

ZIMBABWE ONLINE CONTENT CREATORS TRUST (ZOCC)
versus
ZIMBABWE MEDIA COMMISSION

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 29 May & 3 June 2020

Urgent chamber application

C. Mhike for the applicant
T. L. Dhlakama for the respondent

ZHOU J: This is an application for an order interdicting the respondent from proceeding with the accreditation of journalists based on the new categories which were recently introduced by the respondent. The applicant is a trust duly registered in accordance with the laws of Zimbabwe. Its sphere of operation is the promotion of freedom of expression and media freedom. It represents the interests of online content creators as part of its mandate. Its membership includes journalists, bloggers, social media practitioners, online editors, and content creating media houses.

The respondent is an independent commission constituted as such in terms of s 248 (1) of the Constitution of Zimbabwe as read with s 38(1) of the Access to Information and Protection of Privacy Act [*Chapter 10:27*] (hereinafter referred to as “the Act”). Its functions are detailed in s 249 (1) of the Constitution and s 39(1) of the Act. These include:

- “(a) to uphold, promote and develop freedom of the media;
- (b) to promote and enforce good practices and ethics in the media;
- (c) ...
- (d) ...
- (e) ...
- (f) to ensure that the people of Zimbabwe have fair and wide access to information;
- (g) ...
- (h) to encourage the adoption of new technology in the media and in the dissemination of information;
- (i) to promote fair competition and diversity in the media; and
- (j) to conduct research into issues relating to freedom of the press and of expression, and in that regard to promote reforms in the law.”

On Thursday 21 May 2020 the respondent issued a press statement informing media practitioners about the commencement of the accreditation programme for the year 2020. The statement, among other things, introduced additional categories for the accreditation of media practitioners. In the past the respondent issued only two types of accreditation cards. The one was for local journalists while the other was for foreign journalists. The statement by the respondent informed that owing to concerns of the industry and the fast developments in the digital media, it had decided to issue different accreditation cards for the six listed categories of media practitioners described as follows:

- “1. **Local Journalists:** Journalists working for mainstream media registered or licenced by the ZMC and the Broadcasting Authority of Zimbabwe (BAZ) respectively;
2. **International Media:** Foreign media personnel cleared by the Government through the Ministry of Information, Publicity and Broadcasting Services.
3. **Online Media:** Media practitioners running online news channels;
4. **Content Producers:** Media practitioners who produce various media products for online distribution;
5. **Photographers:** Media practitioners in photography and videography;
6. **Productions:** Media practitioners in the film sector.”

Some members of the media fraternity expressed concern at the proposed new categories, including the concern that they could lead to discrimination of some journalists and media practitioners. In particular, one organization in the media industry, the Media Institute of Southern Africa (MISA) engaged the respondent about the new proposals. The engagement did not result in any consensus being reached between the respondent and MISA. However, the respondent issued a statement trying to allay the fears of the media profession.

Applicant complains that the proposed accreditation, if not stopped, would interfere with media freedom. Applicant refers to attempts by another organization, MISA-Zimbabwe, to engage the respondent about the proposed accreditation and alleges that the engagement failed to produce results. Applicant further alleges that the respondent has introduced new accreditation categories which would result in violation of s 61 and s 62 of the Constitution of Zimbabwe. Applicant alleges that the proposed accreditation seeks to introduce four new categories without changing the legal framework. Mr *Dhlakama* for the respondent submitted that only two new categories are set to be introduced. Nothing turns on this dispute of fact, as the question remains whether the proposed new categories result in contravention of the cited provisions of the

Constitution or otherwise violate the law. The number of additional categories is not material to the determination of the constitutional and other issues raised. Applicant alleges that if the respondent is not interdicted from proceeding with the proposed accreditation many of its members as well as other media practitioners “would be significantly prejudiced in a variety of ways that infringe of the enshrined rights of freedom of the media and access to information”.

