AFRICA TRIBUNE NEWSPAPERS (PVT) LTD
and
MAYZONE INVESTMENTS (PVT) LTD
and
HONOURABLE KINDNESS PARADZA (MP)
and
FANNIE MUSHAVA
and
NEVANJI ERNEST SIVENGWA MUTIZWA MADANHIRE
and
BLESSING MAGENGA
and
STEWART GOMWE
versus
THE MEDIA AND INFORMATION COMMISSION
and
DR TAFATAONA MAHOSO

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 21 June and 21 July 2004

Urgent Chamber Application

Mr *S.V. Hwacha*, for the applicants
Mr *J. Tomana*, for the respondents

UCHENA J: The first applicant is a duly registered company which publishes a weekly newspaper called the Tribune. It until the 10th June 2004 was a registered media company.

The second applicant is a duly incorporated company. It owns all the 100 issued shares in the first applicant. These shares were previously owned by U.K.I.(PVT) Ltd. U.K.I. (Pvt) Ltd sold the 100 issued shares of the first applicant to the second applicant.

The second applicant was created by the 3rd, 4th, 5th, 6th and 7th applicants for the purpose of buying the first applicant. The second applicant is therefore the Mass Media owner.

The 3rd, 4th, 5th, 6th and 7th applicants have interests in the 2nd applicant. They were in the management of first applicant before it was taken over by the second applicant.

The first respondent the Media and Information Commission is a body corporate charged with the responsibility of monitoring and controlling mass media services in Zimbabwe.

The second respondent is the chairman of the 1st respondent.

Factual Background:

After the second applicant had acquired the 1st applicant, the first respondent wrote to the 3rd applicant on the 5th of May 2004. In that letter the 1st respondent informed the 1st applicant through the 3rd applicant its group operations director that 1st applicant's operations were in contravention of Section 67 of the Access to Information and Protection of Privacy Act [*Chapter 10:27*] hereinafter referred to as the Act. The particulars of the contravention were as follows:-

"(a) That the ownership has changed from U.K.I Limited to what you refer to as the management.
(b) That the trade name has been changed from Media Africa Group to Africa Tribune Newspapers (Pvt) Ltd.
(c) That the name form and frequency of the registered papers, the Business Tribune and the Weekend Tribune have been altered to just one called the Tribune."

The 1st respondent's letter also notified the 1st applicant that:-

"In terms of section 67 of the Act, you have a mandatory obligation to notify the Commission of such substantial and material changes.

The Commission has not been notified and in terms of section 71(4) you are hereby notified of the Commission's intention to suspend or cancel A.T.N.(Pvt) Ltd's registration certificate.

You are accordingly hereby called upon, within seven days of the date hereof, to show cause why your registration certificate should not be suspended or cancelled.

The notice has accordingly been given."

The first applicant promptly responded to the 1st respondent's letter on the 5th May 2004. In its letter the 1st applicant states:

"(a) The 1st respondent's letter was of the 4th May 2004 but was erroneously dated the 5th May 2004.
(b) That 2nd respondent had met 1st applicant's management on the 4th May 2004.
(c) That ATN's management was grateful that all potential misunderstandings have been fully explained and resolved.
(d) That 1st respondent had corrected its earlier public statement as quoted in the media.
(e) That ATN was in the process of finalising the management buyout
(f) That ATN is properly registered in terms of AIPPA

The letter was concluded in the following words:-

"Pursuant to the requirements of section 67 we notify the Commission as follows:

(a) The founding management team of A.T.N. have acquired ownership of ATN which traded as Media Africa Group (please see the attached presser)
(b) There are no other owners save as aforesaid.
(c) Due to the recent theft of over 20 computers in the newsroom, we have merged the two titles – Business Tribune and Weekend Tribune into one publication simply called the Tribune published weekly on Friday.
(d) There is no change in the area of circulation.
(e) The editorial office and place of location and form remain the same."

On the 7th May 2004 the first respondent required the first applicant to submit to it the following:

1. Original share certificates for each of the new owners.
2. An original of the C.R. 14 form.
3. Original copy of any other agreement between U.K.I and Mayzone together with a photocopy for certification.

By letter dated the 10th May 20-04 the 1st applicant submitted the required documents.

By letter dated 15 May 2004 the 1st respondent inquired about the 19 900 un-issued shares of the first applicant.

