

IN THE HIGH COURT OF ZIMBABWE

CASE NO. HC 11749 /17

HELD AT HARARE

In the matter between:

VERITAS

Applicant

And

ZIMBABWE ELECTORAL COMMISSION

1st Respondent

MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS

2nd Respondent

THE ATTORNEY GENERAL OF ZIMBABWE

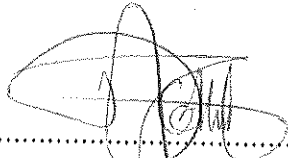
3rd Respondent

NOTICE OF FILING

ATTORNEY GENERAL OF ZIMBABWE
DIRECTOR
CIVIL DIVISION
Sande 1514
P. O. BOX 880, CHICHEWAY
HARARE, ZIMBABWE

TAKE NOTICE THAT the Applicant hereby files its Answering Affidavit and supporting documents.

Dated at HARARE on this the 16th day of MARCH 2018


MTETWA & NYAMBIRAI
Applicant's Legal Practitioners
2 Meredith Drive, Eastlea
HARARE [Mrs Mtetwa/DJC/tz]

NYIKA, KANENGOZI & PARTNERS
LEGAL PRACTITIONERS
3rd FLR. NORTH WING, ZIMDEF HOUSE
16 MAR 2018
OFF MOTHER PATRICK AVE, ROTYEN ROW, HARARE
TEL: 755061, 755062, 755063, 755066
EMAIL: nyikakanengoni@gmail.com

TO: THE REGISTRAR
High Court of Zimbabwe
HARARE

AND

TO: THE ZIMBABWE ELECTORAL COMMISSION
3rd Floor, North Wing
ZIMDEF House
Off Mother Patrick Avenue
HARARE

AND

TO: THE MINISTER OF JUSTICE, LEGAL AND
PARLIAMENTARY AFFAIRS
Corner 4th & Samora Machel Avenue
6th Floor, Block C
HARARE

AND

TO: THE ATTORNEY-GENERAL OF ZIMBABWE
New Government Complex
Corner Fourth Street and Central Avenue
HARARE [4/JUST/1142 KC]

IN THE HIGH COURT OF ZIMBABWE

CASE NO. HC 11749 /17

HELD AT HARARE

In the matter between:

VERITAS

Applicant

And

ZIMBABWE ELECTORAL COMMISSION

1st Respondent

MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS

2nd Respondent

THE ATTORNEY GENERAL OF ZIMBABWE

3rd Respondent

ANSWERING AFFIDAVIT

I, VALERIE ANNE INGHAM-THORPE, do hereby take oath and swear that:

1. I have read the First Respondent's Opposing Affidavit and wish to respond as follows:
2. Any averments made with regard to the law I do so with advice from my legal practitioners, which advice I embrace.
3. Nothing in the First Respondent's Opposing Affidavit may be taken as admitted unless specifically stated herein.

ON THE POINTS *IN LIMINE*

Ad para 1 - 2

4. It is denied that I state at any point in my Founding Affidavit that I derive my capacity to depose to the affidavit from my position as the Director of the Applicant *ex officio*. On the contrary, I stated in the preamble to my affidavit that I am duly authorised to depose the affidavit on behalf of the Applicant, which is a true statement as shall be demonstrated below.
5. I attach hereto a Resolution of the Board of Trustees which confirms the general authority previously given to myself to institute the current proceedings on behalf of the Applicant and formally ratifying everything done in the institution and continuation of proceedings in the present matter, marked Annexure "E". I further attach hereto the trust deed of the Applicant marked Annexure "F" which states at Clause 8.2.1 that the trustees have the power to "To employ a Director to whom the Board may delegate any of its powers, either absolutely or subject to conditions specified by the Board." Therefore, it is denied that the Founding Affidavit was not validly deposed.
6. I am advised by my legal practitioners, whose advice I embrace, that in terms of the Rule 8 and 8C of the Rules of this Honourable Court, trustees may sue and be sued in the name of the trust or under a trade name. As such, the trustees of the Applicant were at liberty in terms of the rules of this court to sue in the name under which this application was instituted. Therefore, it is denied that citation of the Applicant is a nullity and that there is no application before the Honourable Court.

Ad para 3

7. It is disputed that the Applicant does not have a cause of action. As averred earlier, the Rule 8 of Rules of this Honourable Court clearly provide that trustees may sue in the name of the trust and do not need to be cited as parties to the proceedings. Therefore, the trustees are entitled to vindicate their constitutional rights through the Applicant. There can be no dispute that the trustees, as natural persons, are entitled to the rights enshrined in Chapter 4 of the Constitution.
8. Additionally, the Applicant's Founding Affidavit makes it very clear that it seeks to vindicate and protect not only its own rights but also the rights of the public at large. Therefore, the Applicant also has a cause of action in seeking to protect and vindicate the rights of the public, who also are the beneficiaries of the Applicant's work.

