

**IN THE HIGH COURT FOR ZAMBIA  
2010/HPC/0003 AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

BETWEEN:

**HOT FM LIMITED**

**PLAINTIFF**

AND

**COLLINS KABWE CHANGWE**

**1<sup>ST</sup>**

**DEFENDANT**

**YAR FM LIMITED**

**2<sup>ND</sup>**

**DEFENDANT**

**BEFORE THE HON. MR. JUSTICE C. KAJIMANGA THIS 30<sup>TH</sup> DAY OF  
APRIL, 2012**

**FOR THE PLAINTIFF:** Mr. M. Muchende, Messrs Dindi & Company

**FOR THE DEFENDANTS:** Mr. M. Chipanzhya, Messrs Freddie &  
Company

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**J U D G M E N T**

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**Cases referred to:**

The Court regrets the delay in delivering this judgment. This delay was occasioned by election petitions.

The Plaintiff, a radio broadcasting company, issued a writ out of the Commercial Registry endorsed with a claim for:

- (1) An injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally whether by themselves, or by their servants or agents or otherwise from making any use of such or any copyright material consisting of new bulletins

whatsoever, information as aforesaid or any part thereof for any purpose whatsoever;

- (2) An Anton Pillar Order requiring the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally to permit the Plaintiff to enter upon their premises to enable it inspect the on air computers and production computers of the 2<sup>nd</sup> Defendant company and allow a search in the e-mail box of one Kenny Tonga for the retrieval and preservation of the evidence relating to the copyright infringement complained of in these proceedings;
- (3) A declaration that the copyright subsisting in the news bulletins aforesaid communicated by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant were and are intellectual property belonging to and constitute confidential information being the property of the Plaintiffs;
- (4) Damages against the 1<sup>st</sup> Defendant for breach of a written contract of service dated 13<sup>th</sup> February, 2009 made between the Plaintiff and the 1<sup>st</sup> Defendant;
- (5) An inquiry into what damages have been and may be suffered by the Plaintiff by reason of the 1<sup>st</sup> Defendant's breach of confidence in making use of such confidential information as aforesaid;
- (6) Further or in the alternative an account of profits made by the 1<sup>st</sup> Defendant by use of such confidential and copyright material as aforesaid or any part thereof;
- (7) Payment of the amount certified in answer to such inquiry of account as aforesaid;
- (8) Interest thereon;

(9) Further or other relief;

(10) Costs.

In its statement of claim the Plaintiff contended that it is in the business of radio broadcasting on the Lusaka frequency modulation of 87.7 and the producer and owner of the copyright material in the radio news programmes consisting of news bulletins and recordings of government, political and prominent personalities. The 1<sup>st</sup> Defendant was employed by the Plaintiff as editor until 25<sup>th</sup> December, 2009 when he resigned. It was an express, alternatively an implied term of the employment contract that the 1<sup>st</sup> Defendant should keep secret all records, knowledge and information which might from time to time be communicated to him by the Plaintiff in the course of his employment and that he should neither be involved in 'insider dealings' nor make use of the same or any part thereof, other than in furtherance of the business of the Plaintiff.

The Plaintiff also contended that between 15<sup>th</sup> September, 2009 and 19<sup>th</sup> December, 2009 the 1<sup>st</sup> Defendant in breach of the term and/or in breach of the duty of confidentiality transmitted by e-mails about one hundred news bulletins and voice recordings of government, political and prominent personalities to the Defendant company without the licence of the Plaintiff. The 1<sup>st</sup> Defendant transmitted exclusive sound bites for Dr. Musokotwane, Major Robby Chizyuka, Dr. Chituwo, Fr. Paul Samasumo, Mr. Sata on PF Conference, Hon. Shikapwasha, Hon. Mpombo, and Mr. Hichilema on Solwezi by-election. On dates between 15<sup>th</sup> September, 2009 and 19<sup>th</sup> December, 2009 the 2<sup>nd</sup> Defendant infringed the Plaintiff's copyright in the said news items and sound bites (recordings) by reproducing and authorizing reproduction and broadcasting the news items and voice bites aforesaid in verbatim on their Copperbelt frequency modulation 89.9 without the licence

of the Plaintiff. By reason of the foregoing, the Plaintiff has suffered loss and damages.

In his defence the 1<sup>st</sup> Defendant denied the Plaintiff's claim and contended that the Plaintiff was not the owner of the copyright material in the radio news programmes consisting of news bulletins and recordings of government, political and prominent personalities as alleged. If an infringement was committed which is denied, the 1<sup>st</sup> Defendant was not aware and had no reasonable grounds to suspect that copyright subsisted in the work which was at all material times in the public domain.

The 1<sup>st</sup> Defendant contended that it was neither an express nor an implied term of the employment contract that the 1<sup>st</sup> Defendant should keep secret all records, knowledge and information which might be communicated to him from time to time by the Plaintiff in the course of his employment and that he should neither be involved in 'insider dealings' nor make use of the same or any part thereof other than in furtherance of the Plaintiff's business when such material existed in the public domain; and the 1<sup>st</sup> Defendant was not aware and had no reasonable grounds for suspecting either that copyright subsisted in such records, knowledge and information or that the Plaintiff was the exclusive licensee thereof. The 1<sup>st</sup> Defendant was not in breach of any term or duty of confidentiality to transmit to the 2<sup>nd</sup> Defendant news materials of current affairs which were already in the public domain and in respect of which he had no reasonable grounds for suspecting either that copyright subsisted in such news material or that the Plaintiff was the exclusive licensee thereof. He denied that the Plaintiff was entitled to damages.

