IN THE SUPREME COURT OF ZAMBIA **SCZ APPEAL NO. 76/ 2005**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY MEDIA INSTITUTE OF SOUTHERN AFRICA, PRESS ASSOCIATION OF ZAMBIA, ZAMBIA UNION OF JOURNALISTS, ZAMBIA MEDIA WOMEN'S ASSOCIATION, SOCIETY OF SENIOR JOURNALISTS AND POST NEWSPAPERS LIMITED AGAINST THE DECISION OF THE MINISTER OF INFORMATION AND BROADCASTING.

BETWEEN

THE MINISTER OF INFORMATION AND BROADCASTING SERVICES **1ST APPELLANT**

THE ATTORNEY-GENERAL **2ND APPELLANT**

AND

FANWELL CHEMBO, ON HIS OWN BEHALF AND ON BEHALF OF OTHER MEMBERS OF THE MEDIA INSTITUTE OF SOUTHERN AFRICA **1ST RESPONDENT**

AMOS CHANDA, ON HIS BEHALF AND ON BEHALF OF OTHER MEMBERS OF THE PRESS ASSOCIATION OF ZAMBIA **2ND RESPONDENT**

(P.132)

ZAMBIA UNION OF JOURNALISTS — **3RD RESPONDENT**

MARGARET CHIMANSE, ON HER BEHALF AND ON BEHALF OF OTHER MEMBERS OF THE ZAMBIA MEDIA WOMEN'S ASSOCIATION — **4TH RESPONDENT**

SIMON MWALE, ON HIS OWN BEHALF AND ON BEHALF OF OTHER MEMBERS OF THE SOCIETY OF SENIOR JOURNALISTS — **5TH RESPONDENT**

POST NEWSPAPERS LIMITED — **6TH RESPONDENT**

CORAM: Sakala, C.J., Lewanika, DCJ., Chirwa, Mumba, Silomba JJS on 11th October, 2006 and 15th March, 2007

For the Appellants: Hon. G. Kunda, SC., Attorney-General.

For the Respondents: Dr. P. Matibini of Messrs. Patmat Legal Practitioners.

J U D G M E N T

Sakala, CJ., delivered the Judgment of the Court.

Cases referred to:

1. ***Council of Civil Service Union V. Minister of Civil Service (1984) 3 ALL ER 935.***
2. ***R. V. Secretary of State, exparte Spath Holme Limited (2001) 1 ALL ER 195.***

2. Irwin V The People (1993/94) ZR7

4. *Nzowa V Able Construction Limited SCZ No. 17 of 2004.*

5. *Tshabalala V Attorney General (1999) ZR139.*

6. *Funjika V Attorney-General, SCZ No. 18 of 2005.*

7. *Attorney-General V Chipango (1971) ZR1.*

8. *Shamwana V Attorney-General (1988/1989) ZR4.*

9. *Resident Doctors Association of Zambia and Others V Attorney-General (2003) ZR 88.*

10. *Regina V Secretary for the Home Department Exparte Simms (2000) 2 A.C. 115.*

11. *Thornburn V Sunderland City Council (2003) QB. 15.*

12. *Pepper and Inspector of Taxes V Hart (1993) 1 ALL ER 42 .*

13. *Chiluba V Attorney-General (2003) ZR 53.*

14. *Attorney-General V Lewanika & Others (1993/1994) ZR164.*

15. *Pinner V Everett (1969) 3 ALL ER 257.*

16 .*Sussex Peerage 1843-1845 (65RR) 11 at page 15:*

17. *Seafood Court Estates Limited V Asher (1949) 2KB 481*

18. *Betram V Chemons (1955) L.M.D. 941.*

Legislation referred to:

1. *Constitution of Zambia, Cap 1.*

2. *Independent Broadcasting Authority Act No. 17 of 2002*

3. *Zambia National Broadcasting Corporation (Amendment) Act No. 20 of 2002.*

the Adhoc Appointments Committee appointed under the provisions of the Independent Broadcasting Authority Act number 17 of 2002 and the Zambia National Broadcasting Corporation (Amendment) Act number 20 of 2002.

(ii) A Declaration that the decision by the Minister of Information and Broadcasting Services to stop presentation of some of the names recommended by the Adhoc Appointments Committee appointed under the provisions of the Independent Broadcasting Authority Act number 17 of 2002 and the Zambia National Broadcasting Corporation (Amendment) Act number 20 of 2002 to the National Assembly is null and void and of no effect.

(iii) An order prohibiting the Minister of Information and Broadcasting Services from stopping or vetting presentation of the names recommended by the Adhoc Appointments Committees appointed under the provisions of the Independent Broadcasting Authority Act number 17 of 2002 and the Zambia National Broadcasting

Corporation (Amendment) Act number 20 of 2002 to the National Assembly.

(iv) An order of Mandamus compelling the Minister of Information and Broadcasting Services to submit the names recommended by the Adhoc Appointments Committees appointed under the provisions of the Independent Broadcasting Authority Act number 17 of 2002 and the Zambia National Broadcasting Corporation (Amendment) Act number 20 of 2002 to the National Assembly.

