

IN THE HIGH COURT OF ZIMBABWE

CASE NO. HC 11749/17

HELD AT HARARE

In the matter between: -

VERITAS

Applicant

And

THE ZIMBABWE ELECTORAL COMMISSION

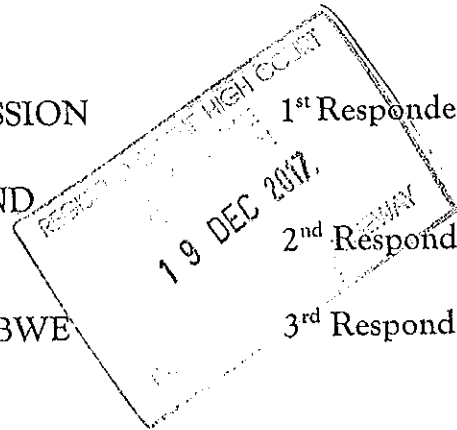
1st Respondent

THE MINISTER OF JUSTICE, LEGAL AND
PARLIAMENTARY AFFAIRS

2nd Respondent

THE ATTORNEY GENERAL OF ZIMBABWE

3rd Respondent



APPLICATION FOR A DECLARATORY ORDER
AND ANCILLARY RELIEF

Application be and is hereby made for an order in terms of the draft order annexed hereto.

The accompanying affidavit (s) and document (s) will be used in support of the application.

Dated at HARARE on this the 16th day of DECEMBER 2017

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

TO: THE REGISTRAR
High Court of Zimbabwe
HARARE

AND

TO: THE ZIMBABWE ELECTORAL COMMISSION
Mahachi Quantum Building
1 Nelson Mandela Avenue
HARARE

AND

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

AND

TO: THE ATTORNEY-GENERAL OF ZIMBABWE
New Government Complex
Corner Fourth Street and Central Avenue
HARARE

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3rd Respondent

 FOUNDING AFFIDAVIT OF VALERIE ANNE INGHAM-THORPE

I, the undersigned,

VALERIE ANNE INGHAM-THORPE

Do hereby make oath and state the following:

I am an adult female and the Director of the Applicant. I am duly authorised to depose to this affidavit on behalf of the Applicant.

The facts herein contained, unless otherwise stated or indicated, are to the best of my knowledge and belief, true and correct.

THE PARTIES

1. The Applicant is VERITAS a trust incorporated in Zimbabwe by a deed of trust and registered with the Deeds Registry as Firinne Trust but trading as Veritas. It is a body corporate, a non-profit making organisation that provides information to the general public on the work of Parliament, the laws of Zimbabwe, the implementation of the Constitution of Zimbabwe, and information pertaining to elections in Zimbabwe. The Applicant's address for service is care of Messrs Mtetwa and Nyambirai of No. 2 Meredith Drive, Eastlea, Harare.

2. The First Respondent is the ZIMBABWE ELECTORAL COMMISSION, which is a commission established in terms of section 238 of the Constitution and the body responsible for conducting and supervising voter education in terms of section 239(h) of the Constitution and for ensuring compliance with the impugned provisions of the Electoral Act [Chapter 2:13] in terms of section 40B(1)(c) of the same Act. The First Respondent's address for service is Mahachi Quantum Building, 1 Nelson Mandela Avenue, Harare.

3. The Second Respondent is the MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS, cited herein in his official capacity as the Minister to whom the administration of the Electoral Act is assigned. His address for service is Corner 4th & Samora Machel Avenue 6th Floor, Block C, Harare.

4. The Third Respondent is the ATTORNEY-GENERAL OF ZIMBABWE, cited herein in his capacity as the chief legal advisor to the Government of Zimbabwe and its representative in constitutional matters. His address for service is New Government Complex, Corner Fourth Street and Central Avenue, Harare.

NATURE OF APPLICATION

5. This is an application for a declaratory order and ancillary relief pertaining to the provisions of the Electoral Act [Chapter 2.13] which impose restrictions on the conducting of voter education by persons other than the Zimbabwe Electoral Commission and political parties.
6. The Applicant seeks an order from this Honourable Court declaring that sections 40C(1)(g), 40C(1)(h), 40C(2) and 40F of the Electoral Act [Chapter 2.13] are *ultra vires* sections 56, 61 and 67 of the Constitution of Zimbabwe in so far as the provisions infringe the Applicant's rights to equality and non-discrimination, to freedom of expression, and their political rights including the right to a free and fair election and to make political choices freely. Additionally, the Applicant avers that the same provisions infringe the general public's rights under section 56, 61 and 67 of the Constitution and seeks the same order on behalf the public.

