

BENARD WEKARE
v
THE STATE
and
THE ATTORNEY GENERAL OF ZIMBABWE
and
ZIMBABWE BROADCASTING CORPORATION

MUSANGANO LODGE (PVT) LTD t/a MUSANGANO LODGE
v
THE STATE
and
ZIMBABWE BROADCASTING CORPORATION

CONSTITUTIONAL COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JCC, GWAUNZA JCC,
GARWE JCC, GOWORA JCC, HLATSHWAYO JCC,
PATEL JCC, GUVAVA JCC & MAVANGIRA AJCC
HARARE, NOVEMBER 14, 2014 & JULY 20, 2016

T Mpfu with W Chinamora, for the applicants

T T G Musarurwa with A Mambosasa, for the respondents

MALABA DCJ: The two cases were heard together because they raised the same constitutional questions for determination. The cases are about the constitutionality of the provisions of the Broadcasting Services Act [*Cap. 12:06*] (“the Act”) on funding for the provision of public broadcasting services.

In each case five questions were referred to the Supreme Court for determination by a magistrate in terms of s 24(2) of the former Constitution upon request by the applicant. The learned magistrate was of the opinion that the request for referral of the constitutional questions which had arisen in the proceedings before him was not frivolous or vexatious. The referral took place in proceedings in which the applicant faced a criminal charge of possessing a television set without a viewer's licence in contravention of s 38(B)(1) as read with s 38E(1)(h)(i) of the Act.

The questions presented in argument for determination at the hearing in each case were whether ss 38B(1), 38C, 38D(2) and 38E(1)(C) and 38E(1)(h)(i) of the Act each infringe the applicant's constitutional right to protection from compulsory deprivation of property (Section 16(1)) the right to the protection of the law (Section 18(1)) and the right to freedom of expression (Section 20(1)).

The applicant in each case seeks a declaration that each provision of the Act infringes each of the fundamental human rights enshrined in the relevant provision of the Constitution and is invalid.

At the hearing, Mr *Mpofu* for the applicants, indicated that the determination of the question whether each of the provisions of the Act referred to infringes the fundamental right of the applicants enshrined in ss 19(1) (freedom of conscience), 21(1) (freedom of association) and 23(1) (protection from discrimination) is no longer sought from the Court. Those contentions may therefore be put out of view.

For the purposes of the determination of the questions referred by the court *a quo* the “former Constitution” is referred to as “the Constitution”.

The Court holds in each case that each provision of the Act the constitutionality of which is challenged does not contravene the fundamental human right enshrined in the relevant provision of the Constitution. Each provision of the Act is a legitimate exercise by the Legislature of the constitutional power vested in it in respect of the matters legislated upon. The provisions of the Act in question are valid. The detailed reasons for the decision now follow.

The background facts are not in dispute. The applicant in the first case had under his possession at his place of abode a television set without a licence. On 5 July 2012 he was charged in the Magistrates Court with the offence of being in possession of a receiver otherwise than in accordance with the terms and conditions of a licence issued by the Zimbabwe Broadcasting Corporation (ZBC) or its agents. The alternative charge was that the applicant contravened s 38D(2)(b) as read with s 38E(1)(c) of the Act. The allegation was that being a listener in possession of a receiver he failed to produce a valid licence in terms of a notice served on him in terms of subs(2) of s 38D of the Act.

The applicant admitted that he knowingly possessed the television set without the requisite licence. There was no defence to the charge on the merits. He raised as a defence the allegation that the provisions of the Act under which he was charged are constitutionally invalid. On 13 July 2012 the applicant requested the presiding magistrate to refer to the Supreme Court

for determination the questions of the constitutionality of the relevant provisions of the Act in a bid to escape conviction.

The applicant in the second case is a company with limited liability incorporated in terms of the laws of Zimbabwe. It carries on a hospitality business in Odzi under the style “Musangano Lodge”. The applicant company was arraigned before the Magistrates Court in Mutare on a charge of contravening s 38(B)(1) as read with 38E(1)(h)(i) of the Act. The allegation was that it had under its possession at the business premises, eight television sets without a licence issued by the ZBC or its agents. The alternative charge was that the applicant contravened s 38D(2)(b) as read with s 38E(1)(C) of the Act in that its director failed to produce a licence in respect of the television sets in terms of a notice served upon it in terms of subs(2) of s 38D of the Act.

The applicant company admitted that it knowingly possessed, at the place of business, eight television sets without a licence. There was no defence to the charge on the merits. The company raised as a defence the allegation that the provisions of the Act under which it was charged are constitutionally invalid. It requested the presiding magistrate under s 24(2) of the Constitution to refer the question of the constitutionality of the relevant provisions of the Act to the Supreme Court for determination.

The provisions of the Act are as follows:

“38B Licensing of listeners

- (1) No listener shall have in his possession in Zimbabwe a receiver otherwise than in accordance with the terms and conditions of a licence issued by the Zimbabwe

- Broadcasting Corporation or by agents of the Zimbabwe Broadcasting Corporation appointed by it in terms of subsection (a1) of section thirty-eight D.
- (2) The fees payable on the issue of licences referred to in subsection (1) shall be fixed by the Zimbabwe Broadcasting Corporation with the approval of the Minister by statutory instrument and the Zimbabwe Broadcasting Corporation may fix different fees for different prescribed classes of listeners:
Provided the Minister may, after consultation with the Zimbabwe Broadcasting Corporation, exempt any class of listeners from payment of all or any of the fees referred to in this subsection.
- (3) ...

38C Collection of licence fees

Licence fees referred to in subsection (2) of section thirty-eight B, less such amounts as may be payable for the services of the agents of the Zimbabwe Broadcasting Corporation referred to in subsection (1) of section thirty-eight B, shall be paid into the general funds of the Zimbabwe Broadcasting Corporation for the use of the Corporation.

38D Appointment of inspectors and powers of inspectors and police officers

(a1) The Zimbabwe Broadcasting Corporation may appoint persons employed by it to be inspectors for the purposes of this Part and shall furnish each person so appointed with a certificate signed on behalf of the company stating that he has been appointed as an inspector.

- (1) An inspector or police officer may require a person who he has reasonable cause to suspect is a listener to produce his licence for inspection.
- (2) If a person referred to in subsection (1):
- (a) is unable to produce his licence on demand; or
 - (b) cannot be located at his usual or last known place of abode or business;
- the inspector or police officer concerned may serve on that person a notice in the prescribed form requiring that person to produce that notice and his licence to the police officer in charge of a police station within a period of seven days from the date of service of that notice.
- (3) ...
- (4) If a person referred to in subsection (1) who is unable to produce his licence on demand or cannot be located at his usual or last known place of abode or business is served with a notice referred to in subsection (2) and
- (a) fails to comply with the requirement contained in that notice, he shall be presumed, until the contrary is proved not to have been issued with a licence.
 - (b) ...

38E Offences and penalties under Part VIIIA

- (1) A person who
- (a) ...
 - (b) ...
 - (c) fails to comply with the requirements contained in a notice served on him in terms of subsection(2) of section thirty-eight D shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for

a period not exceeding six months or to both such fine and such imprisonment.

(d) ...

(e) ...

(f) ...

(g) ...

(h) contravenes–

(1) subsection (1) of section thirty-eight B shall be guilty of an offence and liable to a fine not exceeding level three.”