The grounds relied upon to support the claims were that:-

(i) The decision by the Minister of Information and Broadcasting Services not to submit the names recommended by the Adhoc Appointments Committees appointed under the provisions of the Independent Broadcasting Authority Act number 17 of 2002 and the Zambia National Broadcasting Corporation (Amendment) Act number 20 of 2002 to the National Assembly is so unreasonable in that no reasonable authority directing itself to the relevant law and facts could ever come to such a decision.

(ii) The decision is ultra vires the provisions of Section 7 and 4 of Acts number 17 and 20 of 2002 respectively of the laws of Zambia in that improper reasons or considerations have been made in denying the National Assembly the right to consider all names recommended to them by the Adhoc Appointments Committees.

(iii) The Minister of Information and Broadcasting Services does not have the power to vet the names sent by the Adhoc Appointments Committee for presentation to the National Assembly.

(iv) The Minister of Information and Broadcasting Services decision to vet names is based on her personal whims contrary to the provisions of the law and therefore ultra vires.

(v) The refusal by the Minister of Information and Broadcasting Services to forward some of the names sent by the Adhoc Appointments Committee for presentation to the National Assembly amounts to discrimination against them on extraneous grounds.

(P.138)

(vi) The refusal by the Minister of Information and Broadcasting Services to forward some of the names sent by the Adhoc Appointments Committee for presentation to the National Assembly amounts to usurping the role of the National Assembly to ratify or refuse to ratify the names recommended by the Adhoc Appointments Committee.

(vii) It was a genuine and legitimate expectation of the applicants that the nominees selected by the Adhoc selection Committees to which they had been invited to send representatives would be sent to the National Assembly for ratification without any undue influence from the Minister of Information and Broadcasting Services or any other quarter.

The application for Judicial Review was supported by an affidavit sworn by one Fanwell Chembo, authorized to swear on behalf of the applicants. There was also an affidavit in opposition sworn by the then Minister of Information and Broadcasting Services.

The relevant facts are common cause. The then Minister of Information and Broadcasting Services, pursuant to the provisions of ***Section 7(2) of the Independent Broadcasting Authority Act No. 17 of 2002 and Section 4(2) of the Zambia National Broadcasting Corporation (Amendment) Act No. 20 of 2002(1)*** appointed an **Adhoc Appointments Committee** pursuant to the provisions of the two Acts for purposes of appointing members of the Boards of the Independent Broadcasting Authority and the Zambia National Broadcasting Corporation.

The **Adhoc Appointments Committee** duly selected persons to be appointed to the two Boards. Subsequently, the Committee made recommendations to the Minister. The Minister in turn questioned some of the persons recommended. She insisted that she had power to do so. Consequently, she rejected some of the persons recommended on account, **inter alia,** that there was no representation from various sectors of the society as provided for under the two Acts. On those grounds, the Minister did not forward the names to Parliament for ratification in terms of the two Acts. Hence, the applicants commenced these proceedings leading to the appeal before this court.

(P. 140)

The applicant's contention was that the decision of the Minister, not to submit the names recommended by the **Adhoc Appointments Committee** appointed under the provisions of the two Acts, was so unreasonable in that no reasonable authority, directing itself to the relevant law and facts, could ever have come to such a decision; that the Minister's decision was **ultra vires** Section 7 of Act No. 17 and Section 4 of Act No. 20; that the Minister has no power to vet the names recommended by the **Adhoc Appointments Committee;** that the decision to vet was based on personal whims; and that the Minister's refusal to forward some names amounted to discrimination, usurping of the role of the National Assembly to ratify or refuse to ratify the names recommended.

The Minister's contention was that she acted **intra vires** Sections 7 and 4 of Acts Nos. 17 and 20 of 2002, respectively, and did so in good faith and without any discrimination; that she had a duty to ensure equity in the appointment process; and that the recommendations, once made by the **Adhoc Appointments Committees,** are not binding on the Minister.

The learned trial Judge considered the affidavit and documentary evidence as well as the arguments in support and against the application. The court found that there was no disagreement on the facts pleaded; and that both the

(P.141)

parties understood the scope and purpose of the remedy of Judicial review. The court then reiterated the principles of Judicial review in Zambia and in England.

The learned trial Judge then pointed out that his duty was not to inquire or decide the merits or otherwise of the reasons for the Minister's decision, but rather to decide whether or not she acted without jurisdiction; or exceeded her jurisdiction; or whether or not she acted rationally. The court then pointed out that the starting point was to review the decision making process itself. The court then set out the short title of the **Independent Broadcasting Authority Act No. 17.** According to the trial Judge, the short title provided the entire legal parameters and scope of the subject matter of the case. He noted that the provisions of the Act included the establishment of the authority, its functions, and how it should be constituted. The trial Judge took particular note of Section 6 of Act No. 17 which provides that the authority shall not be subject to the direction of any other person or authority.