On 17 May 2004 the 1st applicant advised the 1st respondent that A.T.N. has 20 000 authorised shares of which only 100 shares were issued. The shares were all bought by 2nd applicant resulting in one share certificate being issued to Mayzone Investments (Pvt) Ltd which is owned by the 3rd to the 7th applicants.

On the 13th May 2004 the 1st respondent informed the 1st applicant of a hearing which was to be held on the 18th May 2004 in the 1st respondent's boardroom at 4.00 p.m. That hearing was however postponed.

On the 27th May 2004 1st respondent wrote to the 1st applicant advising it that its current operations were in contravention of Sections 67 and 79 of the Access to Information & Protection of Privacy Act [*Chapter 10:27*].

The charge of contravening section 67 had already been preferred against the first applicant. The section 79(6) charge was based on the 1st applicant having employed uncredited journalists. The employment of Bekithemba Mhlanga was sited.

In that letter the 1st applicant was advised that the hearing that had been set for the 18th May 2004 was now going to be on the 2nd of June 2004.

On the 31st May 2004 the 1st applicant wrote to the 1st respondent advising it of the following:

1. That it was not its intention not to inform the first respondent of the changes on which the section 67 charge is founded.
2. That the buyout arrangements were still in progress and the management buy out was still in progress.
3. That they intended to advise the 1st respondent when everything had been finalised.
4. That section 67 does not provide a time frame within which the Commission should be notified.
5. That Mhlanga was employed by UKI as a consultant just like the other managers who subsequently bought ATN and it did not know of others employed without being accredited.

The 1st respondent held the hearing on the 2nd of June 2004 and determined the charges as follows on the relevant issues.

1. That 1st applicant's argument that notification was sent to the wrong address was not backed by evidence. It was contradicted by the fact that the same people representing ATN at the hearing had correctly directed journalists and some news paper copies to the Commission's correct physical address.
2. That the claim that the directors did not report changes because they needed to wait until everything had been finalised is contradicted by their earlier claim that the notice was send to a wrong address or the newspaper claim of 4 May 2004 that the M.I.C. had been informed of the changes.
3. That there was no precise and decisive board resolution on the ownership of ATN or the distribution and ranking of the 100 shares out of a total of 20 000 until towards the end of the hearing.
4. That there was no convincing explanation for not informing the commission of the changes.
5. That ATN has not changed but only its ownership has changed. That the management of its previous owner were the new owners.
6. That Bekithemba Mhlanga was employed without accreditation.

7. That respondent made gross misrepresentations by presenting anonymous articles allegedly written by Mhlanga while ignoring the articles bearing the journalist's name. The hard news articles prove that Mhlanga served ATN as a business reporter. Respondents' various replies to the charge of failure to report material changes were also equally misleading and inconsistent.
8. That the commission unanimously found that the respondent contravened section 67.
9. That the commission unanimously found the respondent guilty of contravening section 71(1)(a) on the basis that it made misrepresentations on the employment of Bekithemba Mhlanga.

In the result the 1st respondent in terms of section 71(1)(a) of the Act cancelled applicant's licence and the licence is to remain cancelled for 1 year.

The Application for Review

The applicant applied for an urgent review of the 1st respondent's decision on the following grounds:

1. That the commission purported to exercise powers which it does not have under the Access to Information & Protection of Privacy Act [*Chapter 10:27*].
2. That the commission's decision is grossly unreasonable and irrational and;
3. That the commission was biased especially the chairperson the second respondent.

I will return to these later in the judgment.

Urgency

The applicant urged this court to find that its application was urgent and could not wait because the applicant employed 60 permanent employees who are immediately affected. The applicant has 9 students on attachment and over 200 vendors and agents who rely on the 1st applicant for their livelihood. The applicant has obligations and debts to hundreds of innocent third parties. As at the 11th June 2004 ATN had debts in the sum of $1 734 338 067.00.

Mr *Tomana* for the respondents argued that the applicants' application is not urgent as the applicant waited until the 17th June to apply for the urgent review when the cause of action arose on 10th June 2004. He also said the fact that employees will be affected is not relevant to the urgency of the matter.

Mr *Hwacha* for the applicants pointed out that the notice of cancellation was served on the first applicant on the 10th June 2004. The following Friday the applicants were under shock. Then there was a weekend in between. From Monday to Wednesday the 16th there was consultation and preparation of the voluminous documents for the application which was filed on 17th June 2004.

I am of the view that the explanation given is satisfactory. I am also of the view that the fact that the urgency is based on commercial loses does not mean the case can not be treated as urgent.

