MEDIA PUBLISHING (Pty) Ltd v. THE ATTORNEY-GENERAL and Another 2001 (2) BLR 485 (HC)

Citation	2001 (2) BLR 485 (HC)
Court	High Court, Gaborone
Judge	Lesetedi J
Judgment	September 17, 2001
Counsel	B. Spilg (with him J. Griffiths) for the applicant. M. Chamme (with him M. Mochiri) for the respondent.
Annotations	None

Flynote

Constitutional law - Fundamental rights - Right of freedom of expression - Role of media - Decision by Government to withdraw advertising from newspapers which had incurred its displeasure for articles critical of Government - Government directive hindering free speech and important role of media - Constitution, ss. 3, 11(1), 12(1) and 15(1).

Headnote

The applicant applied for an interim interdict against the respondents pending the determination of the main action by the applicants against the respondents. The applicant was the owner of two newspapers which received a substantial amount of government placed advertising. Following the publication of a number of articles in one of the newspapers critical of certain of the leaders of the country, including the President and Vice-President,

a directive was issued to the effect that the government had decided to cease advertising in the two newspapers concerned. It was not clear who had issued the directive or to whom it was issued but the contents were not disputed by the Permanent Secretary to the President. The court was of the opinion that it was reasonable to infer that it was communicated to all government departments, parastatals and private companies in which the government was a shareholder. The applicants sought an order directing that the directive not be implemented pending the outcome of the action. The applicant contended that the directive was unconstitutional in that it violated its rights in sections 3, 11(1), 12(1) and 15(1) of the Constitution. It was argued for the applicant that although the applicant did not have the right to receive advertisements from the Government for publication in its papers, once the Government had decided to give that benefit or patronage the Government could not withdraw it in order to punish or show its disapproval to the applicant for the applicant's conduct of having published material not acceptable to the Government or top Government officials. The respondent argued that in advertising in the applicant's newspapers, the relationship created was a purely commercial one and that inasmuch as the Government voluntarily decided to advertise in the applicant's papers it was entitled, even without assigning a reason, to withdraw from advertising in those papers.

Held: (1) Section 11(1) and section 15(1) of the Constitution dealing respectively with freedom of conscience and the prohibition of discrimination were not relevant and no discrimination had been shown.

(2) It was clear that by withdrawing advertisement patronage from the applicant's papers, the Government was basically instilling on the applicant pressure that in order for it to continue to enjoy the benefit of advertising from Government it should conform to a reportage that fell within what Government considered to be the parameters of editorial freedom.

(3) Freedom of the media was but one aspect of freedom of expression and in a democratic society the media played a very important role. It was normally the media that formed a vehicle for communication between the governed and those that govern. It was usually the press as part of the media that acted as a watchdog against abuse of power and corruption where it may occur in society. It was through the media that members of society communicated their ideas and feelings about the way they were governed. It played the very important role in society of informing the public of many matters including the way the organs of state operated and by giving general information. It was the press which on many occasions had been in the forefront of the fight against abuse of power, corruption, dictatorship and other ills like blatant disregard of the rule of law committed by those that governed in many countries.

(4) Government was not a consumer like any other consumer. It carried a lot of responsibilities vis-a-vis the individual: it carried a duty to protect the individual and ensure that the rights and freedoms granted by the Constitution were not infringed. It was to the state that the individual usually looked for the protection of its rights and freedoms and for that reason the Government could not act with a view to taking away any individual's

benefits as an expression of its displeasure for the individual's exercise of a constitutional right as this would tend to inhibit the individual in the full exercise of that freedom for fear of incurring punishment. There was nothing commercial about this. The message implicit in the directive was that an individual being a beneficiary to Government patronage, who

in the exercise of his freedom of expression went beyond what the Government was comfortable with, faced the possible unpleasant consequence of losing certain benefits which it would otherwise have received. This hindered the freedom to express oneself freely.

