

Judgment No S.C.136\02
Const. Application No 252\02

(1) ASSOCIATION OF INDEPENDENT JOURNALISTS (2) ABEL
TICHARWA MUTSAKANI (3) VINCENT KAHYA V (1) THE
MINISTER OF STATE FOR INFORMATION AND PUBLICITY IN
THE PRESIDENT'S OFFICE (2) MEDIA AND INFORMATION
COMMISSION (3) THE ATTORNEY-GENERAL OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA, CHEDA JA, ZIYAMBI JA & MALABA
JA
HARARE NOVEMBER 21, 2002 & FEBRUARY 5, 2004

S. Moyo, with him *M.K. Chikuni*, for the applicants

J. Tomana, for the first respondent

No appearance for the second respondent

N. Mutsonziwa, for the third respondent

CHIDYAUSIKU CJ: The first applicant in this case is the Independent Journalists Association of Zimbabwe, a body corporate with a capacity to sue and be sued in its own name with a current membership of sixty journalists. The second applicant is a News Editor employed by Financial Gazette (Private) Limited. The third applicant is a News Editor employed as such by Zimind Publishers (Private) Limited.

The first respondent is the Minister of State for Information and Publicity in the President's Office who is responsible for the administration of the

Access to Information and Protection of Privacy Act [*Chapter 10:27*], hereinafter referred to as “the Act”. The second respondent is the Media and Information Commission, a body corporate established in terms of s 38 of the Act, hereinafter referred to as “the Commission.” The third respondent is the Attorney-General of Zimbabwe who is cited in terms of s 24 of the Constitution of Zimbabwe.

The applicants made this application in terms of s 24 of the Constitution which entitles an applicant to approach this Court, sitting as a Constitutional Court, on an allegation that the Declaration of Rights in the Constitution of Zimbabwe has been, is being, or is likely to be contravened in relation to him or it.

In particular, the applicants alleged that sections 79, 80, 83 and 85 of the Act violate the rights of the first applicant’s members and those of the second and third applicants under s 20(1) of the Constitution of Zimbabwe, that is to say, the right to receive and impart information and ideas without hindrance or interference. The applicants further alleged that s 79 is unconstitutional as it contravenes s 18(9) of the Constitution in that it deprives them of the right to be heard before a decision affecting their rights is made. The relief sought is that s 79, 80, 83 and 85 be declared unconstitutional, therefore, null and void and of no effect.

The respondents contend otherwise and argue that the above provisions are *intra vires* the Constitution and, therefore, valid and of full force and effect.

Section 79 of the Act provides for the accreditation of journalists while s 80 criminalises certain abuses of journalistic privileges. Section 83 outlaws the practice of journalism without accreditation. Section 85 provides for the development of a Code of Conduct by the Commission in consultation with interested parties. That section also confers on the Commission disciplinary powers and provides guidelines on sanctions for misconduct. The above four sections are the only sections of the Act that the applicants seek to have set aside as unconstitutional.

A number of issues raised in this case were also raised in the case of *Capital Radio v The Broadcasting Authority of Zimbabwe and Ors*¹. Judgment in that matter was recently handed down and some of the issues herein were determined therein. There is no need for me to deal in any detail with the issues raised in this case that were determined in that judgment. Thus the Court concluded in the *Capital Radio* case, *supra*, that freedom of expression as enshrined in s 20 of the Constitution includes freedom of the press. The respondent raises the same issue in this case. I am satisfied that s 20 of the Constitution subsumes freedom of the press. I come to that conclusion on the same reasoning that is set out in the *Capital Radio* case, *supra*.

This Court also concluded in the *Capital Radio* case, *supra*, that it was constitutionally permissible to enact laws that regulate the licensing and the functioning of the media or press but such enactments had to be within the limits that are constitutionally permissible. In arriving at that conclusion the Court relied on a number of authorities.² The authorities relied on in arriving at the above conclusion

¹ Judgment No SC-128-02

² *Athukorale & Ors v Attorney-General of Sri Lanka* (1997) 2 BHRC 610; *Groppera Radio AG v Switzerland* 12 EHRR 321

specifically relate to the electronic media as opposed to the print media. While I accept that the constitutionality of a particular impugned enactment differs from case to case it has to pass the laid down test³ I see no basis in principle for holding that it is constitutionally permissible to regulate by statute the electronic media but not the print media. The constitutionality of each statutory enactment depends on the wording and effect of the particular enactment. No doubt the question of whether the impugned provision regulates the electronic media or the print media is a very relevant factor in the determination of the constitutionality or otherwise of the particular impugned enactment. In this regard, I do not accept Mr *Moyo*'s submission that the practice of journalism is special and admits no statutory regulation and that only self regulation is constitutional.

In arguing that the regulation of journalism by statute is unconstitutional and that the only regulation of journalism that is constitutional is self regulation, Mr *Moyo* relied on the Advisory Opinion of the Inter-American Court of Human Rights⁴. SANDURA JA in his judgment has placed reliance on that case for certain of his conclusions. I wish to comment in some detail on the Opinion.

The facts of that case are briefly as follows. In terms of Law No. 4420 of Costa Rica, an individual could not practise journalism in Costa Rica unless he was a member of the Coligio. In other words, it was unlawful to practise journalism without being first a member of the Coligio. The holding of a Licenciante Bachelor Degree in Journalism, or graduation from the University of Costa Rica, was a

³ *Nyambirayi v NSSA & Anor* 1995 (2) ZLR 1 (S)

⁴ Advisory Opinion, OC-5/85, Series A No. 5

requirement, among others, for membership of the Coligio.⁵ A Mr Schmidt was charged with and convicted of practising journalism without being a member of the Coligio in contravention of Law No. 4420. He was convicted and sentenced to three months' imprisonment. The conviction was challenged on the basis that Law No. 4420 was unconstitutional. In particular, it was contended that Law No. 4420 of Costa Rica contravened Articles 13 and 29 of the Inter-American Convention on Human Rights "the Convention". It was common cause that if Law No. 4420 contravened the Convention it was unconstitutional, because Costa Rican law was required to conform with the Convention.

