

ARTHUR LUBINDA WINA, FREDERICK TITUS JACOB CHILUBA, VERNON JOHNSON MWAANGA, AKASHAMBATWA MBIKUSITA LEWANIKA, LEVY PATRICK MWANAWASA, EPHRAIM CHIBWE AND ANDREW KASHITA v THE ATTORNEY-GENERAL (1990 - 1992) Z.R. 95 (H.C.)

HIGH COURT
C. M. MUSUMALI, J.
18TH FEBRUARY, 1991
(HP/1878 OF 1990)

Flynote

Constitutional law - President issuing directive restricting access of opposition parties to Government owned newspapers - Such directive in violation of provisions of Constitution - Directive quashed.

Headnote

The President of Zambia had, at a news conference, issued a directive that certain Government owned newspapers were not to provide coverage to or accept advertisements from the Movement for Multi-Party Democracy. The petitioners applied for an order quashing and setting aside the directive as it

p96

violated their rights in terms of arts. 22 and 25 of the Constitution of Zambia. The Court held that the President was a creation of the Constitution and that he had issued his directive as the Head of State. His order telling the editors of the newspapers what to and what not to publish affected the activities of the petitioners and gave them the legal basis to bring the application. From the evidence before the Court it was held that the newspapers in question were Government controlled papers. The Court commented that, had they not been, then their management would have been at liberty to determine what they published. As the newspapers were Government papers, the directive was discriminatory and unconstitutional unless it fell within one of the permitted derogations of the right against discrimination. In finding that none of the derogations applied the Court found that the directive was not reasonably justified in a democratic society, which allowed for differences in people's political views. The directive further hindered the petitioners in the enjoyment of their freedom of expression as they were prevented from publishing their opinions through Government newspapers. The directive was accordingly quashed.

The Court further commented that newspapers were supposed to run on the basis of journalistic principles and ethics free from any outsider's influence. This did not mean that everything that leaders of any political party said had to be published by public newspapers.

For the petitioners: I. C. T. Chali, Mwanawasa and Company.
V. B. Malambe, Mhango and Company.
E. C. Mwansa, Jacques and Partners.
J. Mwanachongo, Principal State Advocate .
For the respondent: E. Sewanvana, State Advocate.

Judgment

C. M. MUSUMALI, J.:

This is a petition filed by the seven petitioners individually and severally against the respondent. The respondent has been made a party to these proceedings by virtue of s.12 of the State Proceedings Act Cap. 92.

The issue that has given rise to this petition is part of what was said by His Excellency the President of the Republic of Zambia at a news conference at State House Lusaka on 1st November, 1990. In order to state the petitioners' case as accurately as possible it is instructive to quote from the petition filed by them in this matter: para. 4, 8 and 9. I should probably at this stage say that the numbering of the paragraphs of the petition was wrong after the first paragraph 4. The next paragraph should have been 5 but instead it reads 4 again. This was I think a typographical error and I have made the necessary corrections in pencil. There is no need for concern by the petitioners. Paragraph 4 states:

"At the press conference held at State House on 1st November, 1990 His Excellency The President made a directive to the effect that henceforth the Government owned newspaper the *Zambia Daily Mail* and what he referred to as (UNIP) Party newspapers the *Times of Zambia* and the *Sunday Times* shall cease to give coverage to statements made by members of the Movement for Multi-Party Democracy and in the case of the *Times of Zambia* and the *Sunday Times* they shall stop to accept advertisements from the Movement. The President announced that these newspapers were owned by the United

p97

National Independence Party and its Government and as such they should give no room for the opposition to criticise their policies, actions or programmes."

Paragraph 8 says:

"Your petitioner will assert that by the said directive of the President the United National Independence Party and its members were given the privilege of disseminating information and propaganda of their programmes and actions through the news media while denying non-members of the said party effective means to counter propaganda or to present their own case."

Then paragraph 9 states:

"By reason of the foregoing premises your petitioners assert that in relation to them both as citizens of Zambia and as members of the Movement for Multi-Party Democracy individually and severally the directive made by the President as aforesaid being discriminatory has violated their rights under art. 25(2) and (3) of the Constitution of Zambia in that it was given by the President in the performance of the functions of a public office and it had the effect of affording to your petitioners and other non-members of the United National Independence Party different treatment attributable wholly or mainly to their political opinion and they have thereby been subjected to disabilities or restrictions to which members of the United National Independence Party are not subject. WHEREBY your petitioners pray:

- (a) That the *Times of Zambia*, the *Sunday Times* and the *Zambia Daily Mail* are owned by and on behalf of the people of Zambia through the companies by which they are managed and that neither the President nor any other person or organisation has the right to use them for the political or other interest of the President or such person or organisation to the exclusion of the benefit of other citizens except as provided by the law.
- (b) That it may be declared that the directive by the President that the *Times of Zambia*, the *Sunday Times* and the *Zambia Daily Mail* shall cease to give coverage of statements made by members of the Movement for Multi-Party Democracy and in the case of the *Times of Zambia* and the *Sunday Times*, that they should cease to accept advertisements from the members of the said Movement was unconstitutional and violated the rights of the petitioners as recognised under art. 25(2) and (3) of the Constitution of Zambia.
- (c) That the said directive may be quashed and set aside.
- (d) That it may be declared that the press in Zambia are entitled to and should continue to enjoy the freedom of the press that is to say the freedom to hold opinions without interference, the freedom to receive ideas and information without interference and the freedom to communicate ideas and information to the public without interference.

