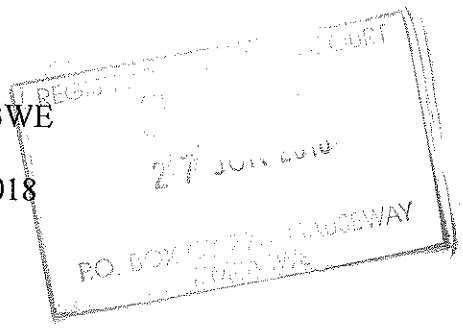
(1) VERITAS
versus
THE ZIMBABWE ELECTORAL COMMISSION
and
THE MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS
and
THE ATTORNEY GENERAL OF ZIMBABWE

(2) FIRINNE TRUST also known as VERITAS
versus
ZIMBABWE ELECTORAL COMMISSION
and
MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS
and
THE ATTORNEY GENERAL OF ZIMBABWE



HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 18 and 27 June 2018

**Opposed Applications**

*T Mafukidze with D Coltart*, for applicants
*TM Kanengoni with C Nyika*, for 1st respondent
*K Chimiti*, for 2nd and 3rd respondents

TAGU J: By letter dated the 14th May 2018 the applicant in the two matters requested that the two matters be consolidated and be heard together by the same judge at the same time. The former case HC 11749/17 is an application for a declaratory order and ancillary relief pertaining to the provisions of the Electoral Act [*Chapter 2.13*] which impose restrictions on the conducting of voter education by persons other than the Zimbabwe Electoral Commission and political parties. The latter case HC 4391/18 is an application for leave to amend the citation of the applicant in the former application. Both applications are opposed by the respondents.

INTRODUCTION

At the hearing of both matters certain concessions were allegedly made. Firstly, the second and third respondents made an application for condonation for failure to file their opposing papers and heads of argument in time. The court was asked to invoke r 4C of the Rules of this court and to allow the second and third respondents to argue their case without filing opposing and written heads in the interest of justice. The application for condonation was not opposed by the applicant and first respondent and was duly granted. In case HC 11749/17 the applicant sought for an order from this Honourable Court declaring that sections 40C (1) (g), 40C (1) (h), 40C (2) and 40F of the Electoral Act [*Chapter 2.13*] are ultra vires sections 56, 61 and 67 of the Constitution of Zimbabwe in so far as the provisions infringe the applicant's rights to equality and non-discrimination, to freedom of expression, and their political rights including the right to a free and fair election and to make political choices freely. Additionally, the applicant averred that the same provisions infringe the general public's rights under section 56, 61 and 67 of the Constitution and sought the same order on behalf of the public. However, at the hearing of the matters the second and third respondents allegedly consented in the merits to have section 40C (1) (h) to be struck off the statute as it creates a lacuna in the law. It was further agreed that the court need not deal with section 40F since this section has since been repealed by the Electoral Amendment Act no.6 of 2018. This left the court to deal with sections 40C (1) (g) and 40C (2). The other issue for the court to consider was whether the citation of the applicant in HC 11749/17 should be amended to read "FIRINNE TRUST also known as VERITAS" or not.

AMENDMENT OF APPLICANT

I have decide to deal with this issue first before I deal with the constitutionality or otherwise of the provisions of the Electoral Act complained of because this issue is directly related to some points raised in limine by the respondents.

In case HC 11749/17 the applicant is cited as VERITAS. In case HC 4391/18 the applicant now seeks to amend the citation of the applicant in HC 11749/17 by inserting the words "FIRINNE TRUST also known as" in front of the current citation of the applicant in that matter such that the full citation of the applicant shall read as follows: 'FIRINNE TRUST also

known as VERITAS" to ensure that both the registered name as well as the operating name of the Trust in whose name the application has been brought appears on all pleadings.