The Costa Rican Supreme Court concluded that Law No. 4420 was constitutional and the Inter-American Commission for Human Rights came to the same conclusion. However, the Inter-American Court of Human Rights came to a different conclusion. That court concluded –

1. That the compulsory licensing of journalists was incompatible with Article 13 of the Inter-American Convention on Human Rights if it denied any person access to the full use of the news media as a means of expressing opinions or imparting information; and
2. That Law No. 4420 of September 22, 1969, Organic Law of the Association of Journalists of Costa Rica, the subject of the instant Advisory Opinion requested, was incompatible with Article 13 of the Inter-American Convention on Human Rights, in that it prevented certain persons from joining the Association of Journalists and,

⁵ Paragraph 81 of the Opinion *supra*

consequently, denied them the full use of the mass media as a means of expressing themselves or imparting information (the underlining is mine).

I agree with the interpretation ascribed to Article 13 of the Convention by the Inter-American Court of Human Rights. I do not, however, agree with Mr Moyo's contention that the same interpretation be ascribed to s 20 of the Constitution of Zimbabwe.

The wording of Article 13 of the Convention differs from the wording of s 20 of the Constitution in certain material respects. Article 13 (1) and (2) of the Convention provides as follows:

"1. Everyone has the right to freedom of the right of expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers either orally, in writing, in print, in the form of art or through any other media of one's choice.

2. The exercise of the right provided for in the foregoing paragraph should not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure -

- (a) respect for the rights or reputations of others; or
- (b) the protection of national security, public order or public health or morals." (the underlining is mine)

Section 20 of the Constitution provides, in relevant part, as follows:

"20 Protection of freedom of expression

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

(2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision -

(a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;

(b) for the purpose of -

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

(ii) preventing the disclosure of information received in confidence;

(iii) maintaining the authority and independence of the courts or tribunals or Parliament;

(iv) regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television or creating or regulating any monopoly in these fields;

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

(c) that imposes restrictions upon public officers;

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.”

A proper reading of the above sections reveals that the underlined words in Article 13 of the Convention do not appear in their equivalent of s 20 of the Zimbabwean Constitution. The difference in wording leads, in my view, to two significant differences in meaning between the two provisions. The right guaranteed in Article 13(1) of the Convention is broader than the right guaranteed by s 20(1) of

the Constitution. The former includes the means of exercising the guaranteed right, while the latter does not. Similarly, the derogation permissible in terms of Article 13(2) is narrower than that permissible in terms of s 20(2) of the Constitution.

Firstly, Article 13(1) of the Convention guarantees the means of exercising the guaranteed freedom of expression. The Convention not only guarantees the individual's freedom of expression but it also guarantees the individual's entitlement to all means of exercising that right, the right of freedom of expression. The Convention in effect guarantees an individual's right to practise journalism or exercise freedom of expression through the medium of journalism if he so chooses. Section 20(1) of the Constitution of Zimbabwe guarantees an individual's right to freedom of expression. It does not expressly guarantee the exercise of that right through any means of one's choice. I see nothing in the language of s 20(1) that suggests that the legislature intended to confer on an individual a constitutional entitlement to work as a journalist. It is quite clear that the Advisory Opinion is predicated on the individual's guaranteed right to "any means", in exercising the freedom of expression. "Any means" includes the practise of journalism, guaranteed by the Convention. In terms of Article 13(1) of the Convention, an individual's entitlement to practise as a journalist is a constitutionally protected and guaranteed right.

Secondly, Article 13 of the Convention outlaws preventive restriction of any description. The requirement for the licensing of journalists, and indeed the need for accreditation, is a preventive restriction, expressly prohibited by

Article 13(2) of the Convention. Section 20(2) of the Zimbabwean Constitution does not, expressly or implicitly, prohibit preventive restriction.

Thus the President of the Court, THOMAS BUERGENTHAL, had this to say in para 38 of the main opinion in this regard:

“38. Article 13(2) of the Convention defines the means by which permissible limitations to freedom of expression may be established. It stipulates, in the first place, that prior censorship is always incompatible with the full enjoyment of the rights listed in Article 13, but for the exception provided for in subpara (4) dealing with public entertainment even if the alleged purpose of such prior censorship is to prevent abuses of freedom of expression. In this area preventive measure inevitably amounts to an infringement of the freedom guaranteed by the Convention.” (The underlining is mine)

The same point is made by JUDGE RODOPFO E. PIZA E at para 17 of his concurring opinion:

“17. Therefore: I am in agreement with the two conclusions of the Advisory Opinion but would add the following –

Third: That, furthermore, the very licensing of journalists in general, and that established by Law No. 4420 in particular, are also incompatible with Article 13 of the Convention, insofar as they impose a licence or a prior authorisation for the practice of that profession, which is the same as preventive restriction not authorised by Article 13(2) of the Convention to the freedom of expression.”

In short, Article 13(2) of the Convention totally prohibits legislation that provides for preventive restrictions on freedom of expression but allows, subject to certain conditions, legislation that provides for subsequent imposition of liability. Article 13(2) of the Convention makes a distinction between legislation that provides for preventive restrictions, which it totally prohibits, and legislation that is restrictive in providing for subsequent imposition of liability. It prohibits the former and allows

the latter subject to certain further criteria. This distinction is very important as it formed the basis of the *ratio decidendi* for holding Law No. 4420 to be incompatible with Article 13 of the Convention.

Subsection (2) of s 20 of the Constitution, which provides for the derogations to the freedom of expression makes no distinction between legislation imposing preventive restrictions and legislation imposing subsequent liabilities. Subsection (2) of s 20 permits both legislation imposing preventive restrictions and legislation imposing restrictions in the form of subsequent liabilities provided such legislation falls within the permitted derogation.

On this basis it is erroneous to ascribe to s 20 of the Constitution of Zimbabwe the interpretation ascribed to Article 13 of the Convention by the Inter-American Court of Human Rights. The texts are materially different and to do so would in effect amend s 20 of the Constitution.