In the case of *Silver's Trucks (Pvt) Ltd & Anor v Director of Customs & Excise* 1999(1) ZLR 490 at 492 G-H SMITH J (as he then was) said:

> "Having regard to the probable consequences to the applicants and their employees if the application is not dealt with without further delay, I consider that the certificate of urgency is justified."

The case involved urgency of a commercial nature. The respondent in that case had attached applicant's goods. The application was for the release of the goods held by customs. If the goods were not released the applicant would be forced into liquidation and their 67 employees would lose their jobs. The goods had been purchased using a bank overdraft facility which was attracting interest at 45% per annum compounded monthly and the overdraft could not be settled until the goods were released and sold.

In the present case the debts of 1 billion plus cannot be paid if the applicant is not allowed to continue publishing. Its 60 permanent employees, 9 students on attachment and 200 vendors or agents would be adversely affected. I am satisfied there is urgency in this application.

I have already indicated that the review is based on the first respondent's decision being outside the powers given to the Commission by the Act, that the decision is grossly unreasonable and irrational, and bias.

Ultra Vires

Mr *Hwacha* for the applicants submitted that the respondents acted outside the powers conferred on the Commission by the Act. He said the Commission can only cancel the licence for situations covered by sections 65, 75 and 89. He submitted that since 1st applicant was charged under sections 67 and 79(6), the Commission did not have a right to cancel 1st applicant's licence. He also submitted that the finding that applicant contravened section 71(a) by misrepresenting at the hearing was not based on a charge in terms of section 71(4).

Mr *Tomana* on the other hand submitted that a contravention of section 67 and 79(6) are included in section 71(1)(a) which authorises the Commission to cancel. He also submitted that section 71(6) does not limit the Commission's powers under 71(1)(a) and (b) but it can also use its powers under section 71(1). Mr *Tomana* however conceded that the Commission's finding that the 1st applicant was guilty of c/s 71(1)(a) due to its having misrepresented facts on Mhlanga's employment during the hearing was irregular.

I will first determine whether or not a contravention of section 67 or 79(6) of the Act warrants cancellation in terms of section 71(1)(a) of the Act.

Section 71(1)(a) provides as follows:

> "Subject to this section, the Commission may whether on its own initiative or upon the investigation of a complaint made by any interested person against the mass media services, suspend or cancel the registration certificate of a mass media service if it has reasonable grounds for believing that-
> (a) the registration certificate was issued in error or through fraud or <u>there has been a misrepresentation or non disclosure of a material fact by the mass media owner concerned; or".</u>(emphasis added)

Mr *Tomana* for the respondents submitted that the non-disclosure charged under section 67 is included in section 71(1)(a) therefore the cancellation was justified for not disclosing the change of ownership.

Mr *Hwacha* for the applicants did not specifically deal with this aspect but he submitted that a contravention of sections 67 & 79(6) does not warrant the cancellation of a licence as it is not covered under section 71(1)(c). It is true that sections 67 and 79(6) are not covered under section 71(1)(c) but the respondent's position is that a section 67 non-disclosure can found a cancellation under section 71(1)(a) of the Act.

The dispute can be resolved by interpreting section 71(1)(a). In my view the section provides for the cancellation of a registration certificate if:-

(a) the registration certificate was issued in error or

(b) the registration certificate was issued as a result of fraud or

(c) there has been a misrepresentation or non-disclosure of a material fact by the mass media owners concerned.

In my view the misrepresentation or non-disclosure need not be one linked to the issuing of the registration certificate. It covers misrepresentation or non-disclosure occurring during the existence of the registration certificate.

All the Commission need to prove is that there has been a misrepresentation then it may cancel or suspend the licence.

The legislature could not have been only concerned with misrepresentation occurring during or prior to the registration process. The intention of the legislature from a reading of the whole Act is to enable the Commission to regulate the mass media. In particular the legislature intended to control the ownership of mass media services. If the misrepresentation or the non-disclosure referred to in section 71(1)(a) of the Act is limited to those occurring before registration then it would be very easy for mass media owners to avoid the local ownership requirement by complying at registration and then changing ownership and not disclosing the change introducing none local ownership.

In my view the use of the word "or" after every envisaged contravention was intended to present different situations which may lead to the cancellation of a licence. The use of the word "or" means each situation stands on its own and is not limited by the preceeding words.

