



# ZIMBABWE · LAW · REVIEW

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# THE LEGAL STATUS OF PARASTATALS: ZIMBABWE'S EXPERIENCE

T. J. NYAPADI\*

## INTRODUCTION

State participation in the economic sector, for example, in areas of production, trading and the provision of public utility services<sup>1</sup> is rapidly growing in this country as the Government wrestles with a large number of economic problems. These economic problems largely emanate from under development and uneven distribution of the country's economic activities resulting from the policies of the previous regimes. These regimes created an undesirable dichotomy in the structure of the country's economic activities so that on the one hand there exists a sophisticated commercial and industrial sector, mainly in the major cities and towns, while on the other hand, the communal areas where the majority of the country's population lives, remain largely underdeveloped.<sup>2</sup> There is therefore an obvious need to provide an even and widespread basic infrastructure for the economy in this country in order to accelerate the development of productive forces even in areas which the colonial governments neglected perhaps through lack of funds or narrowly defined objectives designed to concentrate on those areas of the economy which could produce maximum profits with relevant ease.<sup>3</sup>

State participation in the economy takes at least two forms. The first is where the State does not itself take over any sector of the economy, but rather seeks, through a variety of regulatory and other mechanisms (e.g. tax incentives, subsidies, laws requiring import and export licences, etc.), to influence the conduct of certain economic factors. The second is where the State actually enters into, for example, production or marketing and moves from indirect control of, to actual participation in the economy.<sup>4</sup>

Generally, both forms of intervention in the economy have been applied by all governments in this country in the past, except that in the last seven years there has been a steady increase in direct participation.<sup>5</sup> This increased direct partici-

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<sup>1</sup> Zimbabwe Mining Development Corporation Act No. 31 of 1982; Mineral Marketing Corporation Act No. 2 of 1982; and Zimbabwe Railways Act (Chap. 261) respectively are a few examples of this.

<sup>2</sup> See the Second Reading Speech of the Deputy Minister of Trade and Commerce on the Small Enterprise Development Corporation Bill in 1983, Parliamentary Debates, House of Assembly, Vol. 7 Col. 152.

<sup>3</sup> See Nkala, J. and Nyapadi, T.J. 1987 unpublished manuscript entitled "Parastatals in Zimbabwe."

<sup>4</sup> See Ghai, Y. *Law in the Political Economy of Enterprise* Scandinavian Institute of African Studies (Uppsala), 1977, p.18.

<sup>5</sup> See also *Transitional National Development Plan (T.N.D.P.)* 1982/3-1984/5, Vol. 1 p.1. Note that the words parastatals, public corporations and statutory corporations are used interchangeably throughout this article.

pation has been achieved through the creation of more parastatals such as State-owned enterprises, public corporations or statutory corporations and this in turn has raised questions of the place of these parastatals within the constitutional framework of this country.

The problem has largely centred on the question of Ministerial control of State-owned enterprises and the determination of the degree and nature of the control which Ministers have over them. It will be appreciated that determination of these issues will raise various problems. For example, it will be seen that too much Ministerial control reduces parastatals to the status of Government departments, with a consequent loss of managerial freedom within the parastatal itself, and on the other hand, too little Government control usually exercised through the appropriate Minister will place the State-owned corporations (parastatals) outside the democratic regime.<sup>6</sup> Thus Wade has observed:

“The problems of these corporations lie largely in fitting them into the established constitutional framework and in finding the right balance of power between them, the Government and Parliament. These are questions of constitutional rather than administrative law. Nevertheless there are certain legal issues; and public corporations are so important an administrative mechanism that some remarks about them may be useful.”<sup>7</sup>

The objective of this article, therefore, is to examine the administrative mechanism of parastatals in Zimbabwe with particular reference to Ministerial control of them first before national independence and, secondly, in the period after independence. In doing this, I shall look at the degree and character of Ministerial control of parastatals through the use of directives. Firstly however, I shall review the main and general objectives for the creation of parastatals in order to put the question of Ministerial control of them in proper perspective.

### OBJECTIVES OF PARASTATAL ORGANISATIONS

Parastatals may be created in two ways; firstly by the acquisition of equity share capital in an existing company, in which case the objectives of such a parastatal will be clearly stated in the memorandum of association<sup>8</sup> of the company; secondly by statute (these are in the majority at the moment), in which case the objectives of a particular parastatal will be stated in the establishing Act. In this paper the concern is not with those objectives which are usually narrowly defined to suit each parastatal, but rather the objectives of parastatal organizations in their wider sense which Robson,<sup>9</sup> has stated and which I summarize as follows.