I, however, wish to make the following observation. If Law No. 4420 were a Zimbabwean statute and was challenged it would most probably be struck down as unconstitutional because it places too onerous a burden, namely, possession of a University degree, on anyone wishing to be a journalist.

In brief, I would restate my conclusion as follows. I accept as correct the interpretation of the Inter-American Court of Human Rights of Article 13 of the Convention. I do not agree that the same interpretation can be ascribed to s 20 of the Zimbabwean Constitution because the texts are different.

I agree with Mr *Moyo*'s submission that the practice of journalism is different from the practice of other liberal professions such as law and medicine. It is correct that the practice of journalism involves the exercise of the freedom of expression, the receiving and imparting of information. This distinction, in my view, does not place the practice of journalism beyond the control of statutory regulation. This distinction is reflected in the fact that any law that seeks to regulate the practice of journalism has to conform with the stringent requirements for a law abridging the right conferred by s 20 of the Constitution to be valid. The statutory provisions regulating the other professions are not required to conform with the stringent requirements of s 20 of the Constitution to be valid.

The press has been colloquially referred to as the fourth arm of the State. Mr *Moyo* made several submissions in which he very ably set out the significance and importance of the press to the proper functioning of a democracy. In support of the above submissions he referred the Court to a very wide range of authorities. The Court accepts these submissions and acknowledges, as it did in the *Capital Radio* case, *supra*, the significance and importance of the press.

The acknowledged importance of the press does not mean that the press is above the law and cannot be required to operate within a legal framework. Indeed the applicants, by challenging some sections of the Act and not challenging others, tacitly concede the constitutionality of the unchallenged sections. Inherent in this tacit concession is the proposition that it is constitutionally permissible to regulate the press. What emerges from the authorities we have been referred to is that it is

vital and indeed critical to the proper functioning of the press that the legal framework should ensure and enhance the independence of the press from both governmental and commercial control⁶. It is with the above objective in mind that the constitutionality of enactments regulating the press will be tested. Enactments that unduly undermine the independence of the press will not pass the laid down test for the constitutionality of such enactments.

In challenging s 79 Mr *Moyo* advanced a number of grounds for the challenge. He submitted that s 79 and the other impugned sections do not fall within the ambit of any of the exceptions to s 20(1) of the Constitution and, are therefore invalid, null and void.

In paragraph 15.30 of his heads of argument Mr *Moyo* makes the following submission in regard to s 79 as read with s 91(2)(p):

“This provision is central to the entire licensing system and yet it is impossibly vague. No indication is given of what should constitute either ‘prescribed formalities’ or ‘prescribed standards’, nor are any limitations imposed on the content of two conditions for obtaining a licence. As a result, these provisions vest too much discretionary powers [to restrict] freedom of expression in a government body and fail to provide for any control mechanisms or consultation process. They thus fail to meet the standards required under the provided by law part of the test restrictions on freedom of expression. ... We submit, therefore, that subsections 79(5)(a) and (b) in tandem with section 91(2)(p) grant excessive measure of discretion to politically linked individuals and bodies and thus do not satisfy the requirement that restrictions on freedom of expression be provided by law.”

In the above submission I understand Mr *Moyo* to be making the following points -

⁶ *Athukorale's case supra*

- (a) section 79 provides for the licensing of the media;
- (b) the section is impossibly vague and,
- (c) it confers directly or indirectly too much discretion or power on a political functionary.

On that basis, he argued that s 79 should be declared unconstitutional.

There is no doubt that s 79, as Mr *Moyo* has submitted, is at the centre of the licensing system. The authorities clearly establish that the licensing of the media fall under the exception of public order⁷. I find myself in agreement with the proposition that a law providing for the licensing of the media falls under the exception of a law providing for public order. On that basis Mr *Moyo*'s contention that s 79 does not fall under any one of the exceptions to s 20(1) cannot succeed.

Having concluded that s 79 falls under the exception of public order, the next issue that falls for determination is Mr *Moyo*'s contention that s 79 is too vague to be law and in the event that the Court concludes that s 79 is not vague, the next issue will be, is it reasonably justifiable in a democratic society? As I said Mr *Moyo* has argued that s 79 as a whole and, in particular, subsection (5) is too vague to be categorised as provided by law. I am unable to agree with that submission. Subsection (1) is very clear in its language. It clearly states that in order to exercise the privileges accorded in s 78, which has not been impugned and is therefore for the purposes of this case constitutional, a journalist has to be accredited by the

⁷ *Athukorale's case supra* and the authorities cited therein

Commission. I see nothing vague about this subsection. The subsection is as clear as it can be. It states in very clear terms that in order to enjoy the benefits conferred by s 78 a journalist requires accreditation.

Subsections 79 (2), (3) and (4) are very explicit. Subsection (2) expressly provides that non-citizens and non-permanent residents cannot be accredited as journalists except for a limited period of time as provided in subs (4). There is nothing vague or ambiguous about these subsections. Subsection (3) is equally explicit in that it provides that a journalist wishing to be accredited is required to apply to the commission in the form and manner prescribed. It is patently clear that the form and manner will be prescribed in the relevant statutory instrument. In my view the intention of the legislature is very clear. What is required of an applicant is equally clear. Look at the relevant statutory instrument and it will tell you how to make an application for accreditation and the fee that is required.

The applicants' *locus standi* to challenge the constitutionality of s 79 (2), (3) and (4) is doubtful. There is no averment on the papers that the applicants or any of the members of the first applicant are not citizens or permanent residents of Zimbabwe. In the absence of such an averment the inference is that the applicants are citizens and/or permanent residents of Zimbabwe in which case it is difficult to see how they are adversely affected by the above subsections.

I also find s 79(5) fairly clear. In terms of subs (5), the Commission "may" accredit an applicant as a journalist if it is satisfied that the applicant comes

within the parameters set out therein. It is quite clear from the context that the word “may” means “shall” in this subsection.

“In ordinary usage, ‘may’ is a permissive and ‘must’ is imperative, and, in accordance with the usage, the word ‘may’ in a statute will not generally be held to be mandatory. In some cases, however, it has been held that expressions such as ‘may’ or ‘shall have power’ or ‘shall be lawful’ have – to say the least – a compulsory force and so their meaning has been modified by judicial exposition.”