LOCUS STANDI

7. I submit that the Applicant has the requisite *locus standi* to institute the present proceedings. It is a non-profit making organisation that provides information to the general public on the work of Parliament, the laws of

Zimbabwe, the implementation of the Constitution of Zimbabwe, and information pertaining to elections in Zimbabwe. The Applicant has expertise in electoral issues and regularly releases information on the subject and would like to conduct a programme of voter education which is responsive to topical electoral issues as they emerge. It is not possible for the Applicant to abide by the extremely restrictive requirements of the impugned provisions, nor does the Applicant believe it needs to as it regards the provisions as *ultra vires* the Constitution. Nevertheless, the Applicant's employees face potential imprisonment if found guilty of violating the impugned provisions. This threat causes an unnecessary and unconstitutional chilling effect on the work of Applicant. Therefore, the Applicant has a direct and substantial interest in knowing whether legislation that applies directly to its work is *ultra vires* the Constitution.

7.1 I further submit that the Applicant has been operating in Zimbabwe for many years and has become a valued and respected member of Zimbabwe's civic society providing the general public and the Government of Zimbabwe with accurate and unbiased information on the laws of Zimbabwe and the work of Parliament. The Applicant also works closely with the Parliament of Zimbabwe itself, providing it with valuable research that assists it in doing its work. The Applicant maintains positive and productive relationships with many different branches of the Government of Zimbabwe. The proposed voter education work is an extension and an enhancement of the work that it has done for many years. The Applicant has a proven reputation of providing accurate and unbiased members, and its staff members, who are all citizens or

permanent residents of Zimbabwe, are highly qualified and competent to conduct the voter education proposed.

8. The Applicant also brings this case in the public interest, as provided for by section 85(d) of the Constitution. The general public have a right ensuring to ensuring that the supremacy of the constitution is upheld, that unconstitutional legislation is struck down, and that their rights, explained more fully herein, are protected by the courts. The Applicant and the general public do not have any other reasonable and effective way to challenge the impugned legislation. As will appear more fully below, the Applicant has written to the First Respondent on this issue and was told that the First Respondent was not able to express a position in the absence of a court order. The Applicant and other members of the general public have also lobbied Parliament to amend the impugned legislation to bring it into line with the Constitution, but Parliament has failed to do so. The nature of the relief sought demonstrates that it clearly has general application and prospective application, not just to the Applicant but to other civic organisations and churches that wish to provide voter education as well as to ordinary citizens who wish to do the same. The Applicant has engaged other civic organisations that wish to provide voter education and they have expressed their support for the Application. The Applicant will not oppose any friend of the court who wishes to be joined to the matter to provide expert evidence to the court. The nature of the rights concerned also lend themselves to be protected through public interest litigation. The right to freedom of expression to give and receive information pertaining to elections is a right that every member of society should be allowed to exercise without undue infringement, and is foundational to the exercise of other rights. Certain political rights affected, such as the right to free and

fair elections, are by definition exercised collectively by society as a whole, through their free participation in elections. Additionally, since the rights in question affect every member of society, this includes the most vulnerable of our society who are less able to defend their rights themselves. Lastly, the consequences of the infringement of the rights in question are extremely dire. The freedom of the electoral process in the lead up to, during, and after the elections is the very foundation of our democracy. Legislation undermining citizen's free engagement in that process strikes at the very core of our nation and our constitutional system and could have long-reaching consequences.

FACTUAL BACKGROUND

9. The African Union sent an Election Observation Mission to observe the elections in July 2013 and issued a report on the elections (attached hereto as Annexure A). In that report, they made several comments about the state of voter education in Zimbabwe:

"43. The OAU/AU Principles Governing Democratic Elections enjoin Member States to promote civic and voter education in close liaison with civil society groups and other relevant stakeholders. The AUEOM noted that while legislative provisions exist that enable the transmission of knowledge to the electorate by the ZEC, and/or by persons so designated by the ZEC, civil society stakeholders consulted, felt excluded and marginalised from the preregistration voter education process. The AUEOM observed, consistently, through-out the registration process, the absence of civil society organisations in the electoral arena, a matter which raised some concerns about the principles of collaboration in this regard. The AUEOM was of the view that the pre-registration process might have benefitted greatly from crosssectoral collaboration between the ZEC and other actors permitted by law to undertake these exercises."¹

¹ Report of African Union Election Observation Mission to the 31 July 2013 Harmonised Elections in the Republic of Zimbabwe (2013) available at

10. They gave the following recommendation regarding voter education:

“g. While the AUEOM acknowledges that the 6.4 million registered voters in the 2013 Harmonised Elections was relatively high, it calls for the greater involvement of non-state actors in civic and voter education throughout the democratic process to enhance and sustain participation in elections in future. To this end, consideration must be made to review relevant sections of the Electoral Act to enable the wider involvement of civil society in these processes.”²

11. Moreover, Zimbabwe’s Parliament has commented on the state of Zimbabwe’s voter education system, acknowledged the First Respondent shortcomings, and urged the facilitation of other groups’ participation in voter education through changes in the law. In 2015, the Portfolio Committee on Justice, Legal and Parliamentary Affairs presented their report on the state of Preparedness of the Zimbabwe Electoral Commission to hold by-elections (attached hereto as Annexure B).