<sup>6</sup> See also Robson, W.A. *Nationalised Industry and Public Ownership*, (2nd ed.), Allen & Unwin; London, 1962, p.138 and also *Socialist Union: Twentieth Century Socialism* (1956) p.65.

<sup>7</sup> Wade H.W.R. *Administrative Law*, 4th Ed., Clarendon Press, Oxford, 1978, p.142.

<sup>8</sup> An example of this is the Zimbabwe Iron and Steel Company (ZISCO).

<sup>9</sup> Robson, W.A. *op cit*, Chapter II, pp.29-45.

First, the policy of public ownership springs in the main from a conviction that socialism requires the public ownership and operation in the interest of the whole community of the basic industries, such as fuel, power and transport industries.

Secondly, there it is argued that certain industries which are by their nature monopolistic; for example, fuel and power industries like the Zimbabwe Electricity Supply Authority must be State owned, because it is too dangerous to leave them to be exploited by private enterprise for profit. For example, in the case of the National Railways of Zimbabwe (which makes a loss every year) fares would be increased in order to make profit with the result that the public, with no choice or alternative forms of transport, would be forced to pay the higher fares.

Thirdly, some industries decline during periods of economic depression causing serious social problems of unemployment hence the need to bring such industries under public ownership. Furthermore, where a Government spends huge sums of money annually subsidizing a privately owned enterprise, for example, in order to keep prices down because it provides an essential service to the community, the Government might as well own that enterprise.

Fourthly, there is a belief that competition in some industries would lead to a waste of resources. For example, direct internal competition in the same areas over the provision of say railways or the supply of electricity will rarely be economically beneficial. Thus participation of the State in such industries and others, like an airline, avoids duplication in at least the basic industries which require very huge capital expenditure.

Another factor to consider here is that of national security. It will not be in the national interest in as far as the security of the State is concerned if, for example, our national airline was privately owned, particularly where it shares technical expertise and aerial secrets with the national Air Force. Similarly, it would not be in the national interest to allow the broadcasting services as provided by the Zimbabwe Broadcasting Corporation to be in the hands of private entrepreneurs who may be hostile to the State and thereby allow the broadcasting services to propagate misleading information, which is likely to cause alarm, uncertainty, civil commotion and insecurity to the whole nation.

It thus can be observed that there is no one reason for public ownership of industries or direct State participation in the economy. Everything depends on the social, economic and political climate prevailing at any given time. Hadden<sup>10</sup> has written that:

“The fact that the supply of electricity and the railways and airlines are nationalized in most countries, for instance, is better attributed to the nature of the industries than to the politics of the ruling parties.”

This perhaps explains why a few industries such as Air transport, the

Broadcasting Services, the Railways, the Posts and Telecommunication Services, and the Supply of Electricity) were nationalized during the colonial period in a capitalist-based economy. However; it is common to find that in socialist countries there are more statutory corporations than there are in capitalist countries. This is perhaps because most socialist countries believe that the State should control the means of production and distribution in order to eliminate the imbalances created by the capitalist system and permit a more equitable and beneficial distribution of resources throughout the community.

Assuming that the Government of Zimbabwe has well defined general objectives the question would become how it should pursue them effectively within the context of the country's capitalist economy. The answer to this lies in the way the Government seeks to control parastatal organizations.

### GOVERNMENT CONTROL OF PARASTATAL ORGANISATIONS

Parliament creates parastatals and so it is right that parastatals should ultimately be controlled by Parliament. But Parliament cannot itself take direct control of a parastatal and hence it appoints a Minister, generally known as an "appropriate Minister", as its representative with the duty to supervise the parastatal in a broad sense. This means that the appropriate Minister, as a member of Parliament, represents the parastatal in Parliament and at the same time represents Parliament to the parastatal concerned. There is, therefore, a constant interaction between the two bodies, although this does not mean that the Minister participates in the day-to-day management of the parastatal. Such management is usually left to the Board of each parastatal. On this, the former Minister of Transport, Dr. H. Ushewokunze, in his speech in Parliament had this to say:

"In a developing country like Zimbabwe where the supremacy of the Legislature is very much alive it is desirable and proper that public enterprises continue to be structured in this manner if they are to play their full role as instruments of social transformation. Only in this manner can they be expected to achieve the objectives of the Government in their respective operating sectors."<sup>11</sup>

In India, for instance, parastatals operate as joint stock companies whose control is through the Companies Act. They are, thus operated, regulated and controlled in the same manner as private enterprises registered under the same Companies Act. This, of course, is in contrast to the situation in Zimbabwe where most parastatals are set up through a special enactment and thus fall under a particular Ministry.