- (e) That such other orders or directions as the Court considers appropriate may be made for the purpose of enforcing or securing the enforcement of the provisions of art. 22 and 25 of the Constitution of Zambia.
- (f) That the respondent may be condemned to pay the costs of and incidental to these proceedings."

The evidence

In support of this petition, six people testified. The first witness was Mr Vernon Johnson Mwaanga. He told the Court that the response of the local media prior to 1st November, 1990 was lukewarm and sometimes even hostile. For instance, the Convention of 20th July, 1990, which was held at Garden Hotel to set up the Movement for Multi-Party Democracy,

p98

which I shall from now onwards in this judgment be referring to as MMD, was reported on TV without sound of the pictures of Messrs Arthur Wina, Frederick Chiluba and himself.

The reporting of what had happened at that Convention, he went on, was instead concentrated on the negative aspects. The MMD thus complained to the Director-General of the Zambia National Broadcasting Corporation Limited (ZNBC) on 6th September, he said, against that sort of news coverage. Exhibit P1 was the letter of complaint he said.

The witness then moved on to the news conference that was held by His Excellency the President at State House on 1st November, 1990. At that gathering the President said the following so far as they are relevant to these proceedings;

THAT:

1. The Times of Zambia and the Zambia Daily Mail should not be reporting the activities of the MMD.
2. The Times of Zambia was a (UNIP) Party paper.
3. The Zambia Daily Mail was a Government paper.
4. The two newspapers were expected to toe the Government line.
5. He would issue directives to that effect to the press.
6. He was speaking both as President of UNIP and of the Republic.
7. Government Departments and Parastatals should not advertise in the National Mirror because the National Mirror had told lies about the activities of UNIP's leadership.

The witness then told the Court that on 2nd November 1990 he issued a press release - exh P3 - to rebut the unfavourable aspects which had arisen from that news conference. That press release, he went on, was not carried in the local news media, namely the radio, TV and newspaper, the following day. The *Zambia Daily Mail* carried a very small and very begrudging article of it, he said.

On 5th November, 1990, he continued, the MMD issued another press release - exh P5. In it, it was pointed out that the Government had contravened art. 25(2) and (3) of the (Republican) Constitution in the directives to the press by His Excellency the President. The Government was asked to withdraw those directives or it was to face Court proceedings. The local newspapers of the 6th November 1990 did not carry that press release, said the witness.

On 29th November, 1990, another press release - exh. P7 - was issued by the MMD. That release was not carried in any local daily newspaper or other media the following day.

The witness then told the Court that he served on the Board of Directors of the *Times of Zambia*, *Sunday Times* and Printpak Zambia Limited from 1980 to 1985. The money which was a loan, used to purchase the shares of these two newspapers, *Times of Zambia* and *Sunday Times*, he went on, by the Zambia National Holdings Limited was in part from the Zambia National I Provident Fund and in part from the Zambia State Insurance Corporation Limited.

The Zambia National Holdings Limited is/was wholly owned by UNIP, he said. These companies were bought from Lonrho. In 1989, he went on, the National Media Corporation (NAMECO) took over the *Times* and the *SundayTimes of Zambia Limited*.

p99

In cross-examination Mr Mwaanga said that the directives in question were presidential ones and such directives are law in this country. He then said that the papers in question ie the *Times* and the *Zambia Daily Mail* are not obliged to cover MMD activities; but every Editor-in-Chief is supposed to exercise his discretion. Answering a question whether or not the Editors-in-Chief of these newspapers are not supposed to receive instructions from the Head of State, the witness said that during his time he never received any instructions. He then said that he was not aware of any such arrangements prior to 1st November, 1990.

The next witness (PW2) was Mr Levy Patrick Mwanawasa. He repeated what PW1 (Mr Mwaanga) had already told the Court as to what His Excellency the President instructed the newspapers not to be doing in respect of MMD activities. He then said that the rights of the MMD under art. 26 of the Constitution were being interfered with in that the President was discriminating between the MMD and UNIP members.