Section 38(B)(1) as read with s 38E(1)(h)(i) of the Act imposes an obligation on a person who is in possession of an apparatus capable of receiving broadcasting service and is not exempted from obtaining a listener’s licence. Sections 38(B)(1) and (2) as read with s 38E(1)(h)(i) of the Act, impose an obligation on a person who is in possession of a receiver to pay an amount of money fixed by the ZBC as the appropriate licence fee in terms of subs(2) of s 38B. The licence fee must be collected by the ZBC or its appointed agents. The money is required to be paid into the general funds of the ZBC before it can be used by the corporation as revenue to meet the costs of performance of its functions in providing public broadcasting services in terms of the Act. The primary purpose of the provisions is to establish a mechanism for the funding of the provision by the ZBC of public broadcasting services without interference from government, corporate or other powerful interests.

The provisions the validity of which is impugned form part of the Act containing other provisions on non-financial matters relating to the provision of public broadcasting services. In s 2A the Act sets out the purposes for which it was enacted and the objectives to be attained by means of the provisions it contains. The Act provides in s 2A(1)(e) and (f) that its purpose is to regulate broadcasting services to attain, amongst others, the following objectives:

“(e) to promote public broadcasting services in the interest of the public;

(f) to ensure the independence, impartiality and viability of public broadcasting services.”

The regulatory power is vested in and exercised by the Broadcasting Authority of Zimbabwe (“the Authority”) the establishment of which is provided for under the same Act. This means that when it is providing public broadcasting services the ZBC is under the supervision of the Authority. Section 2A(2) requires every person who is required or permitted to exercise functions under the Act to pay regard to the objectives set out when exercising those functions.

Part 1 of the Seventh Schedule to the Act on programming by Public Broadcasters provides:

“REQUIREMENTS FOR PUBLIC BROADCASTERS:

The broadcasting service operated by a public broadcaster shall,

- (a) make programmes available to Zimbabweans in all the languages commonly used in Zimbabwe; and
- (b) reflect both the unity and diverse cultural and multilingual nature of Zimbabwe; and
- (c) strive to be of high quality in all the languages served; and
- (d) provide news and public affairs programming which meets the highest standards of journalism , and which is fair and unbiased and independent from government, commercial or other interests; and
- (e) include significant amounts of educational programming, both curriculum – based and informal including educative topics from a wide range of social, political and economic issues such as human rights, health, early childhood development, agriculture, culture, justice and commerce; and
- (f) enrich the cultural heritage of Zimbabwe by providing support for traditional and contemporary artistic expression; and
- (g) strive to offer a broad range of services aimed in particular at children, women, the youth and the disabled; and
- (h) include programmes commissioned from independent producers, and
- (i) include programmes featuring national sports as well as developmental and minority sports.”

Taken as a whole, the relevant provisions of the Act give effect to a complex statutory scheme carefully designed for the purpose of furnishing a non-profit public broadcasting service operated by the ZBC in the interest of the public. In the fulfilment of their mandate, public television and radio stations operated by the ZBC in the provision of broadcasting services are required to provide high quality news and public affairs, educational, cultural and entertainment programmes that would otherwise not be available from profit and commercial broadcasting.

Each provision, including those the validity of which is impugned, has as its purpose the promotion of the attainment of the public objects prescribed by the Act. The efficacy of the scheme for the provision of public broadcasting services embodied in the Act is made to depend upon the existence of institutional, editorial and financial independence of the ZBC in the performance of the functions necessary for the attainment of the objects prescribed by the Act.

DEPRIVATION OF PROPERTY

The applicants contended that the provisions of s 38B(1) and (2) as read with s 38E(1)(h)(i) of the Act violate the fundamental right protecting them against compulsory deprivation of property guaranteed under s 16(1) of the Constitution. Section 16(1) of the Constitution provides as follows:

“16: Protection from deprivation of property

- (1) Subject to section sixteen A, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that” ... [the terms, substance and purpose of the provisions of the law on the basis of which property other than agricultural land acquired for resettlement of people in

accordance with a programme of land reform may be compulsorily acquired are then set out].

Section 16(7) provides:

“(7) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision for the acquisition of any property or any interest or right therein in any of the following cases –

(a) in satisfaction of any tax or rate.

(b) ...”

The Constitution demands that statutory provisions be looked at from the point of view of fundamental human rights and freedoms enshrined in the Declaration of Rights. That means that, taking into consideration the requirements of permissible limitation, statutory provisions must not violate fundamental human rights. If the provisions of the Act the validity of which is impugned are provisions in respect of taxation, the effect of s 16(7)(a) of the Constitution is that they are not a violation of the right to property. They are an infringement of the right if they are shown not to be reasonably justifiable in a democratic society.

The obligation to pay the fee and obtain a licence for possession of a receiver is imposed by law. The imposition of the obligation in respect of the possession of a receiver, the fixing and collection of the licence fee are all designed to enable the ZBC to compulsorily acquire property in the form of money from a person who possesses a receiver. The question for determination is whether the provisions of s 38(b)(1) and (2) of the Act for the acquisition of the licence fee compulsorily paid to the ZBC or its agents are in satisfaction of a tax within the meaning of s 16(7)(a) of the Constitution? There is no question that the mechanism of funding given effect to by the provisions of the Act the validity of which is challenged, is based on the

public as the source of the revenue needed by the ZBC to finance its operations. The method of funding chosen gives the ZBC direct access to and control of the use of the revenue collected.

Section 16(7)(a) of the Constitution relates to acquisition of property under the authority of a provision of a law enacted by the State in the exercise of the constitutional power of taxation vested in the Legislature by s 50. Section 50 of the Constitution provides that “Parliament may make laws for peace, order and good government of Zimbabwe”.

The power of the State to impose taxes has been described by Cooley in *Constitutional Limitations* at p 986 as:

“One so unlimited in force and so searching in extent, that we scarcely venture to declare that it is subject to any restrictions whatever except such as are put in the discretion of the authority which exercises it. It reaches to every trade or occupation, to every object of industry, use, or enjoyment; to every species of possession; and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading.”

There is no denying the general power of the Legislature to impose taxes. Although the constitutional power to impose taxes is wide as to matters that may be chosen as subjects of taxation, a measure representing its exercise must be strictly scrutinized to protect the right to property. The provisions must be construed with the view of giving a full measure of protection to the fundamental human right alleged to be infringed. It is also a well settled rule that the citizen is exempt from taxation unless the same is imposed by clear and unequivocal language. Where the construction of a tax law is doubtful, the doubt is to be resolved in favour of those upon whom the tax is sought to be laid.

The general principle is that a tax is the obligation or burden (debt) to pay a specific amount of money to a designated agent imposed (levied) on a person by the State, in the exercise of the constitutional power of taxation. The obligation is imposed in relation to or by reference to an activity in respect of property selected in the exercise of a wide discretion as the subject of taxation. The obligation for the payment of the tax is imposed by the State in terms of a law of general application on the public or a substantial section of the public to raise money for a public purpose. The primary meaning of taxation is, therefore, raising money for the purposes of government by means of compulsory contributions from individual persons.

A tax is not a tax merely because the word “tax” is used to describe the obligation to be paid for a public purpose. The word “tax” is a generic term or “*genus*” covering a variety of species of obligations to pay money for public purposes.

An obligation of the same cannot be excluded from proper classification because of the name by which it is called. In other words the fact that the fixed amount of money compulsorily payable by members of the public who possess receivers is called a “licence fee” would not alter the fact of its being a “tax”. The term “licence fee” is not a definition but is a conclusion. It is a label describing a debt imposed on a person by a statute in respect of an activity in relation to property.

