

IN THE HIGH COURT OF ZIMBABWE

CASE NO. HC 263/18

HELD AT MASVINGO

In the matter between:

**AMALGAMATED RURAL TEACHERS UNION  
OF ZIMBABWE**

**1<sup>st</sup> Applicant**

**OBERT MASARAURE**

**2<sup>nd</sup> Applicant**

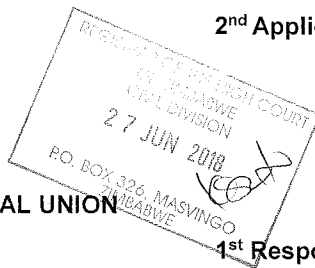
And

**ZIMBABWE AFRICAN NATIONAL UNION  
PATRIOTIC FRONT**

**1<sup>st</sup> Respondent**

**MINISTER OF PRIMARY AND SECONDARY  
EDUCATION**

**2<sup>nd</sup> Respondent**



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**APPLICANTS' HEADS OF ARGUMENT**

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**I. BACKGROUND**

1. This application has been brought on an urgent basis seeking an interdict to stop a political party from compelling school children

and their teachers from attending its political rallies, causing the closure of schools for their political rallies, and using school property for their political rallies including school premises, busses and furniture. The application comes on the back of a series of recent political rallies by Zimbabwe's ruling party, ZANU PF, in the lead up to the country's 2018 elections at which the actions complained of occurred.

2. ZANU PF's actions are in direct contravention of recommendations given to political parties by the Zimbabwe Human Rights Commission (ZHRC) which conducted an Investigative Report into the same violations of children's and teachers' rights which was published earlier this year and delivered to ZANU PF.

## **II. URGENCY OF THE APPLICATION**

3. We respectfully submit that in both elements of the test for urgency, as laid down by our courts on numerous occasions, are clearly met in this case. To establish that a matter is urgent, the Applicant must show:
  - a. imminent danger to existing rights, and
  - b. possibility of irreparable harm.

See RITA MARQUE MBATHA v CONFEDERATION OF ZIMBABWE

INDUSTRIES HH 225-15.

4. Firstly, there is imminent danger to existing rights. As laid out in great detail in the Applicant's Founding Affidavit, ZANU PF has a long-standing practice of compelling children and teachers to attend its political rallies and using school property and facilities for its rallies. There are multiple constitutional rights including the rights to freedom of association and to property which are violated by these practices and which will be outlined in greater detail later on in these Heads of Argument. Suffice to say at this stage, that the violation of these rights has suddenly become imminent. ZANU PF has begun its election campaign which has thus far seen violations of these rights on multiple occasions. The violations are ongoing and further violations have occurred since the filing of this urgent chamber application. These violations are only likely to increase as Zimbabwe draws closer to elections scheduled for 30<sup>th</sup> July 2018 and the campaigns increase in intensity.

5. Secondly, there is a clear possibility of irreparable harm. The disruption to children's education as a result of being forced to attend rallies could have long-term detrimental effects on their educational development. Additionally, there is high possibility of

children and teachers being exposed to hate speech and violation at political rallies which can easily cause physiological or physical harm to a child.

6. Our courts have been clear that when matters involve the potential of harm to children, then they should be heard on an urgent basis.

In DOCUMENTS SUPPORT CENTRE 2006 (2) ZLR 240 (H) the court put it as follows:

*“Some actions, by their very nature, demand urgent attention and the law appears to have recognised that position. Thus, ... where the interests of minor children are at risk demand that the courts drop everything else and in appropriate cases, grant interim relief protecting the affected rights. The rationale of the courts for acting swiftly where such interests are concerned is in my view clear. Failure to act in these circumstances will result in ... the infliction of irreversible physical or psychological harm on children.”*

### III. LOCUS STANDI

7. It is submitted that the Applicants clearly have *locus standi* to bring this application. The subject matter of this application affects the rights of children and the poorest sections of our society. It is primarily the poor who have to send their children to Government schools. Rural teachers are a marginalized group within our society. These are the people who are affected by the Respondents' actions. They are also the people who are least likely to be able to vindicate their constitutional rights themselves. It is precisely for such circumstances that our Constitution envisages allowing applicants such as those to this case to approach the courts to vindicate the rights of the poor and marginalized masses.