(5) The applicant had established at least a prima facie right, though open to some doubt, that the executive's act of withdrawing advertisement patronage from the applicant's newspapers in order to express its displeasure regarding what it perceived to be exceeding the limit of editorial freedom, amounted to an infringement of first applicant's freedom of expression. The other requirements for interim relief having been established, the applicant was entitled to an order.

Case Information

Cases referred to:

(1) *Kamanakao I and Others v. The Attorney-General and Others* [2001] 2 B.L.R. 654

(2) *L. F. Boshoff Investments (Pty) Ltd v. Cape Town Municipality* 1969 (2) S.A. 256 (C)

(3) *Attorney-General v. Dow* [1991] B.L.R. 233

(4) *Graham Haig and Others v. Chief Electoral Officer and Others* 1993 (2) S.C.R. 995

(5) *National Media Ltd and Others v. Bogoshi* 1998 (4) S.A. 1196 (S.C.A.)

(6) *Hyland v. Wonder* 972 F.2d. 1129

(7) *Free Press of Namibia (Pty) Ltd v. Cabinet for the Interim Government of South West Africa* 1987 (1) S.A. 614 (S.W.A.)

(8) *Nilabati Behera v. State of Orissa* [1994] 2 L.R.C. 99

APPLICATION for an interim interdict restraining the government from implementing a directive pending determination of the main action by it the applicant against the respondents. The facts are sufficiently stated in the judgment.

B. Spilg (with him *J. Griffiths*) for the applicant.

M. Chamme (with him *M. Mochiri*) for the respondent.

Judgment

Lesetedi J.:

Introduction

This is an application for interim interdict pending the determination of the main action by

the applicants against the respondents. Originally when the matter was lodged there was one applicant namely Media Publishing (Pty) Ltd whom I shall describe hereinafter as the applicant. The applicant is described in its founding affidavit as a company duly incorporated and registered in accordance with the company laws of the Republic of Botswana, which conducts business as the proprietor of the *Botswana Guardian* and *Midweek Sun* newspapers of Plot 14442 Kamushongo Road, Gaborone, Botswana. The first respondent is the Attorney-General, cited in his representative capacity in terms of section 3(1) of the Civil Procedure (Actions by

LESETEDI J

or against Government or Public Officers), Act (Cap. 10:01) of the Laws of Botswana.

The *Botswana Guardian* and *Midweek Sun* newspapers are two weekly papers circulating in Botswana, the former being a Friday newspaper and the latter a Wednesday newspaper. The *Botswana Guardian* has been described in the papers as the second most widely circulated local newspaper in the country and the *Midweek Sun* as rivalling another local paper as the leading local Wednesday paper circulating in the country.

The founding affidavit and replying affidavit filed on behalf of the applicant was deposed to by one OutsaMokone who is the editor of the *Guardian* newspaper. The respondents' answering affidavit was deposed to by Molosiwa Selepeng who is the Permanent Secretary to the President.

After the filing of this application, the respondent in its answering affidavit challenged the locus standi of the applicant, contending that it is the individual journalist who would have the locus standi to institute these proceedings. Respondent's argument in its papers was that the applicant as a juristic entity was not an individual and could therefore not enjoy freedoms conferred on individuals. This challenge prompted six other applicants to apply for joinder to join the applicant. Two of them were the respective editors of the above referred to newspapers namely Outsa Mokone and Mike Mothibi and the others were some of the journalists of the said papers. The application was however not moved and the respondents did not pursue their challenge to applicant's locus standi. I must also mention at this stage that the applicant has cited as the second respondent, "The persons chairing the ministers' cabinet meeting in April 2001 which made the decisions affecting state advertising in applicant's newspapers."

The citation of the second respondent must however in the light of the provisions of section 3 of the Civil Procedure (Actions by or against Government or Public Officers) Act (Cap. 10:01) fall off. See *Kamanakao I and Others v. The Attorney-General and Others* [2001] 2 B.L.R. 654. This leaves one respondent namely the Attorney-General as the respondent.

