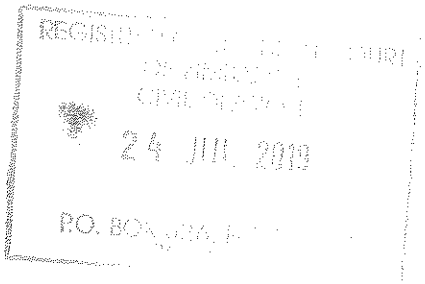
FIRINNE TRUST
and
VALERIE INGHAM-THORPE
and
BRIAN DESMOND CROZIER
versus

ZIMBABWE BROADCASTING CORPORATION
and
ZIMBABWE NEWSPAPERS (1980) LIMITED
and
ZIMBABWE ELECTORAL COMMISSION
and
ZIMBABWE MEDIA COMMISSION
and
BROADCASTING AUTHORITY OF ZIMBABWE



HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 18 September 2018 & 29 March 2019

Date of judgment: 19 June 2019

Opposed application

D. Coltart, for the applicants
E.T. Moyo & R. Magundani, for the first respondent
T.M. Kanengoni, for the third respondent
V. Masaiti, for the fourth respondent
V. Mkwachari, for the fifth respondent
No appearance for the second respondent

MAFUSIRE J

[a] **Outline**

[1] The first applicant is a trust. It is better known by its operating name, *Veritas*. It is active in the field of human rights, the promotion of the rule of law and the promotion of constitutionalism in Zimbabwe. The second and third applicants are two of its trustees. Both are citizens of Zimbabwe and duly registered voters.

[2] On 30 July 2018 Zimbabwe held a harmonised general election. At stake was every conceivable political seat or office: from that of the State President; to Parliament and right down to local government. The proclamation for the ballot was made on 30 May 2018. The next day the applicants launched this application.

[3] The applicants have classified the major relief that they seek as a mandatory interdict. But it is more of a hybrid. It is a mixture of prohibitory and mandatory interdicts. Simply put, a prohibitory interdict is an injunction or restraint or embargo against certain conduct perceived to be harmful to vested rights. It is an order or directive not to do something. On the other hand, a mandatory interdict is an order or directive to do something. In other words, it is a positive instruction to force certain conduct. Underpinning every type of interdict is an apprehension of an irreparable harm if the conduct complained of is not embargoed, in the case of a prohibitory interdict, or is not compelled, in the case of a mandatory interdict. Being antonyms, or two sides of the same coin, the requirements for prohibitory and mandatory interdicts are the same.

[4] With their eyes on the forthcoming election, the applicants thought that the respondents were guilty of certain acts of omission and commission that endangered the freeness, fairness and credibility of the election and the enjoyment of democracy in general. They said they derived their *locus standi* from s 85 of the Constitution of Zimbabwe.

[5] Titled "**Enforcement of fundamental human rights and freedoms**", s 85 of the Constitution entitles any person acting in their own interests; or acting on behalf of another who cannot act for themselves; or acting as a member, or in the interests of a group or class of persons; or acting in the public interest; or any association acting in the interests of its members, to bring a suit alleging that a fundamental right or freedom, as enshrined in the bill of rights in the Constitution, has been, is being, or is likely to be infringed.

[6] The applicants allege that as a result of the conduct of the respondents their right to receive fair, unbiased and accurate information on the political situation in Zimbabwe

which would enable them and the rest of the citizenry to make informed choices in the elections is continuously being violated. As a result they want orders to put a stop to what they perceive to be illegal conduct by the respondents.

[7] The applicants' papers are prolix. They are repetitive and clumsy. Evidently brevity is not their pleader's forte. The draft order spans over four pages. It seeks ten remedies. It is circumlocutory and therefore cumbersome to reproduce verbatim. In paraphrase it seeks:

