IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CONSTITUTIONAL REFERENCE CASE NO. 3 OF 2019

BETWEEN:
THE STATE
-VERSUS-
MALAWI COMMUNICATIONS REGULATORY AUTHORITY.....RESPONDENT
-AND-
THE REGISTERED TRUSTEES OF NATIONAL MEDIA INSTITUTE OF SOUTHERN AFRICA.....1ST APPLICANT
-AND-
TIMES RADIO LIMITED.....2ND APPLICANT
-AND-
ZODIAK BROADCASTING STATION LIMITED.....3RD APPLICANT

Coram: **Hon. Justice Charles Mkandawire**
Hon. Justice Dr. Chifundo Kachale
Hon. Justice Annabel Mtalimanja
Mr. Ian Malera & Mr. John Suzi Banda, of Counsel for the Applicants
Mr. Kingsley Mapemba & Mr. Innocent Kadammanja, of Counsel for MACRA
Mrs. Namagonya, Court Reporter
Mr. Zulu, Court Clerk

JUDGMENT

(Under Order 19 rule 12 of the Courts (High Court) (Civil Procedure) Rules, 2017)[1]

A. Introduction: Factual Context of the Constitutional Referral

1. On 21st May 2019 Malawi went to the polls conducted by the Malawi Electoral Commission (MEC); at stake were Presidential, Parliamentary and Local Government seats across the country. On 29th May 2019 MEC declared the incumbent Prof Peter Mutharika as winner of the presidential

[1] Unanimous decision of the Court read by Justice Dr. Kachale on behalf of the bench

race. The opposition candidates Dr. Lazarus Chakwera and Dr. Saulos Chilima contested that outcome and commenced judicial proceedings seeking various reliefs including the annulment of the election results.[2] In the meantime, intense public debate ensued on various platforms including the local radio and television networks. Among others, citizens participated in live radio phone in programs to express their views on various aspects of the electoral process; in the circumstances these on air discussions proved quite popular.

2. However, on 7th June 2019 the Director General of Malawi Communications Regulatory Authority (MACRA) issued a so-called 'Public Announcement' effectively banning all live radio phone in programs across all local radios. When the National Media Institute of Southern Africa (NAMISA) tried to engage MACRA in order to explore the possibility of reviewing its blanket ban, those efforts proved futile. Instead, on 28th June 2019 the Minister of Information and Civic Education issued Communications (Broadcasting) Regulations 2019; Regulation 30 of which banned all live radio phone ins unless the station had installed a delay-machine. In the end NAMISA, Times Radio Group, Zodiak Broadcasting Station Limited and Capital Radio Malawi Limited (the Applicants) commenced judicial review proceedings to examine the legality of the Direct General's ban; those proceedings were eventually transformed into the present constitutional reference.

B. ISSUES FOR THE DETERMINATION OF THE CONSTITUTIONAL COURT

3. By this process we have been convened to examine the constitutional validity of the purported ban by the MACRA Director General as well as the subsequent Regulations promulgated by the responsible Minister in June 2019. In summary, therefore, these proceedings require the court to determine the following questions:

    i. Whether the Defendant followed the right procedure under the Communications Act 2016 in coming up with the suspension of all radio phone in programs through the Public Announcement of 7th June 2019?

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[2] See **Prof AP Mutharika & Another-v-Dr SK Chilima & Another, MSCA Const. Appeal No. 1 of 2020** (unreported) for outcome of that judicial process.

ii. Whether the suspension is a lawful limitation of the rights to freedom of expression, the press, opinion and economic activity?

iii. Whether in promulgating the Communications (Broadcasting) Regulations 2019 the Minister followed the right procedure under the Communications Act as well as the Constitution?

iv. Whether the Communications (Broadcasting) Regulations 2019 are a lawful limitation of the rights to freedom of expression, press, opinion and economic activity?

v. Who should bear the costs of these proceedings?