The relief sought

The relief being sought at this stage by the applicant against the respondent is contained in para. 2 of the notice of motion. I will deal with them in more detail later.

Background of the case

The genesis of this case arose from a number of articles published in the Botswana Guardian newspaper. Some of the articles were critical of certain leaders of the country, amongst whom were the President and the Vice- President. These articles appear to have precipitated the directive, which the Permanent Secretary to the President attributes in his answering affidavit to the President. The said directive does not appear to have been issued in writing by the President and the only written copy available is a fax transmitted

message from the Permanent Secretary in the Ministry of Minerals, Energy and Water Affairs. Due to a number of deletions including the addressees of the said message, it is difficult to determine to whom

LESETEDI J

exactly it was addressed. The fax message is dated 30 April 2001 and reads as follows:

> "ADVERTISING IN PRIVATE NEWSPAPERS: We would like to inform you that the Government has decided that, with immediate effect, we should cease advertising in the Guardian and Sun Group of papers. This directive applies to all Government Ministries/Departments, parastatals and Private Companies in which the Government is a shareholder. You are, of course, expected to use your discretion regarding any signed contracts. This is taken as an available option for all consumers.
>
> Thank you."

Selepeng in his affidavit does not contest the contents of the said directive. In fact he has endeavoured to justify the directive in substance as contained in the said transmitted message. What is clear is that the applicants only came to know of the directive in early May 2001 from an officer in one of the Government parastatals. I think it will be reasonable to infer and it was not denied that the directive was communicated to all Government ministries, parastatals and private companies in which the government was a shareholder as it was them that were expected to act in accordance with it. A lot of arguments have been made as to who made the decision, i.e. whether it was the Vice-President or the President who did so. The Permanent Secretary to the President himself being the one who deposed to the respondent's answering affidavit states that the decision was made by the President on 23 April 2001. For the purposes of this application I will accept Mr Selepeng's word. I will henceforth refer to the said directive as the "directive". It is common cause that prior to the issuance of this directive the Government used to put a lot of its advertisements in the Guardian and *Midweek Sun* papers. Parastatals and companies in which the Government is a shareholder also used to do so. The applicant challenges the directive essentially on two basis, firstly that the action in issuing the directive was unconstitutional, in that it violates the applicant's rights as in sections 3, 11(1), 12(1) and 15(1) of the Constitution and that as such is liable to be declared invalid. The second basis of the application is that the said directive needs to be reviewed and set aside.

2. *The interim interdict*

2.1 *Essentials*

The applicant is instituting the main action on the basis of the above and it now seeks an interim order directing that the directive be not implemented pending the outcome of that action. The essentials of an interim interdict were crystallized by Corbett J. in *L. F. Boshoff Investments (Pty) Ltd v. Cape Town Municipality* 1969 (2) S.A. 256 (C) at p. 267.

Briefly these requisites are that the applicant for such temporary relief must show are:

> "*(a)* that the right which is the subject matter of the main action and

which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;

(b) that, if the right is only prima facie established, there is a wellgrounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

(c) that the balance of convenience favours the granting of interim relief; and

(d) that the applicant has no other satisfactory remedy;"

In determining whether the applicant is entitled to a temporary interdict, the court will have to be satisfied that the applicant has established all the above requisites and not only one of them; but all on a balance of probability.

Before dealing with the issues involved in determining whether the applicant has satisfied the above requisites I will briefly deal with issues which arose during the application and were either resolved or fell by the side.

Media black out

In its founding papers the applicant also alleged that the Government had imposed a media blackout against the applicants by denying the applicants access to information which was otherwise made available to other papers and by issuing a directive to the addressees of the directive not to buy the papers published by the said newspapers. Applicant also sought an interdict in respect of the alleged acts. Those allegations were denied by respondent. Nonetheless by consent, an order was issued by this court on 9 July 2001. The order reads as follows:

"1. Matter is adjourned to the 14th August 2001.