- a declaratory order to the effect that partisan broadcasting and reporting services by the first and second respondents which exclude divergent views are a violation of the constitutional right to freedom;
- a directive against the first and second respondents to transmit objective, impartial, non-partisan and factually accurate broadcasts and reports that are fair to all political parties, election candidates and the government, and affording the right of reply to any victim of iniquitous or slanderous communication;
- an order against the first and second respondents and their staff to ensure independent editorial content, and to resist government influence or pressure from any political party;
- a directive against the first and second respondents to comply with s 160J of the Electoral Act [*Cap 2:13*] throughout the election period;
- a directive against the first and second respondents to immediately allow all political parties and independent candidates free, fair and balanced access to all their broadcasting and other services;
- a directive against the third respondent to immediately promulgate regulations as provided for by the Electoral Act for the facilitation of free and equitable access to broadcasting services by all political parties and independent candidates;
- an order against the third respondent to precisely set out its criteria and monitoring programmes of the news media in general, and the first and second respondents in particular, during the election period to ensure fair news coverage;
- an order against the fourth and fifth respondents to provide the third respondent with whatever assistance it may require in monitoring the media during the election period; and

- an order against the fourth respondent to immediately disclose the action it would take against any journalist or staff member of the public media found in breach of any law or code of conduct;

[8] The first respondent ("***ZBC***") is a public broadcaster. It offers a broadcasting service. A broadcasting service is any service that delivers television or radio programmes to the public. As a public broadcaster, ZBC is wholly owned or controlled by the State. It was established by s 3 of the then Zimbabwe Broadcasting Act, *Cap 12:01* before that Act was repealed by the Zimbabwe Broadcasting (Commercialisation) Act 26 of 2001. ZBC was not abolished by the repeal of its founding Act. But it was dismantled as a statutory corporation or parastatal. Its functions were unbundled and parcelled out to successor companies that would be registered in terms of the Companies Act, *Cap 24:03*.

[9] Section 61 of the Constitution behoves State-owned media of communication to be free to determine independently the editorial content of their broadcasts; to be impartial and to afford fair opportunity for the presentation of divergent views and dissenting opinions. Freedom of the media is said to exclude incitement to violence or advocating hatred or hate speech.

[10] In relation to elections, and according to legislation *in pari materia*, the core function of the ZBC as a public broadcaster, is the transmission of television or radio programmes to the public, or any substantial section of it: see s 160E of the Electoral Act, *Cap 2:13* and s 2 of the Broadcasting Services Act, *Cap 12:06*. In doing so it is guided by certain standards, both legislative and common law. For example:

- in terms of Part XXIB of the Electoral Act, such regulations as may be promulgated to facilitate access to public broadcasting media should ensure a fair and balanced allocation of time between political parties and independent candidates.
- the terms and conditions for the publication of advertisements of political parties or candidates contesting an election should be the same and non-discriminatory.
- according to the Seventh Schedule to the Broadcasting Services Act, broadcasting services operated by a public broadcaster shall provide news and public affairs

programming that are fair, unbiased and independent from government, commercial or other interests.

- according to the Zimbabwe Electoral Commission (Media Coverage of Elections) Regulations, 2008, SI 33/2008, election broadcasts shall not incite violence or advocate hatred; political parties and candidates shall be afforded the right of reply within twenty four hours of a report aired containing inaccurate information or unfair criticism based on a distortion of facts.

[11] The second respondent ("***Zimpapers***") is a public company. The controlling interest in it is held by the Government of Zimbabwe or its nominees. It is part of the State-owned media as contemplated by s 61(4) of the Constitution. It publishes several newspapers. Its flagships are *The Herald*, *The Chronicle* and *The Sunday Mail*. Its rights and obligations in the sphere of its own operations are similar to those of the ZBC.

[12] In their suit the applicants have a myriad of complaints against the ZBC and Zimpapers. They accuse the two of wanton breach of their Constitutional duty and legislative functions which are to provide a service free from political bias, hatred, and discrimination, and to disseminate divergent views and opinions. The applicants trace the history of broadcasting and publishing from colonial times, through to independence and up to the last general election in 2018 and allege that the public media have been biased, partisan, inequitable in favour of the governing party of the day and that they have been no more than propaganda mouthpieces for the ruling party, a trend which they say still continues.

[13] The third respondent ("***ZEC***") and the fourth respondent ("***ZMC***") are independent commissions established by Chapter 12 of the Constitution. Their remit is, *inter alia*, to support and entrench human rights and democracy, and to ensure the observance of democratic values by the State and government-controlled entities. They are independent and are not subject to the direction or control of anyone. They must exercise their functions without fear, favour or prejudice. Their members must be non-political and must not further the interests of any political party.

