REPORTABLE (48)

Judgment No S.C. 59\03
Civil Application No 328\02

THE LAW SOCIETY OF ZIMBABWE
v (1) THE MINISTER OF TRANSPORT AND COMMUNICATIONS
(2) THE ATTORNEY-GENERAL OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA, CHEDA JA, MALABA JA & GWAUNZA JA
HARARE MAY 15 2003 & MARCH 3, 2004

A.P. de Bourbon S.C., for the applicant

Y. Dondo, for the respondents

CHIDYAUSIKU CJ: The applicant in this case is the Law Society of Zimbabwe, established in terms of the Law Society of Zimbabwe (Private) Act [Chapter 223] of 1974. It has capacity to institute legal proceedings in terms of section 51 of the Legal Practitioners Act [Chapter 27:07]. Although the papers do not expressly allege this, this application is brought in terms of s 24 of the Constitution of Zimbabwe ("the Constitution"). In terms of s 24 of the Constitution an applicant is entitled to approach this Court directly on the basis that the applicant's fundamental right has been, is, or is about to be, violated. The applicant represents over 600 practising legal practitioners. The applicant's case is that its members' right to freedom of expression as enshrined in s 20 of the Constitution is threatened by the

provisions of s 98(2) and s 103 of the Postal and Telecommunications Act [Chapter 12:05] ("the Act"). The applicant seeks an order declaring sections 98(2) and 103 of the Act invalid and of no legal force or effect because they are inconsistent with s 20 of the Constitution.

It is the applicant's case that its members, legal practitioners, are in law entitled to free and unhindered communication between themselves and their clients and amongst each other. The applicant contends that the privileged status of legal communications between legal practitioner and client goes beyond the general protection to all persons by the Constitution. The privileged status of lawyer-client communication is time honoured and enshrined in common law and in s 8 of the Civil Evidence Act [Chapter 8:01]. The applicant contends that legal practitioners receive from their clients, private, personal and confidential information. Their clients must of necessity disclose to them information that has not yet been made public or which is of a private and confidential nature and should not be disclosed to the public. In order for legal practitioners to advise their clients effectively they must receive full information and instructions from their clients. Often the dissemination of such information to third parties or the public would cause potential or actual loss, harm and/or prejudice to clients. It is for the protection of clients that the legal privilege accorded to legal practitioner and client communication is recognised and enforced by law.

Subsection (2) of s 98 of the Act allows the President to give a direction that postal articles shall be intercepted and detained. The Act defines "postal services" in very broad terms and the Act does not impose any restriction on

the manner in which, or the persons by whom, such interception or detention may be effected. In terms of the Act the President is allowed to give a direction that any article shall be delivered to an employee of the State to be disposed of in such a manner as the President may direct. The Act allows the President to give a direction that communications shall be intercepted or monitored. The President may give any of the directions referred to above if, in his opinion, it is necessary in the interests of national security or the maintenance of law and order.

Section 103 of the Act similarly allows the President to give such directions to any licensee as appears to him to be requisite or expedient in the interests of national security or relations with the Government of a country or territory outside Zimbabwe. Section 20(1) of the Constitution expressly provides that no person shall be hindered in the enjoyment of his freedom of expression which includes freedom from interference with correspondence.

Subsection 20(2) of the Constitution provides for the derogation of the freedom of expression if it is necessary to do so in the interests of defence, public safety, public order etc, but such derogation has to be reasonably justifiable in a democratic society.

The applicant contends, firstly, that the impugned sections do not fall within any of the exceptions permissible under s 20(2) of the Constitution.

Secondly, and in the alternative, the applicant contends that even if the impugned sections fall within the exceptions set out in s 20(2) they are too vague to

satisfy the requirement as provided by law and are not reasonably justifiable in a democratic society.

The respondent, on the other hand, concedes that sections 98(2) and 103 of the Act are a derogation on the guaranteed freedom of expression but argued that both provisions fall within the permissible exceptions under s 20(2) of the Constitution and are reasonably justifiable in a democratic society, and therefore constitutional.

It is apparent from the stance of the parties that the facts of this case are common cause. The issue that falls for determination is whether sections 98(2) and 103 of the Act are consistent with s 20 of the Constitution. The applicant has submitted that the issue here relates in general terms, to the interception of communications, but more specifically relates to interference with lawyer-client privilege which would result from the interception of mail and telecommunications between a lawyer and his client. The concern of the applicant is that the right of the State to intercept communications in terms of sections 98 and 103 of the Act put at risk the privilege of such communication and this constitutes an interference with the constitutional rights of both the lawyer and the client in terms of s 20 of the Constitution. The applicant contends that sections 98 and 103 of the Act place at risk the confidentiality of the communications and thus negate the privilege that is granted to those communications.

LAWYER-CLIENT PRIVILEGE

Mr *de Bourbon*, for the applicant, argued strenuously that the lawyer-client privilege was fundamental to the proper administration of justice. He argued that the existence

of the privilege is in the interests of all sectors of the community including the State itself. It was also argued that at the heart of this privilege are two fundamental rights. Firstly, the right of persons freely to communication with one another and, secondly, the right to fair justice. If this privilege is destroyed or threatened then these rights become meaningless.