There are many kinds of taxes that may be imposed by the State in the exercise of the power of taxation. In the American case of *Hylton v United States* 3 Dall 171 (Supreme.justice.com) it was held that the term “taxation” covers every conceivable exaction

which it is possible for a Government to make, whether under the name of a tax or under such names as rates, assessments, duties, imposts, excise, licences, fees or toll. In fact s 113(1) of the Constitution defines “tax” to include “duty or due”. The *Concise Oxford Dictionary (7ed)* defines the word “due” to include “fee” as the concepts connote an obligation or debt owed to some other person.

In *Alberts v Roodepoort – Maraisburg Municipality* 1921 TPD 133 at 136 money compulsorily paid under the name “sanitary fees” charged by a local authority was held to be a “tax”. In *Permanent EST Finance Co Ltd v Johannesburg City Council* 1952(4) SA 249(W) RAMSBOTTOM J (as he then was) at 259A expressed the view that “to require any person who carries on a business or who owns a dog or a motor car to pay a prescribed fee is ... to impose a tax”. So a tax is not any the less a tax because a different name is given to it.

In the Australian case of *Leake v COT (State)*(1934) 36WALR 66 DWYER J at 67 said:

“A compulsory contribution or an impost may be nonetheless a tax, though not so called; the distinguishing features of a tax being in fact that it is a compulsory contribution imposed by the sovereign authority on and required from the general body of subjects or citizens.”

In *Constantinides v Electricity Authority of Cyprus* (1982) 3CLR 798 the Supreme Court of Cyprus held that:

“an imposition is a tax if it is found to fulfil certain characteristics, namely, (a) it is compulsory and not optional, (b) it is imposed or executed by the competent authority, (c) it must be enforceable by the law, (d) it is imposed for the public benefit and for public

purposes and (e) it must not be for a service for specific individuals but for a service to the public as a whole, a service in the public interest.”

In this jurisdiction the authority on the elements which designate a tax is the decision of the Supreme Court in *Nyambirai v National Social Security Authority & Anor* 1995(2) ZLR1(S). Tax was defined in *Nyambirai’s case supra* at 8B-D as “a compulsory, and not an optional contribution, imposed by the legislature, or other competent authority upon the public as a whole or a substantial sector thereof, the revenue from which is to be utilised for the public benefit and to provide a service in the public interest”.

The question whether the provisions of the Act the validity of which is challenged are provisions in respect of taxation requires a finding to be made on the nature of the law. “Law” is used to mean a provision of the Act as is so defined in s 113 of the Constitution. In determining the nature of a law a court should examine the substance of the provisions to decide whether the matter they deal in is a matter in respect to which the State has power to legislate. The court would be concerned with what the provisions of the law are doing.

The applicants conceded through Mr *Mpofu* that the obligation to pay a licence fee provided for under s 38B(1) as read with s 38E(1)(h) (1) of the Act ensures that the licence fee is a compulsory contribution to the general funds of the corporation. The provisions impose an obligation to pay the money to the ZBC for a public purpose. It was common cause that the obligation is imposed on a substantial sector of the public. All persons who have in their possession equipment capable of receiving broadcasting service bear the obligation to pay the licence fee for the possession of the gadget.

On the question whether the compulsory contribution is imposed by the legislature or other competent authority, the applicants' position was that it is the ZBC that exacts the licence fee. Mr *Mpofu* argued that as the ZBC was incorporated in terms of the Companies Act [*Cap. 24:03*] it is a private company carrying on the business of providing broadcasting service. He argued that a provision of a law which gives a private company power to fix and collect licence fees to raise funds for its own operations is not a law in respect of taxation.

According to Mr *Mpofu*, the purpose of the provisions of the Act the validity of which is challenged is to give the ZBC an unfair financial advantage over other competitors in the business of providing broadcasting services. Mr *Musarurwa* for the respondents argued that notwithstanding its incorporation in terms of the Companies Act, the ZBC is a "public broadcaster". The effect of Mr *Musarurwa*'s argument is that the ZBC is a "public broadcaster" because the statute in terms of which its incorporation was authorised says it is a "public broadcaster".

The argument by the applicants is misplaced. The obligation to pay the licence fee is imposed by the Legislature on every person who possesses a receiver. It is the Legislature that exercised its wide discretion to select possession of a receiver as the subject for the purposes of imposing the obligation to pay the money on all persons who get to be in control of a receiver. The fact that the Legislature gave the ZBC the power to fix the value of the obligation with the approval of the Minister of State for Information and Publicity in the President's Office ("the Minister") by a statutory instrument does not make the ZBC the legislative authority. The

Legislature is unrestricted in its choice of subjects on the basis of which to impose the obligation to pay the money.

Section 3 of the Zimbabwe Broadcasting Corporation (Commercialization) Act, 2001 (No. 26 of 2001) provides:

“3. Formation of signal carrier and broadcasting companies.

The Minister shall take such steps as are necessary under the Companies Act [Chapter 24:03] to secure the formation of the following two successor companies, limited by shares, which shall be the successor companies to the corporation for the purposes of this Act,

- (a) A broadcasting company, which will, subject to this Act, take over the functions of broadcasting, and such assets, liabilities and staff of the Corporation as are connected with those functions; --“

Section 2 of the Act defines a “public broadcaster” to mean the Zimbabwe Broadcasting Corporation referred to in s 3 of the Zimbabwe Broadcasting Corporation Act [*Cap. 12:01*] or any other broadcasting entity established by law which is wholly owned or controlled by the State. (the underlining is mine for emphasis). Section 5 of Act No. 26 of 2001 makes it clear that the ZBC is wholly owned by the State. It provides:

“5. Initial shareholding in successor companies.

- (1) All the shareholders of the signal carrier company and the broadcasting company on incorporation shall be persons nominated by the Minister, after consultation with the President and in accordance with any directions that the President may give him and shall hold their shares on behalf of the State.
- (2) Any person so appointed to hold shares, shall do so nominally as an agent for the State.”

There is no doubt that the ZBC is a “public broadcaster” incorporated to carry out the functions of providing public broadcasting services. The primary purpose for the creation of a public broadcaster is to ensure that there is a balanced and consistent presentation to the public

of a variety of ideas and information on diverse matters of public concern. The communication is made through programmes broadcast on television and radio in accordance with the public's collective right of access to such ideas and information.

A "public broadcaster" is distinguishable from the other two types of broadcasters, namely commercial broadcaster and community broadcaster. The ZBC is not a State broadcaster. Incorporation of the ZBC in terms of the Companies Act gives it the mark of institutional independence as it is a legal *persona* distinct from its shareholder.

The contention that the obligation payable by those who are in possession of receivers is not a tax because its value is fixed by the ZBC and collected by it for payment into general funds for use in its operations overlooks important factors. Firstly, the fixing of the amount to be paid is an obligation imposed on the ZBC by the Parliament. It is part of the obligation to pay the money imposed on every person in possession of a receiver who falls outside the class of people exempted from the liability.

There is no legal limitation on the value of the obligation the ZBC may fix. That fact attests to the exercise of the constitutional power of the State to impose taxes. The ZBC would be exercising delegated power. As long as the delegated power is exercised in the manner set out and within the limits imposed by the delegating law for the specific purpose prescribed, the result is the same at law as if the power is exercised by the principal. The ZBC would be exercising the power to fix the amount of the obligation to be paid as tax on behalf of the Parliament. That is why the delegation is in the form of an obligation.