In its defence and counterclaim, the 2<sup>nd</sup> Defendant denied the Plaintiff's claim and contended that the Plaintiff was not the producer and owner of the copyright material in the radio news programmes consisting of news bulletins and recordings of government, political and prominent personalities

as alleged and the 2<sup>nd</sup> Defendant had no reasonable grounds for suspecting the existence of copyright. The 2<sup>nd</sup> Defendant did not require a licence from the Plaintiff as the latter was not the owner of the copyright material. The 2<sup>nd</sup> Defendant did not infringe the Plaintiff's copyright in the said news items and sound bites and the Plaintiff is not entitled to any damages. If necessary the 2<sup>nd</sup> Defendant would seek to set off the Plaintiff's claim from the former's counterclaim which would wholly extinguish the claim.

The 2<sup>nd</sup> Defendant counterclaimed that on 18<sup>th</sup> January, 2010 the Plaintiff, by its chief operating officer, one Oscar Chavula, falsely and maliciously wrote and published of and concerning the 2<sup>nd</sup> Defendant the following words under an article entitled **"PRESS STATEMENT OF SEIZURE OF COMPUTERS FROM YAR FM BY COURT ORDER"** namely,

***"... This morning Hon 87.7 FM Limited of Lusaka served a court order***

***for the seizure of all YAR FM on-air, production and administration computers. It was done as part of a legal action we have brought against YAR FM for what we believe is a serious thief of our intellectual property.***

***Last month it came to our attention that YAR FM has been broadcasting news bulletins stolen from Hot 87.7 FM from September 2009 up to the time we discovered the crime in December 2009.***

***Our humble efforts to seek a well reasoned justification for this from the YAR FM directors and management were rewarded with unsatisfactory cooperation and to a large extent, even trivialized.***

***We are therefore left with no choice but to take legal action against the Kitwe Station to claim damages amounting to US \$200,000.00 for theft of over 100 news bulletins from Hot 87.7 FM.***

***In this regard we have invoked every legal device the law provides to protect evidence and ensure that justice is served.***

***I would like to inform you however that YAR FM management and their agents refused to comply with the court order we served them and blocked the seizure ordered by the Court.***

***We shall duly apply for contempt proceedings against YAR FM management and its agents involved in this matter. However we intend to ensure that this process is completed as soon as possible.***

***We have taken this course of action with profound sadness and disappointment because YAR FM is a station we have assisted in its times of crisis for no charge at all.***

***When their transmitter was damaged, we assisted them with one of ours to help them maintain broadcast. When even that was damaged again, we gave them spares to repair it.***

***We have provided other technical assistance to them free of charge from time to time.***

***This is what makes what they have been doing even more heinous as we cannot understand how they justify going behind our backs to steal a very important intellectual property we produce at great cost and expense.***

***We have informed all professional bodies and the Ministry of Information and Broadcasting Services of our action.***

***This is a very serious matter that strikes at the root of professional conduct of the media in Zambia and hope that it will set a good precedent that will inspire a higher standard of professionalism in the industry.***

***Signed .....Date: 18<sup>th</sup> January  
2010***

***OSCAR CHAVULA  
CHIEF OPERATIONS OFFICER..."***

It was contended that by the words complained of in their natural and ordinary meaning the Plaintiff meant and was understood to mean that the 2<sup>nd</sup> Defendant and its management were thieves, ungrateful, insincere, disobedient to lawful authority and unethical. The Plaintiff sent the aforesaid press statement to all professional bodies and the media houses in Zambia and was broadcast three times on its own 87.7 FM radio station at diverse times on 18<sup>th</sup> January, 2010. The Plaintiff well knew at the time it sent the aforesaid press statement to all the media houses in Zambia that it was likely to be opened, read and broadcast by some person or persons in the employ of the media houses. The press statement was in fact opened and read in the ordinary course of business by one Siphon Kapumba, a Director of the Zambia Chapter of the Media Institute of Southern Africa (MISA).

It was further contended that by reason of the foregoing, the 2<sup>nd</sup> Defendant has been severely injured in its credibility and reputation and has been brought into scandal, odium and contempt and has thereby suffered loss and damage. Particulars of the loss and damage being that in contumelious disregard of the 2<sup>nd</sup> Defendant's rights, the Plaintiff had refused, omitted or neglected to apologise and retract the aforesaid press

statement and make amends despite a demand for the same by the Plaintiff. The 2<sup>nd</sup> Defendant therefore counterclaimed damages for libel; an injunction restraining the Plaintiff by itself, its servants or agents from further publishing the said or any similar libel of and concerning the 2<sup>nd</sup> Defendant; interest on the sums found to be due; and costs.

The Plaintiff paraded two witnesses. PW1 was Oscar Chavula, a director in the Plaintiff company. His witness statement disclosed that on 19<sup>th</sup> December, 2009 whilst in Kitwe he heard the 12.00 hours news on the 2<sup>nd</sup> Defendant's radio station on the Copperbelt frequency modulation 89.9. To his surprise the radio station aired, *inter alia*, four exclusive recordings notable of which was a telephone interview of Honourable Robby Chizyuka which he identified to be a production and copyright property of the Plaintiff. Upon enquiry from the editorial team he was reliably informed by the acting editor, one Natasha Chikonde that she had discovered evidence to the effect that the 1<sup>st</sup> Defendant despite being on leave habitually passed through the office and he was responsible for electronically transmitting the Plaintiff's news bulletins and sound bites to the 2<sup>nd</sup> Defendant. The acting editor further informed him that the 1<sup>st</sup> Defendant had volunteered his private yahoo e-mail address and password to her and upon conducting a search she discovered that the 1<sup>st</sup> Defendant had transmitted various e-mails containing about one hundred news bulletins and recordings produced by the Plaintiff company to one, Kenny Tonga and Clive Saviye as per the e-mail correspondence at pages 1 to 7 of the Plaintiff's bundle of documents.