2. It is hereby declared that;

(a) There is no directive to stop statal and parastatal bodies or companies owned by Government from purchasing or subscribing to the Guardian and Midweek Sun newspapers.

(b) There is no directive to impede the flow of information to the aforesaid newspapers by any statal and parastatal bodies or companies owned by Government."

Availability of the relief of interdict against government

Upon receiving the applicant's founding papers, respondent raised a point in limine. That point was that the relief sought by the applicant in the form of an interdict against the government was not competent in that it offends against section 9 of State Proceedings (Civil actions by or Against Government or Public Officers) Act (Cap. 10:01). The said section reads:

"(1) Nothing contained in this Act shall be construed as authorizing the grant of relief by way of interdict or specific performance against the Government, but in lieu thereof the court may make

an order declaratory of the rights of the parties.

(2) The court shall not in any action grant any interdict or make any order

LESETEDI J

> against a public officer if the effect of granting the interdict or making the order would be to give any relief against the Government which would not have been obtained in any action against the Government."

This point in limine was subsequently withdrawn, it being recognised that the said provision cannot limit the relief available to an aggrieved party who seeks relief under section 18 of the Constitution. The said section 18 of the Constitution gives the High Court original jurisdiction to hear and determine any application made by any person who alleges that any of his fundamental constitutional rights as enshrined under sections 3-16 (Part II) of the Constitution have been breached, and to:

> ". . . make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions . . ."

protecting the fundamental freedoms contained in Part II of the constitution.

Notice to strike out

Amongst the number of interlocutory applications made during the hearing, there was an application by the respondents to strike out certain portions of the applicant's replying papers. Most importantly was the affidavit of one Chris Bishop, a journalist and the former editor of news and current affairs at Botswana Television. The purpose of this affidavit was to show that there was an on-going modus operandi by the Government to restrict the freedom of the press. In that affidavit the said Chris Bishop dealt specifically with the matter relating to a documentary he had wanted to do in respect of the case of one Marrieta Bosch. I upheld the application to strike out and reserved my reasons for so doing. These are my reasons. The said affidavit although filed with the replying papers, contained matters which were new in the application and which would have required that leave be granted to the respondents to file further affidavit in answer to the allegations contained therein. Such a step would have further prolonged these proceedings, and added costs without adding anything of much value to the issues germane to this application.

Existence of right

Infringement of constitutionally entrenched freedoms

Section 3 of the Constitution which is the introductory section to chapter II of the Constitution and which is said to be one of the sections in respect of which the applicant's rights have been infringed provides as follows:

> "Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely -
>
> *(a)* life, liberty, security of the person and the protection of the law;

LESETEDI J

(b) freedom of conscience, of expression and of assembly and association;and

(c) . . .

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

Section 11(1) deals with freedom of conscience. It was conceded in argument by the applicant's counsel that this section may indeed not be relevant to these proceedings. Freedom of the press is part of the freedom of expression which is specifically enshrined in section 12 of the Constitution. Section 15 of the Constitution deals with protection from discrimination. Discrimination is defined in subsection (3) thereof to mean affording different treatment to different persons "attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description". The applicant's difficulty in putting its case within the purview of section 15 arises from the definition of the expression of discrimination.

Although it was held in the case of *Attorney-General v. Dow* [1991] B.L.R. 233 that the list of categories of discrimination contemplated by that section is not exhaustive and that discrimination on the basis of sex falls within the category contemplated by that provision, it appears to me that the applicant has not proved that it has been discriminated against within the recognized grounds under section 15 of the Constitution, nor has it proved any other valid grounds of discrimination. In any event a finding in respect of this section is not necessary for the determination of this application. That therefore leaves section 12(1) of the Constitution in addition to section 3 as sections within which the applicant can strongly argue that its rights have been infringed.