The court also noted that of most immediate bearing to the dispute was Section 7(2) of Act No. 17 and Section 4(2) of Act No. 20. He set out the provisions of the two Acts and observed that it was the provisions of the two acts that were in dispute.

(P.142)

According to the trial Judge, the first question that arose was whether there was any ambiguity in Sections 7(2) and 4(2) of the two Statutes. He found that the import of the two sections was quite plain and unambiguous. The trial Judge set out a number of questions, and answered them that the Minister had power to appoint members of the two Boards; that the power to appoint members of the two Boards is not unfettered; that the law does not empower the Minister to consider any other qualifications or views other than those prescribed in the two statutes; that the law does not empower the Minister to substitute names of nominees; that the law does not empower the Minister to veto any nominated candidate; and that the Minister had not complied with the prescribed methods of appointment of members of the Boards because she had not availed the National Assembly the names of the recommended appointees for ratification.

On the arguments relating to reference to Parliamentary Debates, the court simply said that it found no ambiguity or absurdity in the law providing for the method of appointment of members of the two Boards; but observed that in Zambia, Hansards have been brought on record for consideration when necessary and when relevant to the matter in issue.

(P.143)

On illegality, the court observed that illegality and non-compliance with a statutory provision were synonymous and found in favour of the applicants.

The trial Judge then considered the ground of irrationality. After citing the definition of irrationality by Lord Diplock in the case of ***Council of Civil Service Union V. Minister of Civil Service,***[1] the learned trial Judge pointed out that the moral of the two pieces of legislation was clearly democratic in nature; and took judicial notice that Zambia had embraced democracy in its full context; and that the two pieces of legislation represented a clear and deliberate effort at reform of the law and the circumstances that previously existed.

The court found that the decision of the Minister, in the context of the new legislation, did not only promote non compliance with the new law, but also prevented and frustrated the vital reform of the Media Law in this country; and that the decision clearly prevented the law from taking its course, thereby making it moribund from its beginning. In this context, the court found that the decision of the Minister was irrational.

In conclusion, the trial Judge entered Judgment in favour of the applicants declaring the decision of the Minister bad at law

and therefore null and void and of no effect; quashed it and made the order of prohibition from vetting the recommended names and also made the order of mandamus, compelling the Minister to submit the recommended names to the National Assembly.

The Respondents appealed to this court against the whole Judgment. Initially, they filed a memorandum of appeal containing three grounds. However, in the brief written heads of argument and in the oral submissions the learned Attorney-General combined grounds one and three and argued them as one ground, while ground two was argued separately.

These two grounds, as set out in the Respondent's written heads of argument, are:

(1) that the trial Judge erred in law and fact in quashing the decision of the 1st Respondent on grounds of illegality, non compliance with the Statutes, irrationality, taking into account extraneous grounds, and also ordering mandamus, and not recognizing that the 1st Respondent is not bound by the recommendation of the **Adhoc Appointments Committee;** and

(2). that the trial Judge misdirected himself in referring to or relying on debates of a few members of Parliament in construing the intent of the two pieces of legislation;

(P.145)

namely: the **Independent Broadcasting Authority Act No. 17 of 2002** and the **Zambia National Broadcasting Corporation (Amendment) Act number 20 of 2002.**

Both the learned Attorney-General and Dr. Matibini filed written heads of argument and made oral submissions based on these two grounds.

The gist of the brief written arguments by the learned Attorney-General on the combined ground one and three is that in terms of Section 7(2) of the **Independent Broadcasting Authority Act number 17 of 2002** and Section 4(2) of the **Zambia National Broadcasting Corporation (Amendment) Act,** the Minister is the only one with the power to appoint members of the two Boards in the entire process. The learned Attorney-General submitted that it follows that in making the appointments, the Minister can either accept or reject the recommendation in accordance with the law on reasonable grounds; that the Minister's decision, to ensure equity in the appointment of the Board Members for fair coverage in the Media rather than having one element dominating the other, does not amount to taking into account extraneous matters; and that the rejection of the names by the Minister could not be faulted on the basis of this ground.

(P.146)

The learned Attorney-General concluded his written arguments and submissions on ground one by contending that there was no illegality, irrationality or taking into account of extraneous matters in the decision making process by the Minister.

The summary of the learned Attorney-General's oral submissions was that the crux of the appeal was the interpretation of Section 7(2) of the **Independent Broadcasting Authority Act No. 17 of 2002** and Section 4(2) of the **Zambia National Broadcasting Corporation (Amendment) Act No. 20 of 2002.** He pointed out that the two Sections are couched in similar terms providing for the appointments of Board Members for the two institutions. He submitted that upon a reading of the two Sections, the word **"recommendation"** must be underlined and emphasized.

The learned Attorney-General pointed out that the procedure prescribed under the two Acts is that the Minister constitutes an **Adhoc Appointments Committee** that interviews the candidates and makes a **"recommendation"** to the Minister. He pointed out that the word **"recommendation"** according to the **Ordinary English in the Oxford Pocket Dictionary and the Collins English Dictionary, Millennium Edition,** and even in the ordinary common sense understanding, is merely a

(P.147)

"suggestion", it is also an **"advice as to what course of action to be taken."**

The learned Attorney General submitted that a **"recommendation," "suggestion" or "advice"** can never be binding to a person to whom it was made. And that in this particular case, the Minister to whom certain members of the Board were recommended, was at liberty to accept or reject, ask for further information or even make suggestions.