Mr Mwanawasa then said that in order to determine the ownership of the newspapers, he decided to conduct a search at the Companies' Registry. His findings were:

- (1) The file of the *Times of Zambia Limited* was missing.
- (2) The *Zambia Daily Mail Limited*: the file was found, it is exh. P9 in these proceedings. That file revealed the following information:
 - (a) The company was incorporated on 27th December, 1978.
 - (b) With a share capital of K700 000,00 divided into 7 000 shares of K100,00 each.
 - (c) There were two shareholders namely the Zambia Publishing Company Limited and Mr Sikota Wina.
 - (d) These shareholders had one share each.
 - (e) A Return of Allotment (Form 23) filed on 23rd December, 1983 showed that 3 000 shares had been issued. Of these Zambia Publishing Company held 2,999 shares and Sikota Wina held 1 share.
 - (f) On 19th December, 1984 another Return of Allotment (Form 23) was filed. This document showed that the nominal share capital had been increased to K1 200 000.00. 850 000 shares had been issued. The 1.2 million shares were of K1.00. Of the 850 000 shares Zambia Publishing Company held 849 998 shares and Mr Sikota Wina had 1 share. There were no minutes on that file indicating that any of those shares had been allotted to anybody else.
 - (g) There was another Return of Allotment of 4th January, 1989 on the file.

That document showed the same information as that shown by 19th December, 1984 Return of Allotment (see (f) above).

- (3) The Zambia Publishing Company Limited.

The file of this company was found and searched. It revealed the following information.

- (a) The company was formed on 16th June, 1966.
- (b) With a share capital of K40 000,00.
- (c) The shareholders were Messrs U. G. Mwila (now deceased) and Nephas Tembo. Each of them had 1 share.

p10

- (d) There was a Return of Allotment of 26th January, 1983. It showed three shareholders: the already mentioned ones each holding 1 share and the Minister of Finance with 648 998 shares.
- (e) Another Return of Allotments of 4th January, 1989 was on the file. It showed the three shareholders already mentioned. Messrs Mwila and Tembo still held 1 share each. The Ministry of Finance held 791 000 shares. There were no minutes showing the increases in the share capital at all.
- (f) Also on the record was an extract of a meeting that was held on 3rd March, 1990. Those minutes showed that the Zambia Publishing Company Limited was in voluntary liquidation.
- (4) The National Media Corporation Limited:

The file was found and inspected. It revealed the following:

- (a) The company was incorporated on 16th January, 1989.
- (b) With a share capital of K25 000 000.00.
- (c) Messrs Joseph C.M. Punabantu and George M. Pelekamoyo held 1 share.
- (d) The Minister of Finance surrendered the shares he had held in the Zambia Publishing Company.
- (e) New shares in this Company (NAMECO) were then issued to the Minister of Finance.
- (f) Mr Punabantu is shown as being a special assistant to the President.

Mr Pelekamoyo appears as Permanent Secretary.

The witness then said that the President of this country is not empowered by the articles of Association of the *Zambia Daily Mail Limited* to issue the sort of directives that he issued namely what to publish and what not to publish. Those directives, he said, having been made in the official capacity of President of the Republic of Zambia, were discriminatory of the MMD and this was contrary to the requirements of art. 25 of the Constitution. He then said that the two daily newspapers in this country are Government and not UNIP bodies. That this is so has been evidenced by the asking of the two editors of those papers who were sacked sometime late last year to report to Cabinet Office and not to Freedom House for redeployment, he said.

In cross-examination the witness was asked if he had tried to find out whether or not instructions were given to the newspapers. In reply he said that those instructions were given at a public conference; that he had no cause to believe that they were withdrawn. He then said that neither the Articles nor the Memoranda of Association of those papers nor the Republican Constitution empower the President to direct those papers' activities or to control the press respectively. Next was Mr Joseph Kunkuta (PW3). He said that he was the Registrar of Companies. This witness repeated what was said by PW2 regarding the shareholding and share capital of the National Media Corporation and the *Zambia Daily Mail Limited*, amongst other repetition. He also repeated that the *Times of Zambia Limited* file was lost.

Next was Dr Stephen Moyo (PW4). In essence this witness produced two videotapes of the news conference in question.

p101

One was titled: K.K. Press Conference Tape 2 of 1.11.90. It is number L.V.C. 0206089. This was the unedited tape recording. It was marked as exh. P13. The other was: K. K. Press Conference reshuffle 1.11.90. This was the edited version of that news conference.

Mr Sikota Wina was PW5. He told the Court that he was a shareholder in the *Zambia Daily Mail Limited*. That Company, he went on, was incorporation by the Government for the purpose of disseminating information to the Zambian people. But over the years, he continued, the Government has turned it into a mouthpiece through the *Zambia Daily Mail*. He then said that a newspaper worth its salt has to inform the public of all newsworthy events.

In cross-examination the witness said that when the company was formed he was a Government Minister. But he was a shareholder in his individual and not his official capacity, he said. He then said that there are supposed to be annual general meetings of this company (the *Zambia Daily Mail* Limited) during which the shareholders can review the paper's progress. No such meetings have been held which he has attended over the years, he said.