[14] ZEC's function is to conduct and supervise elections. To achieve its objective, it is reposed with wide ranging and over-arching powers in terms of the Constitution; the Electoral Act; SI 33/2008 and the Electoral Regulations, 2005, SI 21/20015, among others.

[15] ZMC has numerous functions. According to the Constitution and the Access to Information and Protection of Privacy Act, *Cap 10:27*, they include the upholding and promotion of freedom of the media; the monitoring of broadcasting to ensure fairness and wide access to a diversity of views, and the enforcement of good ethical practice in the media.

[16] The fifth respondent ("***BAZ***") is set up in terms of the Broadcasting Services Act to promote the purpose and objectives of that Act. These include the promotion of a wide range of broadcasting services in Zimbabwe; the provision of public debate on political, social and economic issues of public interest; the fostering and maintenance of a healthy plural democracy, and ensuring the independence, impartiality and viability of broadcasting services. In terms of s 160K of the Electoral Act, BAZ is one of those entities obligated to render assistance to ZEC, on request, in monitoring the news media during election periods to ensure compliance with the provisions of the law.

[17] In their suit, the applicants accuse ZEC, ZMC and BAZ of general dereliction of duty in their regulatory and supervisory functions of the public press in Zimbabwe. In a nutshell, they complain that in their news reportage, coverage, dissemination of information and programming, the ZBC and Zimpapers are blatantly biased in favour of the ruling party, the Zimbabwe African National Union – Patriotic Front (ZANU-PF) which is led by the current State President, Mr Emmerson Mnangagwa, against other political parties, particularly the Movement for Democratic Change – Alliance party (MDC-A), led by Mr Nelson Chamisa. Among other infractions complained of are that the ZANU-PF party is given the lion's share of coverage at prime viewing times, sometimes constituting more than eighty-seven percent (87%); that they broadcast and publish hate speech; that they continuously and relentlessly demonise

the MDC-A party and its leadership which is then not afforded the right of reply, and so on.

[18] As regulators, ZEC, ZMC and BAZ are accused of general neglect to censure ZBC and Zimpapers. They are said to have failed or neglected to craft and develop strategies or regulations to free the two public media institutions from the grip and control of the ZANU-PF party and the government, or to combat the toxic environment that they have helped to create.

[19] Zimpapers have not contested the application. Through their legal practitioners, they gave notice of their readiness to comply with the law. Counsel negotiated on costs. As a result, as against Zimpapers the applicants have waived their claim for costs should they succeed.

[20] The rest of the respondents have opposed the application vigorously. Some have taken initial technical objections and all of them have opposed on the merits. Initially the application was a dragnet. It included everyone and everything. However, a few moments into argument, and several postponements later, some issues just fizzled out or resolved themselves, thanks to Counsel's barter arrangements. In the end the application has been withdrawn as against ZEC and BAZ. Counsel reached a deal on costs. The applicants need not tender them. Therefore, the contest is only as against ZBC and ZMC. By agreement, argument proceeded first on the points *in limine* then on the merits. I reserved judgment on both. So this judgment is both on the points *in limine* and on the merits, but only insofar as they relate to the two remaining respondents.

[b] **Points *in limine***

i/ *Applicants' supplementary affidavit should be expunged from the record*

[21] The first technical objection by ZBC was that the applicants' supplementary affidavit should be expunged from the record because, firstly it was unprocedurally filed, and secondly, it contains completely new material as to amount to a new cause of action altogether, something that the law does not permit.

[22] The objection about the applicants' supplementary affidavit and the argument around it are better understood in the context in which the court application was filed and eventually got to be set down. The applicants' suit was in the nature of an urgent court application as contemplated by the proviso to r 232 of the High Court Rules. That rule gives a respondent who wishes to oppose a court application and who stays within a radius of two hundred kilometres of the court house a minimum of ten days within which to file a notice of opposition. This time frame increases by one day for every additional two hundred kilometres, or part thereof, for a respondent staying outside the first two hundred kilometre radius. The proviso to the rule then says in urgent cases the court application may specify a shorter period for the filing of opposing affidavits if the court, on good cause shown, agrees.