The learned Attorney-General noted that the case of **Attorney-*General V Lewanika & Others*** cited by Dr. Matibini, propounded a general rule that where the words of a statute are precise and unambiguous, no more should be done than to give the words their natural meaning.

The learned Attorney-General submitted that the ordinary meaning of the word **"recommendation"** is very clear. And that the power to appoint members of the two Boards is vested in the Minister, while the **Adhoc Appointments Committee** merely plays an advisory role.

The learned Attorney-General observed that Dr. Matibini, in his arguments, tried to interpret the two acts that the purpose was to create two independent institutions which were not to

be at the direction or control of any other authority. The learned Attorney-General submitted that, though the argument was correct, it was only restricted to the operations of the two institutions and not to the mode of constituting or appointing the members of the Boards.

The learned Attorney-General further submitted that the trial Judge, therefore, erred in glossing over the meaning of the word **"recommendation"** and quashing the decision of the Minister on grounds of illegality, irrationality and taking into account extraneous circumstances and granting a mandamus order.

The learned Attorney General contended that the trial Judge should have explained or interpreted the word **"recommendation"** which he did not.

The gist of the short written heads of argument by the learned Attorney-General on ground two is that since the two statutes on the issues in dispute are self contained, the reference to general and varied Parliamentary Debates of the Members of Parliament was inappropriate as per the authority of **R. *V.* *Secretary of State, exparte Spath Holme Limited*[2]**

(P.149)

In his oral submissions on ground two, the learned Attorney-General argued that reliance on the Hansards was irrelevant to the interpretation of the issues raised because the word **recommendation** was unambiguous. For this argument he relied on the case of ***Irwin V The People***[3] and also on the case of ***R. V. Secretary of State, exparte Spath Holme Limited.*** He submitted that the general rule is that we may not look at the Hansards where words are plain.

The Attorney-General finally submitted on ground two that in the context of this case, the Minister is not by any means a rubber stamp or a conveyor belt through which decisions or recommendations of the **Adhoc Appointments Committee** pass for onward transmission to the National Assembly without more; that the Minister is the authority vested with power to make appointments and; according to the two acts the National Assembly could not even consider an appointment until it was presented by the Minister. The learned Attorney-General further argued that the Minister cannot on his or her own volition make Appointments; the Minister has a duty to ensure that there is equity and broad representation in the composition of the Boards. The learned Attorney-General gave an example that where an **Adhoc Appointments Committee** were to recommend only men to the Boards, it would not be unlawful for the Minister to ask for

(P.150)

gender consideration. The learned Attorney-General submitted that at all the three stages of the process of appointment, the Minister was at liberty to raise concerns; the way she did. Because of the use of the word **"recommendation"** in the Act, the Minister would have power to act as she did on the recommendations of the **Adhoc Appointments Committee.**

The summary of the written responses to ground one by Dr. Matibini is that the trial Judge did not only ask himself pertinent questions, but also answered the questions properly; that ground one of appeal raises a fundamental question of statutory construction, that it is settled Zambian jurisprudence that Zambian courts look to literal meaning to give effect to that meaning; that this court has held in ***Lewanika case*** affirmed in ***Nzowa V Able Construction Limited,***[4] following the earlier position in ***Tshabalala V Attorney General***[5]***;*** that if words of a statute are precise and unambiguous, then no more is necessary to interpret those words and the words should be given their natural and ordinary meaning; that the primary rule of interpretation of statutes is that the meaning of any enactment is to be found in the natural and ordinary meaning of the words used; and that the literal and grammatical meaning will prevail where

(P.151)

there is nothing to indicate or suggest that the language should be understood in any other sense.

Dr. Matibini observed that the submission on behalf of the Respondents that the Minister can either accept or reject the recommendation in accordance with the law and on reasonable grounds was an attempt by the Respondents to read into Sections 7(2) of Act No. 17 and 4(2) of Act No. 20 conditions that are not provided for by law. Counsel submitted that this should be deprecated. He pointed out that he was fortified in his submissions by the observation of this court in the case of ***Funjika V Attorney-General,***[6] in which this court reiterated the principle that the primary rule of interpretation is that the words should be given their ordinary, grammatical and natural meaning; that it is only if there is an ambiguity in the meaning of the words and the intention of the legislature cannot be ascertained from the words used by the legislature that recourse can be had to the other principles of interpretation; and that as pointed out in ***Funjika*** case that a court whose duty is to interpret the law, has no right to introduce glosses and interpolations in clear provisions of the law. Dr. Matibini submitted that the provisions of the two Sections are so clear that they do not warrant the glosses and interpolations suggested by the Respondents.