The use of the words "there has been a misrepresentation or non-disclosure of a material fact" signifies misrepresentation taking place after registration. If the legislature intended to confine the meaning to misrepresentation occurring during or prior to registration it would have used the words there had been. If every word in section 71(1)(a) is interpreted it becomes clear that the misrepresentation and non-disclosure is not limited to the time of registration. In fact it is a requirement of the interpretation of statutes, that statute should be interpreted as a whole and every part, section or word must be given a meaning in ascertaining the intention of the legislature. I refer to the case of *Keyter v Minister of Agriculture* 1908 NLR 522 at 253 where the learned judge said:-

> "It is the duty of the court to give effect to every word which is used in a statute unless necessity or absolute intractability of the language employed compels the court to treat the words as not written."

In this case the words fit well into the statute and they should be given their ordinary grammatical meaning.

I am therefore satisfied that a non-disclosure referred to in section 67 can found the suspension or cancellation of a mass media service's registration certificate.

I have already said Mr *Tomana* for the respondents conceded that the conviction of the 1st applicant on a contravention of section 71(1)(a) due to the

misrepresentation by the 3rd applicant during the hearing of the 2nd June 2004 is irregular. The concession was properly made as section 71(4) of the Act provides as follows:-

> "Before taking any action in terms of subsection (1) the Commission shall notify the mass media service in writing of its intention to suspend or cancel the registration certificate of the mass media service and the reasons for doing so, and shall call upon the mass media service to show cause, within such reasonable period as may be specified in the notice, why the registration certificate should not be suspended or cancelled as the case maybe". (emphasis added)

My understanding of section 71(4) of the Act is:-

(a) No action can be taken against a mass media service in terms of section 71(1)(a) (b) and (c).

(b) Unless the Commission has notified the mass media service.

(c) Of its intention to suspend or cancel.

(d) Giving reasons for its intended suspension and cancellation.

(e) And call upon the mass media service to show cause why its registration certificate should not be cancelled.

(f) Giving the mass media service a reasonable period within which it should do so.

In the present case the alleged misrepresentation took place during the hearing. The 1st applicant was not given any notice of cancellation based on such misrepresentation. No opportunity for the 1st applicant to show cause why its registration certificate should not be cancelled for the alleged misrepresentation was given. No period for applicant to show cause was allowed.

In conceding this irregularity Mr *Tomana* said the 1st respondent merely used the misrepresentation as an aggravating factor in deciding on the cancellation. That is however not what the 1st respondent did. In its findings the first respondent said under 4.0 to 4.1.

> "In terms of section 71(1)(a) all six commissioners attending the hearing find respondent guilty of misrepresentation in that while clear evidence reveals that during the material period, that is during the currency of ATN's registration certificate, respondent employed an unaccredited journalist called Bekithemba Mhlanga, the controlling shareholder the Honourable Kindness Paradza feebly sought to mislead the Commission into believing that:-
>
> (a) The practice should be ignored because it is common in most mass media services.
>
> (b) Mhlanga was not a reporter but a consultant.
>
> (c) Mhlanga was employed by UKI Nomines Private Limited and not by ATN.

(d) Mhlanga wrote only sponsored advertorials and other anonymous public relations materials.

4.1. In terms of section 71(1)(a) therefore, respondent's licence to publish has been cancelled and remains cancelled for one year."

According to annexure M the 1st respondent did not use the misrepresentation as an aggravating factor. It used the misrepresentation to find the 1st applicant guilty of contravening section 71(1)(a) of the Act. It is the conviction and not the aggravating effect which led to the cancellation of 1st applicant's licence.

The 1st respondent clearly acted outside the provisions of section 71 of the Act. It therefore acted outside the powers granted it by the Act. It did not follow the procedure prescribed by section 71(4) of the Act. The conviction for contravening section 71(1)(a) due to 3rd applicant's misrepresentation at the hearing was premature. The 1st applicant was entitled to being heard before it could be found guilty leading to the cancellation of its licence.

In conclusion I therefore find that the convictions for contravening section 67 and 79(6) of the Act were based on the procedure laid down in section 71(4) of the Act. They therefore cannot be said to have been made by the 1st respondent while acting outside the powers granted it by the Act.

The punishment meted out considered all the convictions. In view of the admitted irregularity I will consider the effect of the irregularity on the cancellation of 1st applicant's licence after considering applicant's second ground of review i.e. that 1st respondent's decision was grossly unreasonable and irrational.