Ad para 4

9. I deny that the form of the application renders it a nullity. I aver that the application was in fact made in terms of Form 29B. While the Applicant acknowledges that the application should more properly have been made in terms of Form 29, I am advised that Rule 229C explicitly states that the adoption of an incorrect form shall not be a ground for dismissing an application unless there is prejudice. None of the Respondents have averred that they have suffered any prejudice and indeed it is quite clear that they have not suffered any. The purpose of using the forms is to guide the Respondents with regard to the time limits etc within which to file opposing papers. All of the Respondents have had ample time to file their opposing papers and the First Respondent has actually filed its opposing papers. Therefore, it is disingenuous for the First Respondent to claim that the matter must not be heard on the merits, when it has already done precisely what Form 29 would have directed it to do.

ON THE MERITS

Ad para 5 - 8

10. No issues arise which have not already been dealt with in the preceding paragraphs of this affidavit. The First Respondent's acceptance of the factual perspectives from the two reports, which outline the restrictiveness and insufficiencies of Zimbabwe's voter education framework, is noted.

Ad para 9

11. It is denied that the Constitution is unequivocal in vesting of all power and, by extension, all discretion, exclusively in the First Respondent viz. questions of voter education. Section 239(h) of the Constitution of Zimbabwe makes it clear that the Constitution envisages others conducting voter education when it states the First Respondent must "conduct and supervise voter education". By giving the First Respondent a mandate to *supervise* voter education implies that the Constitution envisages others, besides the First Respondent, from conducting voter education. As such, it is vehemently disputed that the Constitution sanctions a state monopoly over voter education.

12. It is precisely the Applicant's case that the Electoral Act already provides mechanisms for the First Respondent to supervise voter education which do not violate constitutional rights in the manner that the impugned provisions do. Notably, section 40E of the Electoral Act is *not* among the impugned provisions. Section 40E is titled "Commission to monitor voter education by other persons". It is this provision that gives effect to the First Respondent's constitutional mandate to "supervise" voter

education. Section 40E provides that the First Respondent may take steps to correct the publication of false or misleading voter education, thereby providing the First Respondent the tools to protect the integrity of voter education without violating constitutional rights.

13. The Applicant agrees that the constitution must be read as a whole and that provisions must be read such that they are consistent with each other and not in violation of each other. It is precisely for this reason that all of the provisions of section 235 of the Constitution cited by the First Respondent must be read in a manner that does not violate fundamental rights enshrined in Chapter 4 of the Constitution. In this regard it is denied that it is "infinitely preferable" to throttle free speech before it is made than to remedy it afterwards. This position goes directly against the principle of prior restraint which is globally considered one of the most serious infringements of the right to freedom of expression. The mischief that 40C(1)(g) and 40C(2) seek to deal with is sufficiently dealt with by section 40E of the Electoral Act which is less restrictive of constitutional rights.
14. The First Respondent has actually made a fatal concession in paragraph 9.22 of its Opposing Affidavit where it states that the fact that political parties are not subject to the impugned provisions "does not however, imply that voter education conducted by political parties will not be subject to the standards of accuracy and adequacy applicable to other voter education programs." It is the Applicant's case that the accuracy and adequacy of voter education programmes can be maintained without resorting to drastic restrictions of fundamental rights that are contained in the impugned provisions. The accuracy and adequacy of voter education programmes by political parties (and any other persons) are sufficiently regulated by section 40E of the Electoral Act and, therefore, the impugned provisions which apply selectively to the Applicant in a discriminatory manner are unnecessary for achieving their supposed objective.
15. On the issue of the timing of seeking approval, I aver that it is incorrect that the Applicant could have applied years in advance to have its materials approved since many issues which need to be dealt with through voter education arise close to elections and often need to be dealt with quickly without going through a lengthy approval process. By way of example, recently there was an issue whereby certain people were collecting voter registration slips and recording the serial numbers of voter registration slips apparently as a tactic to intimidate people. It was essential for all stakeholders to quickly get accurate information out to the public about this issue. Waiting for such material to go through a lengthy approval process by the First Respondent, with information that is time sensitive, would not serve the public.
16. It is denied that section 40C(1)(h) and section 40F of the Electoral Act are necessary for efficiency, freeness, fairness and transparency of elections. The First Respondent makes

sweeping and irrelevant statements about an election in the United States without providing any evidence that the source of funding for organisations was even an issue in the debate in that country or that restricting such funding was used as a measure to curb unwanted foreign influence. Moreover there is certainly no evidence that the United States or any other country bars its own citizens domiciled in other countries from making financial contributions towards voter education. On the contrary, the Applicant has in its Founding Affidavit referred the Court to numerous examples of comparative legislation from the Southern African region showing that other countries in the region do not place such restrictions on voter education or the sources of funding for conducting voter education. This will be discussed more fully in the Applicant's Heads of Argument.