(P.152)

Counsel pointed out that in reaching his determination, the trial Judge referred to the short title of the **Independent Broadcasting Authority Act** and observed that it provided the entire parameters and scope of the subject matter; and that he noted that Section 6 of the Act was of particular importance to the case when it provides that the Authority shall not be subject to the direction of any person or authority.

Counsel further pointed out that the trial Judge observed that the moral of the two pieces of legislation was clearly democratic in nature; that the two pieces of legislation represent a clear and deliberate effort at reform of the law; and that from the reading of the new law, one is left with no doubt that the law is deliberately aimed at detaching government from direct and day to day control of both public as well as private media organizations in the country. It was submitted that the trial Judge was on firm ground in considering the objective and the context of the new legislation in Section 7(2) of Act No. 17 and Section 4(2) of Act No. 20. The cases of **Attorney-*General V Chipango*[7]** and ***Shamwana V Attorney-General*[8]** in which this court pointed out that it is the duty of the courts of law to discern the real intention of the legislation by carefully attending to the scope of the statute to be construed, were cited in support of the applicant's submissions.

(P.153)

It was further submitted that the two Acts aim at enhancing the enjoyment of freedom of expression as enshrined in article 20 of the Constitution; and that the two Acts should not be construed in a manner that tend to abrogate the enjoyment of freedom of expression. The case of ***Resident Doctors Association of Zambia and Others V Attorney-General***[9] was relied upon in support of this proposition.

Finally on ground one, Dr. Matibini urged us to apply the **"principle of legality"** as applied in the United Kingdom that as a rule of Statutory Construction, Statutes must be construed in such a manner as to avoid impinging upon fundamental rights (see cases of ***Regina V Secretary for the Home Department Exparte Simms***[10] and ***Thornburn V Sunderland City Council***[11]

In his oral response apart from repeating his written heads of argument, Dr. Matibini agreed with the learned Attorney General that the gist of the appeal turns around the construction of Section 7(2) of Act No. 17 and Section 4(2) of Act No. 20; and that at the heart of the controversy was whether or not the Minister is empowered either to accept or reject recommendations by the **Adhoc Appointments Committee.**

(P.154)

Counsel pointed out that by this appeal; this court was invited to discover the intention of the legislature. He also pointed out that there are aids or tools in embarking on this journey. Counsel referred us to the cases of ***Attorney-General V Chipango; Shamwana V Attorney-General*** and ***Attorney-General V Lewanika.***

Dr. Matibini contended that the propositions to be distilled from the authorities are:-

(i) If the words of a statute are precise and unambiguous then no more is necessary to interpret those words, they should be given their natural meaning.

(ii) The literal and grammatical meaning should be preferred where there is nothing to indicate or to suggest that the language should be understood in any other sense.

(iii) That it is only if there is ambiguity in the natural meaning of the words and the intention of the legislature cannot be ascertained that recourse can be had to other principles of interpretation.

(P.155)

(iv) That the courts of law whose duty it is to interpret the law have no right to introduce glosses or interpolation in the meaning of the law.

(v) That it is the duty of the courts of law to discern the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.

Dr. Matibini submitted that if it was the intention of the legislature to clothe the Minister with power to reject or modify the recommendation of the **Adhoc Appointments Committee,** it would have said so in unequivocal manner. He invited the court to visit **Section 17(2) of the Legal Practioners Act, Cap 30** of the Laws of Zambia in relation to the appointments of State Counsel.

The summary of the short written responses to ground two by Dr. Matibini is that the English decision referred to by the learned Attorney-General was not binding, but that we have our own binding decision on the point within the Zambian jurisdiction. Dr. Matibini contended that in the context of this matter, the learned trial Judge observed that although he did not find any ambiguity or absurdity in the law that provides for the method of appointment of the members of the two

(P.156)

Boards, he noted, **obiter dicta,** or in passing, that the position in Zambia was somewhat different from that which gave rise to the decision in ***R. V. Secretary of State, exparte Spath Holme*** and in ***Pepper and Inspector of Taxes V Hart***[12]. Counsel pointed out that in the Zambian context in the case of ***Chiluba V Attorney-General***[13] in an application for Judicial Review, the trial Judge observed that the Hansard was allowed on record in both the High Court and the Supreme Court. Counsel submitted that in view that the remarks of the trial Judge in the court below were **obiter dicta,** it was really otiose to press the issue further.

In responding to the learned Attorney-General's oral submissions on ground two, Dr. Matibini observed that the learned Attorney-General had placed heavy reliance on the meaning of the word **"recommendation"** as defined in the English Dictionaries. He submitted that the issue in this appeal goes beyond the English Dictionary meaning of the word **"recommendation".** He argued that on the facts of this case, there were no grounds upon which the Minister would reject the thorough work of the Committee. He submitted that the decision of the Minister was irrational; that the two pieces of legislation were aimed at democratizing the public media in the country; that it was not intended that the Minister plays a passive role; that the Minister initiates the process, and that

(P.157)

she could not be said to be a rubber stamp as she participates in the National Assembly.

