HH 157-03
HC 8191/03
ASSOCIATED NEWSPAPERS OF
ZIMBABWE (PVT) LTD
versus
CHIEF SUPERINTENDENT MADZINGO
and
THE COMMISSIONER OF POLICE

HIGH COURT OF ZIMBABWE
OMERJEE J,
HARARE, 18 September, 2003

OPPOSED URGENT CHAMBER APPLICATION

A P de Bourbon SC assisted by Mr *M P Mahlangu*
Mrs *F Maxwell* for respondents

OMERJEE J: The applicant is the owner and publisher of the Daily News, a daily newspaper published in Harare and distributed throughout Zimbabwe. Its publishing activities commenced in March, 1999 and continued until 13 September, 2003. The Access to Information and Protection of Privacy Act [Chapter 10:27] (the Act) was promulgated and became law in March 2002. One of its provisions is that providers of mass media services, which includes publishers of newspapers must register. In terms of s 93 of the Act, any person who immediately before the Act became law, was publishing a newspaper was deemed to be lawfully registered for a period of 3 months. Therefore, the applicant was required to register before 15 June, 2002. On that date the Access to Information and Protection of Information (Registration, Accreditation and Levy) Regulations, 2002 (S I 169 C of 2002) were promulgated (the Regulations). The Regulations prescribed the various forms that had to be used for registration. The applicant, was of the view that various provisions of the Act were inconsistent

with the Declaration of Rights and therefore unconstitutional and accordingly void. Acting on legal advice, the applicant applied to the Supreme Court for an order declaring certain provisions of the Act to be a nullity. It was of the opinion that the provisions were a nullity and accordingly, it did not apply for registration.

The application was heard on 3 June 2003. On 11 September the Supreme Court handed down a ruling that it was not prepared to hear and determine the merits of the case until the applicant had applied for registration. After the ruling was handed down on Thursday 11 September, the applicant proceeded to put together the application for registration. The applicant published a further edition of the Daily News on Friday 12th September.

Late in the evening of Friday 12 September armed police visited the premises of the applicant at Old Mutual House and at Southerton and evicted all the employees from those premises. On the morning of 13 September, the Chief Executive Officer of the applicant went to the Harare Central Police Station where he was told that the applicant was to be charged with contravening s 72 of the Act and he prepared and signed a warned and cautioned statement. He sought permission from the Police for members of the staff of the applicant to be allowed to enter the applicant's offices so that they could prepare the application for registration. After consultation with his superiors the police officer, Supt Chivasa, allowed certain named employees to enter the premises for that

purpose.

On Monday 15 September the applicant presented its application for registration to the Media and Information Commission. The appropriate fees were paid and receipted and the application acknowledged. Once the application was filed the applicant approached the lst respondent and sought permission to continue its activities i.e. to publish a newspaper. The first respondent wanted proof that an application for registration had been made and that was duly furnished. However he then said that he was awaiting advice from the Attorney-General's Office and refused to lift the blockade of the applicant's premises until the advice was obtained. The first respondent has since refused to lift the blockade.

The applicant claims that it is entitled to carry on its business of publishing a newspaper by virtue of the provisions of s 8 of the Regulations. Subsection (2) of that section provides that an applicant for registration who, before the date of commencement of the Act carried on the activities of a mass media service, shall, during the consideration of his application, be permitted to carry on the activities of the mass media service until his application is determined.

The applicant claims that the matter is one of extreme urgency because it employs approximately 275 employees and, by reason of not being able to operate, it is losing gross revenue from the sales of its newspaper of approximately $18 million a day and from its advertising activities of between $17 - 20 million a day. The interests and welfare of its employees are in jeopardy.

On 16 September, first respondent instructed police officers under his command to remove forcibly various pieces of equipment belonging to the applicant. The equipment consists of computers, printers and related office equipment.