In my view, and as I said earlier, after reading the papers in both files, this application was necessitated by the points *in limine* raised by the first respondent. It was the first respondent's contention that the application in case HC 11749/17 was fatally defective because in the founding affidavit deposed to on behalf of the applicant by Valerie Anne Ingham-Thorpe she described the applicant as "a trust incorporated in Zimbabwe by a deed of trust and registered with the Deeds Registry as Firinne Trust but trading as Veritas. The first respondent went further to allude to the fact that the applicant in case HC 11749/17 lacked locus standi and hence had no cause of action against the respondents. Lastly the first respondent attacked the Form used by the applicant in the main application.

I found it prudent to deal with these preliminary issues at the same time with the issue whether the applicant should be allowed to change its citation because the issues are inter related and I have been asked to deal with the two cases at the same time.



THE LAW

The position in our law has always been that a "TRUST" is not recognized as a juristic persona vested with the requisite legal capacity to sue and be sued in its own name. A trust by law, is merely a legal arrangement/relationship by which a fiduciary relationship is created between trustees and beneficiaries of a trust and the registration of a deed of trust is not an act creating a legal entity but only a formal establishment of this legal arrangement/relationship and in particular the terms regulating that arrangement/relationship. The power to litigate with respect to the affairs of the trust is at law vested in its trustees whose names must be mentioned. In terms of Chapter 4 s 45(3) of the Constitution of Zimbabwe (our supreme law) which falls under the Declaration of Rights, "Juristic persons as well as natural persons are entitled to the rights and freedoms set out in this Chapter to the extent that those rights and freedoms can appropriately be extended to them." It follows therefore that for the applicant a TRUST to be endowed with the rights enshrined in Chapter 4 of the Constitution it must pass the test of being a juristic person. At a glance the applicant in HC 11749/17 appears not to be a juristic person and thus does not enjoy the various rights that are enshrined in Chapter 4 of the Constitution which include the rights provided under sections 56, 61 and 67 of the Constitution of Zimbabwe.

However, DUBE J dealt with the issue of trustees at length in the recent case of *Ignatious Musemwa and others* v *Estate Late Mischeck Tapomwa and others* HH-136-16. I agree entirely with the findings of my sister judge whose findings I found partly useful in resolving the dispute before me. From page 3 to 5 of her judgment she reasoned as follows:-

> "...The concept of a trust originated in English law over 900 years ago and continues to evolve. Phillip H. Pettit in *Equity and the Law of Trusts 5th ed* p23 in defining a trust quotes Underhill, The Law of Trusts and Trustees, 13th ed pl where he defines a trust as follows,
>
> "A trust is an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) either for the benefit of persons (who are called the beneficiaries or *ce stuis que* trust) of whom he may himself be one, any one of whom may enforce the obligation or for a charitable purpose..."

Dr D. S Ribbens in 1985 *Modern Business Law* in a paper titled, "The Hague Convention on the law applicable to trusts and on their recognition" states the following on trusts,

> "In truth a trust is as much a legal person as mere sum of money standing to the credit of a ledger account in some bank. To imagine otherwise is in the opinion of this commentator, to rave with the mob about the unattired Royal's magnificent attire. In essence a trust is a set of legal relationships. Viewed from the point of view of a relationship between the trust property and the trustees, it is a proprietary relationship; viewed from the relationship between the cestuique trust or trust beneficiary and the trustee, it is a vertical fiduciary relationship"

What I gather from these definitions is that a trust is a legal relationship of parties which usually involve the founder, trustees and beneficiaries. The relationship is created by the founder who places assets under the control and administration of the trust for the benefit of named persons, thus beneficiaries. It is created by a trust deed.

Generally, every person or entity which desires to bring a claim at law required to have legal standing in order for it to do so. It is trite that a trust has no legal personality. The common law does not recognize a trust as having *locus standi* to sue in its own name. See *CIR* v *McNellie's Estate* 1961 (3) SA 840. *Braun* v *Blann and Botha* 1984 (2) SA 850. CIR v Friedmann 1993 (1) SA 353 (A).