See Maxwell on *The Interpretation of Statutes* 12 ed by P St. J Langan at pp 234-235 and the cases there mentioned.

The use of the word “may” here does not, as it would in the ordinary sense of the word, confer a discretion on the Commission. If it did, one could be faced with a situation where an applicant, having complied with the requirements of subs 79(5) could be denied accreditation at the whim of the Commission. This cannot have been the intention of Parliament. The requirements for accreditation were set out in subs (5) and the intention must be that, upon satisfaction of those requirements, an applicant is entitled to be accredited. This provision does not allow for an abuse of its powers of accreditation by the Commission. Indeed it lends protection to an applicant who has complied with the prescribed formalities that he will not be deprived of accreditation for reasons other than those stated in the subsection. It certainly does not inhibit the journalist in expressing himself freely.

The courts interpret statutes so as to give effect to the intention of Parliament, as expressed in the words of the statute.

“It is hardly necessary to stress that the intention of the Legislature is to be gleaned from the language used; we must be very careful to avoid the

assumption that the Legislature intended what we think it ought to have intended.”

Per BARON JA in *Hewlett v Minister of Finance & Anor* 1982 (1) SA 490 (ZSC) at 509E.

On this basis, I am satisfied that once an applicant has satisfied the legal requirements he will as a matter of law be entitled to accreditation.

It is patently clear from this section that the formalities in question will be provided for in the relevant statutory instrument or regulations. Paragraph 79(5)(b) also provides that the Commission has to be satisfied that the applicant has the prescribed qualification. The qualification no doubt has to be provided for in the relevant regulations. If the regulations lack clarity as to what constitutes qualification, it is the regulations that may fall foul of the constitution and may be challenged. It would appear to me that the substance of the matter will be in the regulations prescribing the “formalities” and the “qualifications”. Thus if the regulations provide too onerous “formalities” and “qualifications” they may fall foul of the Constitution. Whereas if the regulations provide for mere formalities and qualifications that are hardly onerous it is difficult to see how they can fall foul of the Constitution. Thus, for instance, if the regulations prescribing the qualification provide that a journalist has to have a university degree in order for him to be accredited as a journalist then such a law will most probably be held to be unconstitutional.⁸ On the other hand, if the regulations prescribing the qualification

⁸ Inter-American Court of Human Rights *supra*

for accreditation is that the applicant be literate it is unlikely to be held unconstitutional.

In any event, the qualifications and the formalities required are not a matter of conjecture. They are set out in Statutory Instrument 169C of 2002, which provides for the registration and accreditation of journalists. A perusal of the Regulations reveals nothing patently unconstitutional, except for Form AP3 in the Second Schedule to the Regulations. The requirement in that Form, that accreditation be approved by the Permanent Secretary and the Minister, bears the hallmarks of unconstitutionality. The applicants are entitled to challenge the constitutionality of any of the provisions of SI 169C. They have not done so and the only reasonable inference to be drawn is that the applicants do not believe they have a basis for such a challenge.

The applicants' contention that when s 79 is read with s 91 the effect is unconstitutional is without substance. Section 91 merely enables the Minister to make regulations and specifically mentions areas in respect of which the Minister may make such regulations. The first observation I would make is that s 91 is not impugned in the applicants' affidavits. It is impugned in the heads of argument. An applicant's case, as a general rule stands or falls on his or its founding affidavit. Be that as it may, s 91 is an enabling provision found virtually in every other Act that provides for the making of regulations. The Minister responsible for the administration of the Act is conferred with the authority to make regulations under the Act. This is not to say he is given a blank cheque to make such regulations. The

regulation made in terms of the Act are equally subject to constitutional scrutiny like any other law.

Mr *Moyo* has also argued that s 79 confers on political authority, the Minister, too much power in the licensing system for journalists. I am unable to accept this submission for a number of reasons. A proper reading of the section reveals that that section confers on the Commission and not the Minister certain powers. If the suggestion is that the Commission is not sufficiently independent of the Minister or is controlled by the government the argument is misconceived. Indeed Mr *Moyo* argued strenuously the point that the Commission was not independent. Section 40 of the Act is the section that provides for the appointment and composition of the Commission. Section 40 is not impugned therefore this Court is not seized with the issue of the constitutionality or otherwise of s 40 of the Act. If it is the applicants' contention, as it seems to be, that the Commission is not sufficiently independent of governmental control then the applicant should have impugned s 40 which constitutes the Commission. This Court considered s 4 of the Broadcasting Act [Chapter 12:01] in the *Capital Radio* case, *supra*. That section similarly constitutes the Broadcasting Authority under that Broadcasting Act. This Court unanimously concluded, in that case, that s 4 of the Broadcasting Act was constitutional because the regulating authority was, from a legal point of view, independent of governmental control.

In *Nyambirai's* case, *supra*, this Court set out a three tier criteria that legislation has to satisfy to be adjudged reasonably justifiable in a democratic society. These are:

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

It is common cause that s 79 is at the centre of the licensing system. Licensing of the media, as I have already stated, is sufficiently important to have been recognised as a constitutional exception.⁹ Accordingly I am satisfied that the object of s 79 is sufficiently important for the purpose set in (1) above.

Section 79 is rationally connected to the above objective because as was submitted by the applicants' counsel, it is at the centre of the licensing process. On this basis s 79 is, therefore, rationally connected to the objective of legislation. The second requirement is therefore met.

The third requirement cannot be conveniently applied to s 79. Section 79 is essentially an enabling provision. The requirement that the means used be no more than is necessary to accomplish the objective can only be applied to the regulations that prescribe formalities and qualifications for accreditation. As I have said, none of the provisions of SI 169C have been challenged. Section 79 merely confers the powers to make regulations that prescribe the formalities and

⁹ *Athukorale's case, supra*

qualifications for accreditation. The test will have to be applied to the regulation that prescribes the formalities and the qualifications and not s 79 which only confers the powers to make such regulations.

In the result I come to the conclusion that the challenge to s 79 cannot succeed.