Collection of the payment of the obligation imposed on those who are in possession of receivers is imposed on the ZBC as an obligation. When the ZBC and its appointed agents demand, in appropriate circumstances, production of a listener's licence from a citizen, they are discharging a legal obligation. Collection is in aid of revenue. It occurs after the obligation to pay the money fixed by the ZBC in terms of the Act has been imposed. Collection has no relevance in the determination of the question whether the obligation to pay the money is a tax or not.

The requirement that the money collected as payment of licence fees should be paid into the general funds of the ZBC and not into the Consolidated Revenue Fund is consistent with the provisions of s 101 of the Constitution. The earmarking of the money for payment into the general funds to be used as revenue by the ZBC to meet the costs of its operations underscores the intention to protect the financial independence of the ZBC. State revenue cannot be earmarked except at the point of expenditure by appropriation. The section provides:

“101 Consolidated Revenue Fund,

All fees, taxes and other revenues of Zimbabwe from whatever source arising, not being moneys that –

- (a) are payable by or under an Act of Parliament into some other fund established for a specific purpose; or
 - (b) may by an Act of Parliament, be retained by the authority that received them for the purpose of defraying the expenses of that authority;
- shall be paid into and form one Consolidated Revenue Fund.”

In the first place it may be admitted that revenue is essential to the effective operation of the public broadcasting service and the existence of the ZBC. The State used its power to provide the ZBC with a reliable source of funding to enable it to properly fulfil its statutory obligations. The money received constitutes the proceeds of the discharge of the

obligation. The obligation is separate and precedent to the proceeds. The authorization of any agent by the Legislature to collect the proceeds of the performance of the obligation to pay the money is a matter that cannot be prevented by any legal decision.

The Legislature, with full power over the subject of taxation, short of arbitrary and unreasonable action which is not to be assumed, inserted these provisions on payment of the revenue into the general funds operated by the ZBC in an Act specifically providing for the raising of revenue. It is sufficient for determination of the question of their validity that these provisions have a reasonable relation to the exercise by the Legislature of the taxing power conferred on it by the Constitution.

It must follow that the ZBC is required to use the revenue to meet its obligations in the performance of its functions as a public broadcaster. The revenue raised from compulsory payment of the money is to be used in the provision of broadcasting services in the public interest. The ZBC is required under Part 1 of the Seventh Schedule to the Act to make programmes available to Zimbabweans in all the languages commonly used in Zimbabwe. One of the purposes of providing public broadcasting services is to meet the needs of the unserved sections of the population.

The ZBC said that the revenue collected from members of the public as listener's licence fees is used for the benefit of the public. It revealed that the money is channeled towards ensuring that all parts of the country have access to television and radio programmes that meet the interests of different classes of society.

The applicants' contention in each case was that it is a matter of speculation whether the ZBC is utilizing the revenue accruing to it from the listener's licence fees for the public purposes prescribed by the Act. The argument was that there is lack of transparency and accountability in the manner in which the revenue is administered. The reason given was that financial activities of the ZBC are not subject to mechanisms that ensure public scrutiny and accountability.

The requirement is not that the licence fees collected must be shown to have been used in the public interest for the obligation to pay them to qualify as a "tax". The element of the test is that at the time the value of the obligation is fixed and collected it must be intended to be used for the public benefit. At that stage there is no requirement that the competent authority should show that the money has actually been put to its intended purpose.

Whether the ZBC does not use the funds for the purposes of the statute is not a matter going into the determination of the question whether the money compulsorily payable as a licence fee is a tax. If the amount paid into the general funds was used towards an unauthorised object that cannot reflect back upon the provision imposing the tax or authorizing its collection so as to make it invalid. The use of public funds is not an issue in an action for a declaration on the constitutional validity of a statute. A law cannot be declared invalid simply because it is misused. In any such event, the appropriate remedy would be a *mandamus* compelling the authority administering the public funds to utilize them for their intended purpose.

The mechanism of funding was adopted as an alternative to ordinary State budget appropriations because it would enable the ZBC to operate free of government administrative regulations. The method of funding would also enable the ZBC to avoid government oversight of its day-to-day operations. The idea was to keep the Government out of control of the purse strings of the ZBC and ensure that the ZBC receives its funding directly from the public through taxation.

State funding would give the Government the power to control the public broadcaster's activities particularly the selection and presentation of television and radio programmes. There is nothing unusual about the obligation to pay the amount of money fixed by the ZBC with the approval of the Minister by statutory instrument as a licence tax on possession of a receiver.

Whilst giving effect to a tax-based mechanism of funding, the provisions also give the public broadcaster the right of direct access to and control of the use of the revenue thereby protecting it from interference by the State. The mechanism of funding given effect to by the provisions of the Act the validity of which is challenged, shows that the scheme of public broadcasting service provided for is not a State enterprise nor is it a State sponsored enterprise. It is a public sponsored enterprise.

In imposing the obligation on every person who possessed a receiver to pay the amount of money fixed and collected by the ZBC as a licence fee, the provisions authorized the acquisition by the ZBC of property in satisfaction of the obligation. Section 38(B)(2) of the Act

makes provision for the acquisition of property in satisfaction of a tax within the meaning of s 16(7)(a) of the Constitution. The primary object of s 38(b)(1) and (2) of the Act is the raising of revenue. However labeled the obligation imposed by s 38(b)(1) of the Act on persons in possession of receivers is a “tax”.

In the light of the contention advanced on behalf of the applicants that the money compulsorily paid to the ZBC as a licence fee is not a tax, no argument was made to the effect that s 38(B)(1) as read with s 38E(1)(h)(1) of the Act is not reasonably justifiable in a democratic society. The onus was on the applicants to show that the provisions went further than was reasonably justifiable in a democratic society. The standard of proof is a preponderance of probability. See *Nyambirai’s case supra* at 13B. The presumption is that the provisions of the Act the constitutionality of which is under attack are reasonably justifiable in a democratic society. They are not in violation of s 16(1) of the Constitution as they incorporate the just demands of a democratic society.

PROTECTION OF THE LAW

Section 18(1) of the Constitution reads: “Subject to the provisions of this Constitution, every person is entitled to the protection of the law.” Section 113 defines “law” to mean any provision of the Constitution. Section 18(1) of the Constitution provides protection to every person against a legislative measure which does not meet the requirements of legality. To be a law the measure that is required by the Constitution is to define the prohibited conduct in sufficiently clear and adequately precise language to enable a person to know in advance what not to do so that he or she may regulate his or her conduct accordingly.

In *Chimakure & Ors v A-G* 2013(2) ZLR 466(S) at 497D it is said:

“A compliant law must, in accordance with the principle of legality, enable a person of ordinary intelligence to know in advance what he or she must not do and the consequences of disobedience.”

The right also provides protection to a person under a legal system that is fair in the sense that it guarantees to him or her all the procedural and substantive benefits of due process. In other words the right to the protection of the law guarantees to a person protection against an unfair legal system.

The applicant in each case complained that s 38A of the Act defines a “receiver” too broadly to mean any “apparatus which is capable of being used for the reception of a broadcasting service”. The contention was that by criminalizing the possession of a “receiver” as defined in s 38A without a listener’s licence issued by the ZBC, s 38B(1) is too wide and falls foul of the principle of legality enshrined in s 18(1) of the Constitution. The argument was that a person would not know in advance whether s 38B(1) applied to possession of a television or radio set only or it applied to every gadget capable of receiving a broadcasting service. As this aspect of the broadcasting service regulation has the effect of restricting the exercise of the right to freedom of expression it must be shown that it meets the requirements of legality to be legitimate.