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<sup>10</sup> Hadden, T., *Company Law and Capitalism* Weidenfeld and Nicholson London, 2nd ed. pp.501-502.

<sup>11</sup> Parliamentary Debates (House Assembly) Vol. 14, No. 38, 10th November 1987, Col. 2279.

## MINISTERIAL CONTROL OF PARASTATALS BEFORE INDEPENDENCE

The most important difference between the earlier generation of statutory corporations and those established after Independence lies in the much greater degree of ministerial control over the latter. In the first generation of statutory corporation, that is, those created before independence, political control was comparatively less articulated. The appropriate Minister possessed certain powers over statutory bodies and these powers were limited to specific matters. For example, section 19 of the Air Zimbabwe Act (Chap. 253) provides that:

- “(1) If in the opinion of the Minister, it is expedient in the public interest that the Corporation should supply any air transport service or carry out any aerial work or other operations which, in his opinion, are incidental, ancillary or conducive to or capable of being carried out in conjunction with the provision of the air transport service, he may direct, in writing, the Corporation to supply such air transport service or carry out such aerial work or other operations, as the case may be.
- (2) It shall be the duty of the Corporation with all due expedition to comply with the provisions of a direction issued in terms of subsection (1).”

Clearly it will be noticed that there are no general powers of control given to the Minister of Transport by this Act. Such powers, in fact, were and still are, vested in the Board in terms of section 4 of the said Act which provides that the “operation of the Corporation shall, subject to the provisions of this Act be controlled by a Board to be known as Air Zimbabwe Board.”

Other enactments of this time, for example, the National Railways Act (Chap. 261), were less precise on the powers given to the Minister. Section 23 of the National Railways Act provides that:

- “23. (1) The Minister may, after consultation with the Board give to the Railways such directions of a general or specific character in the exercise by it of its functions, duties or powers as appear to the Minister to be requisite in the national interest.
- (2) If it appears to the Minister that there is a defect in the general plan or arrangements of the Railways for performing any of its functions or exercising any of its powers, he may, after consultation with the Board, give to the Railways directions of a general character for remedying the defect.

- (3) The Railways shall, with all due expedition, comply with any direction given to it in terms of subsection (1) and (2)."

Thus, it is clear that Ministerial powers over statutory Corporations were formulated in general rather than in specific terms. The only exception was the powers of control given to the Minister over the Zimbabwe Broadcasting Corporation (Z.B.C.). Here the powers of Ministerial control were much greater than those given to Ministers over other statutory corporations. In terms of section 29 of the Zimbabwe Broadcasting Act (Chap. 248) the Minister has powers to require the corporation or any operator of a diffusion service to broadcast or diffuse, as the case may be, an announcement or statement of public importance which the Minister may supply in writing. In short, the Minister could require particular matters to be broadcast. Similarly the Government has power to prohibit the broadcasting of any matter or in time of emergency, such as in a war situation, to take over the transmitting stations and assume complete control of the undertaking. However, the fact that the Government possessed enormous contingent powers over the Z.B.C., does not mean it is possessed of powers to control the day-to-day management of the Corporation.

The picture that emerges is that the Government, through the appropriate Minister, has power to control the operations of parastatals. Each establishing statute expressly declares that the Minister has power to give direction about any matter relating to the corporation. Accordingly, it becomes pertinent to discuss the manner and extent of the exercise of these powers during both the pre- and post-independence periods.

Firstly, it is important to note that the Minister can only exercise these powers in his/her official capacity as a Government representative and not in his/her individual capacity. Furthermore, it should be noted that a parastatal is a juristic body and is a separate entity distinct from those who control it, but it cannot act in its own person, for it is not a natural person, hence it must act through the agency of other persons, and those persons are the members of the Board of each parastatal.<sup>12</sup> The *functions* of a parastatal are vested in members of the Board who, in the opinion of the Committee of Inquiry into Parastatals,<sup>13</sup> must provide leadership, identify the objectives of the parastatals they represent and indicate to the management how those objectives can be attained, and ensure that the relevant parastatal carries out its functions which are set out in the relevant establishing statute. Although the members of Boards are appointed by the Parastatals Commission with the approval of the Minister, they are intended to enjoy managerial liberty subject, of course, to Ministerial control should the policies of the parastatal conflict with the national interest. This clearly suggests, as Wade<sup>14</sup> rightly points out, that:

<sup>12</sup> In some parastatals the word "Authority" is used as in the Zimbabwe Electricity Supply Authority, rather than the word Board.