[23] The application specified a period of five days for the respondents to file their notices of opposition. The founding affidavit explained the urgency arising out of the forthcoming election about which remedies were sought. It was feared that if the matter was not heard on an urgent basis the election would come and go whilst the application was still pending, thereby rendering it largely academic if heard afterwards.

[24] Seeing the urgency as pointed out, I granted the shorter period of five days and directed that the respondents' notices of opposition be filed within that time frame. Despite them all being resident outside the two hundred kilometre radius of the court house, all the respondents complied. Then on 2 July 2018 the applicants' legal practitioners wrote to ask for an urgent set down in terms of r 223A. That rule reads:

> "***Set down of urgent cases***
> 223A Where a legal practitioner has certified in writing that a matter is urgent, giving reasons for its urgency, the court or a judge may direct that the matter should be set down for hearing at any time and additionally, or alternatively, may hear the matter at any time or place, and in such event rule 223 shall not apply or shall apply with such modifications as the court or judge may direct."

[25] Regrettably, despite the applicants' lawyers' letter being received by the Registry on the next day, 3 July 2018, it was not brought to my attention, or anyone else's for that matter, until 20 July 2018, thus some few days before the election. In the end, the

earliest date the application could conceivably be set down was 18 September 2018, well after the election. But before that date, on 14 September 2018, the applicants' lawyers gave notice that given how things had panned out, especially that the election had since taken place, on the date of hearing they would seek a postponement, among other things, to file a supplementary affidavit with an amended draft order so as to make the suit cover the future conduct of elections.

[26] On 18 September 2018, at the instance of the applicants' Counsel, the parties all agreed to a postponement of the matter *sine die* to enable the applicants to file a supplementary affidavit to which the respondents could respond. However, at my suggestion, all the parties readily agreed to the application being withdrawn from the roll but with the understanding that once they were ready to come back, the matter would be re-enrolled on a date convenient to them, upon prior consultation with the Registrar. This was done. The applicants' supplementary affidavit had been filed on 18 September 2018. The new set down date was 29 March 2019. That was when the above objection about the supplementary affidavit, among others, was taken.

[27] In moving for this objection, Mr *Moyo*, for the ZBC, argued that the applicants should have moved a formal motion for the filing of the supplementary affidavit. Without a court order authorizing them to do so, the filing of such an affidavit was unprocedural, because in terms of r 235, after the answering affidavit, no further affidavit may be filed without the leave of the court.

[28] Mr *Moyo's* other point was that the supplementary affidavit, together with the answering affidavit, introduced such new evidence as to amount to introducing a further cause of action altogether. He pointed out that the original application had been all to do with the 30 July 2018 election which was now past and that the new draft order in particular sought to cover all other elections in the future. He argued that the supplementary affidavit had been filed well after the pleadings had been closed, as it were, and that the respondents had had no opportunity to file any responses to the answering affidavit and the supplementary affidavit.

[29] Demonstrably, this objection is taken in bad faith. Although r 235 does not specify the procedure on filing further affidavits after the answering affidavit has been filed, in practice, the party wishing to do so files the further affidavit, upon notice, and seeks its admission at the hearing. *In casu*, not only did the applicants' Counsel give notice by letter, but also when the matter was initially postponed with the consent of all parties, it was on the understanding that the applicants would file a supplementary affidavit and that any party wishing to respond to it would be free to do so. Only BAZ did. The applicants went on to file a further supplementary answering affidavit responding to the affidavit by BAZ.

[30] I find that neither the applicants' answering affidavit nor their supplementary affidavit introduces any new cause of action or any new material. Although originally the remedies sought by the applicants were largely predicated on the forthcoming election, the nature of their complaints applied to all elections in general. I explain this point in greater detail later when I deal with the merits. For now I find that the main purpose of the applicants' supplementary affidavit was to file an amended draft order to crystalize the nature of the remedies sought in the light of the new development. As for the applicants' further supplementary answering affidavit, I find it to be just unnecessary density to an already voluminous record. It is argumentative, is of little or no evidential value and is another example of redundancy.

ii/ *Matter has been overtaken by events*

[31] The ZBC' second preliminary objection was that the matter has been overtaken by events in that the election which the applicants' original complaints had been all about has come and gone. Mr *Moyo* presses that the applicants ought to properly withdraw the application and bring a fresh one dealing precisely with the new remedies sought.

[32] Mr *Coltart*, for the applicants, argues that the respondents are belabouring under a misapprehension that their duties, as specified by law, only exist at election times. He says that is not the case. Those duties exist at all times. They particularly increase at election times when there is need to guarantee a free, fair and credible election. I agree with Mr *Coltart*. Whilst it is true that the application was originally filed with

the forthcoming election in mind, it was broad enough to cover general issues pertaining to, among other things, the duties of the public media in Zimbabwe at all times, but particularly at election times.

iii/ *Material disputes of facts*

[33] The ZBC' third preliminary objection is that the papers disclose such material disputes of facts as are incapable of resolution without the aid of a trial. In particular, Mr *Moyo* argues that the methodology employed by the applicants in collating the information which has led them to conclude that the ZBC' broadcasts and programming are biased in favour of the ZANU-PF party, is heavily contested.

[34] However, I find the applicants' explanation of the methodology quite straightforward and the interpretation of their findings in consonant with other data, some of which was common cause. As such, I see no material dispute of fact but mere legal arguments.

iv/ *Applicants' answering affidavit is too voluminous and contains new evidence*

[35] I have in part dealt with this objection already. But under this head, Mr *Moyo*'s further argument is that the applicants went beyond mere answering to what the respondents had said in their opposing affidavits. He said it is only for the first time that the methodology in explaining the data collection is explained, giving the respondents no opportunity to answer back.

[36] Mr *Moyo* is right on one thing. As pointed out already, the applicants' affidavits are long-winded. They are argumentative. Much the same points could have been made with far less verbiage. Admittedly pleading is a matter of style that differs from pleader to pleader. But in this matter the pleadings are burdensome.

[37] However, having said that, and as I have already pointed out, the answering affidavit does not contain any new evidence. It contains an elaborate explanation on the methodology employed in collating and synthesizing the information from which the applicants concluded that the ZBC is biased in favour of the ZANU-PF party. As

indicated earlier, this is a point dealt with more fully below. However, in a nutshell, part of the applicants' evidence consisted of a report by an organisation called Media Monitors. It analysed the press coverage of the election during the period January 2018 to March 2018, it being the first quarter preceding the 30 July 2018 election. Its basic conclusion was that the media in Zimbabwe is polarised along political lines, with the public press favouring the ZANU-PF party and the other non-government press favouring the opposition political parties, particularly the MDC-A. The ZBC challenged the methodology as unscientific. The answering affidavit went to great lengths to show that it is indeed scientific.

[38] In the premises all the preliminary objections by ZBC are hereby dismissed.

v/ *Applicants have no locus standi in judicio*

[39] This objection was raised by ZMC in its heads of argument. On the day of the hearing it was expressly withdrawn. It was the right thing to do, given the express provisions of s 85 of the Constitution granting any interested party the right and power to approach a court for a declaratory order if vested rights have allegedly been violated. So the disposal of the points *in limine* paves the way for judgment on the merits.

[c] **Merits**

[40] The gravamen of the applicants' complaint against the ZBC, Zimpapers and ZMC are as set out in paragraphs [12], [17] and [18] above. The applicants' evidence of breach of duty by the respondents consists of a number of reports and documents. They are these:

i/ ZEC' Media Monitoring Committee Report on 2013 Election

This was a report by ZEC' Media Monitoring Committee on the media landscape during the 2013 general election. In summary, the report concluded that the public media propagated the views of the ZANU-PF party, whose voice they carried, projecting that party as the only one that could guarantee the protection of the values of the nation and its independence. The former head of State, Mr Robert Mugabe, who was also the leader of the ZANU-PF party at the time, was endorsed as the only

viable candidate for the Presidential election. Coverage of the rest of the political parties, particularly the MDC-T (which was then the name of the largest opposition political party), was twisted and meant to discredit them. Some opinion pieces by guest-writers in the public press peddled hate speech and used inflammatory language against the opposition political parties and their candidates. Intra-party violence instigated by the ZANU-PF party was ignored.