I now turn to deal with s 80. This section criminalises the abuse of journalistic privilege. In my view the philosophy of this section as encapsulated in the wording is a cause for concern.

Generally speaking, when one abuses a privilege the remedy is withdrawal of the privilege. Criminalising the abuse of a privilege is patently oppressive. In any event this Court has concluded that freedom of the press is subsumed under s 20 of the Constitution and to perceive the exercise of a constitutionally protected right as a privilege cannot be correct. Freedom of the press is a constitutionally guaranteed right and not a privilege.

Subsections 80(1) (a) and (b) provide that a journalist who falsifies or fabricates information and publishes falsehoods is guilty of a criminal offence. These provisions create strict criminal liability and are so broad in their sweep that I have no hesitation in agreeing with Mr Moyo's submission that on the authority of *S v Chogugudza*¹⁰ and *Tsvangirayi v The State*¹¹ these provisions are unconstitutional in that they are *ultra vires* s 18 of the Constitution.

¹⁰ 1996 (1) ZLR 28

I, however, do not agree with Mr *Moyo*'s submission that s 80(1)(a) and (b) are *ultra vires* s 20 of the Constitution. In my view the constitutional right protected under s 20 relates to the freedom to impart and receive information without hindrance. In my view falsehood is not information. Falsehood is the antithesis of the truth or information. The Constitution confers no right on an individual to falsify or fabricate information or to publish falsehoods. Section 20 of the Constitution protects the right to impart and receive information, not falsehoods. Information is the truth. Falsehoods are not information. There is no intrinsic value in the falsification or fabrication of information or the publication of falsehoods as to warrant constitutional protection of such an activity.

Section 80(c) criminalises the conduct of a journalist who is not a freelance journalist who collects or disseminates information without the permission of his employer. I have serious doubts that this provision can be said to fall under the exception of public order in terms of s 20(1) of the Constitution. Even if I were to accept that it does, that section does not, in my view, pass any of the three tests set out in *Nyambirai's* case, *supra*. The objective of s 80(1)(c) is obscure. An obscure objective can never be sufficiently important to justify the limiting of the freedom of expression.

The matters raised in s 80(1)(c) are matters that are best left in the domain of contractual relationship, that is, between employer and employee.

¹¹ SC-91-2001

Criminalising such conduct has a chilling and intimidating effect on journalists. I accordingly hold the view that s 80(1)(c) is unconstitutional.

Section 80(1)(d) is a standard clause found in most Acts of Parliament. It criminalises the contravention of a provision of the Act. Once a provision of the Act is constitutional I see nothing wrong in criminalising the contravention of a provision that complies with the Constitution. To the extent that s 80(2) has been of necessity amended by the striking down of paragraphs (a)(b) and (c) of the section I see nothing unconstitutional in the amended s 80(2).

In brief, and for the foregoing reasons, sections 80(1) (a), (b) and (c) are unconstitutional and should be struck down.

Section 83 prohibits an individual from practising as a journalist unless he or she is accredited as a journalist. The issues raised here are identical to those raised in respect of the challenge to s 79. What I said in regard to s 79 applies with equal force to s 83. In my view, s 83 is constitutional.

I now turn to deal with s 85. The grounds of the applicants' challenge to s 85 are set out in paragraph 13 and 26 of the founding affidavit of Mr Mutsakani. In effect the applicants seem to be making the following points:

1. Section 85 confers on the second respondent too much power to interfere with the right of freedom of expression of journalists and

reduces that right to a privilege to be enjoyed at the discretion of the second respondent.

2. Section 85 as well as the other impugned sections go beyond the purpose for which the derogations from s 20(1) are permissible.

I must confess that I find Mr *Moyo*'s submissions in regard to s 85 equivocal. From paragraph 15.33 to 15.34 of the heads of argument Mr *Moyo* seems to contend that while it may be proper to regulate other professions it is unconstitutional to regulate journalism. Only self regulation is constitutional when it comes to journalism. However, in paragraph 15.35 of the heads of argument Mr *Moyo* seems to be making the concession that legislative regulation of the media is permissible but such regulation must be minimal otherwise it becomes unconstitutional and that s 85 exceeds what is constitutionally permissible. I have already concluded that legislative regulation of the media is permissible within constitutionally permissible limits. I will now proceed to determine whether s 85 is constitutionally permissible.

Section 85(1) confers on the Commission powers to develop a Code of Conduct. It enjoins the Commission to consult with stakeholders such as journalists when developing the Code of Conduct. The only argument advanced on behalf of the applicants is that the development of the Code of Conduct should be done by the journalists themselves without the involvement of the Commission. While this may be preferable I am unable to accept that the involvement of the Commission in such an activity is unconstitutional.

Section 85(2) confers on the Commission the power to enforce the Code of Conduct. The section also provides for maximum sanctions that the Commission can and not shall impose for the breach of the Code of Conduct. This again is essentially an enabling provision. It sets out what the Commission can do as opposed to shall do. The section confers on the Commission absolute discretion on what sanctions should be imposed for violations of the Code of Conduct within the prescribed limit. I have some difficulty in understanding the basis of the challenge to this section. The suggestion seems to be that journalists should not be sanctioned for violating the Code of Conduct as such sanction would be unconstitutional. I do not find this submission persuasive.

Subsections 85 (3), (4), (5), (6) and (7) provide for the mechanisms to be followed in misconduct proceedings. They provide for a fair hearing and the appeal procedures. There simply is no substance in the submission that these subsections are unconstitutional.

In the result, and for the foregoing reasons, I hold that s 80(1) (a), (b) and (c) are unconstitutional and are hereby struck down. Section 79, subss (1)(d) and (2) of section 80, s 83 and s 85 are hereby declared constitutional.

There will be no order as to costs because both parties have partially succeeded.

CHEDA JA: I agree

ZIYAMBI JA: I agree

MALABA JA: I agree

SANDURA JA: I have read the judgment prepared by CHIDYAUSIKU CJ and agree that paragraphs (a),(b)and (c) of s 80(1) of the Access to Information and Protection of Privacy Act [Chapter 10:27] (“the Act”) are inconsistent with s 20(1) of the Constitution of Zimbabwe (“the Constitution”). In addition, I agree that subsections (1),(3),(4),(5),(6) and (7) of s 85 do not contravene s 20(1) of the Constitution. However, I respectfully disagree with the conclusion that ss 79,80(1)(d),80(2),83 and 85(2) do not contravene s 20(1) of the Constitution. The section reads as follows:-

“Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say,

freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.”

However, the right to freedom of expression is not absolute because subsection (2) of s 20 of the Constitution authorises a restriction of this right in certain circumstances. The subsection, in relevant part, reads as follows:-

“Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision –

- (a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;
- (b) for the purpose of –
 - (i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;
 - (ii) preventing the disclosure of information received in confidence;
 - (iii) maintaining the authority and independence of the courts or tribunals or Parliament;

...;

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.”

The provisions in subsections (1) and (2) of s 20 of the Constitution are very similar to the provisions in paragraphs 1 and 2 of Article 13 of the American Convention on Human Rights, which read as follows:-

- “1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.”

I have set out these provisions *in extenso* because I shall refer to them in the course of this judgment.

In broad terms, two issues arise for determination in this application. The first is whether the provisions of the Act being challenged constitute restrictions of the right to freedom of expression guaranteed by s 20(1) of the Constitution. If they do, the second issue to consider is whether they are saved by s 20(2) of the Constitution, on the basis that the restrictions are reasonably justifiable in a democratic society.

Although s 78 of the Act has not been challenged, I would like to set out its provisions to facilitate a better understanding of s 79(1) of the Act. The section, in relevant part, reads as follows:-

“Subject to this Act and any other law, a journalist shall have the right –

- (a) to enquire, gather, receive and disseminate information;
- (b)-(f)...;
- (g) to circulate reports and materials he prepared under his signature, under a pseudonym or without any signature.”

I now wish to consider whether the provisions of the Act being challenged contravene s 20(1) of the Constitution.

I. **SECTION 79**

This section deals with the accreditation of journalists and, in relevant part, reads as follows:-

- “(1) No journalist shall exercise the rights provided in section seventy-eight in Zimbabwe without being accredited by the Commission.
- (2) ...
- (3) Any person who wishes to be accredited as a journalist shall make an application to the Commission in the form and manner and accompanied by the fee, if any, prescribed ...
- (4) ...
- (5) The Commission may accredit an applicant as a journalist and issue a press card to the applicant if it is satisfied that the applicant –
 - (a) has complied with the prescribed formalities; and
 - (b) possesses the prescribed qualifications; and
 - (c) ...”

The word “journalist” is defined in s 62 of the Act as follows:-

“‘journalist’ means a person who gathers, collects, edits or prepares news, stories and materials for the office of a mass media and is connected with it by reason of his employment and includes freelance journalist.”

In order to make provisions for, *inter alia*, the manner in which a person wishing to be accredited as a journalist would apply for accreditation, the Access to Information and Protection of Privacy (Registration, Accreditation and

Levy) Regulations, 2002, published in Statutory Instrument 169C of 2002 (“the Regulations”) were promulgated on 15 June 2002. Section 6 of the Regulations reads as follows:-

“An application for the accreditation of a journalist in terms of section 79 of the Act shall be made in Form AP3 and shall be accompanied by the appropriate application fee and accreditation fee.”

The application and accreditation fees are set out in the First Schedule to the Regulations. In the case of an application by a local journalist working for a local media, the application fee is \$1 000 and the accreditation fee is \$5 000. In the case of a local journalist working for a foreign media, the application fee is US\$50 and the accreditation fee is US\$1 000.

However, it is clear from Form AP3, the application for the accreditation of a journalist, that the accreditation of a journalist by the Commission is subject to approval by the Permanent Secretary and by the first respondent, with the first respondent having the final say in the matter. The accreditation is not, therefore, a mere formality. If it were, why would it need the Minister’s approval?

I now wish to consider whether s 79 imposes a restriction on freedom of expression. I have no doubt in my mind that it does. The journalist has to apply for accreditation and pay application and accreditation fees. In addition, the accreditation is not a mere formality.

It is pertinent to note that there is no rational basis for distinguishing the practice of journalism from the exercise of the right to freedom of expression,

because the two are intertwined. This was made clear by the Inter-American Court of Human Rights in its Advisory Opinion on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism. The Opinion had been sought by the Government of Costa Rica on the interpretation of the provisions of Article 13 of the American Convention on Human Rights, which I have already set out in this judgment.

In the Advisory Opinion, OC-5/85 of 13 November 1985, Series A, No 5, the Court had this to say at para. 74:-

It has been argued that what the compulsory licensing of journalists seeks to achieve is to protect a paid occupation and that it is not directed against the exercise of freedom of expression as long as it does not involve remuneration and that, in that sense, it deals with a subject other than that dealt with by Article 13 of the Convention. This argument is based on a distinction between professional journalism and the exercise of freedom of expression that the Court cannot accept. This argument assumes that it is possible to distinguish freedom of expression from the professional practice of journalism, which is not possible. Moreover, it implies serious dangers if carried to its logical conclusion. The practice of professional journalism cannot be differentiated from freedom of expression. On the contrary, both are obviously intertwined, for the professional journalist is not, nor can he be, anything but someone who has decided to exercise freedom of expression in a continuous, regular and paid manner. It should also be noted that the argument that the differentiation is possible could lead to the conclusion (that) the guarantees contained in Article 13 of the Convention do not apply to professional journalists.” (emphasis added)

Additionally, at para 72 the Court said:-

“The argument that a law on the compulsory licensing of journalists does not differ from similar legislation applicable to other professions does not take into account the basic problem that is presented with respect to the compatibility between such a law and the Convention. The problem results from the fact that Article 13 expressly protects freedom ‘to seek, receive and impart information and ideas of all kinds ... either orally, in writing, in print ...’ The profession of journalism – the thing journalists do – involves,

precisely, the seeking, receiving and imparting of information. The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees.”

The only issue for consideration, therefore, is whether the restriction imposed on freedom of expression by s 79 is reasonably justifiable in a democratic society.

