all to be doubtful.

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<sup>64</sup> eg, for statistical purposes.

<sup>65</sup> *Op cit* cases footnote 47.

<sup>66</sup> Firearms Act [Chapter 10:09], s 15.

<sup>67</sup> Drugs and Allied Substances Control Act [Chapter 15:03], ss 26-33.

## CONCLUSION & RECOMMENDATIONS

The Broadcasting Act was promulgated in 2001, backdated to the 4 October 2000. Since this date it has been amended twice. This is, with respect to the drafters, an indication that it was hurriedly prepared without proper regard being had to the Constitution and similar legislation in other jurisdictions.

We have reviewed the African Charter and legislation and directives in South Africa<sup>69</sup>, Canada,<sup>70</sup> Australia,<sup>71</sup> the United Kingdom<sup>72</sup> and Europe<sup>73</sup> and compared the same with the legislation in Zimbabwe. Our view is that the legislation in Zimbabwe should be repealed and replaced with one comprehensive piece of legislation, together with regulations, which accords with the international standards and norms of broadcasting, and provides for the transparent administration of the law and the exclusion of political interference in the regulation of an industry critical to the exercise of fundamental freedoms.

The drafting of such legislation is beyond our brief. In so far as amendments to the Act and the Bill are concerned we recommend the amendments set out below.

### **1. Establish an Independent Broadcasting Authority.**

The foreign legislation considered all makes provision for the establishment of an Independent Broadcasting Authority (“IBA”), whether it be styled the IBA (as in South Africa) or the Independent Television Commission (the United Kingdom). The purpose of each IBA is similar. Of paramount importance is their independence. The powers on an IBA include:

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<sup>68</sup> The functions of this entity are set out in Posts and Telecommunications Corporation Act [Chapter 12:03], Part II, ss 3-18..

<sup>69</sup> Independent Broadcasting Authority Act, No.153/93; Broadcasting Act No. 4/99.

<sup>70</sup> Broadcasting Act 1999, Chapter 11.

<sup>71</sup> Broadcasting Services Act, No 110/92.

<sup>72</sup> Broadcasting Act 1990, Chapter 42; Broadcasting Act 1996; Television Licences (Disclosure of Information) Act 2000, Chapter 15.

<sup>73</sup> EC Directive on Broadcasting (89/552/EEC), which provides for limited harmonisation of member States’ laws in the broadcasting field.

- 1.1.1 establishing and implementing regulatory policy subject to the guidelines in the legislation<sup>74</sup>;
- 1.1.2 drawing up codes of conduct for holders of licenses;
- 1.1.3 issue, amendment and cancellation of licenses, including the setting of license fees, the determination and collection of license fees and the allocation of revenue (subject to the preparation of a budget) to any public broadcaster;
- 1.1.4 dispute resolution;
- 1.1.5 ensuring fair and effective competition in the provision of broadcasting services;
- 1.1.6 and generally to perform its duties, powers and functions in terms of the enabling legislation and giving effect to the objects and principles of the legislation<sup>75</sup>.

It is not practicable to set out each and every object, power and function of an IBA. The Australian Broadcasting Services Act is over 240 pages long and little point would, with respect, be achieved in setting out this and other legislation in detail. The following excerpt from s 2 of the South African Independent Broadcasting Authority Act details the primary objects of legislation that is considered to reflect democratic norms given the guarantees enshrined in the Constitution:

“The primary object of this Act is to provide for the regulation of broadcasting activities in the Republic in the public interest through the Independent Broadcasting Authority established by section 3, and for that purpose to-

- (a) promote the provision of a diverse range of sound and television broadcasting services on a national, regional and local level which, when viewed collectively, cater for all language and cultural groups and provide entertainment, education and information;
- (b) promote the development of public, private and community broadcasting services which are responsive to the needs of the public;
- (c) ensure that broadcasting services, viewed collectively-
  - (i) develop and protect a national and regional identity, culture and character;
  - (ii) provide for regular-
    - (aa) news services;
    - (bb) actuality programmes on matters of public interest;

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<sup>74</sup> In the United Kingdom, for example, it is required to ensure that every broadcaster presents news with accuracy and impartiality, s 6(b) of the Broadcasting Act 1990 (Chapter 42).

