

IN THE HIGH COURT OF ZIMBABWE

CASE NO. HC 230/18

HELD AT MASVINGO

In the matter between

FIRINNE TRUST operating as **VERITAS**

VALERIE INGHAM-THORPE

BRIAN DESMOND CROZIER

And

ZIMBABWE BROADCASTING CORPORATION

ZIMBABWE NEWSPAPERS (1980) LIMITED

ZIMBABWE ELECTORAL COMMISSION

ZIMBABWE MEDIA COMMISSION

BROADCASTING AUTHORITY OF ZIMBABWE

1<sup>ST</sup> APPLICANT

2<sup>ND</sup> APPLICANT

3<sup>RD</sup> APPLICANT

1<sup>ST</sup> RESPONDENT

2<sup>ND</sup> RESPONDENT

3<sup>RD</sup> RESPONDENT

4<sup>TH</sup> RESPONDENT

5<sup>TH</sup> RESPONDENT

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5<sup>TH</sup> RESPONDENT'S HEADS OF ARGUMENT

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These heads of argument are filed on behalf of the 5<sup>th</sup> Respondent.

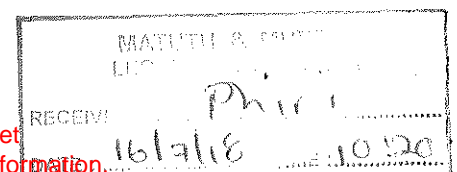
**A] BRIEF SUBMISSIONS**

It is submitted that;

- a) The 5<sup>th</sup> Respondent's opposing affidavit is valid and properly before the court.
- b) There is no proper basis established for the relief sought against the 5<sup>th</sup> Respondent.

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- c) The application ought to be dismissed with costs as against the 5<sup>th</sup> Respondent.

## **B] DETAILED SUBMISSIONS**

### **Propriety of the notice of opposition**

1. The Applicants raised an objection in their answering affidavit attacking the authority of the deponent to 5<sup>th</sup> Respondent's opposing affidavit. The objection was not persisted with in the Applicants' Heads of Argument. The only inference that can be drawn is that the objection has been abandoned. The issue raised is addressed *ex abundanti cautela* as detailed hereunder.
2. It is submitted that the deponent to 5<sup>th</sup> Respondent's opposing affidavit has the legal authority to do so by virtue of his position as the Chief Executive Officer of the 5<sup>th</sup> Respondent.
3. The 5<sup>th</sup> Respondent is established in terms of section 3 of the Broadcasting Services Act [Chapter 12:06] as *an Authority capable of suing and being sued in its corporate name*.
4. Whilst section 4 of the Broadcasting Services Act [supra] provides that '*the operations of the Authority shall, subject to the Act, be controlled and managed by a board to be known as the Broadcasting Authority of Zimbabwe Board*', it is submitted that the Chief Executive Officer of the of the 5<sup>th</sup> Respondent, being an appointee by the board can, in the absence of the board, act in the best interest of the Authority in terms his contract of employment.
5. The above is said moreso given the provisions of Part II , paragraph 9 of the Fourth Schedule of the Broadcasting Services Act which provides for the appointment by the Board, of a Chief Executive Officer to exercise the functions of the Authority including managing the operations of the of the Authority. Needless to say, the order sought by the Appellant enjoins the 5<sup>th</sup> Respondent to cooperate with 3<sup>rd</sup> Respondent's request in terms of section 160k of the Electoral Act to assist in the monitoring of the news media during the election period. This role invariably falls

within the authority of the Chief Executive Officer of managing the operations of the Authority in offering the assistance requested.

It is submitted in the circumstances that the deponent to 5<sup>th</sup> Respondent's opposing affidavit has the authority to depose to same by reason of his employment position.

6. Further and in any event, Order 32 rule 227 sub-rule (4)(a) of the High Court of Zimbabwe rule, 1971, provides that an affidavit can be made by a person who can swear to the facts or averments set out in the affidavit. It is submitted that the Chief Executive Officer of the 5<sup>th</sup> Respondent being the competent person to swear to the facts or averments contained in the opposing affidavit by virtue of his employment position can competently depose to the opposing affidavit as he did.
7. It is submitted on the basis of the above that the objection raised by the Applicants ought to be dismissed with costs.

### **Locus standi**

8. It is noted that the Applicants in their answering affidavit now rely with the provisions of section 85 (1) of the Constitution as the basis to endow them with the *locus standi* to bring the present application. Such reliance on section 85 (1) was not pleaded in Applicants' founding affidavit. It cannot be left for the Respondent to second guess by what right Applicants are approaching the court for redress. Respondent in the circumstances is justified in taking the objection as they did.
- 8.1 The rule of practice and procedure that a litigant either rises or falls on the founding affidavit is well settled in our law and should apply to the Applicants. The Applicants cannot be allowed to supplement their cause of action in the answering affidavit in order to avoid the objection properly raised by the 5<sup>th</sup> Respondent. This is tantamount to making their case as they go.

See the case of **Mobil Oil Zimbabwe (Pvt) Ltd V Travel Forum (Pvt) Ltd 1990 (1) ZLR 67 (H)**

- 8.2 The above notwithstanding, the 5<sup>th</sup> Respondent shall not persist with its objection of locus standi.

**No basis for mandamus against 5<sup>th</sup> Respondent**

9. It is submitted that there is no factual or legal basis placed by the Applicants to warrant a grant of a mandamus or mandatory interdict against the 5<sup>th</sup> Respondent. The order sought in terms of the draft order is couched as follows;

*“ 9. Fourth and Fifth Respondents be and hereby are ordered to provide the third Respondent with whatever assistance it may require for the monitoring of the media during the election period.”*

10. In the case of **Tribac (Pvt) Ltd v Tobacco Marketing Board, 1996 (2) ZLR 52 [S] 56 B-D**, Gubbay CJ (as he then was ) stated that;

*“An application for a mandamus or mandatory interdict ..... can only be granted if all the requisites of a prohibitory interdict are established. These are:*

- 1. A clear or definitive right – this is a matter of substantive law.*
- 2. An injury actually committed or reasonably apprehended – an infringement of the right established and resultant prejudice.*
- 3. The absence of a similar protection by any other ordinary remedy. The alternative remedy must –*
  - (a) be adequate in the circumstances;*
  - (b) be ordinary and reasonable;*
  - (c) be a legal remedy – and*

*(d) grant similar protection [see Setlogelo v Setlogelo 1914 AD 221, 227 and PTC Pension Fund v Standard Chartered Merchant Bank, 1993 (1) ZLR 55 (H) 63 A-C"]*

11. It is submitted that the Applicants have not established any injury actually committed or reasonably apprehended in the sense of an infringement of an established right by the 5<sup>th</sup> Respondent so as to justify the mandamus sought.
12. It has not been equally shown that the 5<sup>th</sup> Respondent in the previous election failed to comply with the 3<sup>rd</sup> Respondent's request in terms of section 160K of the Electoral Act or that 5<sup>th</sup> Respondent has exhibited a disinclination not to render the assistance if so requested in the forthcoming July 2018 elections.
13. In the case of **Dube & Others V Constitutional Select Committee** HB 43/2010 the court stated at page 4 of the cyclostyled judgment that;

*' an interdict and a mandamus are two sides of the same coin, authorised action is presented by means of an interdict and compliance with a statutory duty is enforced by means of mandamus –Continental Landgoed(Edms) Bpk v Bethelrand 1977 (3) SA 168(t) at 169G. There is no difference in principle between the enforcement of a statutory prohibition by way of an interdict and the enforcement of a statutory duty by way of a mandamus. The mandamus is a legal remedy which is aimed at compelling an administrative organ to perform a prescribed statutory duty.'*

14. In the present case, the mandamus is being sought to compel the 5<sup>th</sup> Respondent to perform a prescribed statutory duty arising by reason of section 160K of the Electoral Act. The said section provides as follows;

**'160K            Monitoring of media by Commission**

*(1) The Commission, with the assistance, at its request, of the Zimbabwe Media Commission established by section 100N of the Constitution, and the Broadcasting Authority of Zimbabwe*

*established by section 3 of the Broadcasting Services Act [Chapter 12:06] (No. 3 of 2001), shall monitor the Zimbabwean news media during any election period to ensure that political parties, candidates, broadcasters, print publishers and journalists observe the provisions of this Part.*

*(2) In its post-election report the Commission shall include a report on the coverage of the election by the news media, for which purpose the Zimbabwe Media Commission and the Broadcasting Authority of Zimbabwe will furnish the Commission with such information and reports as the Commission may request.*

*(3) This section shall not be construed as preventing anyone other than the Zimbabwe Media Commission from monitoring news media and reporting on their conduct during an election period.'*

15. It is important to note that the monitoring function of the media in terms of section 160K is primarily placed on the 3<sup>rd</sup> Respondent. The 5<sup>th</sup> Respondent is only required to assist when requested. This point has been correctly conceded to by the Applicants in paragraph 29 of their founding affidavit.
16. Once it is accepted that the monitoring function of media during an election period rests on the 3<sup>rd</sup> Respondent , it follows that the provision of any information or framework for monitoring of media during an election is a prerogative of the 3<sup>rd</sup> Respondent. The 5<sup>th</sup> Respondent's duty when requested is simply to offer monitoring assistance to 3<sup>rd</sup> Respondent as per its directions.
17. It is submitted that the 5<sup>th</sup> Respondent does not have an independent election monitoring framework. It carries out the monitoring assistance under the 3<sup>rd</sup> Respondent's control and in terms of the Electoral Act and Zimbabwe Electoral Commission ( Media Coverage of Elections) Regulations, 2008 (S.I 33 of 2008).
18. The 5<sup>th</sup> Respondent has established that it has already been requested and or engaged to assist the 3<sup>rd</sup> Respondent in its media monitoring duty for the forthcoming July 2018 elections.

19. It suffice to also note that the 3<sup>rd</sup> Respondent in paragraph 4.7 of its opposing affidavit affirmed to requesting the assistance of the 5<sup>th</sup> Respondent in its mandate of media monitoring for the forthcoming July 2018 elections.
20. It is submitted that the minutes attached as Annexure D to 3<sup>rd</sup> Respondents opposing affidavit clearly shows that the monitoring process was initiated following the proclamation of the election date in terms of SI 83 of 2018 made by the President on 30 May 2018.
  - 20.1. As at 4 June 2018, barely 5 days after proclamation of the election date, the 5<sup>th</sup> Respondent, as shown on the minutes under paragraph 5 had made the following progress in respect of monitoring electronic media ;
    - 20.1.1 had the broadcasting monitoring equipment in place
    - 20.1.2 was waiting receipt of broadcasters programming schedules from 3<sup>rd</sup> Respondent for purposes of monitoring.
21. From the foregoing, it is submitted that a mandamus cannot be granted where a public authority in the position of 5<sup>th</sup> Respondent has already started complying with a specific statutory duty in terms of section 160K (supra).
22. It is further submitted that there is no specific statutory duty that obliges the 5<sup>th</sup> Respondent to provide any framework of how it will conduct monitoring of the media . It has already been submitted in paragraphs 13 and 14 above that the monitoring mandate reposes on 3<sup>rd</sup> Respondent and 5<sup>th</sup> Respondent is only required to assist.

In terms of section 160K (2), the 5<sup>th</sup> Respondent is only required to compile a report on the coverage of the election by the news (electronic) media for presentation to the 3<sup>rd</sup> Respondent.
23. To put it differently, it is submitted that the issue of the election monitoring framework is determinable and directed by the 3<sup>rd</sup> Respondent and 5<sup>th</sup> Respondent's obligation with regards thereto is to render such assistance as may be required by 3<sup>rd</sup> Respondent.

24. It is further submitted that regulatory and adjudicatory authority in respect of all issues and all matters arising in respect of the election reposes in the 3<sup>rd</sup> Respondent and not the 5<sup>th</sup> Respondent in terms of the law.
25. The Applicants' assertions in paragraphs 28 and 29 of their answering affidavit are mistaken in applying section 249 of the Constitution in respect of 5<sup>th</sup> Respondent. The said section clearly and exclusively provides for the functions of the 4<sup>th</sup> Respondent in terms of the law.

**conclusion**

26. From the foregoing, it is submitted that Applicants application ought not to succeed on the basis that the 5<sup>th</sup> Respondent is already in compliance of the 3<sup>rd</sup> Respondent's request in terms of section 160K of the Electoral Act (supra).

**WHEREFORE**, it is prayed for dismissal with costs of Applicants' application as against the 5<sup>th</sup> Respondent.

**Dated at Harare on this 13<sup>th</sup> day of July 2018**

  
.....  
**TH CHITAPI AND ASSOCIATES**  
5<sup>th</sup> Respondent's Legal Practitioners  
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**MASVINGO**( Mr Chakabuda)

**TO: THE REGISTRAR**  
High Court of Zimbabwe  
**MASVINGO**



AND TO: **MTETWA & NYAMBIRAI**  
Applicants' Legal Practitioners  
c/o **Matutu & Mureri**  
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AND TO: **SCANLEN & HOLDERNESS**  
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**MASVINGO ( RMB/em)**

AND TO: **NYIKA KANENGONI & PARTNERS**  
3<sup>rd</sup> Respondent's Legal Practitioners  
c/o Bhunu & Associates  
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**MASVINGO(Mr T Bhunu)**

AND TO: **MUSUNGA AND ASSOCIATES**  
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