IN THE HIGH COURT OF ZIMBABWE **CASE NO: HC11749/17**

HELD AT HARARE

In the matter between:

VERITAS **APPLICANT**

AND

ZIMBABWE ELECTORAL COMMISSION **1ST RESPONDENT**

AND

THE MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS **2ND RESPONDENT**

AND

THE ATTORNEY GENERAL OF ZIMBABWE **3RD RESPONDENT**

REGISTRAR OF THE HIGH COURT OF ZIMBABWE CIVIL DIVISION
11 APR 2018
P.O. BOX CY 275, CAUSEWAY, ZIMBABWE

1ST RESPONDENT'S HEADS OF ARGUMENT

ATTORNEY ... P.O. BOX ... CAUSEWAY HARARE, ZIMBABWE

Precis

Consistent with the opposing affidavit filed on behalf of the 1st respondent in this matter, apart from the points taken *in limine*, the 1st respondent undertakes to abide the decision of this Honourable Court on the merits of the application and places before the court, in the manner akin to *amicus curiae*, certain considerations that it views as helpful in the determination of the merits of the application in the event that the points taken *in limine*are not upheld.

MTETWA & NYAMBIRAI
13 APR 2018

In Limine

1. Applicant's Legal Status

1.1. In the matter of ***CrundallBrothers (Pvt) Ltd v Lazarus NO&Anor 1991 (2) ZLR 125 (SC)***, the Supreme Court made the following finding with respect to the legal status of a trust:

> *"We agree with the learned judge in his rejection of this argument.* ***A trust is not a person****. The trustee is the person to be considered for the purposes of the regulations. The trustee is a Zimbabwean resident. That is the end of the matter. But, for good measure, we also agree that the trustee is not to be regarded as the nominee of the beneficiaries."pg128F (Emphasis added)*

1.2. The Supreme Court in that matter was affirming the finding of the High Court in ***CrundallBrothers (Pvt) Ltd v Lazarus NO&Anor 1990 (1) ZLR 290 (H)***, in particular the findings at page 298E of that report whereat the learned judge had made the following observation:

> *"I can see no reason why a trust should be regarded as a person for the purposes of the Regulations, when it is not regarded as a 'person' for other purposes."*

1.3. The position stated in the above authorities was more recently confirmed by this Honourable Court in the matter of ***WLSA &Ors v Mandaza&Ors 2003 (1) ZLR 500 (H)***, per SMITH J, wherein the learned judge made the following observation:

"Mr. Nherere took a point, in limine, that WLSA, being a trust, is not a corporate body and therefore cannot appear as a party. That contention is legally sound."pg505E

1.4. The learned judge in that matter went on to cite the ***CrundallBorthers*** case (*supra*), both in its High Court and Supreme Court iterations, with approval.

1.5. Further, in the matter of ***Gold Mining &Minerals Development Trust v Zimbabwe Miners' Federation 2006 (1) ZLR 174 (H)***, per MAKARAU J, as she then was, it was found that:

*"**It is trite that at law, a trust is not a juristic person**. AM Honore in the South African Law of Trusts 3ed defines a trust in the first chapter of his text. He gives the wide meaning of the term as:*

'any legal arrangement by which one person is to administer property, whether as an officer holder or not, for another or for some impersonal object.'

*...It appears to me clearly that in either sense, the author views a **'trust' as a legal relationship and not as a separate legal entity as a corporation or universitas** even though the*

trustees may together form a board akin to a board of a company or of a voluntary association."pg176D-F (Emphasis added)

1.6. The learned judge goes on to find that:

> *"In my view,* ***our law of trust has not sufficiently grown to recognise a limited separate personality of the trust****, even though some of them operate more or less on the same lines as a voluntary organisation of (sic) incorporated company."pg177F (Emphasis added)*

1.7. A trust is thus, demonstrably not a legal *persona* in terms of our law.

1.8. Having established this, the next question is whether by virtue of the provisions of r8 of the High Court Rules, 1971, litigation can be instituted in the name of a trust. The answer to that question is found in the Rules themselves and is in the affirmative.

1.9. Commenting on the import of r8 this Honourable Court, in the ***Gold Mining &Minerals Development Trust*** case, (*supra*), had the following to say;

> *"In casu I accept that in terms of the rules of this court, trustees may issue out process in the name of the trust. The permission granted by the rules to use the name of the association where associates sue or are sued is* ***merely for convenience and***

does not change the legal status of the association*. Rule 8D clearly provides that the provisions of the order should not be construed as affecting the liability or the non-liability of the associations for the conduct of their associations or associates. Thus the liability of the defendant is to be tested in terms of the accepted principles of the delict of defamation and the legal characterisation of trusts."pg178B (Emphasis added)*

1.10. Of note in the foregoing passage is the point made that the existence of r8 in the High Court Rules, whilst allowing trustees to sue in the name of atrust, it is not intended to vary the common law position that a trust is not a *juristic persona*.

1.11. The next question that must be answered, therefore, is whether the applicant in the present matter finds protection under r8 of this Honourable Court's Rules as to avoid being deemed non-suited. The wording or r8 must be considered carefully in this respect. Rule 8 provides as follows;

> *"Subject to this Order, associates may sue and be sued* ***in the name of their association.****" (Emphasis added)*

1.12. The convenience afforded by r8 therefore, applies only to the extent of allowing suit to be brought **in the name of the trust**, which name is to be found in the trust's constitutive document; the notarial deed of trust.

1.13. According to the Notarial Deed of Trust attached to the applicant's answering affidavit as annexure 'F', in particular clause 2 thereof, the name of the trust is stated as ***FIRINNE TRUST.***

1.14. The applicant's founding affidavit verifies this in paragraph 1 thereof wherein the deposition is made that;

> *"**The Applicant is VERITAS a trust incorporated in Zimbabwe by a deed of trust and registered with the Deeds Registry as Firinne Trust but trading as Veritas.It is a body corporate,** a non-profit making organisation that provides information to the general public on the work of Parliament, the laws of Zimbabwe, the implementation of the Constitution of Zimbabwe, and information pertaining to elections in Zimbabwe…" (Emphasis added)*

1.15. For the applicant to fall within the ambit of the provisions of r8 of the Rules of this Honourable Court, therefore, proceedings must have been brought in the name *"FIRINNE TRUST"*, which is **the name of the trust** as contemplated in that rule.The present application was, however, not instituted under that name but under the name *"Veritas"*, which, as indicated above, is said to be a trade name for the Firinne Trust. The convenience granted under r8 does not extend to trade names, such as *Veritas.*

1.16. Suit under a trade name is covered in terms of r8C of the Rules of this Honourable Court and is couched in the following terms;

"Subject to this Order, ***a person*** *carrying on business in a name or style other than his own name may sue or be sued in that name or style* ***as if*** *it were the name of an association, and rules 8A and 8B shall apply, mutatis mutandis, to any such proceedings." (Emphasis added)*

1.17. As has already been established in these heads, a trust is not **a person** as the term is used in our law. It has also been established that this position of our law is not changed by the existence of r8 of the High Court Rules, which rule has been characterised as no more than a tool of convenience which does not vest juristic personality in a trust, (similar to the convenience granted by r8C by allowing a person to sue under their trade name. The permission to sue in that manner does not create a separate legal entity answering to the trade name as contradistinguished from the person that uses that trade name).

1.18. That being the case, a consideration of the provisions of r8C demonstrates that for that rule to be resorted to one must be:

i. A person, as the term is defined in our law i.e. juristic or natural; and

ii. Carrying on business; and

iii. Such business is carried on in a name or style other than his/its own name.

1.19. These conditions must exist contemporaneously thus the absence of one will vitiate any resort to the provisions of r8C.

1.20. The Ferinni Trust is not a juristic person. It is not a natural person. It can, therefore, not have recourse to the provisions of r8C. Its suit under the name Veritas, which is described as a trading name, is thus not competent.

1.21. This perspective, coupled with the fact that the Ferinni Trust did not sue**in its name** as to profit from the provisions of r8, necessarily means that there is no applicant before the court.

1.22. The next question becomes whether it can be said that the trustees are the parties that have brought the matter under r8C?The answer to this is found in the applicant's pleadings.

1.23. Paragraph 1 of the founding affidavit, upon which affidavit the applicant's case either stands or falls, has already been quoted in paragraph 1.14 above. That paragraph falls under the heading *"The Parties"* in the founding affidavit. In terms of paragraph 1 of the founding affidavit the applicant is identified as *"VERITAS a trust incorporated in Zimbabwe by a deed of trust and registered with the Deeds Registry as Firinne Trust but trading as Veritas"*. The applicant is not described/ identified as the trustees of the Ferinni Trust trading as Veritas.

1.24. Further, paragraph 1 of the founding affidavit goes on to aver,in reference to the cited applicant,that *"It is a body corporate…"*. This

deposition is extremely revealing viz. the party identified in the founding papers as having brought the suit. The belief is clearly held, and expressed, by the deponent to the founding affidavit, that what is cited as the applicant is, by its inherent nature, a body corporate. Put differently the deposition simply evinces the belief that the cited applicant is **a person** as defined in our law with capacity to sue and be sued in its own right independent of its trustees, which, tellingly, are not referenced at all in the founding papers.

1.25. When one considers the depositions made under the head*"Nature of Application"*, in particular paragraph 6 of the founding affidavit, it is explicitly averred that;

> *"The Applicant seeks 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****..."*

1.26. The understanding, as it appears in that paragraph, being that the cited applicant, being viewed as**a person** at law, is possessed of certain rights guaranteed by the Constitution of Zimbabwe. Again, no allusion to the trustees of the Ferinni Trust is made.

1.27. Under the head, *"Locus Standi"* in the founding affidavit, in particular paragraph 7, it is averred that;

"I submit that the Applicant has the requisite locus standi to institute the present proceedings. It is a non-profit making organisation that provides information to the general public on the work of Parliament, the laws of Zimbabwe, the implementation of the Constitution of Zimbabwe, and information pertaining to elections in Zimbabwe."

1.28. Once again, no reference is made to the trustees of the Ferinni Trust in relating to the applicant's *locus standi* to bring the present suit. The depositions are made on the premise that the applicant has, in its own right, corporate personality capable of affording it *locus standi.*

1.29. Nowhere in the founding affidavit, therefore, can one find any deposition characterising the suit as being by the trustees in terms of the provisions of r8C.

1.30. Further, and in any event, it is submitted that even if averments could be said to exist in the founding papers that indicate that the suit was brought by the trustees of the Ferinni Trust under r8C, that would still not avail to the applicant in this matter. Rule 8C, when closely examined, cannot be interpreted to include trusts/ trustees in its purview.

1.31. The pertinent phrase in r8C in this respect is,*"...may sue or be sued in that name or style**as if**it were the name of an association...".*

1.32. To understand this point, one must first draw a distinction between the provisions of r8 and those of r8C.

1.33. Rule 8 is designed to allow associates to sue in the names of their associations, (associations being defined under r7 as including trustsand by extension, trustees being equated to associates in an association for purposes of the rule, hence the idea that trustees may sue **in the name** of the trust).

1.34. Rule 8C, however, allows suit under a trade name to **mimic**suit in the name of an association. This is why the phrase ***"as if"*** is used in r8C.

1.35. That which sues under r8C, therefore, is NOT an association as defined in the Rules of Court, but a legal entity that is allowed by the Rules of Court, for the purposes of instituting litigation, to "pretend" **as if** it were an association.

1.36. Since a trust is specifically defined by the Rules of Court as being an association, it cannot be the entity contemplated by r8C because it does not need to "pretend" **as if** it is an association for the convenience of instituting litigation in its own name.

1.37. This gives credence to the submissions already made in these heads that r8C starts from the premise of there being **a person** as defined in our law, (of which a trust is not), doing business under a name or style different from its actual name, which **person** is then afforded the

convenience created by r8 to sue under that assumed name or style**as if** it were an association defined under r7.

1.38. At the risk of belabouring the point; r8C is not designed to cater to any entity that falls within the definition of an association in terms of the Rules of Court, (such entities being already catered for by the provisions of r8). It is designed instead,to cater for entities that do not fit that definition which are, by the provisions of r8C, under defined circumstances, then allowed to behave **as if** they were in fact covered by that definition. If this were not the case, there would be no purpose served by enacting r8 and r8C separately.

1.39. Flowing from this analysis, therefore,the application cannot be saved by recourse to r8C. There remains no applicant before the court.

1.40. It must be noted that the contentions in respect of r8C are only made in the applicant's answering affidavit and are not pursued in its heads of argument. This may imply that that line of argument is no longer being pursued by the applicant in preference to the arguments related to r8 which are made in the applicant's heads of argument. Whatever the position may be, however, it has been demonstrated that there is no applicant before the court whether under the auspices of r8 or r8C.

1.41. The final issue to deal with under this head is the matter of ***Ignatius Musemwa&Ors v Estate Late MischeckTapomwa&Ors HH 136/16***, cited in the applicant's heads of argument as the primary authority

supporting its contention that under r8 it is in fact properly before the court.

1.42. The findings in the ***Ignatius Musemwa***matter, with respect, do not advance the applicant's cause on this point. They are in fact consistent with the submissions that have been made in these heads on the interpretation of r8.

1.43. The passage quoted in the applicant's heads of argument from the ***Ignatius Musemwa*** matter, paragraph 10 of those heads, ends by instructively stating that;

> *"The court observed that our rules clothe trustees with legal personality, entitling them to sue and be sued **in the name of the trust.**" (Emphasis added)*

1.44. That is the point that has been made in these heads; suit **in the name of the trust** is allowed by r8 of the Rules of Court. Suit under what is described as the trade name of the trust is not.

1.45. In the ***Ignatius Musemwa*** matter the suit was brought **in the name of the trusts** involved in that matter, three of them in that matter. The court, dealing with the exception to *locus standi* of a trust that had been taken therein, made the following instructive findings;

"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 providedfor 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. Perhapsit is time that the Rules Committee and the Law Development Commission reconsidered theposition as provided in the rules." P5 (Emphasis added)*

1.46. The court in the ***Ignatius Musemwa***matter thus confirms that a trust has no legal personality at law and that r7 and r8 only allow the institution of proceedings **in the name of the trust** and stand as an exception to the accepted common law position.

1.47. The court's comments on the existence of r7 and r8, contrary to our common law, must be taken due note of as they imply that the extension of *locus standi* under r7 and r8, to sue in the name of a trust, must not be taken beyond the strict confines of those rules i.e. the rules cannot be interpreted as allowing suit other than in the registered name of the trust. To go beyond that would be to perpetuate the absurdity created by r7 and r8 which was aptly recognised by the court in the ***Ignatius Musemwa*** matter.

1.48. The ***Ignatius Musemwa***matter is thus distinguishable from the present application wherein the name used in instituting litigation is NOT the registered name of the trust.

1.49. The 1st respondent thus prays that this point *in limine*be upheld.

2. Validity of Applicant's Founding Affidavit

2.1. This point flows directly from the first point *in limine* i.e. if there is no applicant before the court there can be no valid founding affidavit advancing the cause of a non-existent applicant.

2.2. In support of this point one can do no more than quote the remarks of McNALLY JA in ***Jensen v Acavalos 1993 (1) ZLR 216 (S)*** that;

> *"In Hattingh v Pienaar 1977 (2) SA 182 (O) 182 at 183, KLOPPER JP held that a fatally defective compliance with the rules regarding the filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of the time within which to comply with the relevant rule. With this view I most respectfully agree;* ***for if 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 (PC) at 11721, '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.'"*** *P220C-D (Emphasis added)*

2.3. In similar vein, where no party is validly cited as an applicant in a matter, there are no valid founding papers before the court and this includes any affidavits that may have been deposed to in furtherance of the cause of the invalid applicant.

2.4. Such affidavits are only placed before the court because there is an applicant pursuing relief before the court. Where no such applicant exists, the affidavits in turn cannot stand on their own as to allow that would be to place something on nothing and expect it to stand.

3. Absence of a Cause of Action

3.1. Once again, this point arises directly from the first point *in limine*.

3.2. In terms of s45(3) of the Constitution of Zimbabwe;

> *"**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" (Emphasis added)*

3.3. Entitlement to Chapter 4 rights in terms of the Constitution thus accrues to natural and juristic persons only. The right to vindicate such rights thus also accrues to natural and juristic persons.

3.4. The applicant is neither a natural nor a juristic person, as has been demonstrated above.

3.5. The applicant's cause of action is the vindication of certain rights under Chapter 4 of the Constitution through a declaration of constitutional invalidity relating to s40(C)(1)(h), s40(C)(2) and s40F of the Electoral Act, [Cap 2:13].It cannot, at law, pursue and prosecute such a cause of action as the rights it seeks to vindicate do not accrue to the applicant.

3.6. There is thus no valid cause of action arising in this matter.

3.7. Further, the contention that the relief is also sought in the public interest does not salvage the applicant's matter. Such public interest litigation, invariably, be pursued by a recognised legal entity before the court. A non-entity, no matter how well intentioned, will not enjoy a cause of action before this Honourable Court.

3.8. The provisions of s85(1)(d) of the Constitution put the issue beyond doubt. It is provided therein that;

> *"...**any person** acting in the public interest is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed..." (Emphasis added)*

3.9. The applicant is incapable of falling with in the prerequisite of being a **person** set out in s85(1)(d). it cannot, therefore, institute public interest litigation under the auspices of that constitutional provision.

4. <u>Form of Application</u>

4.1. This point is addressed in the applicant's answering affidavit but not in its heads of argument. It is dealt with in the answering affidavit by reference to r229C of the Rules of this Honourable Court i.e. the rule relating to instances where form 29 is used instead of form 29B and vice versa.

4.2. With respect, the import of the point raised *in limine* is not that the applicant employed one form when another was prescribed. It is that neither of the two forms was employed and as such the resultant document filed with the court is a nullity.

4.3. In terms of the rules of this Honourable Court, an application made before the court must be brought in either Form 29 or Form 29B. The stipulation of the rules in this respect is peremptory as signified by the use of the word ***shall*** in the rules.

4.4. That being the case a failure by a litigant, who purports to bring proceedings by notice of motion before this Honourable Court, to use either of the two prescribed forms, constitutes a fatal non-compliance with the rules of court the effect of which is to render the purported application fatally and incurably defective i.e. a nullity. See in this respect the matter of ***Zimbabwe Open University v Mazombwe 2009***

(1) ZLR 101 (H) wherein this Honourable Court made the following finding:

> *"...the form for a court application sets out a plethora of **procedural rights that the respondent is alerted to, while the form for an ex parte application sets out a summary of the grounds of the application**. By contrast, the format used by the applicant did neither. The application was therefore fatally defective." Headnote. (Emphasis added)*

4.5. In the present matter, as appears clearly from the applicant's purported founding papers, the 'form' used in initiating the litigation is neither Form 29 nor Form 29B, contrary to the assertion made in the answering affidavit that form 29B was used.

4.6. As a result of this, the applicant is in clear breach of the peremptory rules of this Honourable Court and has presented before it, a purported application that is fatally and incurably defective.

4.7. It is appreciated that in terms of the rules of this Honourable Court, there is leeway for the Court to grant condonation in respect of non-compliance with its rules of procedure, (i.e. r4C). What that entails however, is that there must be, before the Court, something capable of condonation or in respect of which the Court can validly exercise its discretion given under r4C.

4.8. As our law stands, a nullity does not fall within the ambit of things/ instances to which discretion under r4C would attach. The point is made clearly in the ***ZOU*** case (supra) as follows:

> *"...had the applicant used either of the forms prescribed in the Rules, the use of one form instead of another would not in itself constitute sufficient ground for dismissing the application, it being necessary for the court to conclude that some interested party had thereby suffered prejudice which could not be remedied by directions for service on the injured party, with or without an order of costs. The court could have exercised its discretion under r 4C."*

4.9. It follows that because neither of the two prescribed forms was used, the question of the Court's discretion under r4C does not arise.

4.10. In stressing the point, the Court in the ***ZOU*** case (supra), made reference, with approval, to the South African case of ***SimrossVintners (Pty) Ltd v Vermulen, VRGAfrica (Pty) Ltd v Walters t/a Trend Litho, Consolidated Credit Corporation (Pty) Ltd v Van der Westhuizen 1978 (1) SA 779 (T)*** wherein it was stated that;

> *"...This applicant also relies on a nulla bona return, but it chose not only to address the Form 2 notice of motion to the respondent, but also to serve it on him. Hence it is not brought*

ex parte and r 6(5) applies. It was suggested in some of the other applications which were eventually struck off the roll that this non-compliance might be condoned under r 27(3). I have considered that possibility in this case, but apart from the fact that no cause at all is shown why there should be condonation, ***the more fundamental difficulty arises that the document which purports to be a notice of motion is, as I have indicated above, a nullity, and I have grave doubt whether the court has power under this rule to repair a nullity, a concept in law which carries within itself all the elements of irreparability..."*** *(Emphasis added)*

4.11. Further authority for the legal consequences of a defective compliance with the Rules of Court can be found in the matter of ***Jensen v Acavalos****(supra)*. Whilst this case hinged on a consideration of the provisions of r 29 of the Rules of the Supreme Court, the principle it laid down is no less applicable in the present matter as it merely prescribes what the effect of non-compliance with peremptory Rules of Court is. The relevant passage from the judgment has already been quoted herein above.

4.12. There is, therefore, no application validly before this honourable Court, in terms of which relief can be afforded to the Applicant. The matter must simply be struck off the roll for failure to comply with the peremptory Rules of Court. It is so prayed.

Merits

As has already been indicated at the outset of these heads, the 1st respondent undertakes to abide the decision of this Honourable Court should the matter not be disposed of in terms of the points raised *in limine*. Further, the 1st respondent has presented, through its opposing affidavit, considerations that it views as important in assessing the merit of the case made out by the applicant in this matter and will be on hand at the hearing of this matter to render any further assistance on the merits that the Honourable Court may require.

DATED AT HARARE THIS 11TH DAY OF APRIL 2018.

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AND TO: **MESDAMES MTETWA & NYAMBIRAI**
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AND TO: **THE ATTORNEY GENERAL**

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