Section 12(1) provides:

"Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence." (My emphasis.)

It has been argued for the applicant that although the applicant did not have the right to receive advertisements from the Government for publication in its papers, once the Government has decided to give that benefit or "patronage" as it was referred to in argument, the Government cannot

LESETEDI J

withdraw that benefit or patronage in order to punish or show disapproval to the applicant for the applicant's conduct for having published material which is not acceptable to the Government or top government officials. The respondents' argument is that in advertising in the applicant's newspapers, the relationship created was a purely commercial one and that in as much as the Government voluntarily decided to advertise in the applicant's papers, it was entitled even without assigning a reason to withdraw from advertising in the applicant's papers. To quote Mr Selepeng at para. 12 of his answering affidavit:

> "I aver that the Applicant has no right to receive advertisements from the Government and it is a legitimate policy issue and within the functions of the President to decide where and with who to place Governmental parastatal advertisements. In relation to companies registered under the Companies Act in which the state is a shareholder it is common practice that the business of these companies is conducted in accordance with wishes of the majority shareholders, who sometimes consult informally before decisions are made."

At para. 11.8 of his affidavit Mr Selepeng continues: "The placing of advertisements is a privilege not a right."

In support of its argument, counsel for the respondent went on to submit that the freedoms enshrined in the Constitution are couched in the negative and that as such for the court to grant the order sought, it will be tantamount to asking the respondent to take a positive act, and compelling it to advertise in the applicant's newspapers in order to enable the applicant to financially survive so that it maintains its freedom of expression. In withdrawing the patronage of adverting in the first applicant's newspapers, so the argument goes, that will not in any way interfere with the applicant's freedom. The argument is further that applicant will continue to enjoy its freedom to publish what it wants even after the withdrawal of patronage but without the help of government patronage.

The decision to withdraw the patronage was not without an objective or purpose. In his answering affidavit, Mr Selepeng at para. 5.6 thereof states:

> "The real reason for the decision was therefore to demonstrate Government's displeasure at irresponsible reporting and the exceeding of editorial freedom. The fact that the Applicant's papers especially the *Botswana Guardian* sometimes exceed parameters of editorial freedom and fair comment has been recognised by Mr Jones who is described in the papers as the sole Director and shareholder of the applicant."

He further on goes to state at paras. 10.4 and 10.5 of his affidavit:

> "Newspapers are known to alter their editorial policy so that it conforms to the views of their advertisers, who are also known to demand adjustments in the editorial policy to conform to their expectations."

It is clear from Mr Selepeng's affidavit that by withdrawing advertisement patronage from the applicant's papers, the Government was basically instilling

LESETEDI J

on the applicant pressure that for it to continue to enjoy the benefit of receiving advertising from Government it should conform to a reportage that falls within what government considers to be the parameters of editorial freedom. What these parameters are, Mr Selepeng does not say. What is clear however is that "parameters of editorial freedom" is a euphemism for reportage that meets government approval. Otherwise why should Mr Selepeng state that newspapers are known to alter their editorial policy so that it conforms with the views of their advertisers, who are also known to demand adjustments in the editorial policy to conform with their expectations.

Counsel for the respondent has referred this court to the Canadian Supreme Court case of *Graham Haig and Others v. Chief Electoral Officer and Others* 1993 (2) S.C.R. 995. In that case the applicants had amongst other things sought an order from court directing that the government should provide microphones in a referendum process to enable them to exercise their freedom of expression more effectively. The applicant therein had argued that freedom of expression included a constitutional right for all Canadians to be provided with a specific means of expression and that failure to do so denied them their freedom of expression. In that case it was held that where the freedom of expression is couched in the negative there is no legal obligation upon the state to take a positive step in order to enable the appellant to better enjoy that freedom. It is my view that the said case is distinguishable from the present case, because what has happened in the present case is that the state has taken a positive step with the sole intention to disapprove of an individual's exercise of its freedom of expression as it deems fit. The message that has been sent to the applicant herein may reasonably be understood by the applicant and the media at large is that unless it tailors its reporting so as to be acceptable to the government, then the patronage which it has been receiving will be withdrawn such that the applicant in the face of economic realities may forgo its full exercise of its freedom of expression in order to retain patronage where Government, parastatals and private companies in which government has a majority shareholding have been the mainstay or contributed substantively to the applicants' advertising market. Government is entitled to advertise in any medium it chooses. There are many accepted parameters within which government may legitimately withdraw such patronage therefrom, for instance where the applicant's selling rates for publishing space is not competitive compared to that of other papers or where the applicant's publications do not reach the market targeted by the Government for its advertisements. The list is of course not exhaustive. The question is, can it withdraw that patronage for reasons given by Mr Selepeng?

Freedom of expression is one of the fundamental cornerstones of every democratic society. Freedom of the media is but one aspect of that freedom. In a democratic society the media plays a very important role. It is normally the media that forms a vehicle for communication between the governed and those that govern. It is usually the press, as part of the media, that acts as a watchdog against abuse of power and corruption where it may occur in society. It is through the media that members of the society communicate their

ideas and feelings about the way they are governed. It plays the very

LESETEDI J

important role in civil society of informing the public of many matters including the way the organs of state operate and by giving general information. It is the press which in many occasions has been in the forefront in the fight against abuse of power, corruption, dictatorship and other ills like blatant disregard of the rule of law committed by those that govern in many a number of countries. As was succinctly pointed out by Hefer A.J.A. in *National Media Ltd and Others v. Bogoshi* 1998 (4) S.A. 1196 (S.C.A.) at 1209I-J:

> "[I]t is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion (Prof JC van der Walt in *Gedenkbundel: HL Swanepoel* at 68). The press and the rest of the media provide the means by which useful, and sometimes vital, information about the daily affairs of the nation is conveyed to its citizens - from the highest to the lowest ranks (Strauss, Strydom and Van der Walt Mediareg 4th ed. at 43). Conversely, the press often becomes the voice of the people -their means to convey their concerns to their fellow citizens, to officialdom and to government."

The views of the media may not always be palatable to those that govern. The relationship between a free media and government can at times be described as akin to opposing poles of a magnet with the government preferring less and less criticism from the media, getting more irritated by vibrant criticism, for such criticism may at times be strident, while the media on the other side seeks to widen the latitude of its criticism. Indeed because of the important role it plays in a democratic society, freedom of expression is jealously guarded by courts of law. It is however not unknown that sometimes the media has gone overboard in exercising their freedom of expression by encroaching on the rights of others by violating their dignity and reputations. There are laws to guard against such excesses, for instance, the law of defamation. Where an individual feels that the press has violated his rights, he is entitled to approach the courts of law to seek a remedy in the form of interdicts or damages for defamation. Those that govern usually stand more scrutiny in the carrying out of their responsibilities than the ordinary member of society. For that reason and because of the position they hold, those who hold power should be more tolerant of such criticism but where they feel the press has gone beyond bounds of freedom of expression, they are entitled, as everyone else, to approach the courts for protection.

It was submitted for the respondent that like every consumer the Government can withdraw its patronage at will. In developing its argument in this respect, respondent's counsel has submitted that as such applicant had no right at law which is enforceable and that this court cannot come to applicant's relief as it has not been breached or violated.

In the United States of America Court of Appeal case of *Hyland v. Wonder* 972 F.2d. 1129, the court was faced with a more or less similar situation to the present one. In that case Hyland was a volunteer in the

LESETEDI J

San Francisco Juvenile Probations Commission and as a volunteer, Hyland's services could be terminated at the will of the Commission. While still with the Commission, Hyland wrote a memorandum critical of the city's juvenile probate department which reflected badly on the department and in which he was raising his concerns regarding the way the probate department was being run. His superiors did not take kindly to what he had written and he was dismissed from his volunteer job. He made an application to the court asking that his dismissal to be set aside on the basis that it violated his constitutional right to freedom of expression as it was made to punish him for exercising, his freedom of expression.