<sup>13</sup> Air Zimbabwe Corporation Interim Report of the Committee of Inquiry into Parastatals, chaired by Mr. Justice Smith - November 1986, pp.14-15.

<sup>14</sup> Wade, H.W.R., *Administrative Law*, (op cit) p.144.

“There was to be a distinction between broad policy and day-to-day administration, the former being the sphere in which the Government might interfere, and the latter being the sphere of independent self-management.”

The same author goes on to say that words, such as “such directions of general or specific character,” vague as they may appear to be, are intended to express the distinction between control over general policy in the national interest, for which the Minister is responsible to Parliament, and the ordinary business management of the industry, in which the parastatal is expected to be free from Ministerial interference.<sup>15</sup> Further support of these basic premises upon which parastatals are created can be gathered from some pronouncements cited by Ghai. In respect of public corporations in Kenya he quotes the following excerpts:

“We are seeking, in its day-to-day operations, whole detachment or partial detachment from one department or another of a public corporation free from political interference, because we did not wish to upset the commercial success of the undertaking . . . we were giving this greater degree of managerial autonomy in order that we could get a higher degree of business efficiency and less red tape and bureaucracy. . . [its a] corporation clothed with powers of Government, but possessed of the flexibility and initiative of a private enterprise . . .

The public corporation is based on the theory that a full measure of accountability can be imposed on a public authority without requiring it to be subject to ministerial control in respect of managerial decisions and multitudinous routine activities, or liable to comprehensive parliamentary scrutiny of its day-to-day working.”<sup>16</sup>

These pronouncements assume that general policy can be distinguished from management or administration. As we shall see this is not always the case since even though we can distinguish a parastatal from a government department in terms of structures, we cannot do so in terms of operations.

Little is known about Ministerial control of parastatals through the issue of directives during the colonial period. Nevertheless, this does not necessarily mean that the Ministers at that time were inactive or had no real influence over the general policies of parastatals. A possible explanation for this is that Ministers at that time exercised their influence informally through discussions, negotiations, persuasion and pressure, rather than through the issue of formal directions. Evidence of this comes from the former Minister of Transport, Dr. Ushewokunze’s statement in Parliament when he was replying to criticisms of his practice of promoting blacks through directives. He said:

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<sup>15</sup> Ibid. p. 146.

<sup>16</sup> Ghai, Y., op cit pp.161–162.

“When I was Minister of Health, an RF man who was the first Chairman of the P.S.C. in independent Zimbabwe came to bid me farewell. He said that I was doing what was right for my Government and Party by selecting cadres whom I believed could translate into practice the policy of a ZANU (PF) — led Government. He went on to say that they did exactly that during the days his own Party, the R.F., was in power.”<sup>17</sup>

Thus, in the colonial era Ministers did possess control of parastatals but the exercise of such control was carefully hidden, doubtless by a desire to avoid having to answer in Parliament for the greater variety of matters about which they intervened or were consulted on by statutory corporations, but for which they did not wish to be responsible either to Parliament or to the public.<sup>18</sup> This subtle control through influence raised constitutional problems in that the Ministers were able to exercise a great deal of power without accounting for it publicly and thereby depriving Parliament of the opportunity to hold the Ministers accountable.

Through parastatals the colonial regimes saw a new way of pushing forward and implementing racist policies without open criticism or debate either in Parliament or in public. For example, one of the main Government objectives at the time when parastatals like the Rhodesia Railways which was purchased in 1947 from Rhodesia Railways Ltd.; Air Rhodesia, (formerly Central African Airways); Electricity Supply Commission (now ZESA), Grain Marketing Board and many others were created was to use them as instruments of the colonial government’s employment policies. As Dr. Ushewokunze observed:

“Their establishment was followed by a period of mass employment, European immigration and the white poverty (a problem that had to be tackled) following the end of the Second World War. All successive Rhodesian Governments used these parastatals to absorb unemployed whites and European immigrants who could not be absorbed by the private sector, the professions and the public service. It was a well known fact that the policy at the time was to reserve these jobs (higher grades) for the whites (job reservation policy)”<sup>19</sup>

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<sup>17</sup> Parliamentary Debates (House of Assembly) Vol. 14, No. 38, 10th November, 1987 – Col. 2127.

<sup>18</sup> On the British experience of Ministerial control over statutory corporations during Conservative Governments, as compared to the period when a Socialist Labour Government was in power, see Robson, W.A. *Nationalised Industry and Public Ownership* op cit p.142.