The applicant also alleges that the Access to Information and Protection of Privacy Act [Chapter 10:27] which makes provision for accreditation does not provide for the additional categories proposed by the respondent’s Secretariat. The further grounds for impeaching the proposed accreditation are (1) that the decision by the respondent’s Secretariat is rushed and was reached without consulting the affected stakeholders as required by the Constitution; (2) that the respondent is presently not properly constituted in terms of the Constitution and the applicable Act, such that the impugned decision is that of the Secretariat rather than of the respondent; (3) some members of the applicant would be excluded from the accreditation exercise because of the restricted definition of journalists in the proposed categorization in light of the provision in the Act for “accreditation of journalists only”; and (4) that the proposed manner of accreditation is open to abuse, in that it can discriminate against some categories of journalists.

The respondent objected *in limine* to the determination of the application on the merits on two grounds, namely, (a) that the application is not properly before the court because the applicant has not exhausted the domestic remedies available to it; and (b) that there is no legal basis for the application. I will deal with the objections *in limine* first. In respect of the first ground of objection the respondent’s submission is that the applicant ought to have appealed to the Administrative Court in terms of s 69(2) of the Act. That section states as follows:

“An appeal shall lie to the Administrative Court against any decision made or action taken by the Commission in terms of this section.”

The section in question deals with registration of mass media service. It does not concern the creation of accreditation categories or the accreditation of media practitioners. Reliance on it is therefore misplaced.

There is the further submission that in terms of the Administrative Justice Act the applicant ought to have asked for written reasons regarding the decision of the respondent. The statement issued by the respondent on 22 May 2020, annexure “C” to the founding affidavit,

gives those reasons and shows an intention by the first respondent to proceed as earlier advised. It would be an exercise in superfluity for the applicant to ask for further reasons when these had already been given albeit in the context of engagements with MISA.

The objection *in limine* based on the failure to exhaust domestic remedies is therefore meritless and is dismissed.

The second ground of objection is incomprehensible. It makes submissions on the merits of the application. The respondent argues that in coming up with the contested accreditation categories it was merely exercising its mandate as given by the constitution, the Act and the regulations cited. The question of whether the exercise of these powers was in accordance with the law or contravened the provisions of the constitution is the precise issue to be determined in the application. It cannot be a point *in limine*. This objection is misconceived and must be dismissed as well.

On the merits, the respondent's case is that the additional accreditation categories were "necessitated by the revolution in the digital media sector, a phenomenon which was not foreseeable when the current AIPPA was promulgated". Respondent contends, therefore, that the new system is intended to embrace and include the players in the digital market so that they can be duly accredited.

The applicant has alleged violations of s 61 and 62 of the Constitution of Zimbabwe. Section 61 protects the right to freedom of expression and freedom of the media; s 62 protects the right of access to information. However, this dispute can be resolved in terms of the subsidiary law available without a resort to the constitutional rules and principles. This approach commends itself, as it accords with the principle of avoidance. This principle enjoins a court which is faced with a dispute to first attempt to address it by application of ordinary principles of law before resorting to principles of constitutional law. Where it is possible to resolve a legal dispute other than by application of the provisions of the constitution, the principle of avoidance demands that the ordinary rules of law be invoked to determine the dispute, the justification being that a resort to constitutional law procedures and remedies must be reserved for serious disputes. Thus, in the case of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1(CC), para 21, it was held that: "Where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be

followed.” See also *Ashwander v Tennessee Valley Authority*, 297 US 288 (1936); Iain Currie and J. de Waal (2005) *The Bill of Rights Handbook* 5th ed p. 25; J. A. Barron and C. T. Dienes, *Constitutional Law in a Nutshell* 7th ed. p. 27. The dispute *in casu* can be dealt with in the context of the provisions of the Access to Information and Protection of Privacy Act [*Chapter 10:27*] and the Access to Information and Protection of Privacy (Registration, Accreditation and Levy) Regulations, 2002, which are contained in Statutory Instrument 169C of 2002.