8. In MUDZURU & ANOR V MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS & ORS CCZ 12/2015, Malaba DCJ (as he was then) stated the following about the requirements for standing in terms of section 85(1)(d) of the Constitution when a matter involves the rights of children:

*"The contention by the respondents that the applicants lack standing under s 85(1)(d) of the Constitution is based on an erroneous view of the requirements of the rule. The*

*argument that the applicants were not entitled to approach the court to vindicate public interest in the well-being of children protected by the fundamental rights of the child enshrined in s 81(1) of the Constitution, overlooked the fact that children are a vulnerable group in society whose interests constitute a category of public interest." (emphasis added)*

9. The judge went on to state the following with regard to the principles relating to standing under the new Constitution:

*"The object of s 85(1) of the Constitution is to ensure that cases of infringement of fundamental rights which adversely affect different interests covered by each rule of standing are brought to the attention of a court for redress. The object is to overcome the formal defects in the legal system so as to guarantee real and substantial justice to the masses, particularly the poor, marginalised and deprived sections of society." (emphasis added)*

10. It is also clear that where an application for an interdict involves constitutional rights, then the constitutional rules of standing must apply rather than the common law rules. In **HIGHVELDRIDE**

## RESIDENTS CONCERNED PARTY v HIGHVELDRIDGE TLC

2002 (6) SA 66 (T), the court stated as follows:

*"Bearing in mind the expanded standing provided for by section 38 [the South African Constitution's equivalent to Zimbabwe's section 85] and the way in which the latter has been explained and implemented in previous judgments, I am of the view that the restrictions placed by the common law on the legal standing of voluntary associations cannot and should not apply ... in the event of rights in the Bill of Rights having allegedly been infringed or threatened.*

...

*I am also of the opinion that the applicant has established locus standi on the basis provided for by section 38(b). From the papers it is evident that the people affected by the alleged [infringement] are mostly indigent and are unable to individually pursue their claims because of that fact. They are effectively able to individually act in their own name ... There seems no reason, in principle, why an association such as the applicant may not act on behalf of people who are unable to act in their own name.*

#### IV. REQUIREMENTS FOR AN INTERDICT

11. The requirements for a final interdict are as follows:

- a. a clear right;
- b. an injury actually committed or reasonably apprehended; and
- c. the absence of similar or adequate protection by any other ordinary remedy.

See SETLOGELO v SETLOGELO 1914 AD 221 at 227.

12. An application for an interim interdict must obviously succeed if an applicant is able to satisfy the above three requirements. If the above requirements are established, the court has a discretion to grant a final interdict even on motion (See DAVIS v LOMBARD 1966 1 All SA 177 (W) or to grant an interim interdict. If a clear right is established it is not necessary that the harm apprehended will be irreparable. See CHARUMA BLASTING & EARTHMOVING SERVICES (PVT) LTD V NJAINJAI & ORS 2000 (1) ZLR 85 (SC) at p. 89.

13. Alternatively, the court will still grant an interim interdict if the following requirements are established:

- a. A right, though open to some doubt, is *prima facie* established;
- b. A well-grounded apprehension of irreparable harm;
- c. The absence of an ordinary remedy to protect the right;
- d. The balance of convenience favours the granting of an interdict.

14. It is submitted that all of these requirements have been met by the Applicants, each of which will be discussed in greater detail below.