Gross Unreasonableness and Irrationality

In the applicant's supporting affidavit deposed to by the 3rd applicant, the respondents' decision is alleged to be unreasonable because:

1. The respondent whose duty is to promote, develop and grow the media has summarily closed a newspaper for the mere offence of failure to notify it of structural changes.
2. The determination fails to grasp basic tenets of company law and company law procedures as the 1st respondent suspects that there are undisclosed shareholders.
3. The 1st respondent failed to understand what issued and unissued shares are.

In the case of *Nyoni v Secretary for Public Service, Labour and Social welfare & Anor* 1997(2) ZLR 516 H at 525F GILLESPIE J after reviewing

authorities on when gross unreasonableness can succeed as a ground of review said:-

> "These formulations and the authorities cited, are such as lend weight to the notion that unreasonableness as a ground for review is no more than a restatement of other grounds in a different way. They tend to suggest that unreasonableness has an extremely limited, even an insignificant role as a ground of review in our law." (**emphasis added**)

On page 527 A-B the learned judge said:-

> "It is therefore my endeavour to discover whether this is in our law a sufficient ground for review and if so to determine the extent to which such a ground may be investigated in the light of the undoubtedly correct dicta showing that a review does not and should not address the merits of a decision". (**emphasis added**)

In the case of *Muringi v Air Zimbabwe Corporation & Anor* 1997(2) ZLR 488(S) at 490 F-G GUBBAY CJ said:-

> "The application before him was not of review. What was claimed was the impeachment of a decision of an administrative official, exercising a *quasi*-judicial function on the grounds of procedural irregularity and bias. He was obliged to determine that issue alone and not to delve into the merits of the matter. Judicial review, as the phrase implies, is concerned not with the correctness of the decision but with the decision-making process".(**emphasis added**)

In the case of *Charumbira v Commissioner of Taxes & Ors* 1998(1)ZLR 584(S) at 585 D-E McNALLY JA said "Judicial review" as GUBBAY CJ said in *Muringi v Air Zimbabwe Corp & Anor* 1997(2) ZLR 488(S) at 490F "is concerned not with the correctness of the decision, but with the decision making process," or again in *Dube v Mandioma NO & Anor* S. 173-93.

> "In order for the review to succeed it was incumbent upon the appellant to show not that the determination was wrong but that it was irrational, in the sense of being "so outrageous in its defiance of logic or of any accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it as per LORD DIPLOCK in CCSU v Minister of the Public Service (1984) ALL ER 935(HC) at 951a-b." (**emphasis added**)

The learned judge of appeal at page 586A describing the kind of decision that can be upset on review for gross unreasonableness or irrationality said:-

> "Their conclusions cannot possibly be described as irrational "outrageous" or "absurd" – to use the words often used by judges in indicating the kind of decisions that maybe upset on review. (**emphasis added**)

In the case of *EXP Miss X* 1993(1)ZLR 233(H) at 239C CHIDYAUSIKU J (as he then was) dealing with a review of a magistrate's refusal to authorise the termination of a pregnancy said:-

> "The magistrate exercised that discretion and refused to authorise such termination. This court sitting as a review court can only set aside that decision if it were satisfied that it was so grossly unreasonable that no reasonable person applying his mind to the facts before him would have come to that conclusion. That cannot be said of the magistrate's decision in this case.
>
> While I accept that the learned provincial magistrate's decision was within his discretion, I am not entirely satisfied that he was correct in refusing the permission to terminate the pregnancy". (**my emphasis**)

The learned judge on page 240 at E explaining the remedy in a situation where the decision is not grossly unreasonable but wrong said:

> "In the result, if I were sitting as an appeal court, I would have reversed the decision of the provincial magistrate but, because I am sitting as a review court, I cannot interfere with the exercise of the magistrate's discretion". (**emphasis added**)

In the case of *Zimbabwe Proteins (Pvt) Ltd & Ors v Minister of Environment and Tourism & Anor* 1996 (1)ZLR 378(H) at 387G and 388 A-D GARWE J (as he then was) dealing with when a decision can be interfered with on the ground of unreasonableness after analysing authorities on this matter said:-

> "That the above is the law in this country is without doubt. Professor Feltoe in his book A Guide to Zimbabwe Administrative Law remarks at p31:

> "As the function of the court is not to delve into the substantive correctness of an administrative decision, but only to ascertain whether there have been any procedural irregularities or action of an *ultra vires* nature, it would seem to follow that on review the court has no power to overturn a decision simply because it considers it to be unreasonable. If it was to do so, it would in effect be substituting its own decision in place of the decision of the body empowered to make this decision."