12. Generally, they remarked on ZEC’s lack of preparedness when conducting elections:

“ZEC is on record as saying that it is financially unstable and heavily indebted. This impacts heavily on its capacity to run elections efficiently and effectively. Delivery of a high quality, free and fair, credible election comes into doubt where resources are limited or largely unavailable.”³

http://www.veritaszim.net/sites/veritas_d/files/AUEOM%20REPORT%20ZIMBABWE%202013.pdf (last accessed: 7 Nov. 2017) at para 43.

² Report of African Union Election Observation Mission to the 31 July 2013 Harmonised Elections in the Republic of Zimbabwe (2013) available at

http://www.veritaszim.net/sites/veritas_d/files/AUEOM%20REPORT%20ZIMBABWE%202013.pdf (last accessed: 7 Nov. 2017) at para 82(g).

³ First Report of the Portfolio Committee on Justice, Legal, and Parliamentary Affairs on the State of Preparedness of the Zimbabwean Electoral Commission (ZEC) to hold By-Elections (2015) at para 3.3.6.

13. Regarding voter education in particular, the Committee noted in particular the voter education suffered, as ZEC did not have the resources to properly conduct voter education, and did not give civil society enough time to effectively participate:

*"3.3.8 Little improvement was made to the voter education inadequacies experienced in the run up to the July 31 elections. This has been exacerbated by lack of finance making it difficult to roll out full voter education. Though ZEC made a call for collaboration in voter education with civil society for the Chirumanzu-Zibagwe and Mt Darwin West National Assembly by-elections, it received little response as it was late, and was limited to two weeks. This resulted in voters missing out on an opportunity to cast their vote after failing to produce requisite documents, or heading to the wrong ward and sometimes not being registered at all."*⁴

14. The Committee commented on the inadequacy of the law regarding voter education:

*"3.4.3 Currently, civic society cannot conduct voter education without being invited by ZEC. The law must make it easier for all stakeholders to be able to conduct voter education, as recommended by the AU observer mission."*⁵

15. It made the observation that:

"4.1 Elections are part of an electoral cycle. They are not an event. The level of voter education, which the Commission considers 'fairly successful', was conducted in the context of elections as an event rather than as part of a

⁴ First Report of the Portfolio Committee on Justice, Legal, and Parliamentary Affairs on the State of Preparedness of the Zimbabwean Electoral Commission (ZEC) to hold By-Elections (2015) at para 3.3.8.

⁵ First Report of the Portfolio Committee on Justice, Legal, and Parliamentary Affairs on the State of Preparedness of the Zimbabwean Electoral Commission (ZEC) to hold By-Elections (2015) at para 3.4.3.

cycle. It is highly unlikely that such voter education conducted in those circumstances would have the required impact.”⁶

16. And finally, recommended:

“5.7 That voter education should be a continuous process. ZEC should institute a long term approach to voter education which also allows other non-state actors to contribute without unnecessary hindrances.”⁷

17. Notwithstanding the above recommendations about the need for reform of the law on voter education, Parliament has failed to amend the relevant provisions of the Electoral Act in order to facilitate voter education by non-state actors and, in my considered view, to bring those provisions of the Electoral Act in line with the Constitution of Zimbabwe.

18. Therefore, in a letter dated 20 October 2017 (attached hereto as Annexure C), the Applicant wrote to the Zimbabwe Electoral Commission (the First Respondent herein) explaining its position that it views the restrictions on the provision of voter education contained in the Electoral Act to be unconstitutional in that:

18.1 They infringe freedom of expression by unduly limiting the classes of people who can provide voter education;

18.2 They infringe the political rights of citizens by preventing them from receiving information which will enable them to make free political choices.

⁶ First Report of the Portfolio Committee on Justice, Legal, and Parliamentary Affairs on the State of Preparedness of the Zimbabwean Electoral Commission (ZEC) to hold By-Elections (2015) at para 4.1.

⁷ First Report of the Portfolio Committee on Justice, Legal, and Parliamentary Affairs on the State of Preparedness of the Zimbabwean Electoral Commission (ZEC) to hold By-Elections (2015) at para 5.7.