The learned Attorney-General made a very brief reply to Dr. Matibini's submissions by pointing out that Section 17(2) of the **Legal Practitioners Act, Cap 30** provides merely what is known as an **"overkill"** in legislative drafting; and that it does not add anything; but merely emphasizes the meaning of the word **"recommendation."**

We have critically examined and considered the affidavit and documentary evidence on record; the Judgment of the trial court as well as the arguments and submissions by both learned counsel.

We are grateful to both learned counsel for the detailed articulation of the law and the authorities cited on the interpretation of statutes.

We propose to deal with the second ground of appeal first which is that the court below misdirected itself in referring to the Hansards or relying on debates of a few members of Parliament in construing the intent of the two pieces of legislation, namely, the **Independent Broadcasting Authority Act No. 17 of 2002** and the **Zambia National Broadcasting**

(P.158)

Corporation (Amendment) Act No. 20 of 2002. Of the authorities cited on the jurisprudence on the construction of statutes, the case of ***Attorney-General Vs Lewanika and Others***[14] sums up what all the other cases have to say, that the fundamental rule of interpretation of Acts of Parliament is that they ought to be construed according to the words expressed in the Acts themselves. The word ***"construe"*** in our considered opinion means reading the statute in whole and not piecemeal.

In our opinion, when the learned trial Judge referred to the title and Section 6 of Act No. 17 of 2002, he read the statute in whole; hence his findings. In this appeal, the facts leading to the proceedings were a part of a series of acts prescribed by the statutes which were to be read in whole in order to understand the intention of Parliament. Section 6 of Act No. 17 of 2002, does clearly give guidance as to the intention of Parliament when it states ***"except as otherwise provided in this Act, the Authority shall not be subject to the direction of any other person or authority."*** It is this autonomy or independence of activity on the part of the institutions established by these pieces of legislation, which would give guidance to the court as to the core meaning of the provisions.

(P.159)

We agree with Dr. Matibini that the learned trial Judge did not rely on the Hansards. He discussed the avenue of interpretation by reference to Hansards but discarded it when he finally stated that the provisions of the Acts were clear and unambiguous. We are of the view that nothing more should be said on this ground. The second ground of appeal therefore fails.

We now turn to consider the combined ground one of appeal. The question for determination that was before the trial court and now before us in this appeal is one of the proper construction of two similar sections of two different Acts; namely: **Section 7(2) of the Independent Broadcasting Authority Act No. 17 of 2002 and Section 4(2) of the Zambia National Broadcasting Corporation (Amendment) Act No. 20 of 2002.** The upshot of the entire arguments and submissions on behalf of the parties on ground one centers on the real meaning of these two sections. Both Section 7(2) of Act No. 17 of 2002 and Section 4(2) of Act No. 20 of 2002 read as follows:-

> ***"(2) The Board shall consist of nine part-time members appointed by the Minister, on the recommendation of the appointments committee, subject to ratification by the National Assembly."***

(P.160)

At the outset, we must indicate that we are in total agreement with the *principles governing the interpretation or* construction of statutes as laid down in all the cases cited by both the learned Attorney-General and Dr. Matibini in support of their respective written heads of argument and oral submissions.

It is, however, reasonably very clear to us that the kernel of dispute centers on the proper interpretation of the word **"recommendation".** This position is amplified by the events that gave rise to the application in the court below.

In the court below, the summary of the applicants' complaint was that the decision of the Minister not to submit the names recommended by the **Adhoc Appointments Committee** appointed under the provisions of the two Acts was unreasonable; that the Minister's decision was ultra vires Section 7(2) of Act No. 17 of 2002 and Section 4(2) of Act No. 20 of 2002; that the Minister had no power to vet names recommended by the Committee; that the decision to vet was based on personal whims; and that the Minister's refusal to forward the recommended names amounted to usurping the role of the National Assembly.

(P.161)

It was not in dispute that the Minister did make a decision not to take all the names of the persons recommended by the Committee to the National Assembly for ratification. It was also not in dispute that the Minister did decide to veto some of the recommended names.

The learned trial Judge in deciding whether the Minister's decision not to submit the names of the nominees and to veto some was null and void for illegality; first reviewed the decision – making process itself. Thereafter, he examined the various provisions of the two Acts. After setting out the provisions of Section 7(2) of Act No. 17 and Section 4(2) of Act No. 20, the learned trial Judge had this to say:-

> ***"For the applicants to succeed under the ground of 'illegality' in the present case, the Applicants have to show proof that the decision of the Minister contravened or exceeded the terms of the afore-quoted provision in the two statutes in issue which authorize the decision making process itself, or that the decision pursues an objective other than that for which the power to make the decision was conferred.***

(P.162)

On my part, I have looked at the power and the context in which the power to appoint Directors or Members is to be exercised in order to determine whether the Minister's exercise of that power is within or intra vires the two statutes in issue.