The witness statement of PW1 also disclosed that he was aware that Kenny Tonga and Clive Saviye are directors in the 2<sup>nd</sup> Defendant company and he considered the former as a friend who he had helped on occasions when he had breakdowns at his radio station. For instance, some time in early 2004 he shared a flat in Handsworth Park, Lusaka with Kenny Tonga and he had a stint with his radio station in the Plaintiff's studio when he was



relieved of his duties at Radio Phoenix. Most importantly, in 2007 the 2<sup>nd</sup> Defendant's transmitter developed a fault and it could not be on air. Kenny Tonga approached him knowing that he had a spare transmitter and requested that he should help him while his was being repaired. At no charge, PW1 assisted him with his transmitter on the understanding that he would bring it back after repairing his. After a short while Kenny Tonga informed him that a component in the transmitter had blown out and requested for the spare part which he gave him gratis. Sometime in December 2007 Kenny Tonga offered to buy his transmitter. Ordinarily transmitters cost close to K50,000,000.00 including shipping and handling but he sold it to him at only K16,000,000.00 and the spares were sold at cost. He was saddened to learn that the 2<sup>nd</sup> Defendant through Kenny Tonga and Clive Saviye had surreptitiously entered into an agreement with his member of staff, the 1<sup>st</sup> Defendant, by which in consideration to the edited news stories and sound bites the 2<sup>nd</sup> Defendant would be paying the 1<sup>st</sup> Defendant K500,000.00 per month.

The witness statement of PW1 further disclosed that on 20<sup>th</sup> December, 2009 he charged the 1<sup>st</sup> Defendant and requested him to exculpate himself on the discoveries regarding his dealings with the 2<sup>nd</sup> Defendant without the permission of and to the detriment of the Plaintiff company but he resigned. The 1<sup>st</sup> Defendant has refused to surrender the Olympus recording machine used for recording the sound bites in issue. The copyright material in the news bulletins and the sound bites were transmitted to the 2<sup>nd</sup> Defendant from the Plaintiff's computers and/or personal laptop of the 1<sup>st</sup> Defendant to the lap top or computer in Kitwe used by Kenny Tonga and Clive Saviye of the Defendant company. The evidence of the transmitted copyright material belonging to the Plaintiff was captured in the 2<sup>nd</sup> Defendant's on air computers and production computers and adapted, reproduced and broadcast on the 2<sup>nd</sup> Defendant's radio frequency modulation of 89.9 FM. After the Court granted an Anton Pillar Order in favour of the Plaintiff, PW1

searched the computers of the 2<sup>nd</sup> Defendant and discovered that they formatted or deleted the programmes prior to 30<sup>th</sup> May, 2010 and installed a fresh system information which supports the same functions as per page 15 of the Plaintiff's bundle of documents. This meant that as apprehended all the down loads that were transmitted from the Plaintiff's computer system could therefore not be traced. The formatting of the 2<sup>nd</sup> Defendant's system was calculated to defeat the ends of justice by obliterating material evidence which he was entitled to elicit by the Anton Pillar Order granted to the Plaintiff by the Court. Nevertheless, the hard copy e-mails are conclusive evidence that there was connivance between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in stealing copyright material from the Plaintiff and the formatting of his computer system confirms that the 2<sup>nd</sup> Defendant was conscious that evidence would have been elicited to confirm the averments of the Plaintiff.

In cross-examination PW1 testified that the news bulletins consisted of interviews of prominent personalities, among others, and that other radio stations had access to the same interviews. He said that the personalities they interviewed neither gave the Plaintiff exclusive rights to the interview material, licence to neither own the product of the interviews nor copyright in the product of the interviews. PW1 stated that he was not sure if the news bulletins were in the public domain and broadcast by other radio stations by mid September 2009. He told the Court that he was not sure if the Plaintiff was not the only radio station which had access to the news bulletins.

It was also his evidence that Hon. Chizyuka gave a press conference at which journalists from other organizations interviewed him. PW1 stated that the actual wording from Hon. Chizyuka which was recorded via telephone interview from Hon FM became the Plaintiff's because it was sourced by the Plaintiff, using its own equipment, employees and resources. He said that this was not a public interview.

The witness conceded that media houses shared news and information generally but there are set rules and procedures for doing that. He told the Court that although he was unable to produce them before the Court and did not know who prepared them, the procedures were part of journalistic training. PW1 testified that he knew Eugene Phiri who had worked for QFM radio station before he joined the Plaintiff as a journalist. He said that he did not know if Eugene Phiri used to furnish the Plaintiff with news stories. The witness told the Court that the 1<sup>st</sup> Defendant was once a news editor at HOT FM and that he would know if they were getting news bulletins from QFM.

PW1 also told the Court that from time to time he used to render assistance to Kenny Tonga and Yar FM and they never paid for the services he rendered, except for what they bought.

The witness testified that the document at page 12 of the Defendant's bundle of documents is the press statement he issued. He said that they arrived at US\$200,000.00 as damages by using international rates for news bulletins which is US\$2,000.00 per news bulletin. The witness told the Court that a news bulletin consists of all the news items in a particular bulletin and the Hon. Chizyuka story formed part of the Plaintiff's news bulletin.

PW1 testified that the statements in paragraphs 9, 10 and 11 at page 12 of the Defendant's bundle of documents were true. He said that the 2<sup>nd</sup> Defendant paid for the spares and transmitter. He said that in the light of the documentary evidence showing payment by the Defendant for spares and the transmitter the said statements are not correct.

In re-examination, PW1 testified that what gave the Plaintiff rights is that the material was originated from its newsroom by calling and following up with its resources and that it was not in the public domain. He said that if it was an exclusive story, it was the Plaintiff's as it was the originator. It was his evidence that the news bulletins he was referring to were those that were

exclusively recorded from the Plaintiff's radio station, including the Hon. Chizyuka's telephone interview. He said that the Plaintiff did not complain about Hon. Chizyuka's press conference.

PW2 was Natasha Chikonde, a news editor at the Plaintiff company. Her witness statement disclosed that some time in 2009 PW1 asked her how news sound bites or recordings produced by the Plaintiff had found themselves with the 2<sup>nd</sup> Defendant on the Copperbelt because he heard them being aired on the 2<sup>nd</sup> Defendant's radio station. She responded that she knew nothing about it and that perhaps the 1<sup>st</sup> Defendant would know since at that time he was the news editor and she was his assistant. PW1 was upset with her that he had already asked the 1<sup>st</sup> Defendant who told him that he had not been to the office that morning. PW1 then requested to see their e-mails and she agreed and told him that she also had the 1<sup>st</sup> Defendant's password so that they could check his e-mails as well.

On how she got the 1<sup>st</sup> Defendant's password, PW2 stated that as news editor, he was the recipient of diaries (Government and other organization's events communicated to all media organizations from Zambia News and Information Service) on behalf of the Plaintiff. The 1<sup>st</sup> Defendant volunteered the password to her so that when the he was out she could access the e-mails for diaries as assistant editor. She accessed the 1<sup>st</sup> Defendant's e-mails and in the sent items box she found several e-mails to which various news items in issue produced by the Plaintiff were attached and transmitted to the e-mail address of the 2<sup>nd</sup> Defendant's representative namely, Clive Saviye. PW2 reported her findings to PW1 and copies of the said e-mails were printed and given to him.

In cross-examination, PW2 testified that journalists exchange information but there is a procedure which is followed. She said that you first get permission from your bosses, then you enter into an agreement with the other party; and that if you don't get permission you have to

acknowledge the source of your information. The witness told the Court that she did not know who formulated the procedure but that they learned this at school and that it was not in writing.

PW2 testified that she opened the 1<sup>st</sup> Defendant's mail box and she got permission from him. She said that she opened it on the day he went on leave but before that he gave her his password to use. The witness told the Court that the information she got included diaries and official statements from other organizations and companies. She said that she would get news items from other sources in the 1<sup>st</sup> Defendant's mail box.

PW2 also testified that you do not require permission from the source of the news items if you have to use it but you mention the source. She told the Court that they would use the information from the 1<sup>st</sup> Defendant's mail box as news stories and would broadcast the statement. The witness said that a news bulletin is a combination of stories, sports and international news. It was also her evidence that sound bites are voices, not news bulletins but are part of news bulletins.

PW2 testified that according to the footage of the press statement at page 12 of the Defendant's bundle of documents PW1 prepared the press statement and it was given to her by him for circulation. She said that she circulated it to journalists that she knew at Radio Phoenix, Muvi TV, QFM and Zambia National Broadcasting Corporation (ZNBC).

PW2 also testified that the e-mails from the 1<sup>st</sup> Defendant's mail box contained stories they compiled in the news room from various sources. She told the Court that most of the stories had been broadcast and that she did not know if the 1<sup>st</sup> Defendant was sending them before or after they had been broadcast. It was her evidence that the 1<sup>st</sup> Defendant left her his password so that he could access incoming materials, most of which was from Zambia News Information Service. The witness told the Court that

those that were sent as their news items from interviews were their product. She said that a good story would run a maximum of three bulletins in a day or even the following day and that the duration depends on the significance of the story as regards when it would get stale.

DW1 was the 1<sup>st</sup> Defendant. His witness statement disclosed that on numerous occasions the Plaintiff instructed him to release news items for re-use by other news organizations. At the height of Muvi TV's decision to start broadcasting on satellite the 1<sup>st</sup> Defendant obtained an interview with the Minister of Information and Broadcasting, Honourable Lt. Gen. Ronnie Shikapwasha at the time which it later aired on the Plaintiff's radio station news bulletins. The Plaintiff instructed him to share with Muvi TV the news item on CD and in hard copy which was later aired on Muvi TV the same day it was picked up from his office. It is therefore surprising that in its claim the Plaintiff alleges that the 1<sup>st</sup> Defendant as news editor was expressly expected to keep records of the news items secret and he would show numerous occasions where, with the full knowledge of the Plaintiff, information between HOT FM newsroom and other news agencies were shared.

The witness statement of the 1<sup>st</sup> Defendant also disclosed that the lack of resources such as transport at the Plaintiff's radio station meant that he was called upon to strengthen his relationship with reporters from other news organizations in order to share news gathered at their own cost with reporters from HOT FM. There were several times when reporters from FQM, 5FM or Radio Phoenix would be approached by him to share news with HOT FM reporters especially stories involving the Republican President gathered at the International Airport as the Plaintiff could not send its reporters to the airport due to lack of transport. On several occasions the Plaintiff benefitted from this arrangement initiated by the 1<sup>st</sup> Defendant with the full support and knowledge of the Plaintiff. It is therefore unreasonable for the Plaintiff to claim exclusivity for news stories which were aired on several other media

organizations before being transmitted to the 2<sup>nd</sup> Defendant's radio station. He did not at any time transmit any news items before it was aired on HOT FM, rendering the Plaintiff's claim of exclusivity irrelevant.