In *Women & Law in Southern Africa Research and Education Trust and Elizabeth Shongwe and Ors* HH-202-03, the court discussed the nature of a trust and remarked that generally a trust does not have locus standi to sue and be sued in its own name. That if a trust is to be clothed with juristic personality, it would be a person made up of assets and liabilities. The

court cited with approval sentiments in *Commissioner for Inland Revenue* v *MacNeillie's Estate* 1961 (3) SA 833 (A) at p840 where the court remarked as follows;

> "Like a deceased estate, a trust, if it is to be clothed with juristic personality, would be a persona or legal entity consisting of an aggregate of assets and liabilities. Neither our authorities nor our courts have recognized it as such a persona or entity....It is trite law that the assets and liabilities in a trust vest with the trustee"

The same views were cited with approval in *Crundall Brothers (Pvt) Ltd* v *Lazarus N.O. & Anor* 1991 (20 ZLR 125 where the court held that a trust is not a person and that a trustee is the person to be considered for the purposes of the regulations not in its name but in the name of the trustees.

Honore in *The Law of Trusts* (Juta & Co Ltd, Cape Town states at p291 to 296 as follows on the nature of trusts and their capacity to sue,

> "17.1 Actions relating to trust affairs must be brought by the trustees in his official capacity as such and not in his private capacity.
> 17.2 All the trustees should join in bringing the action
> 17.3 The trustee should aver capacity and that he has been properly appointed
> 17.4 The trustees are necessary parties
> 17.5 The trustees are not personally liable for debts of the trust"

> These observations go to show that a trust is not a natural person, does not have legal standing and has no legal standing to sue in its own name. The example of a deceased estate which comprises assets and liabilities being equated to a trust, best illustrates the nature of a trust. In order to sue, an estate has to be represented by an executor. The same should be said of a trust, which should be represented by its trustees in whom the trust's assets and liabilities vest, when it sues or is being sued. These observations emphasize the requirements for trustees to bring proceedings and to be joined in actions where a trust sues or is being sued. It is evident that a trust does not at common law, have independent locus standi. Trusts do not have juristic personality and therefore cannot sue and be sued in their own names unless locus standi or juristic personality is conferred upon them by statute."

That is as far as the common law position stands.

However, DUBE J went on to say:-

"Trusts have been incorporated into our rules. Our rules make provision for trusts in Order 2A.

Order 2A Rule 7 and 8 provide as follows.

"7.Interpretation in order 2A

In this Order –
"Associate" in relation to-
(a) A trust means a trustee;

(b) An association other than a trust, means a member of the association;
8. Proceedings by or against associations
Subject to this order, associates may sue and be sued in the name of their association."

Order 2A was introduced by Statutory Instrument 192 of 1997. Order 2 rule 7 equates an associate with a trustee. A trustee is included in the definition of an association trust. An associate may either be a natural person or a corporate entity like a company. A trustee on the other hand is a natural person. Rule 8 provides that an association may sue and be sued in the name of the association. This means that a trustee can sue and be sued in the name of the trust. Rule 8 also clothes a trust with power to sue and be sued in its own name.

These rules modify trust law to permit and create *locus standi* for a trust. These rules give a trust independent locus standi from its trustees. This position has been endorsed in our jurisdiction. See *Women & Law in Southern Africa Research and Education Trust and Elizabeth Shongwe and Ors* (supra). In *Gold Mining and Minerals Corporation* v *Zimbabwe Mines Federation* HH-20-06, the court reviewed a number of legal authorities that support the proposition that a trust is merely a legal relationship and is not legally clothed with locus standi to bring proceedings in its own name. The court relied on and agreed on the sentiments of Dr Ribbens (supra) and other authorities for the proposition that a trust is not a legal persona. The court also observed that our rules clothe trustee with legal personality, entitling them to sue and be sued in the name of the trust.