- 18.3 The restrictions go far beyond what is fair, reasonable, justifiable and necessary in a democratic society in order to ensure that voters get accurate and unbiased information, an objective that could be achieved quite adequately by penalising the giving of false or inaccurate information—which the Act already does.
19. In the same letter, the Applicant urged the First Respondent to issue a public statement that all interested organisations, including churches, will be permitted to provide voter education without restriction, but that the First Respondent will call for inaccurate or biased information to be withdrawn or corrected.
20. The First Respondent replied to the Applicant's letter in a letter dated 23 October 2017 (attached hereto as Annexure D). In that letter, the First Respondent stated that it was unable to accede to the Applicant's request and stated that it may not be prudent for the First Respondent to rely upon the opinion of a stakeholder in the absence of a court declaration on the constitutionality or otherwise of the legal provisions in question. The First Respondent went further to recommend that due process should be followed if the Applicant was of the conviction that the law was unconstitutional.
21. It is in response to the recommendation of the First Respondent, that the Applicant now brings this application for a court declaration on the provisions in question, in order to clarify the position at law for both the Applicant and the First Respondent, as well as other stakeholders.

IMPUGNED PROVISIONS

22. There are four sections of the Electoral Act which the Applicant seeks to challenge as *ultra vires* the Constitution of Zimbabwe. All four sections relate to restrictions imposed on voter education. These are section 40C(1)(g) and 40C(2) which require any course or programme of voter education to be furnished by or approved by the First Respondent and prescribe that approval process as well as section 40C(1)(h) and 40F which impose a restriction on funding for voter education by the Applicant and other persons, besides the First Respondent. Each will be discussed in further detail below.

A. REQUIREMENT OF PRIOR APPROVAL OF VOTER EDUCATION MATERIALS BY ZEC: SECTION 40C(1)(g) AND SECTION 40C(2) OF THE ELECTORAL ACT [CHAPTER 2.13]

23. The Applicant avers that section 40C(1)(g) and section 40C(2) of the Electoral Act is *ultra vires* the Constitution of Zimbabwe and a violation of the Applicant's rights to freedom of expression and equality in that they require prior approval of the First Respondent before the Applicant can exercise its rights. Section 40C(1)(g), as read with paragraph (a)-(c) for context, states as follows:

40C Voter education by persons other than the Commission or political parties

(1) No person, other than—

(a) the Commission; or

(b) a person permitted to assist the Commission in terms of section 40B(3); or

(c) a political party;

shall provide voter education unless—

...

...

...
 (g) the person conducts voter education in accordance with a course or programme of instruction furnished or approved by the Commission; and
 ...

24. The Applicant also avers that section 40C(2) is *ultra vires* the Constitution. Section 40C(2) goes on to provide greater detail for the approval process that the Applicant has to follow before it can conduct voter education. The section states as follows:

(2) The Commission shall in writing require any person, other than a political party, providing or proposing to provide voter education, to—
 (a) furnish the Commission with copies of all the voter education materials proposed to be used and particulars of the course or programme of instruction in accordance with which the voter education will be conducted; and
 (b) furnish the Commission with all the names, addresses, citizenship or residence status and qualifications of the individuals who will conduct voter education; and
 (c) disclose the manner and sources of funding of its proposed voter education activities; and
 (d) satisfy the Commission that it is not otherwise disqualified in terms of subsection (1) from providing voter education.

25. These provisions are unconstitutional as they create a virtual state monopoly over freedom of expression in the area of voter education and they create an unjustifiable prior restraint over the Applicant's exercise of its rights. Furthermore, the impugned provisions violate the Applicant's right to equality in that it creates a class of and in general limit the Applicant's rights in a way that is not fair, reasonable, necessary and justifiable in an open and democratic society. Lastly, the provisions also violate the general public's rights to receive information and ideas; their right to equality; and their right to a free and fair election and their right to

make free and informed political choices. These arguments will be outlined further below.

B. RESTRICTION OF SOURCES OF FUNDING; SECTION 40C(1)(f) AND SECTION 40F OF THE ELECTORAL ACT [CHAPTER 2.13]

26. The Applicant further avers that section 40C(1)(f) and section 40F are *ultra vires* the Constitution in that they unduly restrict the sources of funding that persons other than the First Respondent may obtain in order to conduct voter education. This restriction violates the right to freedom of expression and equality. Section 40C(1)(f), as read with paragraphs (a)-(c) for context, provides as follows:

40C Voter education by persons other than the Commission or political parties

(1) No person, other than—

(a) the Commission; or

(b) a person permitted to assist the Commission in terms of section 40B(3); or

(c) a political party;

shall provide voter education unless—

...