<sup>19</sup> Whites who were in senior positions had hardly any degrees or diplomas. The colonial national policy was to improve the standard of living of whites at the expense of blacks and the Ministers made sure that this policy was carried out by using their influence in the management of the parastatals. Such Ministers did not meet with any resistance in the exercise of their control and influence because most (if not all) Board members of parastatals were whites and fully identified with to the Government’s racial policies.

This led to a situation whereby whites occupied higher grades and blacks were confined to lower jobs in these and other parastatals. As a result some whites occupied positions of higher grades without proper qualifications for such posts.

A study of the history of the National Railways of Zimbabwe shows that management and technical and supervisory grades consisted only of whites while low clerical and manual grades consisted only of blacks. Blacks were paid far less than their white counterparts, even when they were doing a similar job or a job of a higher grade than a white person. Most blacks who served under whites, but were recruited before 1980, possessed not only undergraduate degrees but also post-graduate qualifications.

Formal directions were occasionally issued but only if there was a special reason to do so, for example, if white supremacy as a policy was seen to be challenged. An example of this is when, in 1968:

“... a non white driver in Gweru was rostered to drive on a shunt with a white fireman. The fireman refused to work under an African. He immediately drove off to Harare to see the Minister of Transport, the late Mr. Dunlop who immediately issued a directive that no white man shall work under a non white”.<sup>20</sup>

It would seem that this directive was issued irrespective of the fact that the black driver was accepted by the personnel manager, as better skilled and therefore more qualified than the white fireman to drive on a shunt. The Minister here, acted unilaterally without consulting Board members before issuing the directive. This, means that he was no longer guiding and directing the relevant parastatal on matters of general policy but that he had taken over the day-to-day management and administration of the parastatal by making decisions on matters which were properly the Board's functions. Ministers exercised great influence over matters of policy, administration and management through informal methods such as negotiations and even pressure on the Board.

Other forms of control Ministers had were in the field of appointment of Board members. The appropriate Minister had statutory duties of appointing Board members. This placed him/her in a position of great influence and ensured compliance with his/her views and directions. The appointments were for a fixed period of three years. This meant that a member who hoped to have his/her contract renewed by the Minister at the end of the three years or who did not wish to be dismissed was not in a good position to oppose or resist pressure from the Minister whether such pressure was applied formally through the issue of directives or informally through methods such as consultations, discussions and persuasion.

Further, there were other Ministerial controls which were related to financial controls which appeared to erode the independence of parastatal organizations.

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<sup>20</sup> Parliamentary Debates (House of Assembly) Vol.14 No. 38 (supra) Col. 2169.

For example, where a parastatal was (and still is) to enter into major expansion programmes involving huge capital expenditure members of the Board were required to seek the approval of the Minister. Without his approval they could not proceed with the programme despite commercial advantages arising from such programmes. Furthermore, the use of surplus revenues and the power to borrow were both subject to ministerial control. Again in matters affecting national interest, for example, in times of economic depression, the Minister could direct a parastatal to cut down its capital programme. The Ministerial controls have not been changed. They have been maintained.

### **MINISTERIAL CONTROL OF PARASTATALS AFTER INDEPENDENCE**

As has already been said the power of control given to the appropriate Minister in the old generation of parastatals were very general in nature except those given to the appropriate Minister in respect of the Zimbabwe Broadcasting Corporation which were very specific in character. This position has not changed. Parastatals created before independence retained their form after independence. The new generation of parastatals created after independence are not different from those created in the colonial period in the way Ministerial powers of control are formulated. Examples of the new generation of parastatals are the Zimbabwe Mining Development Corporation (ZMDC) created by Act No.31 of 1982, the Zimbabwe Development Bank (ZDB) created by Act No.7 of 1983, the Small Enterprises Development Corporation (SEDC) created by Act No.16 of 1983, the Zimbabwe Reinsurance Corporation (ZRC) created by Act No.43 of 1983.

Section 23 of Small Enterprises Development Corporation Act for example, provides that:

“The Minister, after consultation with the Board, may give to the Corporation such directions of a general character relating to the exercise by it of its functions as appear to the Minister to be required in the national interests.”