The Court of Appeal held in his favour and at p. 1136 of the judgment Tang J. made the following statement with which I agree entirely:

> "That Hyland had no right, in the first instance, to serve as a volunteer and that he could have been terminated at will does not diminish his First Amendment claim. Indeed, both the Supreme Court and this court have repeatedly and emphatically rejected this argument.
>
> This court has made it clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which [it] could not command directly. Such interference with constitutional rights is impermissible."

See also, *Free Press of Namibia (Pty) Ltd v. Cabinet for the Interim Government of South West Africa* 1987 (1) S.A. 614 (S.W.A.).

The first amendment referred to in the Hyland case is not much different from our own constitutional protection of freedom of expression. I find the above authority persuasive and adopt its reasoning herein.

Government is not a consumer like any other consumer. It carries a lot of responsibilities vis-à-vis the individual. It carries the duty to protect the individual and to ensure that the rights and freedoms granted upon the individual by the constitution are not infringed. It is to the state that the individual usually looks for the protection of its rights and freedoms. For that reason the Government cannot act with a view to taking away an individual's benefits as an expression of its displeasure for the individual's exercise of a constitutional right as this would tend to inhibit the individual in the full exercise of that freedom for fear of incurring punishment. There is nothing commercial about this. The message implicit in the directive is that an individual being a beneficiary to governmental patronage, who in the exercise of its freedom of expression goes beyond what the government is comfortable with, faces the possible unpleasant consequence of losing certain benefits which it would otherwise have received. This hinders the freedom to express oneself freely.

LESETEDI J

I am therefore of the view that the applicant has established at least a prima facie right, though open to some doubt, that the executive's act of withdrawing advertisement patronage from the applicant's papers in order to express its displeasure regarding what it perceived to be exceeding the limit of editorial freedom amounts to an infringement of the first applicant's freedom of expression.

Irreparable harm

The applicant alleges in his papers that the amount of advertising space it sold to the Government, parastatals and private companies in which Government has a majority shareholding contributed to about 20 per cent of its income. Even if the above figure is not accurate, what is undeniable is that the applicant must have indeed suffered financial prejudice as a result of the withdrawal of advertising in its papers by statal, parastatal and private companies in which government holds a majority shareholding. Such prejudice continues for so as long as a ban continues. I therefore find that the applicant has established the existence a continuing wrong which occasions it irreparable harm will become more clearer when I deal with the next consideration.

Absence of other satisfactory remedy

It has been submitted on behalf of the respondent that the applicants are not without an alternative remedy. In this regard it was said that the applicants could, if they succeed in their main action against the respondent, sue for any damages which they may have suffered as a result of the ban. In this regard, a number of authorities have been cited, one of which is the Supreme Court of India case of *Nilabati Behera v. State of Orissa* [1994] 2 L.R.C. 99. I have read that judgment, it however does not seem to lay out that as a hard and fast rule. This is demonstrated by the remark made by Annad J. in the case at p. 113

> "Adverting to the grant of relief to the heirs of a victim of custodial death for the infraction or invasion of his rights guaranteed under art 21 of the Constitution of India, it is not always enough to relegate him to the ordinary remedy of a civil suit to claim damages for the tortuous act of the state as that remedy in private law indeed is available to the aggrieved party."

In this case it is my view that an injustice will be done to the applicant if applicant is denied the remedy it seeks as it will in any event involve another probably long and expensive process of litigation in trying to establish the quantum of damages suffered as a result of the infringement of its freedoms. It is my view that the existence of a possible remedy cannot in the particular circumstances be used to the detriment of the applicant against the relief sought.