ii/ African Union Observation Mission's Report on 2013 Election

This was a report by one of the election observers of the 2013 election, the African Union Observation Mission. Its key finding was that the national broadcaster provided live and in-depth coverage largely to a single political party in clear violation of the national Constitution and that the media was highly polarised along party lines in clear violation of the Electoral Act. It highlighted the ZBC' shortcomings in failing to provide a balanced platform for all competing voices as required by Article 17(3) of the African Charter on Democracy, Elections and Governance (2007).

iii/ Electoral Commissions Forum of SADC Countries' Report on 2013 Election

This was a report by the Election Observer Mission of the Electoral Commissions of the SADC Countries on the 2013 election. Its conclusion was very much similar to those of the other observer missions. It noted the biased press coverage by the public media in favour of the ruling party and against the opposition parties.

iv/ Article in the Washington Post on 25 November 2017

In November 2017 Mr Mugabe was deposed as head of State and government and of the ZANU-PF party. Having been in power for an uninterrupted period of thirty seven years, the change was seismic. For weeks on end the development dominated news headlines around the globe. The *Washington Post* published a news item on 25 November 2017. It focused partly on the drama playing out in the newsroom of the Zimbabwe *Herald* following that political development. In summary, the article noted the ecstasy of that paper's journalists, editors and staff on their new-found freedom to be able to criticise the President and to touch anything, something they could never have dreamt of in the past, it was said. The journalists and editors were confessing

their lack of freedom and independence in the past and how disconcerting it had been to be writing falsehoods ("*It makes you feel stupid writing this stuff.*")

v/ Media Monitors' Report on Coverage of 2018 Election

This is the report already referred to above. Its findings are presented in the form of texts, bar graphs and pie charts. The conclusion was the same as that of the observer missions. However, it was slanted more on the tone of the coverage by the press. Its conclusion was that only 8% of the coverage of the MDC-A by the public press was positive, with 25% being negative and 67% being neutral. In contrast the coverage of the ZANU-PF party was 13% positive, 4% negative and 78% neutral. On coverage in general, the report noted that the ZANU-PF party alone enjoyed more than 63% of the space in the public print media and more than 87% of the broadcasts, with the remainder being shared amongst the rest of the political parties.

vi/ ZBC' website on 16 May 2018 & *Herald* Article on 15 May 2018

To demonstrate bias, the applicants juxtaposed two reports found on the ZBC' website on 16 May 2018, and two news items in *The Herald* on 15 May 2018. The one set of reports extolled the achievements of Mr Mnangagwa in bringing development to the countryside during the short space of time he had been President and how he was the messenger of hope. In contrast the other articles ridiculed Mr Chamisa who was accused of fomenting violence and in whose party cracks were said to be emerging.

[41] The ZBC acknowledges the reports of the several observer missions and, save for that by Media Monitors, all but admits their contents. But its main response to them is that the applicants are harping on about a bygone era. It says apart from the seismic shift in the political environment, there also have been lots of reforms in the public media which have aligned themselves with their obligations under the law. It argues that there is no basis for the remedies sought by the applicants because its contemporary conduct does not justify any apprehension of fear.

[42] The ZBC also argues that the provisions of s 160G of the Electoral Act contemplate the promulgation of regulations to regulate the manner a public broadcaster may provide free access to its broadcasting services, but that these are still to be incepted.

[43] To rebut the allegations of bias and prove equal and fair coverage of all political parties, the ZBC makes reference to instances when it has aired certain programmes or news items concerning the opposition political parties, particularly the MDC-A and Mr Nelson Chamisa. Two such instances were Mr Chamisa's entire interview on the British Broadcasting Corporation programme *Hardtalk*, towards the 2018 election, and the occasion of his previous ascension to the helm of the opposition party. To cap it all, the ZBC attaches a schedule, Annexure J, detailing the coverage given to all political parties other than ZANU-PF.

[44] The ZBC further argues that political parties other than ZANU-PF refrain from providing their diaries of their political activities, making it difficult for it to track them. Furthermore, some of them, particularly the MDC-A, is hostile to the ZBC journalists who face constant threats of physical violence by their supporters.

[45] On the report by Media Monitors, the ZBC condemns the methodology and findings of that organisation as being unscientific and says that figures have just been randomly bandied about. It says the information is hearsay anyway. On the two articles on its 16 May 2018 website, ZBC says they do not represent its views but those of its sources as quoted. The ZBC mentions that the applicants have confused and mixed its coverage of government business with that of the ZANU-PF party whose members exclusively make up the government.