Similar provisions can be found in section 40 of the Zimbabwe Reinsurance Corporation Act and section 25 of the Zimbabwe Mining Development Corporation Act. Thus there has been no attempt to change the general nature of powers of control given to the appropriate Minister. What is certain however is that the degree of Ministerial control of parastatals has somewhat changed since independence. This is understandable given the fact that the present government came into power professing a commitment to transforming the country's capitalist economy into a socialist one. As a result, it is presumed that the independent government's creation of parastatals has been predicated upon the wider objectives of the creation of parastatals, stated earlier, for example, creation of jobs, elimination of unemployment, improvement of standards of living of all citizens, and the just distribution of national wealth. In the post-independence period Ministers regularly resorted to the use of formal directives

mainly because the informal methods of quiet negotiations did not appear to work or the Ministers were impatient with the slow methods of persuasion. The failure of informal methods of persuasion could have been a result of the unwillingness of the "old guard" managers who had carried on from Rhodesia, to fully identify with the policies laid down by the new government. Because of difficulties related to Ministerial control of parastatals the government set up the Smith Committee of Inquiry into Parastatals in 1986.

The Committee, for example, after inquiring into the Air Zimbabwe Corporation was of the opinion that the then Minister of Transport was issuing directives on matters which were outside his jurisdiction.<sup>21</sup> A review of some of the directives issued by the Minister is useful in determining the validity of the Committee's conclusions. Some of these directives as published in the Smith Committee Report are reproduced below:<sup>22</sup>

"You are directed that all transfers, promotions, upgradings, recruitment and the filling of any substantive positions shall not be effective until I am fully briefed through a memorandum as I have to approve such occurrences. This will apply retrospectively to the 3rd January 1984."

"You are directed to make the following promotions:

- (a) First Officer P. Miller to Viscount Captain
- (b) First Officer Kuuya to Viscount Captain

These directives are with immediate effect (To GM 23/2/84)"

"Considering the staff situation in the Operations Division, you are directed to appoint Mr. Masimba Chikomo (whose curriculum vitae is attached) to the position of Flight Operations Manager (to GM 31/10/1985)"

"You are directed to ensure that the proposed new uniforms for both Crew and Cabin Staff remain as I originally designed them (to Chairman 3/2/86)"

Other directives made by the Minister included the choice of overseas offices in London and the order to reinstate an air hostess who had been suspended pending dismissal following an act of misconduct. The issue here is whether the Minister by issuing such directives was acting *ultra vires*, that is, beyond his powers given to him by statute.<sup>23</sup> Whether or not the Minister was acting *ultra vires* depends on the interpretation of the Act and the construction of powers conferred upon him by it.

<sup>21</sup> Air Zimbabwe Corporation — Interim Report (supra) p.8.

<sup>22</sup> Ibid, pp.86–89.

<sup>23</sup> For a discussion of this issue see *William & Son (Pvt) Ltd. v Rhodesian Railways* 1976(2) RLR 108 which is authority for the proposition that directive issued by the Minister to do anything illegal will not be tolerated by our courts.

The determination of whether or not a Minister acted *ultra vires* his powers, involves firstly a determination of whether or not the powers exercised by the Minister when he issued a directive were expressly conferred upon him by statute. Powers will be expressly conferred upon the Minister if the statute clearly stipulates the circumstances in which he can issue a directive. An example of this is section 29 of the Zimbabwe Broadcasting Act (Chap. 248) which expressly empowers the Minister *inter alia* to require the Corporation to broadcast a statement which the Minister may supply in writing. Secondly where no express power has been given to the Minister the question involves determining whether or not the powers he or she exercised were reasonably incidental to those generally given to him by statute. In other words such powers can be implied. In my opinion such powers as those stipulated in section 23 of the Zimbabwe Railways Act (Chap. 261) and section 19 of the Air Zimbabwe Act, that is, to give directions to the Corporations where it is expedient "in the public interest" to do so, fall under the category of implied powers. The question then becomes one of ascertaining whether the directives issued by the Minister were reasonable in the circumstances.

It is submitted that where directives issued by the Minister are found to be unreasonable then they would be *ultra vires*. Directives are unreasonable, as explained in *ZAPU(P.F.) v Minister of Justice, Legal and Parliamentary Affairs*,<sup>24</sup> if, for instance: (1) they are found to be partial and unequal in their operations as between different classes or (2) they are manifestly unjust or (3) they disclose bad faith and finally, (4) they involve such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men. In all these cases the court may conclude that Parliament never intended to give authority for such directives, in which case the directives would be *ultra vires*. This basically means that when determining whether the Minister was acting reasonably and within the powers given to him by statute when he issued a directive the court will look at all the circumstances of the case, including the nature, purpose and effect of the directives.