The 1<sup>st</sup> Defendant's witness statement further disclosed that part of the documents submitted in the plaintiff's bundle of documents was obtained illegally as he was on leave when the Plaintiff obtained the said material without his permission. He had commenced negotiations with local and foreign news organizations with the view of becoming a news correspondent based in Lusaka because he was planning to quit his position as news editor due to poor working conditions. He went for several months without getting paid his monthly salary and allowances and that he was demotivated after being denied an educational loan of K5,000,000.00 to further his studies despite several promises by the Plaintiff that he would be assisted. Due to the cordial relations that existed with the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Defendant was approached by the former with a view of becoming its news correspondent. This arrangement was to be formalized with a contract of service in February 2010 at which time he would have resigned as HOT FM news editor. The Plaintiff's claim for breach of ethics is not justifiable because it was in a similar arrangement with one Eugene Phiri, a news reporter from QFM, from whom it obtained news items for over a period of three months whilst he was employed by QFM, a Lusaka based radio station. The 1<sup>st</sup> Defendant expressed surprise at how the same act done by the Plaintiff with QFM could not amount to it being unethical. He denied selling news items to the 2<sup>nd</sup> Defendant and that when PW1 called him, he used unpalatable words which caused injury to his integrity and reputation. The Plaintiff's claim that copyright existed in the works produced is both unreasonable and surprising and that its claim should therefore be dismissed with costs as it lacks merit.

In cross-examination, DW1 testified that the document at page 6 of the Defendant's bundle of documents is an employment contract between him and the Plaintiff and that between September and December 2009 this contract was still subsisting. DW1 told the Court that Clause 4(b) of the contract required him to obtain prior consent from the Plaintiff before he could engage in any paid work. He said that he did not deny that some news items were sent to the 2<sup>nd</sup> Defendant by him during the subsistence of the contract and that he did not obtain the consent of the Plaintiff to transmit the news items to the 2<sup>nd</sup> Defendant. He also conceded that he agreed with the 2<sup>nd</sup> Defendant to keep the deal secret until he resigned.

DW1 told the Court that the e-mail at page 1 of the Plaintiff's bundle of documents is one of the e-mails confirming his earlier evidence to keep their dealings a secret. He said that some news stories were produced during the contract of employment and others before. DW1 testified that his dealings with the 2<sup>nd</sup> Defendant were not in breach of his contract of employment. He said that there was no business gain in the exchange of information and there was therefore no need for prior consent.

With reference to paragraph two of his witness statement, DW1 told the Court that the Plaintiff did not instruct him to release the news items for re-use by other news organizations. He said that he transmitted news items only after they had been aired by the Plaintiff. It was also his evidence that there is no exclusivity in a telephonic interview unless there is a contract between the Plaintiff and the person interviewed. According to DW1 what he was doing with the 2<sup>nd</sup> Defendant is what the Plaintiff was doing with Eugene Phiri. He conceded that he had not produced any evidence to substantiate this allegation. DW1 told the Court that they were using either personal or the Plaintiff's equipment when recording and that he was using his lap top in the news room. He testified that he did not give back the Olympus Recorder.



In re-examination DW1 told the Court that he did not engage in paid work with the Defendant and at no time did he receive payment as what existed were negotiations. He said that what was to be kept secret were the negotiations he had with the 2<sup>nd</sup> Defendant until he left the Plaintiff's employment.

It was also his evidence that their source of news was walk-in interviews, phoning or visiting sources and press conferences and that his sources of information was not confidential. DW1 told the Court that exclusivity in news pertains to a situation where a news source gives out an interview and states to the person interviewing him that the story shall only be aired in your organization.

DW1 testified that when he decided to resign he wrote to the station manager that the recorder shall not be returned as the Plaintiff was owing him some money in unpaid salaries, allowances and termination benefits. He said that the recorder is valued at K300,000.00 but he was owed millions of Kwacha by the Plaintiff.

DW1 also testified that Eugene Phiri approached him that he wanted to join HOT FM but there was no vacancy at the time and so, he volunteered to be sending news stories with recordings as a way of winning a place at HOT FM. He said that Eugene Phiri was at the time working for QFM.

DW2 was Kenny Tonga, the 2<sup>nd</sup> Defendant company's commercial director. His witness statement disclosed that the 2<sup>nd</sup> Defendant resolved to have a correspondent reporter based in Lusaka and sought the services of the 1<sup>st</sup> Defendant to assist them in finding a commendable reporter who would deliver according to their expectations. The 1<sup>st</sup> Defendant expressed interest and said he would only be able to work for the 2<sup>nd</sup> Defendant after February 2010 in which period he intended to resign from the Plaintiff's radio station. DW2 advised that the 1<sup>st</sup> Defendant and the news editor Clive

Saviye would have to intensify the already existing exchange of stories to try and gauge the 1<sup>st</sup> Defendant's output in terms of delivery before his engagement as a correspondent reporter in February 2010. The witness further advised the 1<sup>st</sup> Defendant to copy all the e-mails to his account so that he would be able to assess his ability to deliver before the 2<sup>nd</sup> Defendant could engage him. The 1<sup>st</sup> Defendant requested that they keep this between themselves until he resigned for fear of being mistreated. There was no damage in these actions that were done due to the fact that the institutions were based in two different provinces and that it was a normal practice in journalism. In addition the 1<sup>st</sup> Defendant's contract did not restrict him from engaging into news sharing and being a correspondent reporter.

The witness statement of DW2 also disclosed that this relationship went on until sometime in December 2009 when he received a call from PW1 to the effect that he had heard the 2<sup>nd</sup> Defendant's news bulletin at 12.00 hours carrying verbatim, a story he said was exclusive to the Plaintiff and that the same story had ran on their radio station earlier that day. A news story cannot be exclusive when it had been broadcast earlier on during that day. An effort made by DW2 to clarify with PW1 by speaking to him proved futile as the former had a prior engagement. In the meantime, PW1 lost his temper and called them all sorts of names including crooks and that he would deal with them once and for all. After a while PW1 called Vincent Kapembwa, an employee of the 2<sup>nd</sup> Defendant who told him that he would get in touch with him as he was not in the office. Upon reaching the office Vincent Kapembwa enquired with the editor on the allegations raised by PW1 and the editor confirmed that the 2<sup>nd</sup> Defendant had the story through the correspondence it had with the 1<sup>st</sup> Defendant. With this in mind Vincent Kapembwa tried to contact PW1 but he was not successful.

The witness statement of DW2 further disclosed that PW1 alleged that he had helped the Defendant on different occasions for no charge citing

instances when the second hand transmitter and its spare part had broken down. This was meant to dent the image of the Defendants because receipts will show that the transmitter was bought from him at a price he agreed to and when it broke down the 2<sup>nd</sup> Defendant equally paid for it in full, the amount he quoted.

The witness statement also disclosed that regarding the allegation that PW1 shared a flat with him, the correct position is that he gave him a place to stay and in an effort to provide for him as a friend, DW2 temporarily moved out of the flat to stay with a girl friend whilst still paying rent and utilities for the flat PW1 claims they shared. Further, he was not relieved of his duties by Radio Phoenix but he resigned voluntarily in order to assist in the set up of the Plaintiff's radio station. They had inadequate resources and the understanding was that DW2 would be allocated shares in the business once it started running. When the Plaintiff's radio station became operational he realized that things had changed and he had made a mistake of not signing any documents under the mistaken belief that the people he was assisting were his friends. DW2 knew he had lost a lot of money but picked himself up and decided to resign his position as sales and marketing director in the Plaintiff company upon giving one month's notice. Upon tendering his resignation, DW2 was treated like an enemy, sidelined and looked at with suspicion. To this effect, when the 1<sup>st</sup> Defendant told him to keep the issue of engaging him as a correspondent reported a secret until the air was clear, he understood what he meant because DW2 had gone through it.

The witness statement of DW2 further disclosed that the proper procedure in the preparation of news is that it is prepared from start to finish in the news room, printed and then cast in the on air studio and hard copies sent back to the news room. It was therefore not justifiable for the Plaintiff to look for soft copy evidence of the said bulletins; and that therefore, the

search and seizure order was meant to cripple the operations of the 2<sup>nd</sup> Defendant radio station knowing very well that production and on air computers are the back bone of any radio station. Two weeks before the Defendant received court process, PW1 was at his house having lunch with them and his taking legal action against the 2<sup>nd</sup> Defendant came as a shock. They later tried to talk to him with a view to resolving the matter amicably but he totally refused. The media statement which was circulated to various media houses and the one submitted to court are conflicting and untruthful. In his witness statement PW1 stated that the Defendant paid for the transmitter whereas in the circulated press statement to the media houses by e-mail, he claimed that he gave the Defendant the transmitter and spare part for free. He was therefore bent on maliciously tarnishing the Defendant's image and getting money out of the 2<sup>nd</sup> Defendant.

In cross-examination, DW2 testified that the principle of reciprocity applies in exchanging news but they did not have this kind of arrangement with the Plaintiff. He conceded that in spite of the absence of such an arrangement news items were coming from the Plaintiff's news room through the 1<sup>st</sup> Defendant. DW2 told the Court that they did not give the Plaintiff equipment to capture news/information for or on their behalf and that he was not aware whether the 1<sup>st</sup> Defendant was using his own equipment to capture information or not. The witness maintained that there was no requirement to obtain the Plaintiff's permission because of the already existing relationships between his news editor and the 1<sup>st</sup> Defendant; and that they wanted to engage a correspondent from Lusaka and the 1<sup>st</sup> Defendant showed willingness. The witness conceded that they were receiving news stories and sound bites from the 1<sup>st</sup> Defendant during the subsistence of his contract with the Plaintiff.

DW2 testified that money was discussed in the e-mail from the 1<sup>st</sup> Defendant to him appearing on page 1 of the Plaintiff's supplementary

bundle of documents. It was his evidence that by the words, ***“Am ok with the deal”*** in the e-mail at page 1 of the Plaintiff’s supplementary bundle of documents, the 1<sup>st</sup> Defendant had accepted the counter offer. He said that he had not presented anything to the Court which was contrary to the contents of the e-mail.

The witness testified that there was no copyright that existed in the news stories and sound bites from the Plaintiff. He said that copyright requires production of a copyright certificate or contract from the interviewee and that his research revealed that you can copyright something which is an invention and it would be an infringement if someone used such material.

DW2 told the Court that the court order was obtained to cripple the Defendant’s on air operations if it was effected. He said that the seizure did not take place but PW1 was allowed to inspect and nothing was seized.

The witness also testified that the statement by PW1 that the Plaintiff assisted the 2<sup>nd</sup> Defendant for no charge is incorrect. He said that they funded PW1’s trip when he went to install a radio data sender (rds) at their radio station although they did not pay for the time he took to do the work. The witness told the Court that they used the Plaintiff’s transmitter before buying it.