However, as this Court stated in *Woods & Ors v Minister of Justice & Ors* 1994 (2) ZLR 195 (S) at 199B-C:-

“What is reasonably justifiable in a democratic society is an elusive concept. It is one that defies precise definition by the courts. There is no legal yardstick, save that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual. See *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S) at 64; and generally, *CoT v CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 370F-372C; 1990 (2) SA 260 (ZS) at 265B-266D.”

Nevertheless, in *Nyambirai v NSSA & Anor* 1995 (2) ZLR 1 (S) this Court set out the criteria which should be considered in determining whether or not a restriction is permissible. At 13C-E GUBBAY CJ, with whom I and three other judges of this Court concurred, said:-

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

- (i) the legislative objective is sufficiently important to justify limiting a fundamental right;
- (ii) the measures designed to meet the legislative objective are rationally connected to it; and

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

See *R v Oakes* (1986) 19 CRR 308 at 336 – 337 (a decision of the Supreme Court of Canada).”

Due to the overriding importance of freedom of expression in a democratic society, the above test is to be applied strictly. This point was made by the European Court of Human Rights in *Thorgeir Thorgeirson v Iceland* (1992) 14 EHRR 843, at para 63, as follows:-

“The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society; subject to Article 10(2), it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.” (emphasis added)

I now wish to apply the test set out in *Nyambirai’s* case, *supra*, to the facts of the present case in order to determine whether the restrictive provisions of s 79 are reasonably justifiable in a democratic society.

ARE THE LEGISLATIVE OBJECTIVES SUFFICIENTLY IMPORTANT TO JUSTIFY LIMITING A FUNDAMENTAL RIGHT?

The legislative objectives in respect of s 79 are set out by the first respondent in his opposing affidavit as follows:-

“Accreditation is a worldwide practice which is primarily meant to ensure two main objectives i.e. accountability of the journalist to society and ensuring easy access to events by the journalist.”

However, as the applicant avers in its answering affidavit, the second objective given by the first respondent, i.e. ensuring easy access to events by the journalist, only applies to voluntary accreditation, which is not in issue in this application. What is in issue is the compulsory accreditation of journalists. In the circumstances, the first respondent has advanced only one objective for the enactment of s 79, i.e. the accountability of the journalist to society.

Regrettably, the first respondent does not say how the requirement that a journalist be accredited, before exercising his rights as a journalist, would achieve the intended objective. Nevertheless, I am satisfied that the legislative objective given is not sufficiently important to justify limiting freedom of expression.

In a number of cases this Court has stressed the importance of freedom of expression in a democratic society. One of them is *In re Munhumeso & Ors*, *supra*. At 56G-57B, the Court said:-

“The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be under-estimated. 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’, per European Court of Human Rights in *Handyside v United Kingdom* (1976) 1 EHRR 737 at para 49 ...

Freedom of expression, one of the most precious of all the guaranteed freedoms, has four broad special purposes to serve: (i) it helps an individual to obtain self-fulfilment; (ii) it assists in the discovery of truth; (iii) it strengthens the capacity of an individual to participate in decision making; and (iv), it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change ... In sum, what is at stake is the basic principle of the ‘people’s right to know’. See *Indian Express Newspapers (Bombay) v Union of India* (1985) 2 SCR 287.” (emphasis added)

Similarly, in Rights of Access to the Media, *Andras Sajo* says the following at p.3:-

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

In the circumstances, it is clear beyond doubt that the legislative objective given for the enactment of s 79 is not sufficiently important to justify limiting the fundamental right to freedom of expression, which has been described by the Inter-American Court of Human Rights, in the Advisory Opinion already cited, as “a cornerstone upon which the very existence of a democratic society rests.”

ARE THE MEASURES DESIGNED TO MEET THE LEGISLATIVE OBJECTIVE RATIONALLY CONNECTED TO IT?

In my view, they are not. I cannot see any rational connection between the requirement that a journalist should be accredited before practising as a journalist and the objective of making him accountable to society. In his opposing affidavit the first respondent does not say how the two are connected.

ARE THE MEANS USED TO IMPAIR THE RIGHT OR FREEDOM NO MORE THAN IS NECESSARY TO ACCOMPLISH THE OBJECTIVE?

Put differently, the question is whether the restrictive provisions in s 79 are the least drastic means by which the stated objective of the section may be accomplished. There can be no doubt that the answer to that question is a negative one because the provisions of the common law and criminal law adequately make the journalist accountable for his actions.

In the circumstances, it is clear beyond doubt that the provisions of s 79 are not reasonably justifiable in a democratic society. They, therefore, contravene s 20(1) of the Constitution.

This conclusion is supported by the Advisory Opinion of the Inter-American Court of Human Rights, already cited in this judgment. At para 85, the Court unanimously concluded:-

“That the compulsory licensing of journalists is incompatible with Article 13 of the American Convention on Human Rights if it denies any person access to the full use of the news media as a means of expressing opinions or imparting information.” (emphasis added).

As already stated, the compulsory accreditation of journalists in terms of s 79 is not a mere formality. It was obviously intended to exclude some persons from practising as journalists. For example, those persons who cannot pay the application and accreditation fees are excluded from practising journalism.

I now wish to deal very briefly with the argument that s 79 does not contravene s 20(1) of the Constitution because it is a restriction of freedom of expression permitted by s 20(2) of the Constitution as it makes provision in the

interest of public order. I understand the argument to be that the compulsory accreditation of journalists was introduced as a way of organising the profession in general.

This argument was considered and rejected by the Inter-American Court of Human Rights in the Advisory Opinion already cited. At para 76, the Court said:-

“The Court concludes, therefore, that reasons of public order that may be valid to justify compulsory licensing of other professions cannot be invoked in the case of journalism because they would have the effect of permanently depriving those who are not members of the right to make full use of the rights that Article 13 of the Convention grants to each individual. Hence, it would violate the basic principles of a democratic public order on which the Convention itself is based.”

I entirely agree.