> "I agree entirely with the sentiments expressed in these judgments. I also come to the conclusion that a trust is merely a legal relationship and is not at common law a legal persona. Rules 7 and 8 permit a trust to sue and be sued in its own name. What is provided for in the rules is contrary to accepted legal principles governing the law on locus standi. The rules create an absurdity in the law which our courts have no choice but to embrace. Perhaps it is time that the Rules Committee and the Law Development Commission reconsider the position as provided in the rules. The point fails." (My emphasis)

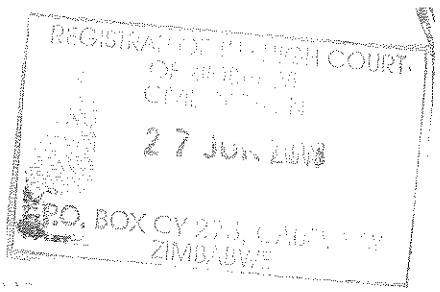
In *casu*, the applicant is cited herein in case HC 11749/17 as "VERITAS". It is thereafter described in the founding affidavit deposed to on its behalf by Valerie Anne Ingham-Thorpe, (paragraph 1 thereof), as "a trust incorporated in Zimbabwe by a deed of trust and registered with the Deeds Registry as Firinne Trust but trading as Veritas." In my view, the applicant having realized the folly of using the name "VERITAS" alone (a Trust) as the applicant in case HC 11749/17 and having been jolted by the points in limine raised by the first respondent, must have

realized that its application was potentially fatally defective and to avoid the application being declared as such at the hearing of the matter sought to bring the second application in case HC 4391/18 seeking leave to amend the citation of the applicant in the matter HC 11749/17 by inserting the words "FIRINNE TRUST also known as" in front of the current citation of the applicant in the main matter such that the full citation of the applicant shall read as follows: "FIRINNE TRUST also known as VERITAS" to ensure that both the registered name as well as the operating name of the Trust in whose name the application has been brought appears on all pleadings.

Having come to the same conclusion that DUBE J came to in the case *of Ignatious Musemwa and others* v *Estate Late Misheck Tapomwa* (supra), if all is equal, technically the applicant is entitled to amend its citation in case HC 11749/17 in order to clothe the applicant in that case with juristic personality and consequently with locus standi. Be that as it may, the application to amend the citation coming as it did as a result of, and in the background of preliminary points raised by the first respondent causes procedural headaches because, ordinarily, once a respondent has raised points in limine the applicant is expected to deal with the points in limine by way of an answering affidavit and or in the heads of argument. In this case the court was of the view that the procedure adopted by the applicant is rather unusual because strictly speaking the application in case HC 4391/18, after I read the papers was indirectly dealing with the points in limine raised by the first respondent. Though the point was not argued that way by the respondents I at first had the impression that the second application was improperly before the court. The nearest the counsels for the first respondent almost raised the point I am saying now is when they were addressing the court on costs when they said:-

> "....one would have assumed that in January this year applicant should have withdrawn its case in HC 11749/17 and proceed to file a proper application before the court."

Procedurally I agree with the counsels for the first respondent's observations because having noted that its application was potentially fatally defective the applicant need not have resorted to filing a new application dealing with points *in limine* raised in another application. I say so because in paragraph 10 the applicant said in her founding affidavit in case HC 4391/18 that-



> "However, in its Opposing Affidavit, the first Respondent raised a number of points in limine including one that the application could not be brought in the name of the Trust. The First Respondent subsequently altered this point in limine in its Heads of Argument to say that the Application should have been brought in the registered name of the Trust rather than the Trust's operating name."

What I deduced was that the whole second application was made for the sole purpose of addressing the points *in limine* raised by the first respondent including one point involving Forms that I will deal with shortly. Reference was made to the Rules by the applicant in paragraph 20 where she said-

> "I further aver that, even if the court were to find that the Applicant failed to comply with a peremptory provision of the Rules of the Honourable Court, it does not follow automatically that the application is a nullity and cannot be amended. I am advised that the general approach of the courts is to allow amendments even in such circumstances, in order to ensure that justice is done between the parties. This is all the more so when the issues raised in the application are important constitutional questions."