In re-examination, DW2 testified that the sources of news items from the Plaintiff included press conferences, press releases, political rallies and one to one interviews. He told the Court that they did not conclude with the 1<sup>st</sup> Defendant on how much they would pay him if he was engaged as a correspondent. The witness testified that there is no property in a news item because news is news at 08.00 hours but not at 11.00 hours and that a news story is usually aired by one institution.

DW2 further testified that he found it offensive for the Plaintiff to circulate the press statement to media houses when the case was before a court of law. He said that when it was aired on the Plaintiff's radio, he started receiving phone calls from his clients in Lusaka, asking why they would engage themselves in theft. DW2 told the Court that the press statement undermined the good intention and confidence the Defendant has with its clients. He said that some of the statements were injurious that wone awards on the Copperbelt as the best radio station.

It was also his evidence that PW1 told them not to pay him money because he had business in Kitwe and could install that rds for them if only they could buy him fuel, which they did. He told the Court that there had been no services rendered by PW1 for which they have not paid.

I have considered the evidence on record, written submissions and the authorities cited by the parties. The Plaintiff's first claim is for an injunction restraining the Defendants from using its copyright material consisting of news bulletins and information. The second claim is for an Auton Pillar order requiring the Defendants to enter upon their premises to enable them inspect the on-air computers, production computers and allow a search in the mail box of one Kenny Tonga for the retrieval and preservation of the evidence relating to copyright infringement complained of in these proceedings. As the record shows, these two claims were dealt with at the interlocutory stage by an order of this Court dated 12<sup>th</sup> January, 2010.

The third claim is for a declaration that the copyright subsisting in the news bulletins communicated by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant were and are intellectual property belonging to and constitute confidential information, the property of the Plaintiff. Sections 7 and 8 of the Copyright and Performance Act Cap 406 of the Laws of Zambia hereinafter called "the Act" provide as follows:

**“7. Copyright is a property which shall subsist in accordance with this Act in the products of creativity specified in section eight.**

**8. (1) The products of creativity in which copyright may subsist under this Act are the following categories of works:**

- (a) original -**
  - (i) literary works;**
  - (ii) musical works;**
  - (iii) artistic works; or**
  - (iv) computer programmes; ...**
- (d) sound recordings;**
- (e) broadcasts; “**

And according to Section 9 of the Act the sound recordings must be made or first published in Zambia and the broadcast must be first transmitted in Zambia to qualify as copyright. Further Sections 13 and 14 of the Act provide that sound recordings and broadcast material subsist for fifty years from the date of the making and or transmissions respectively.

The subsistence of exclusive rights for the usage of the sound recordings and broadcast material is provided in Section 17 of the Act in the following terms:

**“17. (1) The owner of the copyright in a work shall have, in accordance with this Act, the exclusive right to do, or to authorize others to do, in Zambia or on any ship or aircraft registered in Zambia, the acts (in**

***this Act called “controlled acts”) specified in this Section in relation to each category of work...***

**(4) *The controlled acts in relation to an audiovisual work or sound recording are -***

***(a) the adaption;***

***(b) the reproduction;***

***(c) the publication;***

***(d) the broadcasting or inclusion in a cable program;***

***(e) the communication to the public by any other means; and***

***(f) the importation into Zambia of copies;***

***of the audiovisual work or sound recording, together with any of the controlled acts in paragraphs (b) to (e) in relation to an adaptation of the audiovisual work or sound recording.***

**(5) *the controlled acts in relation to a broadcast or cable programme are -***

***(a) the reproduction;***

***(b) in the case of a broadcast -***

***(i) the re-broadcasting; or***

***(ii) the inclusion in a cable programme;”***



In terms of ownership of the sound recordings and news broadcast, Section 10(2) of the Act states in relevant that:

***“Subject to this Section, the author of a work shall be the first owner of the copyright...”***

And “author” is defined in Section 2 of the Act as:

***“(a) in relation to an audiovisual work or sound recording, the person who causes the audiovision work or recording to be made;***

***(b) in relation to a broadcast, the person who is responsible for the contents of the broadcast and for arranging for its transmission.”***

Section 10(3) also provides as follows:

***“Where a work other than a broadcast or a cable programme, is -***

***(a) made by the author in the course of his employment... the employer or the person who commissioned the work shall be the first owner of the copyright.”***

It was submitted on behalf of the Defendants that the Plaintiff has not shown the existence of copyright in the news items by producing a copyright licence of the registered interest in the property at the Patents and Company Registration Agency (PACRA). I am of the strong view that this argument is

not supported by any authority. The Sections of the Act quoted above, particularly Sections 7, 8 and 17, clearly shows that in respect of sound recordings and broadcasts, there is no requirement that the copyright must be registered and a licence obtained from PACRA for the owner to be clothed with the copyright. As can be noted above, Sections 13 and 14 of the Act stipulate that copyright in sound recordings and broadcast material subsists for fifty years from the date of their making and or transmission.

It was also contended on behalf of the Defendants that the Plaintiff is not the owner of the news items transmitted to the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant. In my view, Section 10 of the Act deals with this issue in very clear terms. According to this section the employer or the person who commissioned the work shall be the first owner of the copyright. There can be no doubt that the Plaintiff is the owner of the news items. The news items were prepared by the Plaintiff's staff using the Plaintiff's equipment. This work was therefore commissioned by the Plaintiff.