...

...

...

(h) the voter education is, subject to section 40F (whereunder foreign contributions or donations may be channelled to the Commission for onward allocation), funded solely by local contributions or donations;

27. Section 40F provides as follows:

40F Foreign contributions or donations for the purposes of voter education

No foreign contribution or donation for the purposes of voter education shall be made except to the Commission, which may allocate such contribution or donation to any person referred to in section 40B(3) or section 40C(1).

28. These two provisions are unconstitutional for similar reasons to why section 40C(1)(g) and section 40(2) of the Electoral Act are unconstitutional, in that they place an unnecessary obstacle in the way of the Applicant who wishes to conduct voter education and in doing so violates their right to freedom of expression. The provisions also violate the right to equality by according special privileges to the First Respondent to receive foreign donations, while denying that privilege for the Applicant and others.
29. These two provisions restricting foreign funding are virtually impossible to comply with. The Applicant is a non-profit organization that relies on donations and grants in order to operate. The Government of Zimbabwe does not provide any funding to the Applicant, in fact the Government does not even allocate enough funding to the First Respondent for it to be able to conduct adequate voter registration. The reality is that neither the Applicant nor the First Respondent, nor anyone else, would be able to conduct voter education without funding that comes from outside Zimbabwe. The only difference is that the Applicant is prohibited from receiving foreign funding and the First Respondent is allowed to. The situation is made worse considering that "foreign contribution or donation" is defined so broadly in section 40A of the Electoral Act that it even seems to exclude contributions made by Zimbabwean citizens who are domiciled in other countries. This demonstrates the absurdity of how restrictive these provisions are. These constitutional violations will be explained in further detail below.

CONSTITUTIONAL RIGHTS THE IMPUGNED PROVISIONS VIOLATE

A. FREEDOM OF EXPRESSION

30. I contend that the impugned provisions violate the Applicant's right to freedom of expression as enshrined in section 61 of the Constitution of Zimbabwe. The sub-section 1(a) of section 61 states as follows:

"Every person has the right to freedom of expression, which includes ... freedom to seek, receive and communicate ideas and other information"

31. The impugned provisions create a virtual State monopoly over freedom of expression in the area of voter education. The Applicant, or for that matter any other person who falls outside of the strict parameters of section 40C, may only exercise its right to freedom of expression with regard to the provision of voter education if the materials have been furnished by or approved by the First Respondent. Thus the state maintains absolute control over the content of voter education. Furthermore, section 40C(1)(h) and section 40F of the Electoral Act ensure the State has close to absolute control over the funding for voter education. In an economic environment where it is extremely difficult to source local funding, foreign funding becomes crucial for the operation of any voter education programme. Even the First Respondent, which receives government funding, has become dependent on foreign funding for the smooth operations of its functions. How much more would a small civil society organization such as the Applicant, which does not receive government funding, require foreign funding for its operations? Thus the impugned provisions create a virtual state monopoly over the content and provision of voter education. This is an extremely onerous infringement of the right

to freedom of expression which can only be justified in special circumstances.

32. I am advised that Zimbabwe's courts have laid down principles for when such a State monopoly can be said to have violated the right to freedom of expression, including the following questions:

- a. Is the legislative objective sufficiently important to justify hindering the right of every person to receive and impart ideas and information without interference?
- b. Is there a rational connection between the retention of the State's monopoly and its stated objective?
- c. Is the State monopoly over voter education the least drastic means by which the State's objectives may be accomplished?

33. Considering the above, I aver that the legislative objective of providing adequate, accurate and unbiased voter education is an extremely important one and an objective that is wholeheartedly shared with the Applicant. However, I aver that there is no rational connection between the stated objective and the retention of the State monopoly. On the contrary, the State monopoly actually hinders the objective of ensuring adequate, accurate and unbiased voter education is provided for all because civil society groups, such as the Applicant, could actually assist the First Respondent in achieving its objective if it weren't obstructed from providing voter education. The report of the African Union's Election Observer Mission made it clear that "unnecessary hindrances" contributed to the acknowledged failure of the First Respondent to provide adequate voter education. Furthermore, there are much less drastic means by which the State's objectives may be accomplished. The means to ensure that voter

education is adequate, accurate and unbiased already exist in other parts of the legislation, such as section 40E which creates a mechanism for penalizing anyone who provides misleading voter education.