C. LEGAL POSITIONS OF THE PARTIES REGARDING THE ISSUES RAISED

4. As regards the 7th June 2019 ban by MACRA Director General, the Applicants have argued that the same was irregular because it was rather too broad in its reach i.e. if MACRA wanted to address the alleged infringement of licensing terms then it could easily have targeted its measures at the 3 offending broadcasters, instead of banning all radios across the country, including community radios. Thus the Applicants have argued that the measure represented an unjustifiable limitation of their freedoms namely of opinion, expression, the press and economic activity as guaranteed under sections 34,35,36 and 29 of the Constitution respectively.[3] The Applicants therefore contend that the measure neither met the administrative justice guarantees of section 43 nor the permissible limitation standards under section 44(1) and (2) of the Constitution.

5. With respect to the Communications (Broadcasting) Regulations 2019, the Applicants have argued that the relevant statutory procedure for promulgation was never followed at various levels, rendering the product of such an irregular process unlawful and unconstitutional: specifically, the Minister purportedly made the Regulations under section 200 of the

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[3] Section 29 of Constitution: Every person shall have the right freely to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi.
Section 34 of Constitution: Every person shall have the right to freedom of opinion, including the right to hold, receive and impart opinions without interference.
Section 35 of Constitution: Every person shall have the right to freedom of expression.
Section 36 of Constitution: The press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information.

Communications Act 2016. However, that power can only be exercised on recommendation of the Authority. Furthermore, section 202 of the Communications Act 2016 obliges the Authority to consult affected stakeholders before taking any decision and also to publish the outcome of such consultations.

6. Therefore, according to the Applicants no such consultations occurred, or if they did their results were never published as required; hence rendering any decision by the Authority (assuming there was one) to recommend promulgation of Regulations to the Minister invalid. The Applicants have pointed out that the Power Point Presentation of 28th October 2015 that was produced by the Respondent could not be relied upon by MACRA as evidence of stakeholder consultations on two fronts: the current statute came into force a year later in 2016. Its scheme as envisaged under sections 200 and 202 reflects a marked departure from what obtained in section 57 of repealed the Communications Act of 1999. Secondly, if there had been any stakeholder consultations as contended by MACRA, the Authority should have provided proof of the identities of those stakeholders as well as evidence of the publication of the same as required under the current statute.

7. Above and beyond that, section 58 of the Constitution prescribes the legislative process necessary before any subsidiary legislation-such as the Communications (Broadcasting) Regulations, 2019-can take effect. The same must be laid before Parliament according to its Standing Orders. Standing Order 61 provides two different modes of compliance: first, if the Parliament is in session then the responsible minister is supposed to table the regulations before the house physically. If the house is not sitting, then presenting the subsidiary legislation to the Clerk of Parliament suffices.

8. In that vein, MACRA has produced a letter dated 16th September 2019 by which the Minister of Information and Civic Education submitted the Communications (Broadcasting) Regulations 2019 as well as other materials before the Clerk of Parliament; that in the view of MACRA satisfied the requirements of section 58 of the Constitution. The Applicants, on the

other hand, have pointed out that since Parliament was sitting from 9th September 2019 to 11th October 2019 mere submission of the proposed Regulations to the Clerk of Parliament cannot be deemed as adequate compliance with the duty to lay the same before Parliament as prescribed.

9. On the other hand, according to MACRA the promulgation of the ministerial Regulations superseded the initial ban by the MACRA Director General; rendering any enquiry into the validity or otherwise of the initial ban otiose. However, the applicants have been keen to emphasize that both the content and the process of promulgating the ban needs to be interrogated from a constitutional perspective in order to provide guidance on how such broad statutory powers might be properly exercised in future.

10. In any event, so MACRA argued, the said Communications (Broadcasting) Regulations had been duly enacted under section 200 of the Communications Act 2016 and in full compliance with the terms of section 58 of the Constitution. As such, they cannot be faulted for being either procedurally irregular or substantively unconstitutional. Specifically, they do not represent an unjustifiable limitation of the freedoms of opinion, expression, the press or right to economic activity as contended by the Applicants.