[46] ZMA's response to the entire application is that its mandate in terms of the Constitution, the Electoral Act and SI 33/2008 is to render assistance to ZEC when requested to do so and that it is doing just that. It says the existing legislation is adequate and that it guarantees protection of all stakeholders.

[d] **Synthesis**

[47] A trial in a civil case, or motion proceedings, involve the making of findings or inferences of facts by balancing probabilities and selecting a conclusion which seems to be the more natural or plausible from several other conceivable ones, even though that conclusion may not be the only reasonable one: see *Joel Melamed and Hurwitz* v *Cleverland Estates (Pty) Ltd*; *Joel Melamed and Hurwitz* v *Vorner Investments (Pty) Ltd* 1984 (3) SA 155.

[48] Justice is often depicted as a lady blindfolded, holding a sword in one hand and a set of balancing scales in another. The scales are said to be for measuring the strength of a case. They represent the weighing of evidence. Before the case starts, the scales are evenly balanced. They are in a state of equilibrium. The weight of the evidence as the case progresses upsets the balance. As the case concludes the court checks the way the scales are tilted. Judgment is granted for the party in whose favour the scales are tilted.

[49] In the present case, the weight of the evidence presented by the applicants in support of the relief that they seek plainly tilts the scale in their favour. There is cogent evidence from independent and dispassionate sources of the evident bias of the public media in this country in favour of the ZANU-PF party, its leadership, members and supporters. They enjoy a disproportionate amount of coverage on both the electronic and print media. Furthermore, their coverage of political programmes is largely positive only in respect of the ZANU-PF party, but largely negative in respect of the opposition parties, particularly the MDC-A. Opinion pieces by guest writers, especially in the print media, disgorge hate and inflammatory language.

[50] Among other things, the analysis by Media Monitors is quite scientific. They compared like with like. It has balance. It is objective. The Electoral Act, in s 160K(3), permits anyone other than the ZMC to monitor news media and to report on their conduct during an election period. On the other hand, the ZBC's Annexure J is largely meaningless. It conceals more than it reveals. It does not compare anything with anything. All it does is to list the names of some opposition political parties and

the dates on which something said by their spokespersons was aired. This does not prove anything, especially when compared to the applicants' data that analyses, under the different subjects, the coverage of all political parties and the editorial slant of the public media.

[51] It is not a legitimate excuse by the ZBC that the regulations contemplated by s 160G(2) of the Electoral Act have not yet been incepted. Journalism is one of the oldest and noblest professions. A rich body of rules and ethics have developed. The ethics of the profession call for, among other things, balanced, fair, objective and factual reporting.

[52] But the available legislation is, in my view, quite adequate to guide the media houses in their operations. There is the Constitution. Every person has the right to freedom to receive and communicate ideas and other information. There is the Electoral Act; there is SI 33/2008; Access to Information and Protection of Privacy Act, and the Broadcasting Services Act. There is one common thread running through them all. Public media must be independent; must disseminate free, fair and balanced information; must grant equal opportunity to all political parties; must refrain from publishing hate speech, and so on. It is all very explicit.

[53] Ms *Magundani*, appearing together with Mr *Moyo* for the ZBC, advances the argument that equitable reporting is not achievable in the Zimbabwean context where by its sheer size the ZANU-PF party can field candidates in all constituencies, a feat which even the MDC-A has failed to achieve in the last election, let alone the other political parties which have no visible representation anywhere. But this submission is at war with the law. If a political party is registered it becomes entitled to fair and equitable access to the public media. Dismissing a similar argument in the Supreme Court of Ghana, dealing with similar provisions of the Ghanaian Constitution of 1992, AMUA-SEKYI JSC, in the case of *New Patriotic Front v Ghana Broadcasting Corporation* [1993-94] 2 GLR 354, which Mr *Coltart* brought to my attention, said at p 372:

"In a democracy, the right of the individual to form or join political parties, and of the parties to participate in shaping the political will of the people and to disseminate political, economic and social ideas and programmes are not rights which are enjoyed by the people only when elections are about to take place. They are inalienable rights which the Constitution guarantees for all and which the courts are required to protect. As far as our law is concerned, it is irrelevant that the party or its candidate secured only a handful of votes or none at all at the last elections: so long as it remains a registered political party it is entitled to be heard, and the Constitution, 1992 says that, as far as the state-owned media are concerned, it shall have equal access with any other political party."