Section 2(1) of the Act defines “a broadcasting service” to mean “any service which delivers television or radio programmes to a person having equipment appropriate for receiving that service whether the delivery is effected by means of or uses the radio frequency

spectrum, cable, optical fibre, satellite, or any other means or combination of those means ...”.

Section 38B(1) must be read together with ss 38A and 2(1) of the Act.

By limiting the definition of “broadcasting service” to service which delivers “television or radio programmes”, s 2(1) of the Act effectively limited the commission of the offence under s 38B(1) of the Act to persons who possess equipment appropriate for receiving broadcasting service. There are two types of broadcasting, television and radio broadcasting.

Section 2(1) of the Act is wide enough to bring under the definition of broadcasting service any equipment capable of receiving television or radio programmes broadcast. In other words the gadget does not have to be a television set or a radio set. It can be a smart phone, for example, provided it is capable of receiving television or radio programmes as they are being broadcast. Television or radio programmes do not necessarily have to be received by a television or a radio set.

The fact that the ZBC has, in practice, demanded payment of licence fees from persons who possess television sets or radio sets only, does not mean that the provisions of the Act on what is a receiver are unconstitutionally vague. The law was obviously drafted with effects of changes brought about by technological development in mind. There was no suggestion that the decision by the ZBC to demand payments of licence fees in respect of possession of television sets and radio sets only was a result of vagueness and ambiguities in the language of the statute.

A person who has paid his or her television or radio licence fee to the ZBC would however, not have to worry about what equipment he or she may possess without the requisite licence. Possession of a listener's licence provides greater protection and legal security in the exercise of the right to receive ideas and information from a medium of one's free choice without fear of being sanctioned. The person who, like the applicants, is in possession of a television or radio set without a licence falls within the class of persons under the obligation to pay the licence tax. He or she cannot escape the consequences of the obligation by claiming protection from the very law he or she is required to obey unless the law is unconstitutional.

A law abiding person would, upon a proper reading of the provisions of s 38B(1) together with ss 38A and 2(1) of the Act, with legal advice if necessary, receive the guidance from the law as to which gadgets would attract criminal charges if possessed without a licence. *Chavunduka & Anor v Minister of Home Affairs & Anor* 2000(1) ZLR 552(S) at 560-561. There was failure by the applicants to read and understand the provisions of s 38B(1) in the context of the other provisions with a direct bearing on its meaning.

The allegation that s 38B(1) of the Act falls foul of the requirements of legality and violates the right to the protection of the law is unfounded. The prohibited conduct is clearly and precisely defined in content and scope. It is possession of a receiver without a listener's licence. A receiver is then defined in terms which ensure that any person of ordinary intelligence would be able to know the types of gadgets the possession of which requires a listener's licence. The terms of the provisions are couched in language that ensures that the right of an individual to do that which is not prohibited by law is not infringed. What is prohibited is previously

established in a law that is precise and clear, both in a material and in a formal sense. The applicants remained protected by a norm that meets all the requirements of legality in accordance with the fundamental right guaranteed to them by the Constitution.

It is worth noting that consistent with the right to the protection of the law, the procedural and substantive remedies for alleged contravention of s 38B(1) of the Act are based on the principle of respect for due process of the law. A person who fails to produce a television or radio licence at a designated office within seven days of written notice to do so must be brought before a court where he or she is afforded an opportunity to defend his or her conduct. That person has a right which the applicants exercised, to raise as a defence to a charge, the question of the constitutionality of the provisions of the Act he or she is alleged to have contravened. The applicants failed to establish on a balance of probabilities violation of the fundamental right to the protection of the law as they alleged.

FREEDOM OF EXPRESSION

Each applicant sought to impugn the constitutional validity of s 38B(1) of the Act on the ground that it violated the fundamental right to freedom of expression enshrined in s 20(1) of the Constitution by prohibiting, under threat of criminal sanctions, possession of equipment capable of receiving a broadcasting service without a licence.

Section 20(1) of the Constitution recognizes and guarantees to every person a right to freedom to hold opinions and to receive and impart ideas and information. The right

protects the person from any hindrance in or interference with possession of equipment capable of receiving ideas, information and messages delivered by television and radio programmes.

Article 19 of the Universal Declaration of Human Rights (UDHR) guarantees freedom of opinion and expression in the following terms:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Zimbabwe is a signatory to the International Covenant on Civil and Political Rights (1966) (ICCPR) which is legally binding in international law and guarantees in Article 19, the right to freedom of opinion and expression in similar terms to Article 19 of the UDHR.

There is need to first consider the context of the principles of the law of public broadcasting service and the exercise of freedom of expression.

Broadcasting, as a wide dissemination of ideas and information on a variety of subjects by television or radio, is a means of exercising freedom of expression. As a medium through which ideas and information can be received and imparted, broadcasting is intrinsically linked to freedom of expression. It is a medium specifically dedicated to the exercise of the right to freedom of expression. The one is the life blood of the other. Any public broadcasting service system must meet all the requirements of freedom of expression in order to pass the constitutional muster.

The legislation providing for a public broadcasting service system must be in line with the fundamental principles behind freedom of expression. This means that the conditions of use of the public broadcasting service for conveyance of ideas and information must conform to the requirements of this freedom. These principles can be summarized as being that:

1. Everyone has the right to express himself or herself freely through the medium of his or her choice.
2. This implies the right to access, receive and disseminate ideas, information and messages of all types through all communication systems and media – in this case electronic media.
3. The public broadcasting service media shall in the public interest enjoy editorial independence from undue influence from both State and corporate actors.

There is intertwining of the public interest standard governing the provision of public broadcasting service with freedom of expression interests. The public interest is viewed through the protection of the right to freedom of expression. In that sense the public interest standard is a statutory security for the freedom of expression doctrine in public broadcasting.

The public interest standard necessarily invites reference to freedom of expression principles. The question of how the legal provisions governing the structuring and dynamics of the provision of public broadcasting service relate to the principles of freedom of expression is central to the determination of the question of the constitutional validity of the legislation.

Each applicant argued that by prohibiting the possession of a receiver without a licence issued by the ZBC, s 38B(1) of the Act infringes the right to receive ideas, information

and messages from a broadcasting service of his or its choice. In other words what is regulated is the possession of the means by which to benefit from the services provided by the ZBC or any services like them.

The right to freedom of expression as enshrined in s 20(1) of the Constitution is not absolute. The right is subject to limitations contained in or done under the authority of any law in the cases and for purposes specified under s 20(2) of the Constitution unless the limitation is shown not to be reasonably justifiable in a democratic society.

The effect of s 20(2) of the Constitution is that the same document that entrenches the right to freedom of expression as a fundamental right acknowledges that the right is not absolute. The onus was on the applicants to show that the restriction on the right to possess a “receiver” without a listener’s licence is not reasonably justifiable in a democratic society. The applicants failed to discharge the onus.

The principles governing the relationship between public broadcasting service and freedom of expression reveal the justification for the restriction on the possession of receivers for the purpose of raising revenue for the ZBC. The Zimbabwe Broadcasting Corporation is a central medium of expression. As a public broadcaster it must be a central institution for the effective protection of freedom of expression in the provision of public broadcasting services in a democratic society.

One of the objectives of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning important public issues of the day. According to Article VI of the Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights at the 32nd Session, 17th - 23rd October 2002 Banjul, Gambia, public broadcasting service is a vital element of modern democratic societies.