It is common ground that the additional accreditation categories which are the subject of challenge in this application are not provided for by law. Section 79 of the Act only refers to two categories. These are local journalists (employed by mass media service or news agency, and part-time or freelance journalists), and foreign journalists. This fact is acknowledged by the respondent in its statement ZMC04/2020, annexure “E” to the founding affidavit, para 2 thereof. The respondent’s only excuse for including the impugned categories is that the Act is deficient in dealing with the new challenges presented by rapid growth of the digital media and that when the Act was enacted it did not anticipate these changes. Clearly, therefore, the respondent’s action is not only *ultra vires* the Act but also illegal insofar as it is attempting to amend the law through a mere press statement. The respondent being a creature of the Constitution and the Act must found all its acts within the framework of the law. If the law is deficient as is suggested by the respondent, the option is not to usurp the function of the legislature but to approach parliament with recommendations on how to plug the lacunae in the law.

There has been an allegation that the different accreditation cards can be abused to discriminate against some media practitioners. There seems to be an inadvertent concession that this may be so, implicit in the statement by the respondent that the move is meant to prevent ‘some malignant elements bent on abusing the current system of accreditation, by trespassing into events that clearly do not fit their professed lines of journalism’. This statement lends credence to the concerns raised by the applicant that the additional categories and the different accreditation cards are an exclusionary tactic.

I am mindful that at this stage where a provisional order is sought I need only *prima facie* evidence to prove the allegations. In my view there is sufficient evidence to ground a reasonable apprehension of harm. The applicant’s entitlement to the protection or a right clearly or only *prima facie* established are not in dispute. The applicant and its members are the instruments by

which the access to information envisioned by the Act can be realized. They have a right to be protected in the practice of their profession as journalists. The balance of convenience favours the granting of the interdict sought. This is so because if the proposed accreditation proceeds on the basis of categories not provided for by law there will be irreparable prejudice to the applicants who may be excluded from certain categories. On the other hand, the respondent suffers no irremediable prejudice by proceeding in terms of the existing categories. When the law is changed it can then proceed in the manner proposed. Finally, I do not believe that there is an adequate alternative remedy available to the applicant which would achieve the result sought through the interdict. The requirements for an interim interdict have therefore been established.

The draft provisional order will be amended to reflect that the interdict pertains only to accreditation based on the new categories as announced by the respondent. The respondent is at large to proceed with the accreditation based on the existing categories provided for by the legal framework in place. The reference to the violation of sections 61 and 62 of the Constitution in the terms of the final order sought will also be removed for the reasons outlined above. Finally, I must point out in relation to the section on service that the Sheriff does not require a specific statement in the order to authorize him to serve the provisional order. It is the duty of the Sheriff to serve court orders. If any other person, such as the applicant's legal practitioner, requires a departure from that position of the law then they can seek that relief, as was done in the instant case. The reference to the Sheriff will therefore be deleted as well.

In the result, the relief is granted in terms of the draft provisional order as amended, in the following terms:

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The respondent be and is hereby ordered to accredit the applicant's members on the basis of the accreditation categories provided for in s 79 of the Access to Information and Protection of Privacy Act [*Chapter 10:27*] as read with the provisions of the Access to Information and Protection of Privacy (Registration, Accreditation and Levy) Regulations, 2002 (Statutory Instrument 169C of 2002).

2. Respondent shall pay the costs of this application.

INTERIM RELIEF GRANTED

Pending determination of this matter the applicant is granted the following relief;

1. That the respondent be interdicted from carrying on or continuing with accreditation of media practitioners represented by the applicant in terms of its constitution and deed of trust on the basis of the new categories introduced through its statement ZMC04/2020.

SERVICE OF PROVISIONAL ORDER

The applicant's legal practitioners are granted leave to serve this provisional order upon the respondent.

Atherstone & Cook, applicant's legal practitioners
Musunga and Associates, respondent's legal practitioners