II. **SECTION 80**

This section reads as follows:-

(1) A journalist shall be deemed to have abused his journalistic privilege and committed an offence if he does the following:-

- (a) falsifies or fabricates information;
- (b) publishes falsehoods;
- (c) except where he is a freelance journalist, collects and disseminates information on behalf of a person other than the mass media service that employs him without the permission of his employer;
- (d) contravenes any of the provisions of this Act;

(2) A person who contravenes subparagraphs (a) to (d) of subsection (1) shall be guilty of an offence and liable to a fine not exceeding one hundred thousand dollars or to imprisonment for a period not exceeding two years.”

As stated at the beginning of this judgment, I agree with CHIDYAUSIKU CJ that paragraphs (a),(b) and (c) of s 80(1) contravene s 20(1) of the Constitution. However, with regard to paragraphs (a) and (b) my view is that the two paragraphs contravene s 20(1) of the Constitution simply because the publication of false statements is protected by s 20(1) of the Constitution. The issue concerning the publication of false statements was considered by this Court in *Chavunduka & Anor v Minister of Home Affairs & Anor* 2000 (1) ZLR 552 (S). At 558E-559D GUBBAY CJ, with whom I and three other judges of this Court concurred, said:-

“Plainly, embraced and underscoring the essential nature of freedom of expression, are statements, opinions and beliefs regarded by the majority as being wrong or false ...

In *R v Zundel* (1992) 10 CRR (2d) 193 (Can SC) MADAM JUSTICE McLACHLIN (now CHIEF JUSTICE)..., writing for the majority, in a valuable and forward-looking judgment, stated at 206:-

‘(The) guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority’s perception of “truth” or “public interest” from smothering the minority’s perception. The view of the majority has no need of constitutional protection; it is tolerated in any event. Viewed thus, a law which forbids expression of a minority or “false” view on pain of criminal prosecution and imprisonment, on its face, offends the purpose of the guarantee of free expression.’

And continued at 209:

‘Before we put a person beyond the pale of the Constitution, before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection. The criterion of falsity falls short of this certainty, given that false statements can sometimes have value and given the difficulty of conclusively determining total falsity. Applying the broad purposive

interpretation of the freedom of expression guaranteed by s 2(b) hitherto adhered to by this Court, I cannot accede to the argument that those who deliberately publish falsehoods are for that reason alone precluded from claiming the benefit of the constitutional guarantees of free speech.”

I now wish to deal with s 80(1)(d). This provides that a journalist shall be deemed to have abused his journalistic privilege and committed an offence if he contravenes any of the provisions of the Act. In other words, if a journalist who has not been accredited in terms of s 79 practises journalism, as he is constitutionally entitled to do, he is deemed to have committed an offence. As I have concluded that s 79 contravenes s 20(1) of the Constitution, the same applies to s 80(1)(d) because it prohibits conduct permitted by the Constitution.

Similarly, s 80(2) which provides that a person who contravenes paragraphs (a) to (d) of subsection (1) shall be guilty of an offence contravenes s 20(1) of the Constitution because it prohibits conduct permitted by the Constitution.

III **SECTION 83**

This section reads as follows:-

- “(1) No person other than an accredited journalist shall practise as a journalist nor be employed as such or in any manner hold himself out as or pretend to be a journalist.
- (2) No person who has ceased to be an accredited journalist as a result of the deletion of his name from the roll, or who has been suspended from practising as a journalist, shall, while his name is so deleted, or is so suspended, continue to practise directly or indirectly as a journalist, whether by himself or in partnership or association with any other person, nor shall he, except with the written consent of the Commission, be employed in any capacity whatsoever connected with the journalistic profession.”

In my view, it is clear beyond doubt that this section contravenes s 20(1) of the Constitution. That is so because the compulsory accreditation of journalists in terms of s 79 contravenes s 20(1) of the Constitution.

IV **SECTION 85**

This section, in relevant part, reads as follows:-

“ (1) The Commission shall, in consultation with such organisations it considers to be representative of journalists, develop a code of conduct governing the rules of conduct to be observed by journalists.

(2) The Commission shall be responsible for enforcing the code of conduct referred to in subsection (1) and shall, for that purpose, have the following powers in relation to any journalist who contravenes the code or any provision of this Act –

- (a) deleting his name from the roll of journalists; or
- (b) ordering his suspension for a specified period; or
- (c) imposing such conditions as it deems fit subject to which he shall be allowed to practise; or
- (d) ordering him to pay a penalty not exceeding fifty thousand dollars; or
- (e) cautioning him; or
- (f) referring the matter for prosecution.

(3) to (7) ...”

In my view, subsections (1),(3),(4),(5),(6) and (7) do not contravene s 20(1) of the Constitution, although the code itself, if not carefully drafted, might contravene s 20(1) of the Constitution. This view is supported by the Advisory Opinion of the Inter-American Court of Human Rights, already cited in this judgment. At para 80 the Court said:-

“The Court also recognises the need for the establishment of a code that would assure the professional responsibility and ethics of journalists and impose penalties for infringements of such a code. The Court also believes that it may be entirely proper for a State to delegate, by law, authority to impose sanctions for infringements of the code of professional responsibility and ethics. But, when dealing with journalists, the restrictions contained in Article 13(2) and the character of the profession ... must be taken into account.”

However, subsection (2) stands on a different footing. This is so because it empowers the Commission to penalize journalists, not only for contravening the code, which would be constitutional, but also for contravening “any provision of this Act”, which includes the provisions of the Act which are unconstitutional.

What that means is that in certain circumstances a journalist would be penalized for doing what he is entitled to do in terms of s 20(1) of the Constitution; for example, practising journalism when he has not been accredited in terms of s 79. For that reason, subsection (2) is in contravention of s 20(1) of the Constitution.

In the circumstances, I would order as follows:-

1. Sections 79,80,83 and 85(2) of the Access to Information and Protection of Privacy Act [Chapter 10:27] contravene s 20(1) of the Constitution of Zimbabwe and are hereby struck down.
2. The costs of this application shall be borne by the first respondent.

Scanlen & Holderness, applicant's legal practitioners

Muzangaza Mandaza & Tomana, first respondent's legal practitioners

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