Public broadcasting service models were developed to remedy weaknesses inherent in the other broadcasting service systems namely State controlled broadcasting service and profit oriented commercial models. A State controlled broadcaster's programming is essentially driven by the political interests, while commercial broadcasters are driven by commercial interests. The programming of a public broadcaster is required to be driven by the public interest.

A public broadcasting service is a national asset that must be independent of both political and commercial pressures in the performance of its mandate. In its ownership, funding and programming the concept of "public" has always defined the logical boundary of any public broadcasting service organization. As a public sphere essential for a well functioning democracy, public broadcasting service is of the public, for the public and by the public. In other words public broadcasting service belongs to the entire community, not to the abstraction known as the State nor to the government in office nor its political party. *Patriotic Party v Ghana Broadcasting Corporation* [1992-93] GBR 522 at 536 (Supreme Court of Ghana).

There has been no doubting that it is in the public interest to encourage the growth and development of public television and radio broadcasting for informational, educational, cultural and entertainment purposes. A public service broadcaster thus requires a particular legal framework and certain structural attributes to enable it to execute its mandate effectively. Public broadcasters are generally defined in terms of their characteristics and purposes.

International standards require States to ensure that public broadcasting services operate in an independent manner. This means fundamentally guaranteeing their administrative and editorial freedom. It also means guaranteeing their financial independence.

Article VI of the Principles on Freedom of Expression in Africa provides that for a public broadcasting service system to comply with the requirements of freedom of expression, the following must be observed in the relevant broadcasting legislation framework:

- Public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
- The editorial independence of public service broadcasters should be guaranteed;
- Public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets.
- Public broadcasters should strive to ensure that their transmission system covers the whole territory of the country.
- The public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequately, politically balanced information particularly during election periods.

The features referred to in Article VI of the Declaration of Principles on Freedom of Expression in Africa are structural in nature. They address requirements of a public service broadcaster to ensure that it effectively delivers on its mandate. The question is, to what extent are the provisions of the Act on various aspects of the provision of public broadcasting service based on the principle of promotion and protection of freedom of expression.

How does the legal framework for broadcasting service ensure that the public broadcaster provides the public with the opportunity to exercise their right to speak and have access to television and radio broadcasting as means of communication? How does the legislative framework also ensure that what is broadcast is in the public interest and the programmes meet the standards prescribed in Part I of the Seventh Schedule of the Act? To what extent, does the legal framework on provision of public broadcasting services comply with the recognized international norms on provision of public broadcasting services?

The contents of the objects of the Broadcasting Authority of Zimbabwe and the requirements of the broadcasting service operated by a public broadcaster as prescribed under Part 1 of the Seventh Schedule to the Act, allow the ZBC freedom to express opinions in the process of the exercise of editorial discretion through selection and presentation of programmes in ways that could not become vehicles for government propaganda.

When the ZBC as a public broadcaster speaks it should not be government speaking. The right to freedom of expression does not extend to protecting government from itself.

In an article titled “*The Unnecessary Gravity of the Soul: Public Service Broadcasters or Government Mouthpieces – An Appraisal of Public Service Broadcasting in Botswana*” Vol. 10 Issue 1 April 2013 *SCRIPT ed TB Balule* writes that public broadcasting service “which is a particular way of exercising freedom of expression, serves as a vehicle for self-expression, a reflection of public opinion, an informer of the public, and a participant in the formation of public opinion”.

Pluralism and diversity of programmes promote the full enjoyment of freedom of expression in that they ensure that citizens have access to a wide range of information and ideas on a variety of subjects. One of the fundamental requirements of the right to freedom of expression is the need for a broad plurality of information: *Inter American Court of Human Rights Rios et al. v Venezuela*, Judgment of January 28, 2009 para. 106. A public broadcaster that is free from political interference and commercial pressures has the potential to ensure quality programming covering a wide range of interests that respond to all sectors of the public thereby promoting pluralism and diversity of programme content. *Balule* at pp 81-82.

What is of paramount importance is not the rights of the public broadcaster. What is paramount is the collective right of the viewers and listeners in receiving a balanced presentation of ideas and information on diverse matters of public concern by television and radio. The public’s free speech interest in broadcasting is a collective and not an individual right in that the people as a whole retain their interest in free speech by radio and television. The people as a whole also retain the collective right to have the medium of television and radio broadcasting function consistently with the ends and purposes of the constitutional protection of

freedom of expression. *Red Lion Broadcasting v FCC* 395 US 367 (1969) at 390, 389-91. *FCC v League of Women Voters* 468 US 364(1984) at 380.

It follows that for a public broadcaster to effectively discharge its mandate of serving the public interest, it needs protection of a legal nature. The legal protections aim at creating an appropriate structure that will ensure that the public broadcaster is able to discharge its mandate in an independent manner. These legal protections include a clear statement of the purposes and objectives of broadcasting service provided. There must be a guarantee of the public broadcaster's editorial independence in the law.

A report by Robert Corn-Revere: Washington DC, May 2002 on "*Freedom of Expression in Public Broadcasting*" defines editorial independence as: "the responsible application by professional practitioners of a free and independent decision – making process which is ultimately accountable to the needs and interests of all citizens".

The financial independence of a public broadcasting service requires that its funding arrangements should not be used to directly or indirectly exert any influence over the public broadcaster's editorial independence and institutional autonomy. The institution must be adequately funded in order to provide citizens with high quality programmes. There is a direct relation between financial independence and editorial freedom of a public broadcaster. They are both guaranteed primarily for the benefit of the public.

Being wholly owned by the State, the ZBC as a public broadcaster could be compromised by the pressures of operating with an inherent conflict of interest in the discharge of the dual responsibility of reporting information and bringing critical judgment to bear on public affairs.

The structuring and dynamism of the public broadcasting service system provided for by the provisions of the Act reveal an acceptance of the principles of institutional and editorial independence. Section 2A(f) of the Act provides that one of the objectives of the Act which the Authority must have regard to as the regulatory authority is “to ensure the independence, impartiality and viability of public broadcasting services”. Part 1(d) of the Seventh Schedule to the Act requires the ZBC to “provide news and public affairs programming which meets the highest standards of journalism, and which is fair and unbiased and independent from government, commercial or other interests”. The provisions show a commitment to freedom of expression.

Selection and presentation of programmes should be an exercise of editorial discretion. For better or for worse editing is what editors are for, “and editing is selection and choice of material”. *Columbia Broadcasting System v Democratic Nat’l Comm* 412 US94 (1969) at 124. The provisions of s 2A(f), Part 1(d) of the Seventh Schedule to the Act and the application of the principle of company law to the effect that shareholding and management of a company must always be kept separate are important in this respect. They show that the public broadcaster is vested with substantial editorial discretion and judgment in deciding how to meet

its journalistic purposes, achieve high standards of quality in the programmes broadcast and fulfil statutory obligations.

The ZBC is not permitted but required to exercise independent editorial discretion and judgment in the performance of the functions necessary for the fulfillment of its journalistic purpose and statutory obligations. It is for the ZBC in the exercise of editorial discretion to decide whether a programme is compatible with the requirements of freedom of expression by adhering to the standards of programming prescribed in Part 1 of the Seventh Schedule to the Act.

The editorial independence of the ZBC is further guaranteed by the requirement that the board to which the ZBC is accountable and has the power to appoint its Chief Executive Officer must not interfere in the day-to-day management of the ZBC.

Public broadcasters, particularly when they effectively delegate editorial discretion to professional journalists, may perform their functions and fulfil statutory obligations admirably. In any case the public interest standard on the programmes broadcast by the ZBC in respect to their geographic reach, content, subject – matters, linguistic presentation, independence from governmental, commercial or any other interests and quality prescribed by Part 1 of the Seventh Schedule of the Act requires that a substantial degree of editorial discretion must remain with the public broadcaster.