34. The impugned provisions also constitute a prior restraint since the limitation of freedom of expression is placed on the Applicant, and any other member of the public who wishes to conduct voter education, before the right is even exercised. In particular, sections 40C(1)(g) and 40C(2) of the Electoral Act create an approval process which must be complied with *before* the Applicant, or other members of the public, can exercise its right to freedom of expression in relation to voter education. Furthermore, the strict funding requirements created by sections 40C(1)(h) and 40F must also be complied with *before* the Applicant, or anyone else, can exercise their rights. Clearly, these provisions create a prior restraint on freedom of expression.
35. I am advised by my legal practitioners, whose advice I embrace, that there is a strong default position in law against prior restraints on publications and that it is often regarded as the most serious and least tolerable infringement of freedom of expression. Prior restraint can only be justified only in the most exceptional of circumstances such as times of war, the publication of obscenity, and national security. Furthermore, I am advised that in other jurisdictions, even where there are seemingly exceptional circumstances (such as times of war or publication of obscenity or national security issues) the courts have often still refused to allow prior restraint, precisely because it is such a drastic and extreme measure. In the present instance the material in question is not obscene nor does it have anything to do with national security, and this is not a time of war. The information is in fact essential to the public's exercise of their democratic rights. I

contend that no such exceptional circumstances exist to justify the drastic use of prior restraint.

36. The provisions of section 40C(2) of the Electoral Act create an onerous and time-consuming approval process. The Applicant cannot comply with the requirement that all voter education materials must be furnished in advance. The Applicant wishes to conduct voter education in such a way that is responsive to current events. This makes the material highly time-sensitive and therefore the Applicant cannot wait for approval from the First Respondent for all of its material on electoral issues. Such an approach is highly impractical and an affront to the freedom of speech. Furthermore, the requirements to furnish the First Respondent with names, addresses, citizenship and residence status and qualifications prior to conducting voter education is unnecessarily burdensome and further contributes to the prior restraint on the freedom of expression. The requirement to disclose the manner and sources of funding its funding prior to conducting voter education is another burdensome and invasive requirement, which also serves to prop up sections 40C(1)(h) and 40F of the Electoral Act, which I contend are also unconstitutional and virtually impossible to comply with.
37. Furthermore, I contend that the fact that failure to comply with the impugned provisions carries the risk of criminal prosecution and imprisonment of up to six (6) months in terms of section 40C(3) is a very drastic sanction which further adds to the violation of the right to freedom of expression. The Applicant, who cannot comply with the strict and time-consuming approval process, runs the risk of criminal prosecution simply for exercising its right to freedom of expression.

38. The framing of the right to freedom of expression in section 61 of the Constitution makes it clear that the right includes both giving and receiving of information. Therefore, by prohibiting the Applicant from providing voter education not only violates the Applicant's rights to impart information but also violates the general public's right to receive information. The public is entitled to receive information from whomever they wish to receive it.

39. I am advised that the Constitution prescribes specific limits on what types of speech are protected by the right to freedom of expression, as found in sub-section 5 of section 61, which states:

Freedom of expression and freedom of the media exclude—

- a) *incitement to violence;*
- b) *advocacy of hatred or hate speech;*
- c) *malicious injury to a person's reputation or dignity; or*
- d) *malicious or unwarranted breach of a person's right to privacy.*

40. I contend that the provision of voter education by the Applicant cannot, by any stretch of the imagination, be classified as any of the types of speech outlined above which are not protected by the right to freedom of expression. Therefore, the Applicant's provision of voter education must be presumed to be protected speech. I am advised that only in exceptional circumstances should any additional limitations be placed upon the right

to freedom of expression, which is a foundational right for the exercise of other rights.

B. RIGHT TO EQUALITY AND NON-DISCRIMINATION

41. I submit that the impugned provisions directly and by implication infringes on the Applicant's right to equality and non-discrimination as it is provided for in section 56 (1) of the Constitution. The section provides that:

All persons are equal before the law and have the right to equal protection and benefit of the law.

42. I say the foregoing because section 40C(1) of the Electoral Act creates a class of persons who may conduct voter registration with no restrictions besides that the information must be accurate and unbiased, and another class of persons who must overcome enormous hurdles to be allowed to conduct voter education, such that it is completely prohibitive, and furthermore are faced with harsh criminal sanctions for providing voter education, even if it is done in the exact same manner as the class of protected persons.
43. The class of persons who may conduct voter education with minimal restrictions include the First Respondent, person's permitted by the First Respondent to do so, and political parties. I am advised by my legal practitioners, which advice I embrace, that this discriminates against the Applicant and others in its position who are not affiliated to any political party. "Political affiliation" is a listed ground included in section 56(3) of the Constitution of Zimbabwe upon which the constitution prohibits unfair discrimination. Discrimination on the ground of "political affiliation" must surely include discrimination against those who are not

affiliated to a political party or who are affiliated to an independent political candidate who is not a member of a political party. The Applicant is not affiliated to any political party and on this basis is being discriminated against. Since the discrimination against the Applicant is a listed ground in section 56(3) of the Constitution, I am advised that it must be presumed to be unfair discrimination unless it is established that such discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