The learned author remarks further:-

"In certain circumstances, however, the courts will set aside decisions of a grossly unreasonable nature. A well recognised ground for doing this is where the decision is not only grossly unreasonable but is so grossly unreasonable that it is only explicable on the basis of *mala fides*, ulterior motive or failure of the decision-maker to apply its mind to the decision it has to make".

Similar remarks have been made in cases cited by the respondent. These cases stress that for a decision to be interfered with on the ground of unreasonableness the unreasonableness must be gross. See for example *Union Govt v Union Steel Corp* 1923 AD 220 at 237. *Associated Provincial Picture Houses v Wednesburg Corporation* (1947) 2ALL ER 680; *Clan Transport Co. v Rhodesia Railways & Anor* 1956(3) SA 480(FS)".(**emphasis added**)

An analysis of the authorities I have referred to which I respectively agree with clearly sets out the court's position on reviews based on unreasonableness. I must now decide whether the 1st respondent's decision is so unreasonable as to warrant interference by this court.

The applicant's criticism of the 1st respondent's decision is that since 1st respondent's duty is to promote develop and grow the media it should not have closed applicant's newspaper for a mere failure to notify it of structural changes.

Section 39 of the Act provides for the powers and functions of the Commission. It provides as follows:-

(1) Subject to this Act, the powers and functions of the Commission shall be

(a) To ensure that Zimbabweans have access to information and effective control of mass media services and

(b) To receive and act upon comments from the public about the adminstration and performance of the mass media in Zimbabwe and

(c) ....

(d) ....

(e) ....

(f) ....

(g) To conduct investigations in terms of Part IX to ensure compliance with the provisions of this Act and

(h) to advise the minister on the adoption and establishment of standards and codes relating to the operation of mass media and

(i) to receive, evaluate for accreditation and consider applications for accreditation as a journalist; and

(j) To enforce professional and ethical standards in the mass media; and

(k) ....

(l) ....

(m) ....

(n) To accredit journalists and

(o) To monitor the mass media and raise user awareness of the mass media.

(p) To register mass media in Zimbabwe,

(q) To investigate and resolve complaints against any mass media service in terms of the provisions of this Act.

(2) In the exercise of its functions, the Commission shall have regard to the desirability of securing the following object (sic)(objectives).

(a) To foster freedom of expression in Zimbabwe.

(b) To make information easily accessible to persons requiring it.

(c) To ensure accurate, balanced and unbiased reporting by the mass media in Zimbabwe.

(d) The development of mass media that uphold professional and ethical codes of conduct;

(e) To promote the preservation of national security and intergrity of Zimbabwe.

(f) To foster a Zimbabwean national identity and integrity. (emphasis added)

In my view the functions of the 1st respondent include the monitoring of mass media services, enforcing ethics standards and professionalism; control mass media services, act upon comments by the public on mass media services and ensure that mass media services comply with provisions of the Act. It is therefore not true that the functions of 1st respondent are to merely promote, develop and grow the media. The 1st respondent's functions while including those mentioned by the applicants also includes monitoring and controlling the media investigating none compliance by media services and ensuring that media services comply with the provisions of the Act and enforcing compliance with professional and ethical standards in the mass media services. The first respondent can where appropriate take the disciplinary action it has taken against the first applicant. It can therefore not be said that the action taken by the 1st respondent is grossly unreasonable because it has a duty to develop, promote and grow the mass media. It is expected to do so if the mass media is in compliance with the Act but is also expected to punish and control those who contravene provisions of the Act.

It was further argued that 1st respondent's decision is unreasonable because the offence committed is a mere failure to notify it of structural changes. I have already said the provisions of section 71(1)(a) include none disclosure provided for under section 67. In my view the none disclosure is material as one of the duties and functions of the Commission is to ensure that Zimbabweans have control of the mass media service (Section 39(1)(a) of the Act). That objective cannot be achieved if ownership of media services can change without the 1st respondent being informed.

The applicants also alleged that the 1st respondent misunderstood company law and company law procedures. It is therefore being alleged 1st respondent made an error in law. A reading of the 1st respondent's decision indicates that when it made the final decision it had correctly appreciated the law. The fact that the 1st respondent could have made a mistake in law, if it had is not necessarily a ground for review.