To me this is an admission by the applicant that some peremptory provisions of the Rules of this Honourable Court were not followed.

This brings me to the last point *in limine*.

The respondents took the point that the application in HC 117489/17 which is at page 1 of the applicant's founding papers is not made in either of the two prescribed forms. It takes on a form that is not prescribed in terms of the Rules of Court. They submitted that the Rules of Court prescribe the use of Forms 29 and 29B in peremptory terms thus enjoining that failure to use either of the two Forms in instituting an application before this Honourable Court renders the application so made fatally defective. It was their contention that this defect in the applicant's founding papers renders its entire application null and *void ab initio*. As our law does not countenance the amendment of a nullity, which by definition has no recognized legal existence, the discretion of the Honourable Court be invoked in considering and affording the right to amend such a nullity. The effect being that the applicant's purported application is fatally and incurably defective. Hence there is no application before the Court. To the extent that there is no application before the Court the respondents submitted that the second application automatically cannot be granted because there is no applicant before the Court. For this contention the respondents referred the Court to the famous cases of *Mcfoy* v *United Africa Co. Ltd* [1961]

3ALL ER 1169 at 1172 and *Jensen* v *Acavalos* 1993 (1) ZLR 216 at 220 A-D where the superior court dealt with the non-compliance with provisions of Rule 29 of the Rules of the Supreme Court, RGN 380/1964 and said the following:-

> "The reason is that a notice of appeal which does not comply with the rules is fatally defective and invalid. That is to say, it is a nullity. It is not only bad but incurably bad, and, unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice of appeal to be filed, the appeal must be struck off the roll with costs: *De Jager* v *Diner & Anor* 1957 (3) SA 567 (A) at 576 C-D
>
> In *Hattingh* v *Pienaar* 1977 (2) SA 182 (O) at p. 183 KLOPPER JP held that a fatally defective compliance with the rules regarding the filling of appeals cannot be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule. With this view I most respectfully agree; for the notice of appeal is incurably bad, then, to borrow the words of LORD DENNING in *Mcfoy* v *United Africa Co. Ltd* [1961] 3 ALL ER 1169 at 1172, "every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

Basing on the above reasoning the respondents argued that though this was not a notice of appeal, the same principles apply in the instant case. Hence if there is no applicant or application before the court in case HC 11749/17 one cannot bring an application in case HC 4391/18 to support and amend something that does not exist.

The applicant opposed this point in limine and vigorously submitted that the leave to amend should be granted in light of the provisions of section 85 (3) of the Constitution of Zimbabwe which demand that, in matters involving constitutionally protected rights, the right to approach a court in terms of the expanded grounds of locus standi in section 85 (1) of the Constitution (which includes associations) must be fully facilitated; that formalities relating to the proceedings, including their commencement, are kept to a minimum, and that the court, while observing the rules of natural justice, is not unreasonably restricted by procedural technicalities.

The applicant's submissions were shot down by the respondents who submitted to the contrary that section 85 (3) of the Constitution makes rules of court paramount since it provides that the rules of every court must provide for the procedure to be followed in cases where relief is sought under subsection (1), and those rules must be followed.

In the main application in case HC 11749/17 the applicant used the following Form:-

> "Application be and is hereby made for an order in terms of the draft order annexed hereto. The accompanying affidavit(s) and document(s) will be used in support of the application."

The respondents submitted that this form is neither Form 29 nor Form 29B. The applicant submitted that it is Form 29B with appropriate modifications and urged the court to condone the departure from the rules if any under Rule 4C and more specifically because this is an application of a constitutional nature.