The foregoing reasons I cannot agree more with the Plaintiff's submissions that the sound recordings and news stories transmitted by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant were property belonging to the Plaintiff because they were made and recorded for the Plaintiff by its journalists and reporters including the 1<sup>st</sup> Defendant in the course of their employment. I also agree with the Plaintiff that the copyright in the sound recordings and news editions vested in the Plaintiff.

For the foregoing reasons I declare that the copyright subsisting in the news bulletins communicated by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant were and are intellectual properties belonging to the Plaintiff.

From the foregoing, I find that the Plaintiff is entitled to damages from the 2<sup>nd</sup>

Defendant occasioned by the Defendant's infringement of its intellectual property. The

Plaintiff is claiming damages of US\$200,000.00 from the 2<sup>nd</sup> Defendant for loss suffered as a result of theft of its one hundred news bulletins. No evidence was produced to prove this quantum. I refer the issue to quantum of damages for assessment by the Deputy Registrar at Chambers.

The Plaintiff's fourth claim is for damages against the 1<sup>st</sup> Defendant for breach of a written contract of service dated 13<sup>th</sup> February, 2009 made between the Plaintiff and 1<sup>st</sup> Defendant. The said contract appears at pages 6 to 9 of the Defendants' bundle of documents. Clause 4 of the Contract is pertinent and provides as follows:

***"4. Commitment and Devotion to business***

***(a) You are required to devote your whole time, attention to the duties as outlined in your job description, and you shall do all in your power to promote, enhance, develop and extend the business of HOT FM.***

***(b) You shall not without the company's prior consent... be employed or engaged or be in any paid work of any kind whatsoever... subsequently you shall not use company time and/or resources for personal business gain or for furtherance of your personal business. In the event that you wish to engage in other creative, advertising, media, entertainment,***

***promotion, public or consultancy work, it shall be selectively be considered under clearly agreed and written terms that do not create a conflict of interest via or viz-a-vis the company's business interest. In any case, this shall only be permitted to be conducted in your own private time without any use of company equipment in your care e.g. Laptop, recorders, OB equipment and/or any peripherals."***

The above clause clearly shows that the 1<sup>st</sup> Defendant was forbidden from engaging in paid work outside his employment without the Plaintiff's prior consent. As aptly submitted on behalf of the Plaintiff, the 1<sup>st</sup> Defendant was proscribed from being engaged as a correspondent with the 2<sup>nd</sup> Defendant without the former's prior consent. However, the evidence on record clearly shows that the 1<sup>st</sup> Defendant was sending news bulletins and sound recordings to the 2<sup>nd</sup> Defendant from the Plaintiff's news room without the prior consent of the Plaintiff.

The evidence on record also shows that for the services rendered to the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Defendant was receiving K500,000.00 per month. This is confirmed by an e-mail from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant's Kenny Tonga dated 15<sup>th</sup> September, 2009 appearing in the Plaintiff's supplementary bundle of documents which reads:

***"Ok. I hope you are good. Great to hear from you. We can start with a round figure of 500 pin per month with a guarantee that you will receive all the big stories from Lusaka. They will be edited and almost ready to air. Tell mw what you think."***

The 1<sup>st</sup> Defendant contrived to extricate himself from liability by testifying in re-examination that he did not receive any payment from the 2<sup>nd</sup> Defendant as what existed were negotiations. This argument cannot be sustained considering that the whole arrangement was shrouded in secrecy. I also do not accept the evidence of DW2 that the 1<sup>st</sup> Defendant was to start working for the 2<sup>nd</sup> Defendant only in February 2010 after resigning. None of the e-mails appearing in the Plaintiff's and Defendants' bundle of documents exchanged between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants support the Defendants' contention.

For the foregoing reasons I find that the 1<sup>st</sup> Defendant was in breach of the written contract of employment entered into with the Plaintiff dated 13<sup>th</sup> February, 2009. Consequently, I hold that the Plaintiff is entitled to damages. These damages shall be assessed by the Deputy Registrar at Chambers.

The fifth claim is for an enquiry into what damages have been and may be suffered by the Plaintiff by reason of the 1<sup>st</sup> Defendant's breach of confidence in making use of the Plaintiff's confidential information. I have since determined in respect of the fourth claim which is interrelated with this one that the damages shall be assessed by the Deputy Registrar. This will also take care of the fifth claim.

The sixth and seventh claims are in the alternative to the preceding claims. Consequently no additional award can be given to the Plaintiff on the alternative claims.

The eighth claim is for interest. I award interest on the amounts to be assessed by the Deputy Registrar at short term bank deposit rate from 8<sup>th</sup>

January, 2010 to the date of assessment and thereafter at the lending rate as determined by the Bank of Zambia from time to time until full settlement.

I now turn to the 2<sup>nd</sup> Defendant's counter claim for libel. The 2<sup>nd</sup> Defendant contended that it has been severely injured in its credibility and reputation and that it has been brought into scandal, odium and contempt and has thereby suffered loss and damage. The 2<sup>nd</sup> Defendant did not call any witnesses to prove the loss and damage it has suffered. Most importantly a perusal of the article complained of indicates to me that its contents are not untrue. For examples, DW2 conceded in cross-examination that the 2<sup>nd</sup> Defendant did not pay for the time PW1 worked on the installation of their radio data sender at their radio station and that they used the Plaintiff's transmitter before buying it. I therefore find that the Defendant's counter claim has no merit and it is accordingly dismissed costs following the event and shall be taxed in default of agreement.

**DELIVERED THIS 30<sup>TH</sup> DAY OF APRIL 2012.**

**C. KAJIMANGA  
COURT**