The Court was referred to a wide range of authorities that underpinned the importance and significance of the lawyer-client privilege. In the case of *Baker v Campbell*[1] it was held that the privilege existed not simply in relation to litigation but to advice sought between a client and a lawyer so that the client can regulate his affairs. In another case cited to this Court it was held that the privilege between lawyer and client even overrode the policy consideration that no innocent man should be convicted of a crime, see *S v Safatsa*[2]. In this regard see also *Mahomed v President of the Republic of South Africa & Ors* 2001 (2) SA 1145 (C) at pages 1151 and 1152 – 1155. The sanctity of the lawyer-client privilege and the need to minimise in-roads into that privilege is emphasised in a number of Canadian cases that were cited by the applicant.[3]

It is also very clear from the cited authorities that the privilege is not absolute. The following are some of the recognised exceptions to the rule:

(a) the right of the accused to fully defend themselves;

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[1] (1983) 153 CLR 52 (HCA)

[2] 1988 (1) SA 868 (A) at pages 878-887

[3] *Solosky v The Queen* (1979) 105 DLR (3d) 745 (SCC) at p 760; *R v McClure* (2001) 151 CCC (3d) 321 (SCC) at p 332; *Dexôteaux v Mierzwinski* (1982) 141 DLR (3d) 590 (SCC)

(b) communications that are criminal in themselves or that are intended to obtain legal advice to facilitate criminal activities;

(c) when safety of the public is at risk.[4]

In Zimbabwe the lawyer-client privilege is provided for in a statute. Section 8 of the Civil Evidence Act [Chapter 8:01], which protects the lawyer-client privilege provides as follows:-

"8. (1) In this section –

'client', in relation to a legal practitioner, means a person who consults or employs the legal practitioner in his professional capacity';

'confidential communication' means a communication made by such a method or in such circumstances that, so far as the person making it is aware, its contents are disclosed to no one other than the person to whom it was made;

'legal practitioner' means a person entitled to practise in Zimbabwe as a legal practitioner or entitled to practise outside Zimbabwe in an equivalent capacity;

'third party', in relation to legal proceedings, means a person who is not a party to those proceedings.

(2) No person shall disclose in evidence any confidential communication between –

(a) a client and his legal practitioner or the legal practitioner's employee or agent; or

(b) a client's employee or agent and the client's legal practitioner or the legal practitioner's employee agent;

where the confidential communication was made for the purpose of enabling the client to obtain, or the legal practitioner to give the client, any legal advice.

[4] *Smith v Jones* (1999) 169 DLR 385 SCC para 52 p. 401, para 55 p. 402, para 57 p. 403

(3) No person shall disclose in evidence any confidential communication between a client, or his employee or agent, and a third party, where the confidential communication was made for the dominant purpose of obtaining information or providing information to be submitted to the client's legal practitioner in connection with pending or contemplated legal proceedings which the client is or may be a party.

(4) No person shall disclose in evidence any confidential communication between a client's legal practitioner, or his employee or agent, and a third party, where the confidential communication was made for the dominant purpose of obtaining information or providing information for the client's legal practitioner in connection with pending or contemplated legal proceedings in which the client is or may be a party.

(5) The privilege from disclosure specified in this section shall not apply –

(a) if the client consents to disclosure or waives the privilege; or

(b) if the confidential communication was made to perpetrate a fraud, an offence or an act of omission rendering a person liable to any civil penalty or forfeiture in favour of the State in terms of any enactment in force in Zimbabwe; or

(c) after the death of the client, if the disclosure is relevant to any question concerning the intention of the client or his legal competence.

(6) Any evidence given in contravention of this section shall be inadmissible."

It is quite clear from the cited authorities and section 8 of the Civil Evidence Act that the sanctity of lawyer-client privilege is largely applicable in the domain of litigation or court proceedings. Indeed a proper reading of s 20 of the Constitution reveals that the lawyer-client privilege, as such, is not constitutionally guaranteed. It is only constitutionally guaranteed to the extent that the lawyer-client privilege is subsumed in the right to freedom of expression which includes freedom from interference with one's correspondence. I have no doubt that a breach of the

lawyer-client privilege almost invariably leads to the violation of one's entitlement to a fair trial guaranteed under s 18 of the Constitution but that is not the basis of the present application.

ARE SECTIONS 98(2) AND 103 OF THE ACT INCONSISTENT WITH SECTION 20 OF THE CONSTITUTION?