The issue of Forms came for determination by HLATSHWAYO J (as he then was) in *Zimbabwe Open University* v *Mazombwe* HH-43-2009. I cannot do any better but to borrow what the Learned Judge said in that case in a bid to resolve the matter before me. He said from p 2- 3 of the cyclostyled judgment that:-

> "Lest an impression be formed that this is a sterile dispute about forms, I have deemed it necessary to outline in a summary way what each of the two forms contains, on the one hand, and the unique features of the format used by the applicant, on the other. In Form 29 the applicant gives notice to the respondents that he or she intends to apply to the High Court for an Order in terms of an annexed draft and that the accompanying affidavit/s and documents shall be used in support of the application. It goes on to inform the respondent, if he or she so wishes, to file papers in opposition in a specific manner and within a specific time limit, failing which the respondent is warned that the application would be dealt with as an unopposed application. In Form 29B an application is made for an order in terms of an annexed draft on the grounds that are set out in summary as the basis of the application and affidavits and documents are tendered in support of the application. By contrast, the unique format used by the applicant consists of s heading: "Application for Rescission of Judgment" and the following terse statement: "Take notice that the Applicant, Zimbabwe Open University, hereby applies for Rescission of Judgment. The annexed affidavit is used in support thereof."

Now, the format adopted by the applicant does not contain the plethora of procedural rights that the respondent is alerted to in Form 29 nor the summary of the grounds of the application required in Form 29B. Can this substantial departure from the rules be condoned under Rule 4C? Rule 4C states as follows:

> "The court or judge may, in relation to any particular case before it or him, as the case may be-
>
> (a) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;
> (b) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient."

The learned judge having found that the Form used by the applicant was neither Form 29 nor Form 29B, struck the application off the roll with costs on the legal practitioner and client scale.

In *casu* the Form used by the applicant is, with the greatest of respect not Form 29 nor Form 29B. There was therefore a substantial departure from the rules. The question now is can this substantial departure from the rules be condoned under Rule 4C? Or can I condone it merely because this is an application of a constitutional matter? The answer is a definite NO.

I will therefore uphold the preliminary points and decline to deal with the matter on the merits. In taking this decision I am aware of the concessions allegedly made by the second and third respondents at the beginning of the matter, but be that as it may since I found that the application in case HC 11749/17 is fatally and incurably defective, every proceeding and or concessions founded on it are also bad and incurably bad, one cannot put something on nothing and expect it to stay there. It will collapse. Even if I am convinced that the relief being sought is an urgent one given the fact that it would impact on the current elections which are around the corner, even if I were to condone the departure from the rules and hear the matter on the merits, and in the event that I grant the reliefs being sought it will not be relevant for the purposes of the current elections given the provisions of section 157 (5) of the Constitution of Zimbabwe. For avoidance of doubt let me quote the section which reads as follows-

"157 Electoral Law

(1) An Act of parliament must provide for the conduct of elections and referendums to which this Constitution applies, and in particular for the following matters-
(a) .....
(b) .....

(5) After an election has been called, no change to the Electoral Law or to any other law relating to any other law relating to elections has effect for the purpose of that election."(My emphasis)

In *casu* an election has already been called so any decision this court may make to the provisions of the Electoral Act has no effect to this election. The applicant has ample time to relodge its papers properly if it feels it has a good case otherwise the applications are dismissed.

This brings me to the question of costs. Both sides agreed that once the matter has been decided on the merits the issue of costs does not arise since it is a constitutional matter. But were matter has been decided on the preliminary points without dealing with the merits, the losing party would have to pay the other party's wasted costs. Since the applicant has lost I will award costs in favour of the respondents on a legal practitioner and client scale.

IT IS ORDERED THAT

1. The applications be and are hereby dismissed.
2. The applicant to pay the respondents' wasted costs on a legal practitioner and client scale.

*Mtetwa & Nyambirai*, applicant's legal practitioners
*Messers Nyika, Kanengoni & Partners*, 1st respondent's legal practitioners
*Civil Division of the Attorney General's Office*, 2nd and 3rd respondent's legal practitioners.