In the case of Bridges and Hume (Pvt) Ltd v Magistrate Byo & Anor 1996(1)ZLR 542(H) it was held:

> "That a mistake in law is not necessarily an irregularity, entitling the proceedings to be reviewed. It is not unknown for a court to misread a statutory provision or overlook one not brought to its notice. But such a mistake could amount to an irregularity:-

(a) Where a wrong question of law is asked, so that the lower court misunderstands the nature of the enquiry and misdirects its mind to wrong matters;

(b) Where an error of law caused the lower court to fail to appreciate the nature of the discretionary powers vested in it;

(c) Where the misconstruction of the provisions of an enactment caused in the lower court a misconstruction of the extent of its jurisdiction for example, by declining to hear a case which it should properly hear;

(d) Where the decision was dependent on the error of law or was substantially or manifestly influenced by it."

In the present case if the 1st respondent's misconception of issued and un-issued shares had persisted and its decision was substantially or manifestly influenced by that misconception its decision could have been reviewable under (d) above. The 1st respondent's decision in Annexure M at 2.5 clearly states that:

"Even the distribution and ranking of the 100 shares out of a total of 20 000 was not revealed until towards the end of the hearing. And this was done with great reluctance."

My understanding of this paragraph is that the 1st respondent finally understood the distribution and ranking of the shareholding. Therefore no issue arises from that criticism as its decision was not dependant on the error of law nor was it substantially or manifestly influenced by it.

In a review the court is not to concern itself with the merits of the case or the correctness of the decision, but with the decision making process. All I am required to do is satisfy myself that the decision is not so grossly unreasonable as to be outrageous as to be explicable on the basis of *malafides,* ulterior motive or a failure by 1st respondent to apply itself to the decision it had to make (see the case of *Zambezi Proteins (Pvt) Ltd & Ors v Minister of Environment (supra*).

Mr *Hwacha* for the applicants submitted that section 71(6) of the Act provides for other penalties and that it was grossly unreasonable for 1st respondent to cancel the 1st applicant's licence. Mr *Tomana* submitted that section 71(6) does not take away the Commission's powers to cancel or suspend under section 71(1) because section 71(6) specifically states that "without derogation from its powers in terms of subsection (1)…". I agree with

Mr *Tomana's* submission that the use of the words "without derogation from its powers in terms of subsection (1)" means the Commission can in situations where it could resort to its powers under subsection (6) use its powers under subsection (1). It therefore cannot be said the 1st respondent's decision to cancel is grossly unreasonable even if it could have resorted to its powers under subsection (6) it remains entitled to use its powers under section 71(1)(a)-(c). The question of the severity of punishment is not for the review court. It can properly be dealt with by the appeal court. I refer to the case of Exp Miss X (supra) where CHIDYAUSIKU J (as he then was) clearly indicated that a review court cannot interfere with a decision within the tribunal's discretion even though it thinks the decision is not correct. The learned judge said:

> "While I accept that the learned provincial magistrate's decision was within his discretion, I am not entirely satisfied that he was correct in refusing the permission to terminate the pregnancy."

The learned judge on page 240 at E went on to say:

> "In the result if I were sitting as an appeal court I would have reversed the decision of the provincial magistrate, but because I am sitting as a review court I cannot interfere with the exercise of the provincial magistrate's discretion".

He inspite of his views confirmed the provincial magistrate's decision because the decision was within the provincial magistrate's discretion.

In the present case I am in view of the provisions of Sections 39(1); 71(1)(a) and 71(6) of the Act and the fact that it is not in dispute that the 1st applicant contravened sections 67 and 79(b) of the Act, of the view that the 1st respondent's decision to cancel the 1st applicant's licence is within its discretion. It can therefore not be interfered with on review even though an appeal court might find the cancellation to be a severe sentence for a contravention of section 67 of the Act.

<u>The effect of the admitted irregularity</u>

It is common cause that the 1st respondent convicted the 1st applicant on one of the counts without first inviting it to show cause why its licence should not be cancelled as provided by section 71(4) of the Act.

The punishment imposed was therefore for the contraventions of sections 67, 79(6) and 71(1)(a) of the Act. I have already found that a contravention of section 67 can on its own found a cancellation in terms of

sections 71(1)(a). Even if section 71(6) was applicable it also leaves the 1st respondent with the option to resort to its powers under section 71(1). This means the 1st applicant committed two offences for which the penalty of cancellation could be imposed. The fact that one of the convictions has to be set aside does not take the penalty of cancellation out of the 1st respondent's discretion. To borrow an example from criminal law the situation can be explained as follows:

If A commits two offences for which a particular punishment can be imposed for each offence the fact that one of the convictions is set aside does not take that sentence out of the court's discretion. For example if A is convicted of two counts of murder with actual intent and is sentenced to death both counts being treated as one for sentence the setting aside of one of the convictions on appeal does not mean A can now escape the death sentence as the death sentence remains the appropriate sentence for the remaining count.

In the circumstances while I have to set aside the 1st applicant's conviction for contravening section 71(1)(a) for 3rd applicant's misrepresentation during the hearing because 1st applicant was not afforded the notice required by section 71(4) of the Act, I still cannot interfere with the penalty imposed by the 1st respondent as it remains within its discretion to cancel the 1st applicant's licence for the contravention of section 67 of the Act.

Bias

The last ground of review was that the 1st respondent's letters to 1st applicant exhibited intention to cancel and that 2nd respondent in Annexures M1 and M2 announced the Commission's intention to cancel.

It is trite that a judicial officer or official in a *quasi*-judicial position should not announce the result of a trial still to be held. If he does that would reveal his bias. The decision of a court or tribunal can only be announced after all the evidence has been heard and properly considered. The decision should be announced in an appropriate manner to the parties by way of a written judgment or in court. It is clearly an irregularity to tell the world of a decision one will arrive at before hearing the case. The announcement will in fact be evidence of the official's bias.

I now have to determine whether this is what happened in this case. The applicants base their allegations on the letters written by the 1st respondent and annexures M1 & M2.

As regards the letters notifying 1st applicant of 1st respondent's intended cancellation for contravening sections 67 and 79(6) I am of the view that these

were in terms of section 71(4) of the Act and are therefore not indicative of bias. Section 71(4) requires the Commission to:

> "notify the mass media service in writing of its intention to suspend or cancel the registration certificate of the mass media service and the reasons for doing so, and shall call upon the mass media service to show cause, within such reasonable period as may be specified in the notice , why the registration certificate should not be suspended or cancelled as the case may be."

The Commission can therefore not be said to have been biased because it complied with section 71(4) of the Act. It merely complied with the procedure set down for it in the Act. This procedure is akin to a show cause summons. It simply informs the media service of the allegations it is to face and that if it fails to show cause why its licence should not be cancelled then its licence will be cancelled.

I now proceed to consider the effect of annexures M1 and M2. In annexure M1 the 2nd respondent was dealing with a situation he believed was the correct position. If those facts which he believed to be correct were correct he would have been simply stating the correct legal position and was requiring the 1st applicant to apply for registration to remove the perceived illegality. The 2nd respondent who is 1st respondent's chairman was reacting to the 1st applicant's editorial comment in its issue of the 30th April 2004. To demonstrate that the 2nd respondent was merely doing his job in terms of section 39(1)(b)(o) and (q) he on realising that the 1st applicant was a registered mass media, two days later issued a press statement annexure C correcting his mistake in annexure M1. He as provided by section 39(1)(e) and (o) appealed to all owners and managers of mass media services to take all provisions of AIPPA seriously.

On realising that 1st applicant had a registration certificate he then envoked the provisions of section 71(4) for the contravention of section 67 of the Act. The provisions of section 71(4) were not appropriate if 1st applicant was not registered as 2nd respondent believed in annexure M1. The only course then open was to advise the appropriate authorities as the 2nd respondent had done plus raising the media services awareness of the need to comply with provisions of AIPPA as he is entitled to do in terms of section 39(1) of the Act.

As regards annexure M2 it is simply a narration of the steps 1st respondent had taken by another media service. It is not the 1st respondent's

statement. It is a statement by a third party narrating the steps 1st respondent had taken against 1st applicant. I have already said the steps 1st respondent took were lawful and cannot found bias. I am therefore of the view that no bias has been established against the 1st and 2nd respondent.

In conclusion I find that 1st respondent committed an irregularity in finding 1st applicant guilty of contravening section 71(1)(a) without first complying with section 71(4) of the Act. I further find that the irregularity being one affecting only one of the contraventions warranting cancellation does not on review affect the 1st respondent's final decision which still remains within its discretion.

As the applicants' were successful in setting aside the conviction on the contravention of section 71(1)(a) of the Act each party shall bear its own costs.

In the result the 1st respondent's finding that the first applicant contravened section 71(1)(a) by misrepresenting during the hearing is set aside.

The applicant's application in respect of the contravention of sections 67 and 79(6) is dismissed with no order as to costs.

Dube, Manikai & Hwacha, applicant's legal practitioners
Muzangaza, Mandaza & Tomana, respondent's legal practitioners