Section 20 of the Constitution provides as follows:-

> **"20 Protection of freedom of expression**
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> (1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.
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> (2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision—
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> (a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;
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> …
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> except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

The impugned sections of the Act provide as follows:-

> "98.(2) If, in the opinion of the President it is necessary in the interests of national security or the maintenance of law and order, he may give a direction that –
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> (a) any postal article or class of postal articles or any telegram or class of telegrams shall be intercepted or detained and shall be delivered to an employee of the State specified in the direction to be disposed of in such manner as the President may direct; or

(b) any communication or class of communication transmitted by means of a cellular telecommunication or telecommunication service shall be intercepted or monitored in a manner specified in the direction; or

(c) any cellular telecommunication or telecommunication service established, maintained or worked by a cellular telecommunication or telecommunication licensee or any class of such services shall be suspended or that such service shall be suspended in respect of a person named in the direction.

103. **Directions to licensees in the interests of national security**

(1) The President may, after consultation with the Minister and the licensee concerned, give that licensee such directions of a general character as appear to the President to be requisite or expedient in the interests of national security or relations with the government or territory outside Zimbabwe.

(2) If it appears to the President to be requisite or expedient to do so in the interests of national security or relations with the government of a country or territory outside Zimbabwe, he may, after consultation with the Minister and the licensee concerned, give to that licensee a direction requiring him to do, or not to do, a particular thing specified in the direction.

(3) A licensee shall give effect to any direction given to him in terms of this section notwithstanding any other duty imposed on him by or under this Act.

(4) The President shall, at the earliest opportunity, publish in the Gazette every direction given under this section, unless he is of the opinion that such publication is against the interests of national security or relations with the government of a country or territory outside Zimbabwe, or the commercial interests of any person.

(5) A person shall not disclose, or be required by virtue of any enactment or otherwise to disclose, anything done by virtue of this section if the President has notified him that the President is of the opinion that disclosure of that thing is against the interests of national security or relations with the government of a country or territory outside Zimbabwe, or the commercial interests of some other person.

(6) The President may make *ex gratia* payments to licensees for the purpose of defraying or contributing towards any losses they may sustain by reason of compliance with any direction given in terms of this section.

(7) Any licensee who refuses to comply with a direction given in terms of this section shall be guilty of an offence and liable to a fine not exceeding two hundred thousand dollars or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment."

It is quite clear from a reading of the above provisions that sections 98(2) and 103 are a derogation of the right to freedom of expression conferred by s 20 of the Constitution.

It is also clear that the protection given, under the Constitution, to freedom from interference with correspondence is not an absolute right but may be restricted, as with freedom of expression, in certain circumscribed circumstances:-

(a) the interference with the right must be in accordance with a law;

(b) it must be, *inter alia*, in the interest of defence, public safety, public order, the economic interests of the State, public morality or public health;

(c) the interference must be reasonably justifiable in a democratic society.

The impugned sections 98(2) and 103 of the Act confers on the President unfettered powers to intercept correspondence and communications. The only limitation to the exercise of that power is that the President has to hold the "opinion" that it is necessary in the interests of national security or necessary for the maintenance of law and order. It is not a legal requirement that the holding of the opinion be based on reasonable grounds or good cause. In terms of s 103 of the Act the only restriction on the President before he gives certain directives is that he should consult the Minister, an appointee of the President, who is accountable to him.

Sections 98(2) and 103 of the Act have no built-in mechanism restricting or limiting:-

(a) who the President may authorise to make the interception;

(b) what is to become of the mail or other communication once it has been intercepted;

(c) who has access to the contents in the intercepted communication;

(d) what steps are to be taken to ensure that any lawyer-client privilege is not unduly interfered with.

The net effect of the failure to provide statutory mechanisms to control or limit the exercise of the power conferred by the Act on the President leads to an unfettered discretion to intercept mail and communication. The impugned sections provide no guidance as to what a citizen should not do to avoid conduct that might lead to the exercise of the powers conferred by the impugned sections. The Act provides no legal recourse or safeguard for the innocent. The Act does not provide any mechanisms for accountability. Similar legislation in other jurisdictions provides or is required to provide, for prior scrutiny, independent supervision of the exercise of such powers and effective remedies for possible abuse of the powers.[5] The Act provides for no such safeguards.

The issue here is not that the powers have been abused or are likely to be abused by the President but rather that there are no mechanisms in the Act to prevent such an abuse. In the absence of such limitations and control mechanisms the powers conferred on the President are too broad and overreaching to be reasonably justified in a democratic society. The impugned sections, as I have

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[5] *Klass & Others v Federal Republic of Germany* (1978) 2 EHRR 214

already stated, are so vague that the citizen is unable to regulate his conduct in such a way as to avoid the interception of his mail or communication. Thus, in this regard, the impugned sections of the Act are too vague and do not satisfy the constitutional requirement of "provided by law".[6]

In the result the application succeeds and sections 98(2) and 103 of the Postal and Telecommunications Act [Chapter 12:05] are hereby declared unconstitutional and are struck down. The costs of this application shall be paid by the respondents, jointly and severally, the one paying the other to be absolved.

SANDURA JA: I agree

CHEDA JA: I agree

MALABA JA: I agree

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6 *Chavunduka & Anor v Minister of Home Affairs* 2000 (1) ZLR 552

GWAUNZA JA: I agree

Gill Godlonton & Gerrans applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners