IN THE HIGH COURT OF ZIMBABWE
HELD AT HARARE

CASE NO: HC 11749/17

In the matter between:

VERITAS — APPLICANT

and

ZIMBABWE ELECTORAL COMMISSION — 1ST RESPONDENT

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

THE ATTORNEY GENERAL OF ZIMBABWE — 3RD RESPONDENT

1ST RESPONDENT'S NOTICE OF OPPOSITION

BE PLEASED TO TAKE NOTICE THAT the 1st Respondent hereby intends to oppose the Application on the grounds set out in the Opposing Affidavit.

FURTHER TAKE NOTICE THAT the 1st Respondent's address for service is as specified below.

The Application was served on the 1st Respondent on the 27th December 2017.

DATED at **HARARE** this 24th day of **JANUARY 2018**

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MESSRS NYIKA, KANENGONI & PARTNERS
1st Respondent's Legal Practitioners
3rd Floor, North Wing
ZIMDEF House
Off Mother Patrick Avenue
Rotten Row
HARARE (CN/TMK/SM)

TO: THE REGISTRAR
High Court of Zimbabwe
HARARE

AND TO: **MESDAMES MTETWA & NYAMBIRAI**
Applicant's Legal Practitioners
2 Meredith Drive, Eastlea
HARARE (Mrs Mtetwa/DJC/tz)

AND TO: **THE MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS**
2nd Respondent
Cnr 4th Street/ Samora Machel Avenue
6th Floor, Block C
HARARE

AND TO: **THE ATTORNEY GENERAL**
3rd Respondent's Legal Practitioners
New Government Complex
Cnr 4th Street/ Samora Machel Avenue
HARARE

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REGISTRAR OF THE HIGH COURT OF ZIMBABWE CIVIL DIVISION 24 JAN 2018 P.O. BOX CY 275, CAUSEWAY HARARE

1ST RESPONDENT'S NOTICE OF OPPOSITION

NYIKA KANENGONI & PARTNERS
Legal Practitioners
3rd Floor ZIMDEF House
Off Mother Patrick Ave-Rotten Row
HARARE

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

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In the matter between:

VERITAS APPLICANT

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ZIMBABWE ELECTORAL COMMISSION 1ST RESPONDENT

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MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS 2ND RESPONDENT

AND

THE ATTORNEY GENERAL OF ZIMBABWE 3RD RESPONDENT

1ST RESPONDENT'S OPPOSING AFFIDAVIT

I, EMMANUEL MAGADE, in my capacity as the 1st respondent's deputy chairperson and presently its acting chairperson, by due authority of the 1st respondent hereby make oath and state that the facts deposed to hereunder are within my personal knowledge and belief and are true and correct.

I have read and understood the applicant's founding papers and wish to respond thereto as follows:

IN LIMINE

1. APPLICANT'S LEGAL STATUS

1.1. The applicant is cited herein as "VERITAS". It is thereafter described in the founding affidavit deposed to on its behalf by Valerie Anne Ingham-Thorpe, (paragraph 1 thereof), as *"a trust incorporated in Zimbabwe by a deed of trust and registered with the Deeds Registry as Firinne Trust but trading as Veritas".*

1.2. Valerie Anne Ingham-Thorpe states her authority to depose to the founding affidavit on behalf of the applicant as deriving from her capacity as its Director. She does not depose to the affidavit as a trustee of the applicant. The relevance of this position will become clearer herein below.

1.3. In terms of our law, a trust is not recognised as a juristic *persona* vested with the requisite legal capacity to sue and be sued in its own name. A trust, by law, is merely a legal arrangement/relationship by which a fiduciary relationship is created between trustees and beneficiaries of a trust and the registration of a deed of trust is not an act creating a legal entity but only a formal establishment of this legal arrangement/ relationship and in particular the terms regulating that arrangement/ relationship.

1.4. The power to litigate with respect to the affairs of the trust is at law vested in its trustees. In the present matter none of the applicant's trustees appear as parties to the litigation and even the deponent to the founding affidavit is not a trustee in the applicant and/or does not purport to depose to the founding affidavit as a trustee of the applicant.

1.5. The citation of the applicant, in the circumstances, is, therefore, a nullity such that there is no applicant before this Honourable Court. That disposes of the entire purported application without the need to deal with its merits.

2. VALIDITY OF THE APPLICANT'S FOUNDING AFFIDAVIT

2.1. Following from my depositions under paragraph 1 hereof, the affidavit by Valerie Anne Ingham-Thorpe cannot be valid for purposes of this or any other litigation.

2.2. Valerie Anne Ingham-Thorpe, as I have already averred, finds her authority to depose to the "founding affidavit" from her position as a Director in the applicant, (see the preamble of her affidavit where she makes a deposition to the effect that she is *"...an adult female and Director of the Applicant". I am duly authorised to depose to this affidavit on behalf of the Applicant.*).