D. APPROACH ADOPTED BY THE COURT IN DISPOSING OF THIS REFERRAL

11. The principles governing the exercise of this Court's constitutional interpretation mandate have been well settled; among others we are enjoined to adopt interpretative methodologies and principles that reflect the unique character and nature of our Constitution, see **Fred Nseula-v-Attorney General [1999] MLR 313**. In addition, we have been reminded to read the entire Constitution as a document propounding a fundamentally democratic governance and political accountability template which is structurally coherent and mutually legally reinforcing in design, see **In The Matter of Presidential Reference of a Dispute of a Constitutional Nature under Section 89 (1) (h) of the Constitution (sic)[2007] MLR 174**. Furthermore, in applying constitutional provisions the courts must approach their task in a manner that reflects fidelity to the peculiar historical context of its creation and general principles of sound

jurisprudential analysis of pertinent issues, see **State-v-Malawi Electoral Commission, ex parte Mzima [2005] MLR 442.**

12. In disposing of this case we have adopted the position that even if the Director General's ban might have been overtaken by the Communications (Broadcasting) Regulations 2019, there was still the constitutional imperative to scrutinize whether such purported exercise of MACRA's broad regulatory mandate under the Communications Act 2016 was valid and lawful under the prevailing constitutional and legal order. Indeed, in our view, accepting the position of MACRA that the Regulations had superseded the ban seems pre-emptive of the fundamental inquiry whether the Regulations are legally valid in the first place.

13. Overall the general approach has been to examine the issues earlier enumerated from two broad fronts: firstly, to examine the due process compliance of both the ban and the ministerial Regulations and secondly to scrutinize the content of both the ban as well as the regulations to verify whether they pass the relevant constitutional muster for limitation of rights and freedoms. In doing all this, the need to articulate some jurisprudential guidance on the exercise of the Authority's far reaching regulatory mandate under the Communications Act 2016 has informed the treatment of the material under our consideration.

E. COURT'S REASONED DETERMINATION OF THE ISSUES

i. The 7th June 2019 Ban by MACRA Director General

14. For reasons that will become clear in due course it might be useful to recite unedited the measure which kick started this whole process i.e. the ban of 7th June 2019. On that day the Director General issued the following order:

> MACRA
> Public Announcement
> 7th June 2019
>
> The Conduct of Broadcasters on Coverage of Post Elections Events
>
> The Malawi Communications Regulatory Authority (MACRA) has noted with regret the conduct of some broadcasters who are indulging themselves in careless and unethical coverage of post elections events.
>
> The Authority would like to inform broadcasters that such broadcasts have the potential to incite the masses into violence.

The Authority hereby advises broadcasters to conduct themselves professionally and desist from broadcasting any material that would incite violence. MACRA further advises all broadcasters to comply with the Code of Conduct for Broadcasters as stipulated in the Communications Act Second Schedule which among others stipulates the following:
Broadcasting licensees shall: -

(a) Not broadcast any material which is indecent or obscene or offensive to public morals (including abusive or insulting language) or offensive to the religious convictions of any section of the population or **likely to prejudice the safety of the Republic or public order and tranquility.**
(b) Exercise due care and sensitivity in the presentation of material which depicts or relates to acts of brutality, **violence,** atrocities, drug abuse, and obscenity.

The Authority is hereby suspending all phone in programs with immediate effect until further notice. The Authority will continue executing its broadcasting monitoring mandate during this period and shall not hesitate to invoke regulatory sanctions to any broadcaster that deliberately breaches the above mentioned provisions of the law.

Signed
Godfrey Itaye
Director General
(Emphasis in the original)

15. On the face of it the public announcement might appear quite legitimate: however, when examined within the context of the specific details of the legislation on whose basis it was purportedly issued several issues arise:

a. First and foremost, it was issued and signed by the Director General of MACRA. In reality the Director General is not the same as the Authority: in absence of evidence that the Director General was communicating a decision of the Authority as constituted under section 7[4] of the Communications Act 2016 there are serious challenges about the legal validity of this measure. The Authority appoints the Director General under section 19; [5]whereas section 21(1) outlines the mandate of the Director General, it does not empower him or her to make any decision for the Authority.[6]

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[4] Section 7: The Authority shall consist of (a) Six members appointed in accordance with section 8; (b) the following ex-officio members-

(i) The Secretary of Information or his representative;
(ii) The Secretary to the Treasury or his representative;
(iii) The Solicitor General or his representative.

Section 8 (1) The President shall appoint members of the Authority other than ex-officio members, and each appointment shall be subject to confirmation by the Public Appointments Committee of Parliament.

[5] The Authority shall appoint the Director General who shall be the chief executive officer of the Authority and shall, subject to the general supervision of the Authority, be responsible for the day to day operations of the Authority.