The last witness (PW6) was Evans Haamaundu. He told the Court that he is the Company Secretary of the National Media Corporation. The Ministry of Finance and National Commission for Development Planning is the principal shareholder he said. He then said that the companies fall under his corporation. These are the Zambia Printing Company Limited, Printpak Zambia Limited, the *Times* Newspapers Zambia Limited, The *Zambia Daily Mail* Limited and the Newspapers Distributors Limited. The *Times of Zambia* Limited, Printpak Zambia Limited and Newspaper Distributors Limited were acquired from the Zambia National Holdings Limited by the National Media Corporation, he said. Share transfers were executed in or about July 1989 from Zambia Publishing Company Limited to National Media Corporation. He went on and said that share transfer certificate number ZNHL/006/90 (exh. P15) transferred 99 800 ordinary shares in the *Times* Newspapers Zambia Limited from the National Holdings Limited to National Media Corporation. Share transfer certificate number ZNHL/007/90 (exh. P16) transferred 200 ordinary shares in the *Times* Newspapers Zambia Limited from Petronella Chisanga to Mr George Pelekamoyo. Share transfer certificate number ZNHL/004/90 (exh. P17) transferred 499 800 ordinary shares in Printpak Zambia Limited from Zambia National Holdings Limited to National Media Corporation. Share transfer certificate number ZNHL/002/90 (exh. P20) transferred 1 ordinary share in Newspaper Distributors Limited from Axon Soko (deceased) to Milimo Punabantu. Share transfer certificate number ZNHL/003/90 (exh. P21) transferred 1 share in Newspaper Distributors Limited from Petronella Chisanga to George Pelekamoyo. The witness then said that the share transfer certificates referred to above were executed on 1st August 1990. He went on and said that the money which was used to pay for the shares in the National Media Corporation in respect of all the companies came from the Ministry of Finance. The Zambia National Holdings Limited does not hold any shares in any of the companies falling under the National Media Corporation, he said. The Ministry of Finance is the major shareholder in the National Media

p102

Corporation, he added. The *Times* Newspapers Zambia Limited, Printpak Zambia Limited and Newspaper Distributors Limited are owned by the National Media Corporation Limited, which in turn is controlled by the Ministry of Finance etc. being the majority shareholder, said the witness.

In defence of this petition the respondent called one witness, Mr Emmanuel N Nyirenda. He told the Court that he is the Deputy Managing Editor of the *Zambia Daily Mail*. He went on and said that after the news conference of 1st November 1990, his paper did not get instructions that the paper should not be giving coverage to MMD activities. He then said that the covering of the MMD had not stopped since that press conference. To illustrate the truth of this statement the witness showed the Court nine reports of what he called MMD activities between 3 November and 25th December 1990. Those reports were the following:

- (1) 3.11.1990 front page coverage entitled: Pluralists Complete Draft Constitution. This was marked exh. P23.
- (2) 15.11.1990 front page coverage of the proceedings in Choma subordinate court involving some MMD leaders and cadres - exh. P22.
- (3) 21.11.90 front coverage titled: Pluralists Solicit Support Abroad. Exhibit P24.
- (4) 3.12.1990 page 5 coverage titled: MMD name to be retained. Exhibit P25.
- (5) 6.12.1990 two front page stories titled:
 - (a) MMD Denies UNITA Linking.
 - (b) MMD attacks UNIP's Past Record.Both these are in exh. P26
- (6) 14.12.1990 front page story:

MMD Official Get Threats. Exhibit P27.

- (7) 10.12.1990 front page coverage: Move Cheers Wina. Exhibit P28.
- (8) 21.12.1990 front page story: MMD Born Again. Exhibit P29. and
- (9) 25.12.1990 again front page coverage. Story titled: MMD is our Baby, says M.U.Z. Chief. Exhibit P30.

The witness then said that it was possible that some MMD statements may have not been published by his paper. This was because that paper has its own criteria of deciding what to use and what not to use. Some of those statements, he went on, did not meet the necessary criteria for publication, while others may have been received late. He then said that the presidential statement or directive of 1st November, 1990 did not influence the newspaper. If it had, he contended, the many publications quoted above could not have been published. There was no discrimination in the coverage of the MMD news unless this meant the non-giving of front page coverage to that news, he said.

In cross-examination the witness said that the directive which was given by His Excellency the President had no relevance at all so far as he was concerned. He then said that the report carried in exh. P23 was based on the press release marked exh. P3, as well in what the MMD discussed with members of the press soon after that press release that day. He went on and said that exh. P5 was not in any issue of his newspaper. Talking about the instructions of 1st November the witness said that it was within the

p103

Head of State's powers to give instructions to the newspapers. But such instructions were normally channelled through the Ministry of Information. The Head of State had such powers, said the witness, because first the Government owns the papers and second he is the Head of the Government. He then conceded that the articles contained in exhs. P24 to P30 were published after the commencement of this action. Be that as it may, he contended, those stories were not published because the paper had been sued. About the story carried in exh. P22, the witness agreed with Mr Silwamba, the MMD advocate who was cross-examining him, that it concerned court proceedings against some MMD dignitaries and members.