44. The Court will note that the impugned provisions of the Act have the effect contemplated in section 56(4)(a) of the Constitution in that the impugned provisions subject the Applicant to a condition and restriction which other people are not subject to. Sections 40C(1)(g) and 40C(2) place a condition on the Applicant that it must gain prior approval of the First Respondent to conduct voter education while political parties and the First Respondent itself may conduct voter education without seeking such approval. Section 40C(1)(h) and 40F subject the Applicant to a further condition and restriction with regard to the sources of funding which is not imposed on the First Respondent. Furthermore, the impugned provisions also have the effect contemplated by section 56(4)(b) in that they accord a privilege to other people to which the Applicant is not accorded. The First Respondent and political parties are accorded the ability to provide voter education unimpeded by restrictive conditions, without first seeking approval to do so and with the ability obtain funding from foreign sources. The Applicants are not accorded those privileges.

C. POLITICAL RIGHTS

45. It is further submitted that the impugned provisions violate the Applicant's and the general public's political rights enshrined in section 67 of the Constitution of Zimbabwe. Section 67(1) of the Constitution provides as follows:

"Every Zimbabwean citizen has the right—

(a) to free, fair and regular elections for any elective public office established in terms of this Constitution or any other law; and

(b) to make political choices freely."

46. As will appear more fully in the Applicant's Heads of Argument, the right to a free and fair election—a right held by and exercised collectively by all citizens of Zimbabwe—entails the right of all prospective voters to have access to accurate, comprehensible and adequate information upon which to make electoral choices and information on information about where, when, how and why to register and vote. This right can only be respected, protected, promoted and fulfilled if undue obstacles to the provision of accurate and unbiased voter education are removed from the electoral environment. The impugned provisions place unnecessary and unjustifiable hurdles in the way of people seeking to exercise that right.

47. Section 67 of the Constitution of Zimbabwe goes on to state at sub-section (2)(a) that *"... every Zimbabwean has the right ... to participate in peaceful political activity"* and at sub-section (3)(a) that everyone Zimbabwean over 18 years of age as the right to *"vote in all elections and referendums"*. These rights entail the right to impart and receive information that will assist citizens from exercising these rights in an informed manner. Placing restrictions

such as those included in the impugned provisions infringes not only the rights of those who wish to impart the voter education to citizens but also the rights of those citizens to receive such information and act accordingly.

48. I also request that the court take judicial notice of the fact that not all candidates contesting for political office belong to political parties. This means that an independent candidate contesting in the same constituency are subjected to different conditions as candidates which are affiliated to political parties. Those affiliated to political parties can conduct voter education without having to comply with the onerous restrictions imposed by the impugned provisions, while independent candidates will have to comply with them. This is patently discriminatory and negatively impacts on the independent candidate's right to enjoy all constitutionally protected political rights.
49. I therefore submit that the impugned provisions of the Electoral Act are *ultra vires* the Applicant's and the general public's political rights enshrined in section 67 of the Constitution in so far as they place an unjustifiable limitation on the right to impart information that will assist others in making informed and free political choices and the right to receive such information.

D. ARE THE LIMITATIONS JUSTIFIABLE?

50. I am advised that section 86 of the Constitution of Zimbabwe provides that any fundamental rights protected by the constitution may only be limited in so far as that limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. I contend that the limitations placed on the right to freedom of

expression and the right to equality fall far short of the test for constitutionally permissible limitations.

51. The contention that the limitations are not necessary is supported by the fact that other countries within the region do not impose such drastic restrictions on voter education. A sampling of comparative legislation from across southern Africa demonstrates that South Africa, Zambia, Malawi and Namibia do not impose such drastic restrictions on voter education. The electoral legislation in South Africa and Namibia say that any person “may” apply for accreditation, but there is nothing in the legislation which says they must do so in order to provide voter education and there are no penalties in either of the electoral laws. Furthermore, the accreditation process focuses on the competency of persons to provide impartial voter education, and does not require prior approval of materials nor restrict sources of funding. Zambia goes even further by creating a right for anyone to provide impartial and independent voter education and without interference. All these countries have had credible elections under their respective electoral laws, demonstrating that drastic measures restricting voter education are not necessary in an open and democratic society. On the contrary, it seems the opposite is true: less restrictive voter education laws promote free and fair elections. That Zimbabwe is in fact going against the grain is clear from the report of the African Union Election Observation Mission on the July 2013 election.