[6] Section 21(1) The Director General of the Authority shall be in charge of the overall administration of the Authority and, in particular, shall have the following powers and functions-

(a) Implementing the decisions of the Authority;

b. Although section 26[7] empowers the Authority to delegate some of its powers to the Director General, in the absence of written proof of effective delegation, it cannot be assumed that there were valid premises upon which the Director General purported to act. Indeed, given the gravity of the measures under consideration, it would be quite difficult for the Authority to delegate such extensive powers in any case. As was decided recently by the Constitutional Court in **Dr SK Chilima and another-v-Prof AP Mutharika and another, Constitutional Reference No 1 of 2019** where the court (at **paragraphs 1098 to 1101** of its transcript) disapproved of the conduct of the Electoral Commission in purporting to delegate its quasi-judicial functions to its Chief Elections Officer on the basis of a statutory provision similar to section 26 of the Communications Act 2016.

c. Commenting on the proper purview of section 9 of the Electoral Commission Act (ECA) the ConCourt made the following instructive observations: *"When section 9 of the ECA is considered in light of section 12(a)(b) and (c), section 40, as well as section 78 of the Constitution, the Commissioners could not afford to delegate [their] quasi-judicial powers and functions, which result in making legally binding and appealable decisions....the powers of the Commission to make decisions on the information that is contained on documents whose ultimate end will affect candidates' rights as well as voters' rights cannot be delegated".* In essence, the responsibility of the duty-bearer cannot be lightly delegated when it concerns its essential functions. By analogy, therefore, as the regulator of Content Licences in the Communications Act the Authority as constituted under section 7 would be expected to take such significant decisions as was contained in the Public Announcement of 7th June 2019, and not the Director General.

(b) Keeping the Authority informed of the activities of the Authority;
(c) Submitting strategic plans, action plans, and budget support programs to the Authority for approval;
(d) Implementing the strategic plans, action plans and budget support programs;
(e) Ensuring that activities of the Authority comply with the relevant laws, policies and regulations;
(f) Acting on behalf of the Authority; and
(g) Generally, perform such functions and duties as may be assigned to him by the Authority.

[7] Section 26(1) The Authority may delegate some of its functions under this Act to the Director General, any member of the Authority, or member of staff of the Authority.
(2) The Director General of the Authority may, with the approval of the Authority, delegate any power or function assigned to him under this Act, to any member of staff of the Authority.

d. Above and beyond this jurisdictional competency challenge, the failure to cite within the so-called Public Announcement the specific legislative provision under which the ban was purportedly made raises the question what sort of measure it specifically was: was it a suspension of license under section 43[8] or a cease and desist order under section 173[9] of the Communications Act 2016?
e. Whereas section 43 provides for procedure for suspending or revoking licences, no such procedures guaranteeing natural justice appeared to have even exercised the mind of the author of the Public Announcement.
f. Section 173 provides some residual powers for imposing sanctions besides the criminal ones stipulated under the Act: these include cease and desist measures-akin to the language in the third paragraph of the above-quoted Public Announcement. But even such have to be directed at the person in breach and not issued at-large. For these purposes 'person' is as defined under section 2, the General Interpretation Act to 'include...any company or association or body of persons, corporate or unincorporated'.
g. Without the Director General disclosing on the face of the order which specific statutory provision was relied upon to issue the Public Announcement it becomes rather difficult to appreciate its legal premise. The need to specify the relevant legal provision has a bearing on the mode of appeal. For example, if the measure was issued under section 173 of the Communications Act 2016, anyone dissatisfied with a sanction imposed under the Authority's dispute resolution mandate may appeal to the High Court within 30 days; on the other hand, an order under section 43 would be subject to judicial review as stipulated under

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[8] Section 43(1) The Authority may suspend or revoke a licence granted under this Act if [licensee is in breach of terms of licence or the law or goes into liquidation or becomes otherwise unqualified]

[9] Section 173(1) Where the Authority is satisfied that a person has breached or is likely to breach any requirement under this Act, the Authority shall make an appropriate order against that person.

(2) The order made by the Authority under subsection (1) may include any of the following

(a) compliance order

(b) cease and desist order requiring a person to stop or refrain from doing an act which is in contravention of this Act.