After this witness, it was agreed that the parties' advocates would send written submissions by 11th January, 1991. This undertaking was not honoured by either side. But I did receive the submissions before I wrote this judgment.

The submissions

- (a) The petitioners'

Those submissions were that the presidential directives of 1st November, 1990 constituted a hindrance in the petitioners' enjoyment of their fundamental human rights as guaranteed by arts. 22 and 25 of the Constitution. To help the Court determine this issue two questions were posed:

- (a) Does the executive power of the President include or extend to the exclusive utilisation of public property for the sole benefit of the President or the political party that carries favour with him to the exclusion and express disadvantage of the political party or parties opposed to the President's view?
- (b) Is the property bought and owned by the Government and so acquired at the complete discretion of the Government to be enjoyed by all the Zambian people generally or can it legitimately be used for parties or personal interest?

Then arts. 22 and 25 were reproduced. Since reference will be made to those articles, it is imperative to reproduce them here. They provide as follow:

"Article 22;

- (1) Except with his own consent no person shall be hindered in the enjoyment of his

freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question makes provision:
 - (a) that is reasonably required in the interest of defence, public safety, public order, public morality or public health; or
 - (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private rights of persons

p104

concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the Courts, regulating educational institutions in the interests of persons receiving instruction therein or regulating the technical administration or the technical operation of telephone, telegraphy, posts, wireless, broadcasting or television; or

- (c) that imposes restrictions on public officers and except, so far as that provision or as the case may be, the thing done under the authority thereof is shown not be reasonably justifiable in a democratic society."

Article 25:

- (1) Subject to the provision of clauses (4), (5) and (7) no law shall make any provision that is discriminatory either of itself or in its effect.
- (2) Subject to the provisions of clauses (5), (7) and (8) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
- (3) In this article, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subject to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
- (4) Clause (1) shall not apply to any law so far as that law makes provision -
 - (a) for the appropriation of the general revenues of the Republic;
 - (b) with respect to persons who are not citizens of Zambia;
 - (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
 - (d) for the application in the case of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or
 - (e) whereby persons of any such description as is mentioned in clause (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage which having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.
- (5) Nothing contained in any law shall be held to be inconsistent with or in contravention of clause (1) to the extent it is shown that it makes reasonable provision with respect to qualifications for service as a public officer or as a member of the disciplined force or for the service of a local government authority or a body corporate established directly by any law.
- (6) Clause (2) shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in clause (4) or (5).
- (7) Nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question makes provision whereby persons of any such description as is mentioned in clause (3) may be subjected to any restriction on the rights and freedom guaranteed by arts. 19, 21, 22, 23 and 24 being such a restriction as is authorised by arts. 19(2), 21(5), 22(2), 23(2) or 24(3), as the case may be.

- (8) Nothing in clause (2) shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law."

p105

It was then submitted that the office of the President in Zambia is a creation by art. 37 of the Constitution. The executive power of this country is vested in the President who exercises it either himself or through his subordinates according to the provisions of the Constitution. The meaning of executive power was then defined as: what remains of the function of the Government after legislative and judicial powers have been taken away. It is not limited to the execution of the laws and, provided it is not forbidden by the law, action by government need not wait upon legislation expressly empowering government to do it. The formation of policy and the preliminary steps necessary to implement it by legislation come within the executive power.

The directive of the President of 1st November, 1990 constitutes a formation of policy and the preliminary steps necessary to implement that policy, it was contended. As such, went on the submissions, the directive in question was and still is an act by virtue of a written law or in the performance of the functions of any public authority. The Constitution dictates that such acts should not be 'discriminatory', it was submitted. It is irrelevant, went on the submissions, that the directive may not have been followed up by written instructions to the editors-in-chief or that the editors may have ignored it. Given this state of affairs, was this exercise of executive power justifiable under the Constitution or any other law, it was asked? In answering this question the submissions argued that the President can only exercise his executive power within the provision of the Constitution, which is the instrument that has created that office (of President). In the exercise of that power, went on the submissions, the provisions of arts. 22 and 25 of the Constitution have to be respected. The attention of the Court was then drawn to the fact that the word used in art. 22 of the Constitution is 'hindered' and not 'prevented' or 'stopped'. One case where this word ('hindered') was construed by the Privy Council was cited. This is the Maltese case of *Olivier and Another v Buttigieg* [1966] 2 All E.R. 459. The submissions then quoted the relevant parts of that decision to support the contention in this case that the petitioners have been hindered in their enjoyment of the right given them by art. 22.

It was further submitted that the President does not have the right to trample upon the right of private persons in order to promote his political party. Further the directive in question does not fall under any of the permitted derogations under arts. 22 and 25 of the Constitution. Then the case of *Eleko v Government of Nigeria* [1931] A.C.662 at page 670 was cited in support of the contention that:

"The Executive can only act in pursuance of the powers given to him by the law. In accordance with British jurisprudence no member of the Executive can interfere with the liberty of a British subject except on the condition that he can support the legality of his action before a Court of Justice."