<sup>75</sup> This would include, for example, one of the objects of the Canadian Broadcasting Act, s 3(i) as set out on page 9 hereof.

- (cc) programmes on political issues of public interest;  
and
- (dd) programmes on matters of international, national, regional and local significance;
- (d) protect the integrity and viability of public broadcasting services;
- (e) ensure that, in the provision of public broadcasting services-
  - (i) the needs of language, cultural and religious groups;
  - (ii) the needs of the constituent regions of the Republic and local communities; and
  - (iii) the need for educational programmes, are duly taken into account;
- (f) encourage ownership and control of broadcasting services by persons from historically disadvantaged groups;
- (g) encourage equal opportunity employment practices by all licensees;
- (h) ensure that broadcasting services are not controlled by foreign persons;
- (i) ensure that private and community broadcasting licences, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in the Republic;
- (j) impose limitations on cross-media control of private broadcasting services;
- (k) promote the most efficient use of the broadcasting services frequency bands;
- (l) ensure that public broadcasting licensees, private broadcasting licensees and signal distribution licensees comply with internationally accepted technical standards;
- (m) ensure that broadcasting signal distribution facilities are made available in respect of all licensed broadcasting services;
- (n) refrain from undue interference in the commercial activities of licensees, whilst at the same time taking into account the broadcasting needs of the public;
- (o) ensure fair competition between broadcasting licensees;
- (p) promote and conduct research into broadcasting policy and technology;
- (q) encourage investment in the broadcasting industry;
- (r) promote the stability of the broadcasting industry;
- (s) ensure equitable treatment of political parties by all broadcasting licensees during any election period;
- (t) ensure that broadcasting licensees adhere to a code of conduct acceptable to the Independent Broadcasting Authority;  
and
- (u) encourage the provision of appropriate means for disposing of complaints in relation to broadcasting services and broadcasting signal distribution.”

It is, in our view, essential that any legislation establishing an IBA in Zimbabwe include the following, which has been copied from s 3(3) of the South African Independent Authority Act:

“The Authority 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 or any political party”.

Certain sections of the Broadcasting Services Act would be in conflict with the spirit of the proposed IBA legislation as set out above, whether it be a separate Act or introduced by way of further amendments to the Broadcasting Services Act. They would need to be repealed. These are ss 38B (the licensing of listeners), 38C (collection of license fees), 38D (powers of inspectors and police) and 46 (regulatory powers of the Minister).

The Broadcasting Services Amendment Bill would also need amending by the deletion of clauses 5 (collection of license fees), 6 (appointment and employment of inspectors), s 9 (which gives the Minister further regulatory powers and requires registration of dealers and listeners) with consequent amendments to the relevant clauses dealing with penalties (for example, failure to register as a dealer) in clause 7 of the Bill.

## **2. s 8(6) of the Broadcasting Services Act (amendment inserted by s 10 of the Zimbabwe Broadcasting (Commercialisation) Act)**

Section 8(6) deals with the prohibition of foreign funding. We have already stated that this subsection should be repealed as the prohibition of foreign funding is contrary to the subject's right to freedom of association guaranteed by s 21(1) of the Constitution. In any event, the prohibition of foreign funding unduly burdens the subject's exercise of the right to freedom of expression and therefore falls foul of s 20(1) of the Constitution.

We believe however, that for a proper understanding of the country's laws governing the Broadcasting sector, a detailed analysis of the Broadcasting Services Act chapter 12:06 is required. We would reiterate that the diction used in the instructions was such that we simply

give our legal opinion and analysis of the two pieces of legislation dealt with above. In that vein it is our view that the analysis is incomplete and hope that that analysis will be completed in the near future.

L Chibwe

B G Carr

Harare, May 2002