(c) a compensation order

(d) suspension or withdrawal of licence for a maximum period of 3 years.

(e) any other order considered appropriate by the Authority.

(3) an order made under this section shall be in writing, shall specify reasons and shall be served on the person concerned.

section 196 of the Communications Act 2016-all that assumes that a licensee has been properly served with such an order in the first place.

h. The scheme of sanctions under section 173, as noted above, assumes that someone has lodged a complaint to MACRA against a licensee's exercise of its right to publish information. In that vein, it would appear that unless there was proof of such a complaint by a third party the Authority would lack the factual basis to invoke any power to issue cease and desist measures. In other words, the law seems to circumscribe the capacity of the Authority to issue certain measures unless the proper scenario has been presented for its intervention.

16. Being a creature of statute MACRA is bound to act within the strict confines of the empowering legislation. No matter how urgent the situation, the rule of law dictates that any public authority exercise only such power as has been clearly assigned under valid legal instrument. Thus, while acknowledging that the present communications management regime envisages a scenario under section 43(1)(f) of the Act as read with Regulation 22 (Regulations for Content Services:2nd Schedule to the 2016 Act) empowers the Authority to take certain actions in order to preserve public order or in the public interest; however, in constitutional order underpinned by the rule of law as articulated under section 12 (1) (f) of our Constitution such interventions cannot be promulgated without regard to the prescribed legal mandate. [10]

17. That is why the law provides due process guarantees to ensure that anyone affected by a contemplated measure has the opportunity to present his side of the story before being penalized (see for example section 43(2)(3) and (4) of the Communications Act 2016). There is nothing in these proceedings to even suggest that the Authority made any attempt to

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[10] Under Schedule 2 to the Communications Act 2017 there have been enacted the following Regulation for Content Services

2. The main principles for content regulation shall consist of__

(a) protecting the public against offensive and harmful content;

(b) excluding material likely to encourage crime or other illegal acts;

(c) presenting comprehensive, accurate and impartial news;

(d) presenting religious material in a balanced and responsible manner;

(e) protecting children and young persons; and

(f) appropriate advertising and sponsorships

adhere to those legislative safeguards with regards to the ban of 7th June 2019; such purported exercise of the regulatory function is quite clearly beyond the purview of what is permissible under the law and is therefore ineffectual. Indeed. whilst section 195 of the Communications Act provides general powers to the Authority to issue appropriate enforcement orders to licensees, that power is subject to judicial review under section 196; additionally, section 197 outlines various criminal offences for specific breaches; all these are broad powers to augment the regulatory capacity of the Authority. The question that impugns the validity of the measure under consideration remains: which one of these powers did the Public Announcement of 7th June 2019 invoke?

18. Furthermore, if MACRA (as the regulating Authority) had wanted those measures to bind all licensees, then under section 200(1) of the Communications Act 2016 such measures should have been subject to the consultation of the affected parties; on the available evidence no such efforts to engage the stakeholders were done on the part of the regulator. On that score alone the same would have had to be set aside for being irregular. At another level, the attempt to curtail freedoms of various citizens was quite arbitrary and unlawful: the law has stipulated how such extensive power should be exercised in a manner that is both measured and appropriately consensual. The failure to comply with statutory procedures for the exercise of its own mandate renders the measure legally invalid from its inception.

19. In effect, therefore the June 2019 ban was wrong both in its content as well as in the manner followed to promulgate it i.e. both procedurally and substantively that directive would fail the twin tests of legality and validity. For a measure purportedly issued under the cloak of a statutory power to be lawful, it must be the outcome of a legitimate exercise of the relevant law. Correspondingly such power may not be exercised by anyone other than the entity or person contemplated in the law: any purported exercise of such power by an unauthorized person renders such exercise invalid. In so far as the substance and reach of the measure is concerned, it was rather overreaching for MACRA to stop all radio stations from having any

kind of phone in programs including ordinary community radios. In other words, if the aim was really to curtail unsafe public debates MACRA might have simply directed its regulatory measures at the three offending licensees.

ii. Communications (Broadcasting) Regulations 2019 (28th June 2019)

20. Now we must consider the Communications (Broadcasting) Regulations 2019 promulgated by the Minister of Information and Civic Education on 28th June 2019 purportedly under section 200(1) of the Communications Act 2016. Section 200 empowers the Minister to make regulations covering a very broad space as outlined under section 200 (2) thereof; such regulations may only be made on recommendation of the Authority. This power seems to complement the rule making power vested in the Authority under section 201(1) of the same statute.