Another case is that of *Molapo v Seeiso* (1966) S.S. 150, a Kingdom of Lesotho decision, was referred to, to show that courts have the power to strike down executive conduct that was motivated by partisan political considerations and consequently discriminatory on people of opposing political views.

It was further argued that the President breached his oath of office by

p106

giving the directive in question. The said oath is prescribed in The Official Oaths Act Cap. 436. Having been guilty of such breach, it was submitted that he should vacate his office.

In ending the submissions, it was contended that the President acted in a discriminatory manner when he gave the directive in question. The case of *Chilufya v City of Kitwe* 8 (1967)

Z.R. 115 was quoted to show that the sort of considerations that gave rise to this directive were political and as such discriminatory. It was then submitted that this Court should so be fined, and grant the petitioners their prayers.

(b) **The respondent's**

The submissions of the respondent, on the other hand, were that this petition is misconceived. It is misconceived because the MMD is not entitled to coverage by newspapers as a matter of right. Neither are the *Times of Zambia* and the *Sunday Times* obliged to accept advertisements from the Movement. The discretion of what to publish and what not to publish lies with the newspapers themselves, went on the submissions. It was then submitted that the petitioners have no rights, natural or accrued, which have been transgressed, as coverage of their statements and activities is merely a privilege.

The submissions then were that the petitioners do not have a *locus standi* in this case as they were not personally aggrieved by the directive. To be personally aggrieved they are required to prove that their rights have been transgressed or infringed. The petitioners have no right to challenge the directive because it was not issued to them but to the newspapers, argued the submissions. In support of this lack of *locus standi* argument two authorities were cited, namely: the late de Smith's book: *Judicial Review of Administrative Action* at page 363. The edition of this book was not stated. At that page the learned author is quoted saying:

"To be 'legally aggrieved' a person must be not merely dissatisfied with or even prejudiced by an action or decision. He must also have been deprived of or refused something to which he was legally entitled. . . . He must be able to point to some 'enchroachment or vested right'. . . ."

The other authority was *R. v Nicholson* [1899] 2 Q.B. 455 at pages 471-2. Since the freedoms alluded to in para. 8(c) of the petition are for enjoyment by the papers, the petitioners are strangers to them (the freedoms) and cannot therefore sue on that basis, it was submitted.

The respondent then submitted that what the President said on 1st November, 1990 was not a directive but was merely an expression of his dissatisfaction that the papers were giving prominence to people who were opposed to UNIP. But even assuming that what was said was in fact a directive, it was argued that that was in order because as Head of State the President has power to give operational guidelines to parastatal companies. The newspapers in question fall under a parastatal company, namely the National Media Corporation. That being the case it was submitted that the petitioners have not been discriminated against. This petition should therefore be dismissed, with costs, ended the respondent's submissions.

p107

The decision

At this stage it is instructive to say that it is common cause in this case that His Excellency the President of the Republic of Zambia held a news conference on 1st November, 1990. This conference was held on the State House lawns. During that news conference the President did say that the newspapers the *Times of Zambia* and the *Zambia Daily Mail* should not be reporting the activities of the MMD; that the *Times of Zambia* was a Party, and the *Zambia Daily Mail* a Government paper; that as such those papers were expected to toe the Government line; that he was speaking both as President of UNIP and of the Republic, and the Government Departments and parastatal organisations should not be advertising in the National Mirror because that newspaper had told lies about him and his colleagues in the leadership of UNIP. I will revert to these findings later in this judgment but first let me deal with the question of the *locus standi* of the petitioners in these proceedings which has been raised by the respondents. It is the respondent's contention, as already stated in this judgment, that the order in question was given by the Head of State to the newspapers and not to the petitioners. As such the petitioners are strangers to that order and cannot found an action on it. It is indeed correct to say that the order in question was made to the newspapers. But it was telling the editors of the papers not to be doing certain things if the MMD leadership were involved i.e. to deny coverage to them. Since the order affected their activities, it

brought the petitioners and their many members within the provisions of arts. 22(1) and 25(2) and (3) of the Constitution. This is especially so in this case where the reason for the order was that they had different political views from those held by the President and members of his Party. The petitioners therefore have a legal basis for the petition before this Court.

The next question for determination is the status of what the papers were told not to be doing. Was that a directive or not? The answer to this is that those who listened to that press conference, and I was one of them, would no doubt say that was a directive, simple and clear. I accordingly find and hold that it was a directive. The reason for that directive has already been stated in this judgment.

The next issue arising from this finding is: did the directive discriminate between the petitioners and their members on the one hand and those who held views similar to those held by the President on the other hand? The answer again is in the affirmative. The nature of the directive is such that it cannot command any other interpretation even from those really hostile to the petitioners. That discrimination was against the petitioners and their followers and in favour of the UNIP leaders and their members.