V. A CLEAR RIGHT, OR ALTERNATIVELY, A PRIMA FACIE ESTABLISHED RIGHT

15. It is submitted that the Applicants have multiple clear rights, or in the alternative, multiple rights which though open to some doubt, have been *prima facie* established. These rights are enshrined in the following provisions of the Constitution:
- a. **Section 81(1)(h)**: The right of children not to be compelled to take part in any political activity;
  - b. **Section 81(1)(f)**: The right of children to education;
  - c. **Section 81(2)**: The right of children to have their best interests held paramount in all matters that concern them;
  - d. **Section 81(3)**: The right of the child to adequate protection from the courts, in particular the High Court as their upper guardian;
  - e. **Section 19(2)(b)**: The right of children not to perform work or provide services that are inappropriate for their age or place at risk their well-being, education, physical or mental health, or spiritual, moral or social development;
  - f. **Section 75**: The right to education;
  - g. **Section 58(2)**: The right to freedom of association including the right not to be compelled to attend a meeting or gathering;
  - h. **Section 71**: The right to property including the right to use property and the right not to be compulsorily deprived of property;
  - i. **Section 200(3)**: The right to a non-partisan civil service
  - j. **Section 68**: The right to lawful and impartial administrative conduct

16. Where an applicant establishes a clear right, some of the other requirements for an interim interdict fall away, notably that the injury apprehended must be irreparable and that the balance of convenience favours the granting of an interim interdict.
17. Even where an applicant has established, not a clear right, but a strong *prima facie* right the court may in its discretion place less emphasis on the other requirements. In ERASMUS v SENWES LTD 2006 (3) SA 529, the court stated the following at 540:

*“The different requirements for an interim interdict interact and where the applicant for such an interdict has established a strong prima facie right, the Court in the exercise of its discretion may place less emphasis on the other requirements.”*

#### **A. THE APPLICATION OF THE DECLARATION OF RIGHTS**

18. Before considering in detail each of the rights, it is important to first discuss the application of the Declaration of Rights and its relevance to the present matter as well as the role of the Zimbabwe Human Rights Commission and the courts duty to assist with the implementation of its recommendations.
19. With the advent of the new Constitution of Zimbabwe in 2013, there came a fundamental shift in our human rights jurisprudence: constitutional rights enshrined in the Declaration of Rights (Chapter 4) apply not only vertically (i.e. between the state and its citizens)

but also horizontally (i.e. between persons in their interactions with one another).

20. Section 44 of the Constitution of Zimbabwe puts it as follows:

*“The State and **every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter.**”* (emphasis added)

21. Section 44 is complimented by section 45 of the Constitution which states at sub-section (1) and (2) as follows:

*“(1) This Chapter binds the State and all executive, legislative and judicial institutions and agencies of government at every level.*

*“(2) This Chapter binds natural and juristic persons to the extent that it is applicable to them, taking into account the nature of the right or freedom concerned and any duty imposed by it.”*

22. The import of these provisions is that the rights enshrined in the Declaration of Rights apply to both the First Respondent (as a juristic person) and the Second Respondent (as a representative of the state). Furthermore, it means that the Constitution imposes both positive and negative obligations on them with regard to the upholding of constitutional rights. The phrase “respect, protect, promote and fulfil” is one commonly used in human rights discourse and implies the imposition of both negative and positive duties. Thus

the duty-bearer (in this instance, the First and Second Respondents) have a negative duty to *respect* the Applicants' rights (i.e. not violate them) but it also may have positive duties to actively do certain things to *protect, promote and fulfil* the Applicants' rights.

## **B. THE IMPORTANCE OF THE ZIMBABWE HUMAN RIGHTS COMMISSION'S FINDINGS AND RECOMMENDATIONS**

23. It is essential that the court takes due regard for the importance of the findings and recommendations Zimbabwe Human Rights Commission (ZHRC). The ZHRC's Investigate Report helps to establish that the Applicants have clear rights, that they have a reasonable apprehension of irreparable harm and that the Applicants have exhausted other potential remedies available to them and are in dire need of the protection of this court.