Balance of convenience

The view that I take regarding the existence of an alternative remedy also extends to the consideration of the balance of convenience. A party who

LESETEDI J

comes to court under section 18 of the Constitution can derive no comfort in being told to wait for undefined period to endure the infraction of its right while awaiting the out come of the main action. It appears to me that the applicant stands to suffer more prejudice if the relief is not granted in that it will continue being denied the advertisement patronage on the basis of the directive where as if the operation of the directive is suspended, the respondentwill not suffer as much prejudice in that the amount of advertising if any that may go to the applicants will be on the same considerations as before the advent of the directive.

Conclusion

In the light of the aforegoing I think that the applicant has established all the requisites for the grant of an interlocutory order that the directive said to have been issued by His Excellency the President on 23 April 2001 to all statals, parastatals and companies in which the government is a shareholder, banning all advertising in the newspapers owned by the applicant be not enforced pending the outcome of the action instituted by the applicants against the Government for an order effectively declaring the said directive wrongful and unlawful. In so concluding, I must reiterate that Government like anybody else cannot be forced to advertise or buy advertising space in any paper or media. Even where it has been advertising or has bought advertising space in any paper or media for any given period of time, it is, as a general rule entitled to withdraw such patronage at will. As I have stated earlier on in this ruling, a line has to be drawn where the Government does so in order to demonstrate its displeasure at what it considers to be "irresponsible reporting and the exceeding of editorial freedom". But even where the court strikes down a directive such as this which is intended to demonstrate the Government's displeasure at what it considers to be irresponsibe reporting and exceeding of editorial freedom, the next question is whether by so striking down the directive, statal, parastatal and companies in which government is a majority shareholder are by implication compelled to advertise or buy advertising space in the applicant's papers. The answer to that question is in the negative. The decision makers of those bodies are still entitled to exercise their general discretion in deciding whether and how much advertising they want to give to the applicant provided such decisions are not made in pursuance of the directive.

Other relief

The applicant had also sought an order interdicting and restraining the Government of the Republic of Botswana, its ministries, permanent secretaries and other organs or agencies and public officers from removing, destroying or tampering with any circular, e-mail, directive, request or other document (by which is included electronically or computer created or transmitted documents), which any of them brought into existence on and after the date of the directive and relating to any matters pertaining to this dispute.

The applicants have not laid out a well-grounded basis for any apprehension that the

Government or any of its officers may remove, destroy or

LESETEDI J

temper with any such material as may later become necessary for the litigation and for that reason, the relief sought in this respect is denied.

Costs

The applicant's counsel has argued vigorously that the applicants should be entitled to costs at an attorney and client scale as the court's measure to show its displeasure regarding the conduct of the Permanent Secretary to the President in having been untruthful as to the real reasons for the making of the directive. I however agree with learned counsel for the respondent that it is not the Permanent Secretary to the President whose conduct is at issue in this matter. I further do not want to comment on his conduct, as it is not necessary for purpose of my decision on the issue of costs. For purposes of this application, I have accepted Mr Selepeng's word that the directive was made by the President. It is that directive that has been complained about and it is on the basis of that decision that I determine the issue of costs in this matter. Although I have found against the applicant on the issue of the interdict in respect of materials relating to the directive, that issue took a minimal part of the proceedings and I will therefore disregard it when it comes to the issue of costs. Costs have to follow the main events and be on the normal scale. I therefore make the following order:

(1) That the operation of the directive made by the President on or around 23 April 2001 to the effect that all statal, parastatals bodies and private companies in which the State has a majority shareholding should cease placing advertisements in the Botswana Guardian and Midweek Sun newspapers, be suspended pending the outcome of an application instituted by the applicant for a declaration that the said directive be declared invalid and of no force and effect. This order shall not prejudice the rights of the decision makers of those bodies to exercise their general discretion in deciding whether and how much advertising they want to give to the applicant provided such decisions are not made in pursuant to the directive.

(2) That the respondent pays the applicant's costs of this application on party and party scale.

Application granted with costs.