21. The specific terms of section 200 (1) are that *'the Minister may, on recommendation from the Authority, make regulations for the better carrying into effect the provisions of this Act'*. Furthermore, section 202(1) stipulates that *'where the Authority intends to take a decision in accordance with this Act, it shall consult with any interested party, and shall give the interested party an opportunity to comment on the proposed decision within a period specified by the Authority.'* The outcome of any such stakeholder consultations are required to be published under section 202 (2). Therefore, in these proceedings, it is common cause that since such ministerial regulations would emanate from a decision of the Authority and would in turn affect various stakeholders the process of promulgating them falls under the terms of section 202(1) & (2). In other words, there must not only be consultations but even the outcome of that process need to be published in a certain format.

22. With the greatest respect to the respondent, this court is unable to find proof in support of its argument that the required stakeholder consultations were ever undertaken by the Authority before the Minister

promulgated the Communications (Broadcasting) Regulations 2019. The PowerPoint presentation of 28th October 2015 clearly predates the current Communications Act 2016; the Introduction slide quotes section 57 of the Communications Act to the effect that *'The Minister (of Information) may on the advice of MACRA, from time to time make Regulations governing the provision of broadcasting services in Malawi.'* Quite likely this provision is a precursor of the current section 200 of the Communications Act 2016.

23. However, it is very significant to note that the specific terms of these provisions are substantially different: under the old law MACRA only needed to offer 'advice', while under section 200 they must make a 'recommendation' for enacting regulations. Even more significantly for present purposes is the requirement for the Authority to publish the outcome of any stakeholder consultations. To that extent, the previous statute had no provision similar to section 202 of the current statute. Maybe that would explain why any outcome of that October 2015 process was never published anyway: if it had been, as pointed out by the Applicants, MACRA should have produced that as evidence of compliance with the stipulations of section 202 (2). As a matter of fact, the PowerPoint presentation without any authenticated list of actual participants to the purported consultations of 28th October 2015 would not suffice for the present purposes.

24. That MACRA sought to rely on such inadequate proof to establish that it had discharged its responsibility under section 202 of the Communications Act 2016 is quite misleading, to say the least. Public authorities who have been entrusted with the duty to regulate such important utilities as communications need to act with the utmost fidelity and public confidence; it is quite disconcerting for MACRA to downplay its omission to undertake stakeholder consultations when its proposed measures produced such drastic changes to the manner licensees exercise those rights. In the considered opinion of our court the present proceedings only highlight the imperative for constitutional vigilance over any such executive authority as herein implicated. Hence the principle under section 12(1)(f) of

Constitution subjecting all institutions and persons to the rule of law, including MACRA.

25. Section 202(1) of the Communications Act 2016 is quite unambiguous on the manner of consultations and the concomitant duty (under subsection 2) to publish the outcome of such a process. Even assuming MACRA had undertaken any consultations-which we have found it never did- there is no proof that the same was ever published. The law has deliberately provided this consultation process in order to safeguard the interests of all affected by any purported restriction or regulatory measures. It would be rather disingenuous to permit the flagrant circumvention of those guarantees with the wanton disregard for statutory accountability postulated within the law governing the powers of the regulator.

26. It would appear from the scanty material presented in this case that whereas MACRA might have attempted to undertake some prior consultations under section 57 of the Communications Act 1998 with a view to issuing regulations through the Minister that process might have stalled at some level; when the stakeholder backlash arose as a result of the June 2019 ban the Authority attempted to deflect the concerns of the affected licensees by hastily pushing through a battery of regulations that had never been properly discussed as contemplated in the current Communications Act 2016. Whereas the intentions of ensuring that a potentially volatile political climate does not degenerate into social disorder through unwholesome radio content cannot be gainsaid, such measures have to be both proportionate and appropriately promulgated. For the avoidance of doubt, a cease and desist order under section 173 seems to arise in response to a complaint by a third party: did MACRA have such a complaint on 7th June 2019, if so, who was the complainant?