24. The ZHRC is given a special role in the protection of human rights in Zimbabwe. In his article "*Zimbabwe Human Rights Commission: Prospects and Challenges for the Protection of Human Rights*", L. Chiduzwa states the following:

*"To achieve effective domestic protection of human rights it is important that the introduction of pro-human rights laws is accompanied by a network of complementary norms and mechanisms to co-ordinate or supervise the implementation of such laws. In order to ensure the domestic protection of human rights, the Constitution of Zimbabwe establishes the Zimbabwe Human Rights Commission (ZHRC). In accordance with the Principles Relating to the Status of*

*National Institutions (The Paris Principles), the Constitution mandates the ZHRC with a primary role of promoting and protecting human rights at all levels of society.”*

25. In conducting its investigation and providing recommendations, the ZHRC has done well to discharge its mandate in terms of the Constitution. However, the ZHRC recommendations are not binding and are being flagrantly violated and indeed totally ignored by the Respondents. Therefore, it is the duty of this court to take the findings of the ZHRC into account and give a binding court order that will give real protection to the Applicants and all those they represent as well as develop Zimbabwe's human rights jurisprudence.

26. In an article entitled “*The role played by the South African Human Rights Commission's economic and social rights reports in good governance in South Africa,*” D Horsten argues that the reports of the South African Human Rights Commission (SAHRC) should play an important persuasive role in influencing the courts' human rights jurisprudence in South Africa. Additionally, the SAHRC has played a highly influential role as an *amicus curiae* in many human rights cases in South Africa. In the landmark case **GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v GROOTBOOM AND OTHERS** 2001 (1) SA 46, in which the SAHRC appeared as an *amicus*, the Constitutional Court acknowledged the importance of its participation remarking at paragraph [17]:

*"We are grateful to ... the Human Rights Commission ... for a detailed, helpful and creative approach to the difficult and sensitive issues involved in this case."*

27. It is requested that this Honourable Court invites the ZHRC to be joined to this matter as an *amicus curiae* when this matter is heard fully on the return day. In the meantime, the Court should attach due weight to the findings and recommendations of the ZHRC in considering the interim relief sought.

### **C. CHILDREN'S RIGHTS**

28. It is submitted that all children on whose behalf the Applicants bring this application have clear rights enshrined in section 81 of the Constitution and have a right for their best interests to be held paramount in all matters that affect them. These rights are directly threatened by the impugned conduct of the Respondents.

29. Section 81 of the Constitution enshrines a number of rights which apply specially to children. Notably for this case: the right of children to education (section 81(1)(f) of the Constitution) and the right of children not to be compelled to take part in any political activity (section 81(1)(h) of the Constitution). These two rights also find there expression in the general provisions on the right to education (section 75) and the right to freedom of association (section 58) which will be discussed below, but it is important to point out that section 81 specifically that children deserve special protection from the violation of these two rights.

30. Section 81(2) provides that “a child's best interests are paramount in every matter concerning the child”. In South Africa, the courts have determined that the “best interests of the child” this is not only a principle for the interpretation of other rights but is also a right in and of itself. In **MINISTER OF WELFARE AND POPULATION DEVELOPMENT v FITZPATRICK** 2000 (3) SA 422 (CC) pointed out that:

*“Section 28(2) [South Africa's equivalent of Zimbabwe's section 81(2)] requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) [South Africa's equivalent to Zimbabwe's section 81(1)] and 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent from those specified in s 28(1).*

31. It is submitted that as a general rule it is always in the best interests of a child to remain in education and for their education not to be disrupted. This has been proven time and again by academic studies. See Truter, Anna, M. ***“Education in the best interests of the child : a case study of rural schools in KwaZulu-Natal”*** (Thesis (PhD) University of Pretoria, 2016); R. Brian Howe Katherine Covell, ***“Education in the Best Interests of the Child: A Children's Rights Perspective on Closing the Achievement Gap”*** (Toronto University Press: 2013).

32. Therefore, the prioritising children's attendance at political rallies rather than their remaining in school is a violation of the right of children to have their interests had paramount in all matters concerning them. Additionally, the potential exposure of children to hate speech and violence at political rallies is certainly not in their best interests. Therefore, the courts should always err on the side of protecting the child's interests in such matters.

33. Children also deserve special protection from the courts as a result of section 81(3) of the Constitution which states:

*"Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian."*

34. These sentiments are clearly articulated in the passages from **MUDZURU** *supra* cited earlier.

#### ***D. THE RIGHT TO EDUCATION***

35. It is submitted that the Applicants and all those they represent have a clear right to education which is threatened by the impugned conduct of the Respondents. The disruption to learning by the closure of schools for political rallies and the compulsory attendance of children deprives children of an opportunity to prioritise their education and to reach their full capacity. The exposure of the children to hate speech and violence at political rallies also undermines some of the core purposes of education which is to build a more tolerant and just society.



36. This position is clearly supported by the Constitution of Zimbabwe and various international instruments which the court is required by section 46(1)(c) to take into account when interpreting the Declaration of Rights.

37. The right to education is enshrined in section 75 of the Constitution, which refers to basic education. Therefore, it is important to understand what “basic education” means and what its purpose is. UN Committee on Economic, Social and Cultural Rights General Comment 13 adopted *The World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs*. The Declaration defines basic education at Article 1 as follows:

*“[Basic learning needs] comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to ... to develop their full capacities ... to improve the quality of their lives, to make informed decisions, and to continue learning.”* (emphasis added)

38. The Declaration goes on to state that the satisfaction of these basic learning needs should result in the following:

*“... empowers individuals in any society and confers upon them a responsibility to respect and build upon their collective cultural, linguistic and spiritual heritage, ... to further the cause of social justice, ... to be tolerant towards social, political and religious systems which differ from their own, ensuring that*

*commonly accepted humanistic values and human rights are upheld ...* (emphasis added)

### ***E. THE RIGHT TO FREEDOM OF ASSOCIATION***

39. It is submitted that children and teachers both clearly have a right not to be compelled not to take part in political activities to which they have not consented.

40. In the new constitution, the right to disassociate is clearly spelt out under section 58 of the Constitution which states:

*“(1) Every person has the right to freedom of assembly and association, and the right not to assemble or associate with others.*

*“(2) No person may be compelled to belong to an association or to attend a meeting or gathering.”* (emphasis added)

41. Even under the old Constitution, in which the right not to attend a meeting was not explicitly stated, our courts held that it was a necessary aspect of the right to freedom of association. In **COMMERCIAL FARMERS UNION v MINISTER OF LANDS & ORS** 2000 (2) ZLR 469 (S), the Supreme Court held that the forced attendance of farmers and farmworkers at meetings organised by the local ZANU PF branch violated the right to freedom of association guaranteed by section 21 of the former Constitution of Zimbabwe.

42. What constitutes a person being “compelled” to attend a gathering?

Or what constitutes *consent* to attend a political rally? These questions are particularly important to ask in the context of children being forced to attend rallies. This is because compelling a child to attend a rally might not necessarily entail putting a gun to their head and saying “I will shoot you if you don’t attend!” When a child is in the care and instruction of a school, they typically do as they are told. Parents also entrust their children to the school for that time, and expect the school to protect the child’s best interests. It is also an important question in relation to teachers, especially given the power dynamics at play. When the instruction comes from one’s employer to attend a rally or, for children, from one’s own teachers who are under instruction, then one may feel that one may not refuse. Therefore there is an added duty to protect them from exploitation by political parties and for political parties to desist from any conduct that might result in children attending rallies against their informed consent and the informed consent of their parents. It is for this reason, it seems, that the ZHRC Investigative Reports recommends that political parties to not “ask, encourage or force children in schools to participate in any political gathering or demonstration.” (emphasis added) Children in schools should stay in school during school time. Outside of school time they *may* attend a rally of their own accord and with the consent of their parents, but it should be entirely up to the children to make that decision to attend. Political parties should not try to ask, encourage or force them.

## **F. PROPERTY RIGHTS**

43. It is submitted that the act of compelling schools to provide their premises, busses, furniture and other property is a violation of the right to private property. The right to property in section 71 of the Constitution protects the right to *use* property and the right against *compulsory deprivation* of property.

44. In **DAVIES & ORS v MINISTER OF LANDS, AGRICULTURE & WATER DEVELOPMENT** 1996 (1) ZLR 681, the Supreme Court drew a distinction between compulsory acquisition and compulsory deprivation of property. While compulsory *acquisition* implies compulsory acquisition of property rights, compulsory *deprivation* is more of an attenuation or negative restriction of some rights that come with private ownership. Thus, the negative restriction on a school's rights to use their property when their busses, furniture and other property are temporarily taken for ZANU PF's rallies amounts to a violation of the right against compulsory deprivation of property, notwithstanding the fact that the school retains ownership of the property.

45. Additionally, the act of compelling teachers to make financial contributions towards ZANU PF's political rallies is also a violation of the right to property. The definition of property in section 71 of the Constitution is very broad and money is certainly within the scope of its coverage.

## **G. THE RIGHT TO A NON-PARTISAN CIVIL SERVICE**

46. It is submitted that the Applicants, and all citizens of Zimbabwe, have a right to a non-partisan civil service and that right is threatened by the First and Second Respondent's conduct which places civil servants in a position where they feel pressurized to act in a partisan manner and unlawfully further the interests of the First Respondent by sending school children to its rallies, closing down schools for its rallies, and providing school premises, buses and other property for its rallies.

47. Section 200(3) of the Constitution of Zimbabwe states as follows:

*"(3) No member of the Civil Service may, in the exercise of their functions—*

*(a) act in a partisan manner;*

*(b) further the interests of any political party or cause;*

*(c) prejudice the lawful interests of any political party or cause; or*

*(d) violate the fundamental rights or freedoms of any person."*

48. It is submitted that every constitutional duty creates a corresponding right for all citizens for that duty to be complied with and for the Constitution to be respected. Additionally, the Applicants and every person have a right in terms of section 68 of the Constitution to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. Any partisan conduct by a civil

servant is not lawful or impartial and therefore a violation of the Applicants' right to administrative justice.

## **VI. A WELL-GROUNDED APPREHENSION OF IRREPARABLE HARM**

49. It is again submitted that should the court find that the Applicants' have a **clear right** which is threatened, that it no longer becomes necessary to show well-grounded apprehension of *irreparable* harm. Any threat of injury or harm will be sufficient for the court to grant the interim relief, or indeed even a final interdict. See **CHARUMA BLASTING & EARTHMOVING SERVICES (PVT) LTD V NJAINJAI & ORS** *supra* at p. 90.

50. Nevertheless, in the event that the court finds that the Applicants' right, though *prima facie* established, is open to some doubt, it is submitted that the Applicants' do have grounds for a reasonable apprehension of irreparable harm.

51. An applicant does not have to establish on a balance of probabilities that the injury *will* occur; he or she must simply establish that there are grounds for a reasonable apprehension that his or her rights or her rights will be detrimentally affected. See **ERASMUS v AFRIKANDER PROPIETARY MINES LTD** 1976 (1) SA 950 (W) at 965. The test is objective and the question is whether a reasonable person, confronted by the facts, would apprehend the probability of harm; actual harm need not be established on a balance of probabilities. See **SETLOGELO v SETLEGELO** *supra*.

52. It is submitted that the Applicants have clearly demonstrated that they have multiple grounds upon which a reasonable apprehension of harm is based. Their grounds for being concerned that the violations will happen include the following:

- a. The history of forcing children and teachers to attend rallies and the use of school property for rallies in the past (as clearly documented in the ZHRC Investigative Report);
- b. The sudden series of repeated re-occurrences of the violations in recent weeks (as clearly documented in the Founding Affidavit and the Supporting Affidavit),
- c. The Respondents' apparent disregard for the recommendations of the ZHRC suggesting they care little for the rights of the Applicants will not stop the violations unless compelled to do so by an interdict;
- d. The continuation of the campaign period up to 30<sup>th</sup> July 2018 and potentially as far as 8<sup>th</sup> September 2018, in which the violations will likely continue and increase in number and intensity.

53. The courts have found that where a wrongful act impairs an applicant's rights or makes it impossible to exercise the right the injury will be considered to be irreparable. See **BAMFORD v MINISTER OF COMMUNITY DEVELOPMENT AND STATE AUXILIARY SERVICES** 1981 (3) SA 1054 (C). Therefore, it is submitted that the mere fact that the actions complained of impair the rights outlined in detail above means that they automatically constitute irreparable harm. In particular, the right of children for their

best interests to be paramount in all matters concerning them is clearly impaired by the impugned actions.

54. Nevertheless, in addition to the impairment of the constitutional rights themselves, the Applicants have highlighted in their Founding Affidavit additional grounds for being concerned that the violations will result in irreparable harm, which include the following:

- a. The disruption to children's learning and other educational/sports activities by their attendance at rallies during school hours and/or the closure of their schools that can have long-term detrimental effects on their educational development and their ability to reach full capacity;
- b. The threat of hate speech and/or speech which does not encourage a spirit of tolerance and collective identity at rallies which can cause psychological damage to children and/or undermine their positive educational and moral development;
- c. The threat of violence or scuffles at rallies (as clearly demonstrated at several recent rallies) which could cause physical, mental or psychological harm to children or even result in death;
- d. The psychological harm to children when they see their schools and school buses used for a political agenda and decorated in political regalia and the confusion that causes to young and impressionable minds as to where the line is drawn between their school and a political party and the ideas each represent;
- e. The irreparable financial loss to teachers and schools as a result of them being compelled to make financial contributions



towards and/or have their property used for rallies without compensation;

- f. The threat of a repeated mass exodus of teachers (as happened in 2008) if working conditions become unbearable and there is undue interference in the work of teachers;
55. The paragraph quoted above at page 4 of **DOCUMENTS SUPPORT CENTRE (PVT) LTD v MAPUVIRE** *supra* makes it clear that where there is a risk of physical or psychological harm to children, such matters should be regarded as having a reasonable apprehension of irreversible harm.
56. The Applicants' apprehensions are based in part on the fact that the Respondents have demonstrated a total disregard for the recommendations of the ZHRC in its Investigative Report. Not only did the Respondents give no response to the Investigative Report when it was sent to them, but they have continued to do the very things that the Investigative Report urges them to desist from doing.
57. In **MINISTER OF POLICE v HUMAN RIGHTS COMMISSION & 2 ORS** 2012/1095I (unreported judgment from South Gauteng High Court of South Africa), the court had the following to say at paragraph [16] and [17] about an applicant who had failed to respond to communications from the SAHRC:

*"I find it disconcerting that a government officer and his department, displayed such a non-chalant attitude to the rights and duties imposed by the Constitution upon them [to cooperate with the SAHRC]. If it is not contemptuous of the first respondent [SAHRC] as a constitutional institution then at*

*the very least it shows disrespect for the first respondent's standing as a body instituted by the Constitution, tasked with the duty to investigate incidents placed before it where constitutional rights have been violated. ... The applicant [Minister of Police], as an organ of state and member of the executive, is duty bound to give full cooperation and show respect to the first respondent [SAHRC] to enable it to execute its functions properly, timeously and expeditiously. The conduct of the applicant in this particular matter falls far short of its constitutional duty to assist the first respondent in the exercise of its constitutional mandate." (emphasis added)*

58. In this case, the Second Respondent is a senior government officer and, in that capacity, is duty bound to assist the ZHRC and to protect its effectiveness in terms of section 235(3) of the Constitution of Zimbabwe. The First Respondent, although not an institution of government, has many senior government officials among its ranks and decision-making structures since it is the governing party. Therefore, its contemptuous conduct towards the ZHRC is equally concerning. It is submitted that the conduct of both Respondents towards the ZHRC shows that the Applicants have a well-grounded apprehension that the Respondents will continue to violate the rights in question unless this Court intervenes to protect those rights.