51.1 Rather than seeking to retain these unnecessary and unjustifiable provisions, Zimbabwe’s priority should be to align its electoral to the Organisation of African Unity’s Declaration on the Principles Governing Democratic Elections in Africa which at III(e) states:

We commit our Governments to: ... e) promote civil and voters' education on the democratic principles and values in close cooperation with the civil society groups and other relevant stakeholders;

51.2 Additionally, Zimbabwe should be looking to align its electoral laws with the Southern African Development Community's Principles and Guidelines Governing Democratic Elections which states at Article 11.4.1 that:

Member States agree that civic and voter education are indispensable to democratic consolidation, as they allow the electorate to make informed choices on who decides on their governance.

52. I am advised that one of the factors outlined in section 86, is the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose. There does not seem to be any rational connection between the limitations imposed by the impugned provisions and their stated purpose of ensuring the provision of adequate, accurate and unbiased voter education. As outlined in paragraphs 10 to 17 above, the African Union Election Observation Mission (AUEOM) found the First Respondent's provision of voter education ahead of the previous election inadequate due to lack of time and resources to reach sufficient people and recommended that the law be changed in order to make it easier for civil society organisations to provide voter education without "unnecessary hindrances." The AUEOM specifically cited the onerous approval process created by section 40C(1)(g) and 40C(2) as one of reasons

why voter education was inadequate. Furthermore, the provisions of section 40C(1)(h) and section 40F of the Electoral Act which create a bottleneck and obstacle to the Applicant and other prospective providers of voter education making it extremely difficult for them to access funding also serve to hinder the objective of providing adequate, accurate and unbiased voter education. There is no rational connection between the source of funding for voter education and the adequacy, accuracy and bias of the voter education. The fact that the First Respondent is from that requirement further demonstrate its irrationality.

53. I am advised that the Constitution further requires consideration of whether there are less restrictive means of achieving the purpose of the limitation. Not only are there many hypothetical less restrictive means of achieving the objective, there are even existing provisions in the Electoral Act which are less restrictive but which serve the identical purpose of seeking to ensure adequate, accurate and unbiased voter education. For example, section 40E provides a process by which the First Respondent may monitor programmes of voter education conducted by the Applicant, or any other person, and if it considers that any programme is false or biased the First Respondent may direct the Applicant to stop providing the voter education or to make such alterations so as to render it accurate and fair. Any person who fails to comply will be guilty of an offence and liable to be imprisoned for up to a year. The provisions of section 40E are still more restrictive than most provisions in the rest of the region, but they are less drastic than the impugned provisions and are more than sufficient to accomplish the State's objectives. Therefore, section 40E of the Electoral Act renders the drastic limitations created by the requirements of prior approval under section 40C(1)(g) and 40C(2) and the funding restrictions

in terms of section 40C(1)(h) and section 40F of the Electoral Act totally unnecessary and counter-productive.

APPROPRIATE ORDER

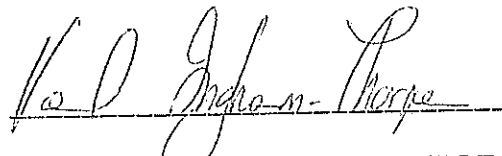
54. It follows suit that provisions that unjustifiably seek to limit rights enshrined in the Constitution should be declared to be the nullity that they are. I submit that the inconsistency of the aforementioned sections is not one that can be cured through rules of interpretation and use presumptions as the intention of the Law Maker to unlawfully take away the right is clear.

55. I therefore pray that the sections be declared to be *ultra vires* the Applicant's rights and struck out of the Electoral Act.

WHEREFORE, I pray for an order in terms of the draft annexed hereto.

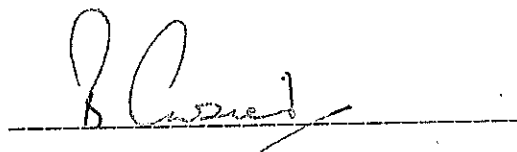
Thus signed and sworn to at HARARE on this the 15th day of DECEMBER 2017

Signed



VALERIE ANNE INGHAM-THORPE

Before me



COMMISSIONER OF OATHS

JUSTICE OF THE PEACE

It is hereby ordered that:

1. It be and is hereby declared that section 40C(1)(g) and (h), section 40C(2), and section 40F of the Electoral Act [Chapter 2:13] are inconsistent with section 56, 61 and 67 of the Constitution of Zimbabwe and are hereby struck down.
2. Respondents to bear, jointly and severally, Applicant's costs.

BY THE COURT/ REGISTRAR