27. In effect, the broad extent of the proposed measures amounted to illegal censorship of publication of legitimate opinions and the communication of diverse points of views. Freedom of expression and its corresponding right to hold and share opinions need to be jealously guarded especially within the context of a contested electoral process, which is clearly acknowledged

even in the relevant Regulations under the Communications Act 2016.[11] The duty to act with utmost transparency and full fidelity to the applicable legal safeguards was correspondingly enhanced on the part of the Authority; the present proceedings suggest that MACRA failed to exercise those powers in accordance with either the letter or the spirit of the pertinent legislation.

28. The other critical question concerns the issue of whether those regulations were properly laid before Parliament as stipulated under section 58 (1) of the Constitution. The relevant law was also considered in the case of **Dzanjalimodzi-v-Attorney General, Misc. Civil Cause No. 127 of 2005 (HC)** which articulated the accountability imperative embodied in such an arrangement i.e. between the principal law making body and the one exercising the delegated mandate in issuing regulations; this is captured under the terms of Standing Order 159(e) of the Parliamentary Standing Orders (2013) which mandates the Legal Affairs Committee to scrutinize any such proposed subsidiary legislation.[12] Standing Order 61 of the Parliamentary Standard Orders[13] is invoked for purposes of section 58(1) of

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[11] Schedule 2, Regulation 32. during any election period, all content licensees shall ensure equitable treatment of political parties, election candidates and electoral issues.

[12] S.O.159 Parliamentary Standing Orders (2013) says that
"A Legal Affairs Committee shall be appointed to, inter alia, perform the following functions
.....
(e) Consider and report on
(i) any subsidiary legislation laid before the Assembly and any statutory instruments promulgated under an Act of Parliament.
(ii) proposed powers to make subsidiary legislation by any authority;
(iii)general questions relating to whether powers to make subsidiary legislation are being properly exercised by any person or authority within such delegation.
(g)to examine whether any statutory instruments being promulgated
(i)is in accordance with the Constitution or the statute under which it is made;
(ii) does not trespass unduly on personal rights and liberties
(iv)is concerned only with administrative detail and not amount to substantive legislation which is a matter for the Assembly.
Provided that the Minister, body or authority in charge of such subsidiary legislation or statutory instrument shall promptly provide copies to the Committee as soon as such documents are published in the Gazette.

[13] S.O.61 (1) Papers may be presented to the Assembly: -
(a) by Minister or Member laying them on the Table of the Assembly during Sittings of the Assembly;
(b) by delivery to the Clerk when the Assembly is not sitting.
(2)When presenting a Paper under Sub-Rule (1), the Minister or Member concerned shall make a brief explanatory statement on the Paper.

the Constitution: where Parliament is sitting the Minister is supposed to lay the papers (in this case regulations) on the Table in the Assembly. On such occasion, a brief explanation from the Minister concerned on the Paper is required but no questions are permitted on the subject in plenary. Presumably, that is because if such a Paper is proposing Regulations or other subsidiary legislation then the critical work is expected to take place in the Legal Affairs Committee as mandated under S.O. 159(e). However, where Parliament is on recess, delivery of the papers to the Clerk of Parliament would suffice for purposes of section 58(1) of the Constitution.

29. This Court has taken judicial notice of the fact that between 9th September and 11th October 2019 Parliament was sitting; yet the Minister purported to submit the Regulations to the Clerk of Parliament on 16th September 2019. This Court therefore, finds as a matter of fact that in those circumstances the applicable procedure would have been for the papers to be presented at the table of the house by the responsible Minister. Such was never done, rendering the Communications (Broadcasting) Regulations 2019 ineffective for procedural default. For purposes of clarity, we read laying before the table literally i.e. in order to comply with section 58 (1) of the Constitution, the Minister need only present the papers physically on the Table before the Speaker and her Clerk, in compliance with S.O. 61 (2) (3) with a brief explanation without any open discussion or questions on the floor of the Assembly.