There has been no post-independence case where a Board of a parastatal has brought an action against a Minister alleging that his directive was *ultra vires* his powers. The only time this happened was before independence in *Williams Maine & Son Ltd. v Rhodesia Railways*<sup>25</sup> where the Minister had issued a directive which had the effect of breaching an already signed contract. The Board brought an action against the Minister claiming that the direction was illegal and therefore *ultra vires*. The court ruled that the direction was illegal in the sense that the Minister had issued a direction without correctly understanding the law that regulated his powers to give that direction. In other words, the court concluded that Parliament could not have intended to give him, in the exercise of his discretion, powers to make directions or orders that would amount to an illegal act such as the breach of a contract.

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<sup>24</sup> SC.60/85, p.27.

<sup>25</sup> 1976 (2) R.L.R. 108.

Normally, the Board is required by statute to comply with the provisions of a direction issued by the Minister. The Board may not comply with such an order where it thinks the direction is unreasonable. If at any time the Minister is satisfied that the Board has failed to comply with the provisions of his direction it is provided in most statutes creating parastatals that he may, in writing, require the Board to comply with his direction within a specified time. The statutes further provide that if the Board fails to comply with such further order, the Minister may apply to the High Court for an order compelling the Board to remedy the default and the High Court may make such an order as it thinks fit. The court, before making an order, will no doubt determine whether or not the order is reasonable after hearing evidence from both sides. The courts generally exercise extreme restraint in determining how, in their opinion, the Minister's discretion to issue a direction ought to be exercised.

It is surprising that this procedure has not been resorted to particularly in the National Railways Corporation case where the Minister issued a directive to the Board to promote certain individuals which the Board refused to comply with. Instead he went on to promote them himself. This led to accusations that the Minister was interfering with the internal management of the Corporation.

Those Ministers, after independence, who had good working relationships with their Boards, and there were many, found it unnecessary to issue formal directions. Instead, as did their predecessors, their influence over matters of policy and management was exercised informally through discussions and negotiations. More recently the influence of the Minister has been felt through his Permanent Secretary who is an *ex officio* member of the Board. The presence of the Permanent Secretary in Board meetings has an intimidating effect upon the minds of the other Board members who may feel powerless to oppose anything the Permanent Secretary may say has the approval of the Minister.

The recent events witnessed at the National Railways and Air Zimbabwe between the then Minister of Transport and the General Managers of both parastatals demonstrate that a General Manager or any Board member usually appointed for a fixed period of three years not wanting to risk demotion, would not be in a position to resist pressure from the Minister whether the pressure is applied formally or informally. For example, the Committee of Public Accounts (P.A.C.)<sup>26</sup> reporting on the activities of the National Railways heard evidence from the then General Manager, that a Mr. Chongo, an Area Traffic Manager, had "received rapid promotions through three grades" because he did what the Minister had instructed him, that is, to intercept mail between the General Manager and the Auditor-General's Office.

Further, no Board member would like to sour his good relationship with the Minister for fear that that might frustrate him or her in his or her job or even force him or her to resign as did some Board members recently in the Air Zimbabwe Corporation. These members resigned because a decision had been taken (which they did not approve of) by the Acting Chairman of the Board with the apparent approval of the Minister to demote five sectional managers for failing to follow

proper complaint procedures. Another example is that of the National Railways where Mr. Avery, the then General Manager was accused by the Minister of practicing racism and of failing to take any steps to comply with the government's policy of black advancement within the Railways. The Minister then made some appointments without consulting Mr. Avery. As a result Mr. Avery was quoted as having said he was "finding it extremely difficult to operate the Railways."<sup>27</sup> This has the effect of making the General Managers or Chairman feel really "unable to act" as public spokesmen for their parastatal, or even act in accordance with their conscience in case they offend the Minister. This denies parastatals their commercial independence since they are under constant political pressure.

If the independence of a parastatal is allowed to be eroded because Ministerial directives have formally or informally become the order of the day, rather than the exception, then Boards become agents of government departments. Where the Boards become agents of government departments, they lose managerial control as Mr. Avery, the General Manager found out. He stated:

"I am not able to do something I want to do. My hands are tied and we are going through rough waters right now. I am certainly not in control of the situation because of this under current people reporting, not to me but to outsiders and then telling me what I am supposed to do. Who knows how to run the National Railways of Zimbabwe better than me the General Manager?"<sup>28</sup>

Further, where governmental influence is exercised informally without the publication of directions from Ministers:

"The result is not merely that the lines of responsibility are blurred and policy is shifting and uncertain. There is also the constitutional aspect, Ministers are able to exercise a great deal of power without accounting for it publicly, thus depriving Parliament of its opportunity to criticize."<sup>29</sup>

There is nothing wrong with a Minister who keeps himself familiar with the general work of the Board(s) with which he is concerned. Informal discussions of mutual interest are useful.<sup>30</sup> But, the Minister should not let himself be "persuaded to acquiesce in policies which he will find hard to defend in public".<sup>31</sup> On the other hand the Board should not be induced or persuaded to take decisions which they consider to be wrong and opposed to the best interest of the industry

<sup>26</sup> First Report of the P.A.C. 25th March, 1986 (Govt. Printers) p.12.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Wade, H.W.R. *Administrative Law* 4th ed., *op cit* p.148.