The first question that arises to my mind is whether there is any ambiguity in Sections 7(2) and 4(2) of the two statutes as already quoted. In my considered view, the import of the two Sections in issue is quite plain and unambiguous. They simply mean what they say, namely that the Boards shall consist of nine part- time Directors or Members appointed by the Minister on the recommendation of the Appointments Committee, subject to ratification by the National Assembly. It is also important to recognize that the law in issue does not only provide for the qualifications of the nominees, but it also provides for the methods of appointment of members to the two Boards. None of the parties to this matter has drawn the Court's attention to any ambiguity".

Thereafter, the learned trial Judge set out a number of questions to which he provided answers that the Minister had power to appoint members of the two Boards; that the power is

(P.163)

not unfettered; that the law does not empower the Minister to consider any other qualifications; that the law does not empower the Minister to substitute the names; that the law does not empower the Minister to veto any nominated candidate; and that the Minister did not comply with the law.

The court then found that the acts of the Minister were illegal. This finding was made in the face of the earlier findings that the two Sections in issue were plain and unambiguous. Above all, it was made without the learned trial Judge even attempting to interpret the meaning of the word **"recommendation,"** as used in the two sections of the two Acts.

On the issue of irrationality, the trial Judge observed that the moral of the two pieces of legislation was clearly democratic in nature. He then stated:-

> ***"The decision of the Minister in the context of this new legislation, does not only promote non-compliance with the new law, but also prevents and frustrates the vital reform of the Media law in this country. The decision clearly prevents the law from taking its course; thereby making it moribund from***

(P.164)

its beginning. In this context therefore, I have found the Minister's decision to be irrational".

Thereafter, the learned trial Judge entered Judgment in favour of the applicants; making the orders as already indicated.

In our considered opinion, the approach of the trial Judge in his interpretation of the two sections was erroneous in a number of ways. In the first place, he never defined or construed the import or definition of the word **"recommendation"** in the two Sections, despite his findings that the two Sections were plain and an unambiguous. Secondly, the issue was not the moral of the two statutes or the democratization of the media, but the interpretation of the two sections. The learned trial Judge having found that the two Sections were plain and an unambiguous, he should have given their meaning by applying the **maxims** of interpretation of statutes. This, the learned trial Judge did not do. But, instead, he decided the issue on the moral of the two statutes and the democratization of the Media.

Issues of the moral of the two statutes and democratization of the Media would perhaps have been relevant if the validity of the two sections were constitutionally challenged and we were

asked to rule whether the two sections were valid. But this was not the case here.

In the circumstances, before the decision of the Minister could be declared illegal or irrational; the substantial question that the court had to determine first was whether the use of the word **"recommendation"** in the two sections envisaged any discretion on the part of the Minister. This question again boils down to the issue of interpretation of the two Sections. If the word **"recommendation,"** implied discretion, the Minister's decision could not be nullified on the basis of illegality unless shown that she exercised the discretion unjudiciously. In our view, the crucial issue in these circumstances, was the meaning of the word **"recommendation"** in the two sections. Once the meaning of the word **"recommendation"** is understood in the context of the two Sections, then the issue of **"illegality"** or **irrationality** only arises if she exceeded her jurisdiction or the decision was unreasonable or outrageous. Since the trial judge did not interpret the word **"recommendation"** as used in the two Sections; We are now at large to interpret that word.

In the case of ***Pinner V Everett,***[15] a case referred to by the trial Judge, Lord Reid at pages 258 to 259 had this to say on interpretation of any **word or phrase** in a statute:-

(P.166)

"In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute."

And as ***Tindal*** CJ said in the old English case of ***Sussex Peerage***[16]

" If words of a Statute are in themselves precise and an unambiguous then no more can be necessary than to expound those words in their natural and ordinary source."

Indeed, as ***Lord Denning*** observed in the case of ***Seafood Court Estates Limited V Asher***[17].

"A Judge must not alter that of which it (a statute) is woven, but he can and should iron out the creases."

(P.167)

In the instant case, the crucial question we must ask, in our view, is: what is the natural or ordinary meaning of the word **"recommendation"** in the context of the two Sections of the two Acts? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that we should look for some other possible meaning of the word **"recommendation".**

We take note that the learned trial Judge, in his Judgment never alluded to nor explained and or even mentioned the word **"recommendation".** He, however, attempted to define the word by making comparisons with the appointments of the Director of Public Prosecutions, the Judges and the Auditor-General, all public officers for which, according to the trial Judge, the law does not allow interference by any person or authority. The trial Judge, in our view, misplaced the comparisons. The non-interference in relation to the public officers cited by the trial Judge relates only to their operations and not to their appointments. Public officers cited by the trial Judge, according to the constitutional provisions, are appointed by the President on **"advice,"** in case of the Judges, by the Judicial Service Commission, subject to ratification by the National Assembly. In practice, it is common knowledge that the President is not bound by the **"advice"** of the Judicial Service Commission. There are in

(P.168)

fact examples where the President has actually rejected the **"advice".** In the event, the comparisons the trial Judge made do not support his reasoning.