## **VII. THE ABSENCE OF AN ORDINARY REMEDY**

59. It is submitted that the Applicants are without any other remedy besides the granting of an interdict against the Respondents in order to protect their rights. The urgency of the matter and the nature of

the harm threatened by the Respondents' conduct means that no other remedy will provide adequate protection.

60. It is clear that Applicants have exhausted all other possible avenues. The Applicants approached the ZHRC which conducted a thorough investigation and made recommendations which have been totally disregarded by the Respondents. The Applicants wrote to the Second Respondent and received no response. The Applicants are left with no other option but to approach this court.
61. It is also clear that damages would be an inadequate remedy in the circumstances as the violation of the Applicants' rights is being repeated weekly, is ongoing and is likely to continue throughout the entire election period. In RIVAS v PREMIER (TRANSVAAL) DIAMOND MINING CO LTD 1929 WLD 1, the court held that damages will not be considered an adequate alternative remedy when there is a continuing violation of an applicant's rights.
62. Additionally, it would be extremely difficult to quantify or place a monetary value the loss of learning, educational development and potential future capacity of children to live whole lives; the psychological and physical damage to children and teachers; or even the loss of a child's life. These types of injuries are best remedied by putting a stop to them immediately by way of an interdict. See NAMPESCA (SA) PRODUCTS (PTY) LTD v ZADERER 1999 (1) SA 886 (C) at 901.
63. If the Applicants wait until the matter is heard on the ordinary roll, the irreparable damage outlined above will have already occurred

by the time it gets to the court as the election campaigns are ongoing.

64. Therefore, the Applicants are left with no other option than to approach this court on an urgent basis to seek an interim interdict until the return day, and after that, a final interdict as per the provisional order.

### VIII. BALANCE OF CONVIENIENCE FAVOURS GRANTING THE INTERDICT

65. It is submitted that, since the Applicants have established a clear right, the court need not consider the balance of convenience. This is because the question of the balance of convenience only arises if an applicant for an interdict has not established a clear right, but only a right which, though *prima facie* established, is open to some doubt. See HYDRO HOLDINGS v MINISTER OF PUBLIC WORKS 1977 (2) SA 778 (T) 787.

66. Nevertheless, it is submitted that the balance of convenience clearly favours the granting of an interim interdict in the present circumstances. In making a determination, the court must weigh up the likely prejudice to the Applicants if the interim interdict is refused and the refusal is later shown to have been wrong against the likely prejudice to the Respondents if the interim interdict is granted and the grant of the interdict is later show to have been wrong. See G S GEORGE CONSULTANTS & INVESTMENTS (PTY) LTD v DATASYS (PTY) LTD 1988 (3) SA 726 at 732E.

## IX. COSTS

70. It is submitted that an award of costs against the Respondents is appropriate in the circumstances as the litigation could have been avoided had the Respondents simply complied with the recommendations of the ZHRC. The sentiments expressed in the passages quoted above from **MINISTER OF POLICE v HUMAN RIGHTS COMMISSION & 2 ORS** *supra* led the judge to award costs against the Minister in that matter. It is that act of bad faith by the Respondent which has caused unnecessary litigation to come before this court wasting both the time and resources of the court as well as putting the Applicants out of pocket.

DATED AT HARARE THIS 27 DAY OF JUNE 2018



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**MASVINGO** [BTM/DC]

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

**AND**

**TO: ZIMBABWE AFRICAN NATIONAL UNION PATRIOTIC FRONT**

1<sup>st</sup> Respondent

ZANU PF Head Office

Crn Samora Machel/Rotten Row Street

**HARARE**

**AND**

**TO: MINISTER OF PRIMARY AND SECONDARY EDUCATION**

2<sup>nd</sup> Respondent

Ambassador House

88 Kwame Nkrumah Avenue

**HARARE**