<sup>30</sup> Such discussions should be free, frank, forthcoming and co-operative.

<sup>31</sup> Robson, W.A. *Nationalised Industry and Public Ownership* (Allen & Union, 1962) 2nd ed. p.146.

merely in order to please the Minister.<sup>32</sup> The Minister should not allow himself, by his excessive interference through informal or formal direction or even overbearing attitude to undermine the Board's sense of responsibility which has been happening recently, more particularly in the National Railways Corporation and the Air Zimbabwe Corporation. It is surely reasonable to assume that the legislature never intended, for example, that the General Manager "be in a position similar to that of a permanent head of a Department *vis-à-vis* the Minister to be in charge of that Department."

### THE PARASTATALS COMMISSION

It is important to note that, on paper at least, some of the Ministerial controls over parastatals have now been curbed by the creation of the Parastatals Commission in terms of the Parastatals Commission Act No. 22 of 1987. For example, for the first time in the history of this country the Ministers no longer have important powers of appointing Board Members although they are still required to be consulted on such appointments. The responsibility now falls on the Parastatals Commission. No doubt the Minister will still exert his/her influence whether formally or informally on who should be appointed and the Commission is likely to listen to him/her as it will not afford to ignore his/her advice and thereby sour relationships with him/her as an elected representative of Government. The question that still remains is one of the degree of that influence. Another example is that Ministerial directions are now subject to examination or scrutiny for their reasonableness by a non-representative body, the Commission. This means that a very small and non-representative body can now determine the reasonableness of the Minister's actions without itself being accountable to Parliament or able to answer questions in Parliament for its actions. Further, this examination of Ministerial directions by the Commission, while it is likely on one hand to deter Ministers from issuing improper directions, on the other hand, it will encourage them to exert their influence informally and thereby hide their actions from public scrutiny.

### CONCLUSION

Ministerial control of parastatals through the use of directives varied in degree in the two periods, that is, before independence and after independence. In general the issue of formal directions depends on a number of things, such as the relationship that exists between the Minister and the Board members, the Minister's own interpretation of his powers given him by statute, the Minister's individual enthusiasm in seeing that Government policies are achieved or implemented, the size, nature and the national importance of the parastatal concerned and finally the formulation of the powers in the provisions giving Ministers' powers to monitor the performance of parastatals. The problem has been that the majority of the statutes have formulated ministerial control in very vague terms such as the Minister's power to issue a direction if it is "in the public

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<sup>32</sup> Ibid.

interest" to do so. Each statute leaves it to the Minister to determine what is in the public interest. No doubt such a nebulous term invites uncertainty as to the limits of Ministerial powers of control.

The more sensible approach to the whole problem is to create a permanent Committee made up of five members or more all chosen from the House of Assembly. This Committee will act as a kitchen cabinet charged with the responsibility of determining what is in the national or public interest and issue directions accordingly. This will mean removing all the powers that Ministers individually have of supervising and controlling the operation of parastatals. This Committee by virtue of its functions will be a political and planning Committee answerable directly to Parliament for all its actions. Like in the Soviet Union this Committee should not recognize any limits preventing it from interfering with a Board's management of a parastatal, when intervention is considered necessary in the interest of national policy. This change would give Parliament an opportunity to question or criticise the Committee on its supervision of parastatals. The functions of the Committee must be clearly defined so that there will be no need to interfere with the operational activities of each parastatal. Further it will have the advantage of making consistent directions not like at the moment when directions in the public interest are issued depending on the political enthusiasm of each Minister.

However, if this arrangement is unsatisfactory then we should consider the introduction of a Ministry of Parastatals just as we have created the Ministry of Women's Affairs and Co-operatives. Its task will be to deal with parastatals, thus it will have the responsibility of supervising and ensuring the efficiency of the entire range of parastatals. Its main functions would include the appointment and dismissal of members and chairmen of all Boards, defining the pricing and investment policies which will be adopted by each parastatal, receiving investment programmes and approving capital projects, approving capital structures and borrowing, promoting co-ordination and co-operation between parastatals to improve their commercial efficiency, conducting a general overview of the structure and organization of parastatals, and above all being responsible to Parliament for the parastatals.



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