In the exercise of editorial discretion the ZBC has power under Part 1 of the Seventh Schedule of the Act to decide on what programmes to broadcast, at what time, on which subjects and for what purposes. It has the power to decide on who participates in the programmes, provided it does not exclude people because it disagrees with their points of view on matters of public interest and complies with the relevant requirements of programming prescribed in Part 1 of the Seventh Schedule of the Act. The decision must be reasonable and viewpoint neutral. In other words the legal discretion granted to the ZBC and its editors is not limitless or expressed in terms of an unfettered power.

The existence of provisions which underpin the presence of editorial discretion in the public broadcasting service system gives rise to a presumption against State involvement in the programming decisions of the ZBC. In fact governmental involvement in decisions as to which programmes to broadcast would be incompatible with or antithetical to the editorial discretion vested in the ZBC by the statute.

The system imposes on the ZBC programme and content obligations that protect freedom of expression in the public sphere. The provisions of the Act reveal the symbiotic relationship existing between the provision of public broadcasting service and freedom of expression in the public sphere.

The principles on the provision of public broadcasting services and the exercise of freedom of expression are now related to the method of funding chosen for the ZBC. In other words, how does the mechanism of funding chosen fit into the structure and dynamics of the

relationship between the provision of public broadcasting service and freedom of expression?
Does the method of funding promote or violate the right to freedom of expression?

As a public broadcaster ZBC is able to enjoy and maintain the independence guaranteed to it by the law and achieve the objectives for which it was established as it relies on funding from members of the public and not on State resources. In that way it is able to provide access to the speech market to a broader section of the public thereby ensuring greater participation.

In ensuring that broadcasting services reach as many people as possible who also would want to enjoy the right to receive and impart ideas or information, the ZBC is promoting freedom of expression. Provision of public broadcasting service is by its nature intended to reach the poor, marginalized and illiterate sections of society. In this sense, the regulation of public broadcasting service is part of a proactive policy of social inclusion that tends to reduce pre-existing inequality in access to the media. *Nyambirai's case supra* at 14G. The method of funding and the objectives prescribed for the corporation as a public broadcaster are influenced by the considerations of the right to freedom of expression.

The system of funding the provision of public broadcasting service through the payment of listener's licence fees is commonly used in many democratic societies. The African Charter on Broadcasting 2001 Windhoek which inspired the Declaration of Principles on Freedom of Expression in Africa to which Zimbabwe is a signatory provides in Part II s 5 that:

“Public services broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets.”

The report by AFRIMAP, OSISA & OSIMP on Zimbabwe in Public Broadcasting in Africa Series 2009 commented on the funding of the ZBC as follows:

“(1) Licence fees form the backbone of the ZBC revenue sources because they provide stable, predictable multi-year funding and allow the broadcaster to plan and implement the necessary investment in programming and operational improvements.”

The system of licence fees is used in the funding of the British Broadcasting Corporation (the BBC) and the South African Broadcasting Corporation (the SABC). The money from licence fees is collected by the BBC – rather than by a governmental organisation – and then utilized to fund its programming and operations. In the United States of America citizens pay the Federal Communication Commission (the FCC) taxes. The amount of the fee is calculated based on the needs of the FCC. The taxes are collected by cable providers through the monthly fees paid by television watchers.

The difference between the FCC and the ZBC method of funding is that, instead of the money being collected directly from the public by the public broadcaster the taxes are collected by cable providers as middlemen for onward transmission to the FCC. See *Andrew Giarolo “Public Broadcasting” Seton Hall Journal of Sports and Entertainment Law: Vol 23.2(2013) 439 at 457.*

Unlike our statute the South African Broadcasting Services Act expressly provides that the licence fee must be paid by a person who owns a television set or a radio set. The system of funding adopted for the BBC and SABC is based on a restriction on the exercise of the right to receive television or radio programmes broadcast. The applicants did not refer the

Court to any authority from these democratic countries to the effect that the use of licence fees to fund the public broadcaster under a system of law that guarantees editorial independence is a violation of the fundamental right to freedom of expression.

The Report of the Independent Review Panel on the future funding of the BBC indicated that funding the public broadcaster through television licence fees remained the most viable option if public broadcasting was to remain in existence. It said at p 137:

“The best means of funding such broadcasting yet devised is a licence fee. However, broadcasting which the market will not provide may (almost by definition) be broadcasting that is not very popular. At least, it will not necessarily be the kind of “lowest common denominator” which can command the largest audiences. And people naturally resist the proposition that they should pay for programmes that they do not wish to watch. Hence we have a debate which veers dangerously between the purist view of public service broadcasting, the so-called “Himalayas” view, which has it just producing programmes at the top end of the market, and the impure view, which interprets, “public service” as potentially embracing any broadcasting, however populist, which a public broadcaster chooses to put on the air.

We have not resolved this conundrum, perhaps because it is unresolvable. We do believe that public service broadcasting however defined, can play an important role in the competitive and complex broadcasting environment of the multi-channel, digital future. There is good reason to suppose that the market, left to itself, will not provide the broadcasting which our society wishes to foster.

Public service broadcasting exists to service the community by providing distinctive programmes which inform, educate and entertain. It can help to ensure that the benefits of the information age are available to all at a reasonable cost and that viewers and listeners have access to quality services which cater for a wide range of interests. In all these respects, it can correct the tendency of the market to pull too far in the opposite direction.”

Each applicant failed to show that the use of a licence tax as a method of funding the ZBC as a public broadcaster under the Act, with its attendant condition on the possession of receivers, is not reasonably justifiable in a democratic society. Countries like Germany which

abandoned the funding model of a licence fee based on ownership of television and radio sets did so, not for the reason that the model of funding violated the fundamental right to freedom of expression. Germany did so upon the realization that reliance on ownership of television and radio sets limited the source of funding for the public broadcasters as people now used other appliances to watch and record television programmes.

The other reason for abandoning the funding model based on ownership of television and radio sets, was that the costs of enforcement of the law against evaders who had increased in numbers, was too high. The law governing public broadcasting service in Germany, now requires every household to pay a fixed licence fee annually, regardless of whether the household owns an appliance capable of receiving broadcasting service or not.

The example of the funding method adopted by Germany shows that, whatever model is adopted for funding public broadcasting service, it must ensure that the funding is protected against arbitrary governmental interference. Institutional and editorial independence of a public broadcaster such as the ZBC is not likely to be effectively guaranteed if government can exert pressure on its programming through control of the financial resources. The example of the model of funding adopted by Germany helps to show that public financial support is a *sine qua non* of a public broadcasting service system.

There is a close link between the funding model adopted and the type of broadcasting service to be supported. It is often argued that the mechanism of funding adopted by the State is critical in determining the nature of a broadcasting institution with fears that

commercial funding methods have the tendency to undermine public broadcasting service values. One of the important definitional features of a public broadcasting service system is absence of efforts to raise funds from viewers and listeners. The usual source of revenue is taxation.

It follows that taxation as the mechanism of funding adopted by the State cannot be examined without reference to the substance of the scheme for public broadcasting service embodied in the provisions of the Act of which it is an integral part. What is clear is that the mechanism of funding adopted by the Parliament is part of a system of broadcasting service. The primary object of the broadcasting service is to protect and promote the right of the public to receive suitable access to social, political, cultural, moral and other ideas and experiences by television and radio programmes consistent with the requirements of freedom of expression. The method of funding, combined with the editorial independence and the public interest standard, provides a viable solution to the governmental control problem consistent with the principles of freedom of expression. The issue of an appropriate method of funding for a public broadcaster like the ZBC is intrinsically linked to the fundamental question whether the country should have a public broadcasting service system or not.