The applicant is seeking an order that the respondent vacate the premises of the applicant and restore possession and control thereof to the applicant, return all the goods and equipment removed from the applicant's premises and refrain from interfering with the normal business activities of the applicant and its employees.

The response of the respondent is as follows -

The respondents rely on s 49 of the Criminal Procedure & Evidence Act [Chapter 9:07]. That section provides that the State may "in accordance with Part V!" of that Act, seize any article which is, on reasonable grounds, believed to be concerned in the commission of an offence. Section 50 of Part V1 deals with seizure under warrant. There is no evidence before the court that a warrant was issued. Section 51 deals with seizure without a warrant. It provides that a police officer may seize any article if the person concerned consents thereto, or if he believes, on reasonable grounds, that a warrant would be issued if it was applied for and the delay in obtaining a warrant would prevent the seizure or defeat the object of the search. There is no allegation that the applicant consented to the

seizure. Nor is there any allegation that the first respondent believed that a warrant would be issued if it had been applied for and that he considered that the delay in obtaining a warrant would defeat the object of the search. Accordingly the seizure was not done in accordance with Part V1 of the Criminal Procedure & Evidence Act.

Since the provisions of the Act have not been declared to be unconstitutional and therefore void they must be observed. Therefore the applicant, being a provider of a mass media service, is required to register in terms of s 66 of the Act. It is not disputed by the applicant that it is not registered. However, it has submitted an application for registration and has paid the requisite application and registration fees. In terms of s 8(1) of the Regulations the Media and Information Commission is required, as soon as practicable, and in any case within 60 days either to grant or to refuse the application. Subsection (2) of s 8 of the Regulations, provides that the applicant is permitted to continue carrying on the activities of the mass media service until its application is determined.

The Act came into operation on 15 March 2002. It provides in s 93 that persons such as providers of mass media services who are in business when the Act becomes law shall be deemed to be registered for a period of 3 months. Obviously it was envisaged that those persons who were required to register would apply and be registered within the 3 month period. However, the Regulations were not promulgated until 15 June, 2002, the last day of the 3 month period. That meant that no application for registration could be made within the 3 months because the application forms were not prescribed, neither were the fees until the end of the 3 months. In order to cater for the problem that would have ensued, s 8 (2) of the Regulations provides that once a person has submitted an application for registration then that person is permitted to carry on the activities in question whilst the application is being considered. There is no qualification in s 8 (2) that it refers only to applications

which are made within a few days or any specified period after the 3-month period has elapsed. It applies to any application for registration, whenever it is made. Mrs *Maxwell* contended that the applicant "should not benefit from s 8 (2)". As mentioned earlier, the Regulations were not promulgated until the very end of the 3 month period of deemed registration. That means that every application for registration made after 15 June was made by a person who was not registered. Section 8 (2) does not provide that its provisions apply only to those who apply for registration within a month or any stipulated period thereafter. It is open-ended. Mrs *Maxwell* does not give any legal basis for her submission and, indeed, there is none. It was not the order of the Supreme Court that made the applicant an "illegal operator". The Supreme Court merely declared that the applicant was acting outside the law. In fact it had been doing so since 15 June 2002. It only started operating within the law after it lodged its application for registration on 15 September, 2003.

Therefore, in view of the clear and unambiguous wording of section 8 (2) of the Regulations, the respondents have no legal right to prevent the applicant and its employees from gaining access to the premises of the applicant and carrying on its business of publishing a newspaper. It is not in dispute that there is a pending application for registration submitted by the applicant.

Furthermore, as regards the return of the property that was seized, the respondent claims that it was seized in order to enable it to be declared forfeited in terms of s 72 (3) of the Act. I have dealt

earlier with the contention that the seizure was not in accordance with Part V1 of the Criminal Procedure & Evidence Act. That being the case, the property must be restored to the applicant. It may only be declared forfeit after conviction.
The provisional order sought is granted in terms of the Draft Order filed of record.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Criminal Investigation Department, for first respondent
Civil Division of the Attorney-General's Office, for second respondent