[54] In the same case, FRANCOIS JSC, said, at p 368:

"A denial of opportunity for the expression of opposing views, inherent in a democracy, would amount to moves which may culminate in the creation of a monolithic government which is only one step removed from a one-party government.

.....

It is the court's constitutional duty in upholding the fundamental law to strike down tendencies towards a one-party state or a dictatorship, however minuscular the blot may first appear."

[55] I respectfully associate myself with such sentiments. The respondents are all critical players in any plebiscite. By the powers reposed and vested in them by law and social contract, they can individually or collectively make or break an election. They can make or break a nation. They can foster democracy or stifle it. The framers of our Constitution and our Parliament were quite conscious of the need, among others, to safeguard multi-party democracy and combat one-party state governance. That is why there exist such provisions in the Constitution and the legislation referred to above as will guarantee press freedom, impartial reporting and equal access of all political parties to the public press. The applicants are in principle entitled to the substance of the relief they seek.

[e] **Relief**

[56] The requirements of an interdict are so well known as to require no citation of further authorities beyond the *locus classicus*, *Setlogelo* v *Setlogelo* 1914 AD 221. The applicant must show a clear right having been infringed, or about to be infringed; an apprehension of an irreparable harm if the interdict is not granted; a balance of convenience favouring the granting of the interdict, and the absence of any other satisfactory remedy.

[57] The application meets all these requirements. State-owned media are national assets. They must be accessible to all. By virtue of the Constitution and the various pieces of legislation referred to above, the applicants, like any other citizen of this country, have a clear right to receive fair, unbiased and divergent views to enable them to make informed choices. Partisan broadcasts and skewed reporting lead to polarity and threaten national peace. There can be no other remedy but to interdict the wrongful conduct.

[58] But an order of court must be efficacious. It should not be a pious exhortation. It must be enforceable. Mr *Coltart* evidently realised that the applicants' amended draft order, as was the original one, was impractical and incompetent. He applied to amend it further. The application was granted on condition that if any of the respondents wished to respond to the further amendment they were free to do so before I wrote the judgment. None did. But the final draft order is no better than the previous two. The relief sought is imprecise and seeks nothing more than what the Constitution and the legislation already provide. Thus, beyond merely declaring that the respondents have been in breach of their duties and ordering them to stop the wrongful conduct, there is practically little else that the court is being asked to do.

[59] With regards to ZMC, I find the applicants' cause of action premature. For example, there are elaborate provisions in the Access to Information and Protection of Privacy Act on the disciplinary powers and functions of ZMC and the Media Council under it. No complaint was lodged in terms of s 42B of that Act. ZMC gets involved in press monitoring upon invitation. In my view the law is adequate to deal with any perceived infractions by the State media.

[60] In the circumstances the following orders are granted:

i/ It is hereby declared that the first and second respondents have conducted themselves in material breach of s 61 of the Constitution in that they have not been impartial and free to determine independently the editorial content of their broadcasts or other

communication; and that they have not afforded fair opportunity for the presentation of divergent views and dissenting opinions.

ii/ The first and second respondents are hereby ordered and directed to exercise impartiality and independence in the editorial content of their broadcasts or other communication; and to afford fair opportunity for the presentation of divergent views and dissenting opinions by ensuring that their communications do not show bias in favour of one political party or its candidates against the others.

iii/ The application as against the third and fifth respondents is hereby withdrawn with no order as to costs.

iv/ The application as against the fourth respondent is hereby dismissed with costs.

v/ The first respondent shall pay the applicants' costs.

19 June 2019

Mtetwa & Nyambirai, applicants' legal practitioners
Scanlen & Holderness, first respondent's legal practitioners
Gula-Ndebele & Partners, second respondent's legal practitioners
Nyika, Kanengoni & Partners, third respondent's legal practitioners
Musunga & Associates, fourth respondent's legal practitioners
TH Chitapi & Associates, fifth respondent's legal practitioners