17. It is denied that Zimbabwe's constituency-based electoral system provides a valid justification for denying Zimbabwean citizens based in the diaspora from making contributions towards voter education programmes. Voter education programmes are conducted at a national level and the material is relevant to people from all constituencies as well as those who live outside of Zimbabwe. Therefore, it is illogical to state that only those who are domiciled in a certain constituency may make contributions towards voter education programmes that are pitched at the entire nation including Zimbabweans who are domiciled in other countries. I aver that this arbitrary discrimination against Zimbabweans in the diaspora is a violation of their constitutional rights. The First Respondent is on record saying that Zimbabweans living in the diaspora are free to register to vote and to vote in the forthcoming elections, only that they will have to come to Zimbabwe to do so. (See article "ZEC Rules Out Diaspora Vote" published in *The Herald* newspaper on 7th July 2018 attached hereto marked Annexure "G" in which the then-chairperson of the First Respondent is quoted saying "Will diasporians be able to register to vote? Yes, they can register to vote. They can come back here, present themselves before a voter registration officer, with their proof of identity and an address within Zimbabwe"). Why then should Zimbabweans living in the diaspora be denied an opportunity to contribute financially towards voter education for an election which the First Respondent has confirmed they are allowed to participate in?
18. Furthermore, the apparent assumption by the First Respondent that any financial contributions towards a voter education programme—whether by Zimbabwean citizens in the diaspora or otherwise—would have an influence over the content of the Applicant's or any other person's voter education programmes is disputed. The First Respondent has failed to demonstrate any link between the source of funding and the accuracy or adequacy of voter education programmes. In order to justify the limitation of constitutional rights, more evidence than the vague speculation offered by the First Respondent needs to be provided. In reality, the Applicant's editorial control of its publications and informational materials is independent of its sources of funding and

the Applicant has developed a strong reputation for providing accurate and impartial information on a range of issues.

19. It is further denied that the fact that section 40F of the Electoral Act allows the First Respondent to allocate foreign funding to other persons in any way saves the impugned provisions from being unconstitutional. Section 40F is discretionary, meaning the First Respondent may choose not to allocate any foreign funding it receives or if it does it may choose to allocate only part of the funding and retain the rest. There is no reference in the provision to the purported process the First Respondent refers to of scrutinizing the source of the funds and then allocating the funds if it is satisfied that with their source. There is no recourse to the Applicant or any other organisation or person wishing to conduct voter education if funds raised by such person are held by the First Respondent and not released. The Applicant maintains that the restrictions imposed by the provisions stifle freedom of expression and political rights and serve no valuable or necessary purpose in an open and democratic society.

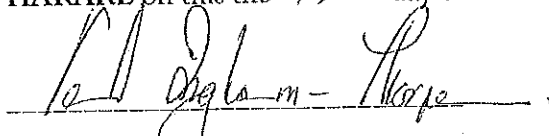
20. The First Respondent's response to the Applicants averments that it and others in its position are unfairly discriminated against by the impugned provisions seem to suggest that the First Respondent did not understand the thrust of the Applicant's averments on that point. To clarify, the impugned provisions unfairly discriminate between political parties and all persons in the position of the Applicant. This discrimination is most stark in the case of independent candidates who are forced comply with the extremely restrictive impugned provisions while political parties do not, even though they have identical roles for the purposes of elections. The discrimination against independent candidates seems to be admitted by the First Respondent in paragraph 9.22 of the Opposing Affidavit. However, the discrimination is just as unfair with respect to the Applicant and other non-partisan organisations who are forced to comply with the impugned provisions while political parties do not need to. To make matters worse, the discrimination is not only unfair, but it is utterly irrational since the supposed purpose of the provisions is to ensure that voter education is not biased towards any *political party* and yet political parties face less stringent conditions than non-partisan organisations which are much less likely to be biased.

COSTS

21. The Applicant disputes that the First Respondent's grounds for requesting a costs order on a punitive scale have any merits. As explained above, the points *in limine* raised by the First Respondent do not have merit and, in any event, the First Respondent has not been prejudiced in any way. The matter is one of great public importance and the Applicant should not be penalized for bringing such a matter to court. The Applicant abides by its request for costs against, jointly and severally, against the Respondents.


Thus signed and sworn to at HARARE on this the 15th day of March 2018

Signed:



VALERIE INGHAM THORPE

Before me:



COMMISSIONER OF OATHS

S.B. Chauke LLB
COMMISSIONER OF OATHS
2018 -03- 15
32 CORK RD, AVONDALE, HARARE
TEL: 0773 620 100, (04) 764393