30. Having reached this conclusion, the Court should still clarify one legal point which was advanced by the Applicants regarding the validity of section 17 of the General Interpretation Act in light of section 58(1) of the Constitution. In essence the Applicants suggested that the General Interpretation Act was more or less invalid because it was enacted on 29th August 1966, whereas the Constitution was ushered into law in 1994. That argument ignored the terms of the same constitution under section 200

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(3) All papers shall lie on the Table without question put.

which saves the operation of all laws predating its enactment in these words:

> "Except in so far as they are inconsistent with this Constitution, **all Acts of Parliament,** common law and customary law **in force on the appointed day** shall continue to have force of law, **as if they had been made in accordance with and in pursuance of this Constitution**:
> Provided that any laws currently in force may be amended or repealed by an Act of Parliament or be declared unconstitutional by a competent court." **(Emphasis supplied)**

31. Jurisprudentially, therefore one cannot seek to impugn a law in the casual manner proposed by the Applicants. In fact, the Court holds the view that section 17 of the General Interpretation Act is a valid legal provision since it is merely complementary and not contradictory to the stipulations of section 58(1) of the Constitution: whilst laying the subsidiary legislation before Parliament completes the accountability function between the delegated and the delegating authorities, publication in the Gazette puts the general public on notice about such new legislative instruments. In fact, the proviso to Parliamentary S.O.159(g) seems to assume that such subsidiary legislation will be Gazetted as a matter of principle. In truth, both functions (i.e. laying before Parliament as well as Gazetting) are quite integral to a well-functioning democratic society governed by the rule of law.

32. There was a suggestion from the Applicants that the proposed Regulations are seeking to amend their licenses through the backdoor by imposing conditions such as requirement for a delay machine for all radio call in programs: in the first place it would be important to properly distinguish between the print as opposed to the electronic media. The foreign decisions which NAMISA has cited emanate from a discussion of delays with respect to the print media; in that sense the need to minimize any opportunity for delaying news publication cannot be overemphasized.

33. One cannot ascribe the same impact to a few seconds delay with respect to live radio broadcasts: there ought to be a viable means for ensuring that the broadcaster retains some real technical capacity to avoid the unbridled

publication of unsavory and even inflammatory opinions through the airwaves in a scenario of potential public tensions as obtained at the relevant time. Nevertheless, since the Regulations have been faulted for lack of compliance with the relevant due process requirements for now the measure has no legal effect; this however does not preclude the proposed delay machine measure should the Authority seek to implement the same on the basis of appropriate processes for its imposition.

34. As far as the licensees duties are concerned Clause 10.6 of the Standard Broadcasting Licence makes it quite clear that besides the terms outlined within the license, there might well be regulations and laws which they would be required to adhere to; in that vein, not every condition will require similar negotiations prior to amendment (if for example the proper procedure for promulgating a law or regulations has otherwise been complied with).

35. Having found that the Communications (Broadcasting) Regulations were promulgated without the prescribed stakeholder consultations under section 202 of the Communications Act 2016 as well as in breach of the constitutional requirement for being laid before Parliament under section 58(1) of the Constitution, this court finds them to be entirely without any legal effect and therefore invalid. On that basis, it becomes quite unnecessary in that context to analyze whether Regulation 30 is a justifiable limitation of the rights implicated.

CONCLUSION

36. In closing, therefore, this court has reached the conclusion that the present Applicants have rights which required vindication through the present proceedings. Specifically:

i. The Ban issued through the Public Announcement dated 7th June 2019 signed under the hand of the Director General of MACRA stopping all radio stations from having phone in programs was irregular and lacked legal validity in the first place.

ii. The subsequent Communications (Broadcasting) Regulations 2019 of 28th June 2019 have likewise been found to have been promulgated in breach of both the stakeholder consultation guarantees of section 202 of the Communications Act 2016 as well as for failure to lay them before Parliament as stipulated under section 58(1) of the Constitution.

Both instruments are therefore set aside for lack of any legal or constitutional validity.

37. The purported exercise of MACRA's regulatory mandate either through the Public Announcement of 7th June 2019 or under the purported Communications (Broadcasting) Regulations 2019 has been found to be an irregular and hence illegal exercise of statutory authority.

Costs are for the Applicants.

Pronounced in Open Court this 29th day of May 2020 at Lilongwe.

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Justice Dr. Chifundo Kachale, J

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Justice Charles Mkandawire, J

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Justice Annabel Mtalimanja, J