Was that discrimination legal or, put in other words, was the directive within the provisions of the Constitution: art. 22 and 25? Before I answer this question I would like to examine one or two aspects which arose in this case. The first one is whether or not the office of the President is a constitutional creation. The answer is that he is such a creation, by art.37 of the Constitution.

That office is therefore a public office. The next question is: who owns the *Times of Zambia*, the *Sunday Times of Zambia* and the *Zambia Daily*

p108

Mail? The evidence received in this case showed that UNIP, through its wholly owned company called the Zambia National Holdings (ZNHL) Limited, purchased the Times Newspapers Zambia Limited from Lonrho. The money used to pay for that purchase was a loan partly from the Zambia National Provident Fund (ZNPf) and partly from the Zambia State Insurance Corporation (ZSIC) Limited. I have accepted this evidence since there was no evidence countering its validity. The ZNPf and ZSIC are part of what are called parastatal companies. Under the Zambian arrangement, those companies are regarded as public companies. Their assets and liabilities are thus public assets and liabilities. This means if they are financially sound some of their funds can be used by the Government on projects or requirements of a national stature. Similarly if they are in financial doldrums, the Government will bail them out by pumping in public monies. It is because of this public nature of these companies that there is even a parliamentary committee of parastatal companies. This committee scrutinises the activities of those companies and submits reports of its findings to the National Assembly. Having said these, it is my view that there was nothing wrong for a parastatal company to have extended loan facilities to a UNIP owned company as was done by the ZNPf and ZSIC. Being loans, that company is required to pay that money back, with interest I suppose, to those institutions if it has not already done so. It should I think be pointed out that now that Zambia has reverted to multi-party politics, if loans from parastatal companies are still found to be necessary by UNIP, or its companies, such loans must also be available to other political parties or their companies. It is not just or moral for one political party to be enjoying benefits deriving from institutions of a public nature. All the people of Zambia irrespective of their political affiliations are equally entitled. These could be the benefits accruing from the Civil Service and/or parastatal companies, District Council Houses and markets, to mention only these public institutions and amenities. Even a GRZ personal to holder car is expected to serve the people of Zambia at large in that the services which it enables the particular officer to whom it has been given to perform have to benefit society at large and not just a section of the society which identifies itself with the political party that may be in power at a given time.

Coming back to the ownership of the newspapers, on 16th January, 1989 the National Media Corporation Limited was incorporated. As already shown five companies were transferred to

this new company. The *Times Newspapers Zambia Limited* and the *Zambia Daily Mail Limited* were some of those companies. On 1st August, 1990 share transfers were executed which transferred all the shares (99 800 in number) Zambia National Holdings (ZNH) Limited had held in the *Times Newspapers Zambia Limited* to the National Media Corporation and the 200 shares held by Petronella Chisanga (Mrs) to Mr George Pelekamoyo. The principal shareholder in National Media Corporation is the Ministry of Finance and National Commission for Development Planning. National Media Corporation is thus owned by the Government of the Republic of Zambia and not by UNIP. This means that the *Times of Zambia* and the *Sunday Times* which comprise the *Times Newspaper Zambia Limited* are owned by the Government of this country.

p109

As for the *Zambia Daily Mail Limited* the evidence showed that it was incorporated by the Government of Zambia. I am satisfied that up to this point in time the Government is still the principal shareholder. Even the other shareholders have been such shareholders as officers of the Government and not in their own private capacities. The *Zambia Daily Mail* is therefore a Government paper as well.

This finding is important because if the newspapers had been privately owned by UNIP, or indeed any other person or body, then their management would be at liberty to determine what to publish in them and what not to publish, subject of course only to legal restrictions such as the interests of security, public order, morality or public health, to mention only these.

The next issue to look at and determine is whether when the President gave this directive he did it in the course of his public office of President of this country. The answer is in the affirmative. The occasion was an address to the nation by him as its leader. This nation embraced all the people of different political shades. As such he could not have addressed them in any other capacity than that of Head of State.

I now revert to the question of the legality or otherwise of the directive. I have already held that the directive was made by the President in the course of his official office.

That directive was discriminatory of the petitioners and their cadres. The reasons for the discrimination was that they had held different political views from those of the President and his members. The newspapers which were given the directive are owned by the Government. In the light of these findings, the directive would be unconstitutional unless it falls within one of the permitted derogations. The first such derogation is consent of the victims of the discrimination. In this case none of the petitioners consented to his being excluded from the enjoyment of the freedom of expression. The directive in question was not a written law as it was not enacted by Parliament in order to attract the considerations of art. 22(2)(a), (b) and (c). So those derogations under that article do not apply here. But the directive fell within the 'in the performance of the functions of any public office' part of art. 25(2) of the Constitution. Clause 6 of this art. (25) provides that:

"Clause 2 shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in clause (4) or (5)."