In the instant case, the trial Judge took a route of examining the sections in broad terms without examining the words or phrases thereby glossing over the sections and adding his own interpolations. The result was that the learned trial Judge did not iron out creases but infact altered the very fabric of which the statute is woven. The approach taken by the learned trial Judge amounts to nothing but the usurpation of the legislative powers of the legislature by the Judiciary. It is not the duty of the courts to edit or paraphrase the laws passed by Parliament. The duty of the courts is to interpret the laws as found on the statute.

Equally, Dr.Matibini never defined the word **recommendation"**in his written or oral submissions by embarking on discussing the philosophy of the two Acts and democratization of the Media.

The question is: What is the natural or ordinary meaning of the word **recommendation"** in the context of the two Sections? According to the Attorney-General, the Minister is the only one with the power to appoint Members of the two

(P.169)

Boards in the entire process; that in making the appointments the Minister can either accept or reject the **"recommendation"** on reasonable grounds, to ensure equity in the appointments.

The learned Attorney-General submitted that the word **"recommendation"** in English Dictionaries and even in the ordinary common sense understanding means a **suggestion" "advice" "as to what course of action to take".** The Attorney-General contended that a **"recommendation"** as a **"suggestion"** or **"advice"** can never be binding to a person to whom it is made. He submitted that in the context of the two Acts, the Minister, to whom certain members were recommended, was at liberty to accept or reject or ask for further information or even make suggestions. He further submitted that the Committee merely plays an advisory role; that a distinction must be made between appointment of members of the Boards and the operations of the Boards which have to be independent; that the trial Judge should have explained the word **"recommendation,"** and that the Minister is not by any means a rubber stamp or conveyor belt.

Dr. Matibini agreed that the words, in interpreting a statute, must be given their natural and ordinary meaning; and that the literal and grammatical meaning must prevail where there

(P.170)

is nothing to indicate or suggest that the language should be understood in any other sense.

Dr. Matibini submitted that the issue in this appeal goes beyond the English Dictionary meaning of the word **"recommendation".**

As already observed, the issue for determination in this appeal is the proper construction of the word **"recommendation".** Both the Attorney-General and Dr. Matibini are agreed on the principles of interpretation. The first approach is to ascertain the natural or ordinary meaning of **any** word or phrase in a statute. Here the word is **"recommendation".** If we may repeat, the learned trial Judge did not ascertain or explain the natural or ordinary meaning of the word **"recommendation".** But Dr. Matibini argues that the issue in this appeal goes beyond the English Dictionary meaning of the word **"recommendation".** He did not suggest that meaning beyond the Dictionary.

The Longman Dictionary of Contemporary English, The Living Dictionary, New Edition, gives the following meanings of the word **"recommendation"**

(P.171)

(a) official advice given to someone about what to do; and

(b) a suggestion to someone that they should choose a particular thing or person that you think is very good.

According to ***Stroud's Judicial Dictionary of Words and Phrases,*** the word **"recommendation"** is defined as follows:-

(a) a freedom to follow or not to follow; and

(b) to accept or reject the recommendation according to one's discretion.

Strouds refers to a case of ***Betram V Chemons[18].*** The Reports are not in our Library.

In our considered view, the foregoing meanings of the word **"recommendation"** do not lead to some result which cannot reasonably be supposed to have been the intention of the legislature. It is and was unnecessary to look for some other possible meaning of the word; the natural and ordinary meaning suffices. Indeed, the issues of morals, democracy, or freedom of speech were unnecessary in defining the word

"recommendation". Equally, there was no need to apply **"the principles of legality"** in the present case. Section 17(2) of the **Legal Practitioners Act, Cap 30,** in our view buttresses the position that a **"recommendation"** by its very nature can be accepted or rejected. We accept that the drafting of that Section was an **overkill.**

We are satisfied that the word **"recommendation"** in the context of the two sections connotes or implies a discretion in the person to whom it is made to accept or reject the **"recommendation".** We agree with the submissions of the learned Attorney-General **in toto** that the Minister cannot be a rubber stamp or a conveyor belt in the process of appointments of members to the two Boards.

Indeed, a distinction ought to be made between constituting the Boards and the operations of the Boards. In constituting the Boards, the Minister is not bound to accept the names recommended by the **Adhoc Appointments Committee.** But once the Board has been established, then it becomes independent and in its operations is beyond the control of the Minister or any other authority or person as provided in Section 6 of the **Independent Broadcasting Authority Act, No. 17 of 2002.**

(P.173)

For the foregoing reasons, We are satisfied that there was no **illegality** in the Minister vetting certain names recommended to her. Her decision could not be said to have been **outrageous** or **irrational.**

On the combined grounds one and three, we allow this appeal. The appeal is, accordingly, allowed. The Judgment of the trial court is set aside.

In the circumstances of this case, we make no order as to costs. Each party will bear its own costs.

.....

E. L. Sakala

CHIEF JUSTICE

.....

D. M. Lewanika

DEPUTY CHIEF JUSTICE

(P.174)

.....

D. K. Chirwa

SUPREME COURT JUDGE

.....

F. N. M. Mumba

SUPREME COURT JUDGE

.....

S. S. Silomba

SUPREME COURT JUDGE

/rmc