The applicants labored under the mistaken belief that the purpose of s 38 B(1) of the Act is to compel the holder of the television or radio licence to view or listen to programmes broadcast by the ZBC. Both applicants said the reason why they were opposed to the licensing fee system of funding in this case is that they did not want to receive broadcasting service from the ZBC. Musangano Lodge went further to say it did not want to pay the licence fees because there was no broadcasting service from ZBC reaching the area where its business is located. It

said it subscribed to DSTV. Mr *Wekare* also said DSTV was the broadcasting service provider of his choice.

It is true that freedom of expression goes further than the theoretical recognition of the right to receive ideas and information. It also includes, and cannot be separated from the right to choose from which effective medium of communication one wants to receive ideas and information.

Section 38B(1) of the Act does not guarantee the ZBC an audience. It does not compel the holder of a listener's licence to receive the broadcasting service from the corporation. All it does is to compel a person who is in possession of a receiver to pay a licence fee because the gadget in question is a "receiver" capable of receiving a broadcasting service from any provider. It sets a pre-condition for the exercise of the right to freedom of expression by the person in possession of a receiver. The fact that any given listener is averse to the material that the ZBC broadcasts, whether from a recreational or political perspective, does not necessarily violate his right to freedom of expression.

Section 38B(1) of the Act is not to the effect that the equipment possessed by a person under the obligation to pay the licence fee should be capable of receiving a broadcasting service from the ZBC. The right of a person who does not want to view or listen to programmes broadcast by the ZBC by television or radio is not violated. The person is obliged to pay a licence fee for the possession of the receiver whether he or she wants to receive broadcasting service from ZBC or not.

Once a person has paid the licence fee for the possession of the receiver he or she is free to receive a broadcasting service from a provider of his or her choice. In other words, his or her right to freedom of expression is then not hindered or interfered with. The law is, however, intended to serve the public interest. It does not follow that because an individual does not want to receive ideas and information from a public broadcasting service the law should be changed.

It cannot be overemphasized that a public broadcasting service is established to serve the public interest in the exercise of freedom of expression. The interests of the individual to access ideas and select programmes of his or her choice may be satisfied by the ever-expanding availability of channels. This is particularly so through cable broadcasting. The channels allow for some degree of individual preference in programme selection.

It would not matter for the purpose of the obligation to pay the licence fee for possession of a receiver in terms of s 38B(1) of the Act, that there is no signal from the ZBC reaching the area where the equipment is located or that one prefers to watch DSTV programmes. Payment of a tax has always been a social responsibility of the individual placed under the obligation to pay. No direct benefit needs to accrue to a tax-payer for discharging a social duty. This is not to say the ZBC is doing well by failing to ensure that its broadcasting services reach all areas of the country.

The law governing the public broadcasting service system, expressly imposes an obligation on the national broadcaster, to ensure that its programmes are available to Zimbabweans in languages commonly used in Zimbabwe. This means that the ZBC is under an

obligation to make its services available throughout the country. Failure by the ZBC to fulfil its mandate does not mean that the law by which the obligation is imposed is unconstitutional.

The contention was that s 38(b)(1) of the Act violates the applicants' right to freedom of expression because it has the effect of prohibiting possession of appliances for receiving programmes broadcast by television and radio. The applicants overlooked an important point relating to the nature of the constitutional power of taxation exercised by the legislature. In the exercise of the constitutional power of taxation, the legislature has an absolute discretion to select an activity or conduct and not others, as a subject of taxation. In this case it selected receivers and chose to prohibit their possession without a listener's licence as the subject of taxation. The Legislature may prescribe the basis of tax, fix the value and require payment as it may deem proper. Within the limits of the constitutional power, it is supreme in its action. *McCray v United States* 195 US 27 at 57.

The fact that other motives may impel the exercise of taxation power does not authorize the courts to inquire into that subject. Whether the choice of the activity or conduct as a subject of taxation, has the burdensome regulatory effect of restricting the activity or conduct in relation to the use of the appliance as a means of exercising freedom of expression by receiving broadcasting service from a provider of one's choice, cannot be investigated by the Court. Every tax is in some measure regulatory in effect. To some extent it interposes an economic impediment to the activity or conduct taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect.

If the legislation is within the taxing power it may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. The argument is the same as saying that the question of power depends not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.

If a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results that arise from its exercise. The power to tax is exercised oppressively upon persons who have fundamental rights. The rights are not destroyed. They are restricted to the extent necessary for the public purpose of raising revenue consistently with the principles of freedom and justice upon which the Constitution rests. *McCray's case supra* at 64.

As pointed out, inquiry into the hidden motives which may have moved the Legislature to exercise the power of taxation constitutionally conferred upon it, is beyond the competence of courts. The Court will not undertake a collateral inquiry, as to the measure of regulatory effect on the conduct of possession of an appliance capable of receiving a broadcasting service because of alleged violation of the right to freedom of expression. To do so would be an attempt to undermine the exercise by the Legislature of the constitutional power of taxation. *Sonzinsky v United States* 300US 506(1937).

The challenges to the constitutionality of the relevant provisions of the statute, appear to have been motivated by what each applicant said was decreasing public confidence in

the programmes broadcast by the ZBC. The grounds of the complaints were that the programmes broadcast by the ZBC tended to be monotonous and of poor quality. The applicants also complained that there is no transparency and accountability in the way the ZBC uses the funds it gets from the public. These are concerns which the ZBC must welcome and take seriously.

There is need to ensure that the managers use the revenue from licence fees to get the best value for money with programming choices. There is need to ensure that the programmes produced and broadcast by the ZBC are of high quality, challenging, engaging and innovative in accordance with the requirements of Part 1 of the Seventh Schedule to the Act.

There is nothing wrong in the public telling the ZBC what they think about the quality of its services to help it police its own conduct. In that way the ZBC would have a close relationship with its audience treating the public as “owners” of the broadcasting service rather than licence fee payers.

The ZBC as a public broadcaster cannot work in a culture which is that it does what it likes without having to be accountable. The applicants, like all tax payers, have a right to know how their money is spent. There was, however, no evidence that any of the applicants used the procedure provided by the ZBC in terms of s 40 of the Act for handling complaints from the public about programme content. They should have used the procedure to bring the complaints referred to in this application to the attention of the ZBC before approaching the Court.

The reasons given by the applicants for not complying with the law relate to accrual of benefits. Their contention is that programmes broadcast by the ZBC are not of the quality they expected to receive in return for the money they would have paid as licence fee for possessing a receiver.

Accrual of direct personal benefits is not a factor for consideration in the determination of the question whether s 38B(1) of the Act is unconstitutional for allegedly violating the right to freedom of expression. One does not pay tax to derive a direct personal benefit. Tax is paid for a public purpose as opposed to a private purpose. In other words tax is not paid to protect personal interest. One pays a road tax for construction of a road one may never use.

The argument on encryption is also based on the principle that a person must pay for the programmes he or she wants to watch. The principle is alien to the purposes of the provision of public broadcasting services.

Each application is dismissed with no order as to costs.

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA AJCC: I agree

Mtewa & Nyambirai, applicants' legal practitioners

Mambosasa, respondent's legal practitioners