Article 25 has already been reproduced in this judgment. The directive in question does not fall under any of the provisions made in Clause 4 and 5. It does not even fall under (e) of Clause (4) of art. 25 as the sort of discrimination that was made by this directive is not reasonably justifiable in a democratic society. A democratic society allows for differences in people's political views.

The next question is: did this directive constitute a hindrance of the petitioners from their enjoyment of their freedom of expression. My very considered answer is that it did. It did because in order for them or indeed anybody else to fully enjoy this freedom they must be able to receive and publish information. The receipt part is what I would call an inlet of

information to the person. The publication is the outlet of information from that person to another person or other persons. If either of these, inlet or outlet, is blocked without the consent of the individual in question and without any legal justification for the blockade, then that is a denial of the constitutional freedom of expression. This is especially so where the blockade is effected by means of a piece of legislation or by any person in the performance of the functions of any public office or public authority. Since the petitioners were not allowed to publish their views on matters political through the Government newspapers, and by necessary implication even through radio and TV, they were denied the enjoyment of their freedom of expression. Thus they were hindered from exercising their said right. I have found and held that the directive in question, and thus the hindrance already explained, was unconstitutional and therefore illegal. As President of the Republic of Zambia, His Excellency the President whose GRUND NORM is the Constitution of Zambia, is not allowed by the law to make pronouncements which are contrary to any provision of the Constitution. Unless the Constitution is amended, everybody from the President down to the commonest of the common man is obliged to follow to its letter what it says. And this is so whether it is in a one party or a multi-party political arrangement. Since the directive in question was unconstitutional it is hereby quashed.

This then brings us to the next point, namely how newspapers of public ownership, such as the one this judgment has been concerned with, are supposed to operate. My considered answer to this question is that in the case of newspapers they are supposed to be run on the basis of journalistic principles and ethics free from any outsider's interference. Those principles dictate the coverage of all newsworthy events regardless of the source of such news. Anything less than this, and it is very easy for the general public to assess whether or not a given newspaper is working according to sound journalistic principles and ethics, is not acceptable from a public news medium - print or other. In respect of other public companies the President may put his views to the board of directors. It is up to the members of the board to either accept those views and adopt them as those of the board or to reject them. This is because not all proposals made by a Head of State may be in the best interests of a given public company. Even public companies have to be run on sound financial bases. Public money is involved in those companies and that money must be put to work in order to realise profits. It should not be misunderstood that this Court is saying that everything that leaders of any given political party say must be published by public newspapers must be so published. What to publish and not to publish is in the discretion of the editors. But that discretion must be exercised fairly and reasonably, otherwise the paper or papers in question would not be working according to sound journalistic principles. All the people of Zambia, as already stated, are entitled to a fair share of airing their views through these newspapers. That share should not be based on political opinion, race, sex etc. considerations, which have been prescribed by the Constitution as already seen.

Lastly I would like to look at the issue of the sort of news coverage the MMD leaders were receiving before and after the 1st November news conference. As I have already said the discretion of deciding what not

to publish enjoyed by newspaper editors is capable of an objective assessment. From the evidence placed before this Court, especially that of PW1, it is clear that the MMD received very grudging publicity from the newspapers prior to 1st November. The same attitude was shown by the ZNBC.

After the news conference in questions that sort of attitude continued in the *Times of Zambia* until there was a change of leadership. Since that change that paper has endeavoured to report the activities of all the political parties without discrimination. This is as it should be.

As for the *Zambia Daily Mail*, I have found the following:

The article in P23 was a report of the MMD activities. The article in exh. P22 was not of an MMD activity but of court proceedings against some members of that organ. The article P24 concerned MMD activities. The article in exh. P25 concerned news about the MMD. The article entitled 'MMD denies UNITA link' in exh. P26, about the MMD leadership's reaction to some allegations against them by the President, was news about the MMD. The other article in that same newspaper was not MMD news. It was a report of proceedings in the National Assembly. The article in exh. P27 talked about alleged threats made against MMD members in Choma. The source of that piece of news was an MMD official.

Acting on that revelation the police in the province were informing the people of Zambia that the allegation was being investigated. I would put that article as an MMD - initiated news item. The article in exh. P28 was an MMD news item. The article in exh. P29 was also another MMD news. And so was the article in exh. P30.

This means that between 3rd November, 1990 and 25th December, 1990 there were eight articles in the *Zambia Daily Mail* about the MMD. It is of course true to say that all those were post-this-suit publications. Be that as it may I am not able to say that these publications were made because of this suit. I would therefore give the benefit of doubt to the *Zambia Daily* and hold that the publications were made on the professional journalistic assessment of what was newsworthy and what was not newsworthy by the editors. That was reasonable publicity given to the MMD during that period.

When all is said and considered I find and hold that the petitioners have succeeded in their prayers under (a), (b), (c) and (d). I also award them the costs of this action.