2.3. She treats her position in this respect at par with that of such a functionary in any other legally recognised corporate body and believes that, *ex officio*, she has the authority to make the deposition she makes on behalf of the applicant.

2.4. Having already averred that the applicant is not a recognised juristic *persona*, it follows that Valerie Anne Ingham-Thorpe's claim to authority by virtue of her position in the applicant is also not valid. Not being a trustee herself and in any event not having made the deposition as a trustee, she can only derive her authority from the trustees of the applicant who must in turn be cited as parties in the litigation.

2.5. Once Valerie Anne Ingham-Thorpe's authority to depose to the founding affidavit is found to be non-existent, a finding which is inevitable in the circumstances, her affidavit in turn must be found to be a nullity in as far as it

purports to advance the cause of and derive authority from a non-entity, (not in the derisive sense), such as the applicant.

2.6. There is, therefore, no founding affidavit validly deposed to and filed in this matter.

2.7. As all other documents in motion proceedings hinge upon the founding affidavit, where such affidavit is found to be a nullity all other papers attached to such affidavit cannot, on their own, establish a cause of action for this Honourable Court to properly try.

3. ABSENCE OF A CAUSE OF ACTION

3.1. Arising from the fact that the applicant is not a legal *persona* capable of suing and being sued before this Honourable Court is the equally important point that the applicant, as cited, cannot possess any rights in terms of Chapter 4 of the Constitution of Zimbabwe.

3.2. In terms of s45 (3) of the Constitution of Zimbabwe, which falls under the Declaration of Rights, *"Juristic persons as well as natural persons are entitled to the rights and freedoms set out in this Chapter to the extent that those rights and freedoms can appropriately be extended to them".*

3.3. The Constitution thus endows the rights enshrined in Chapter 4 thereof upon legally recognised juristic persons and upon natural persons. There is no

other category of persons upon which such rights are bestowed and indeed at law no category of persons exists outside the two stated in the Constitution.

3.4. It follows therefore; that for the applicant to be endowed with the rights enshrined in Chapter 4 of the Constitution it must pass the test of being a juristic person. It is not. It thus does not enjoy the various rights that are enshrined in Chapter 4 of the Constitution which include the rights provided under sections 56, 61, and 67 of the constitution.

3.5. The applicant, under paragraph 6 of its founding affidavit, states its cause of action thus; *"The Applicant seeks an order of this Honourable Court declaring that sections 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..."*

3.6. The applicant thus derives its cause of action from the notion that it is vested with the rights enshrined in Chapter 4 of the Constitution. In line with my deposition hereinabove, that is clearly not a correct legal position. By that token the applicant's cause of action is, at best, defective. In fact the applicant has no cause of action in this matter and conceptually, by not being a juristic *persona* or any other recognised legal *persona,* the very notion of possessing/ being vested with a cause of action cannot be discussed in reference to the applicant.

3.7. The perspective that the applicant takes, in addition to its main cause of action, that the application is brought in the public interest does not create a cause of action vesting in the applicant either.

3.8. In terms of s85 (1) (d) of the Constitution of Zimbabwe, *"...any person acting in the public interest is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed..."*

3.9. To pursue litigation in the public interest in terms of s85 (1) (d), one must be a *person* as that term is understood in our law. The applicant is not a *person* in terms of our law. The applicant can therefore, not pursue any litigation under the auspices of s85 (1) (d) of the Constitution. There thus remains no cause of action in this matter.

4. FORM OF APPLICATION

4.1. In terms of the Rules of this Honourable Court, civil applications made in the High Court are either made in Form 29 or Form 29B.

4.2. Form 29 and Form 29B respectively afford a respondent in an application notice of the rights and obligations that such respondent has viz. filing a response to the application and/or the basis of the said application.

4.3. The Rules of Court prescribe the use of Forms 29 and 29B in peremptory terms thus enjoining that failure to use either of the two forms in instituting an application before this Honourable Court renders the application so made fatally defective.

4.4. The "application" made in the present matter appears at page 1 of the applicant's founding papers. It is not made in either of the two prescribed forms. It takes on a form that is not prescribed in terms of the Rules of Court.

4.5. The nature of this defect in the applicant's founding papers renders its entire application null and void *ab initio*. As our law does not countenance the amendment of a nullity, which by definition has no recognised legal existence, the discretion of this Honourable Court cannot be invoked in considering and affording the right to amend such a nullity. The effect being that the applicant's purported application is fatally and incurably defective. There is no application before the Court.

MERITS

5. Should the Court find that the points raised *in limine* herein above are not sustainable and thus embark on a consideration of the merits of this matter, the 1st respondent wishes to put across certain fundamental aspects that underpin the impugned provisions of the Electoral Act justifying their existence. In the final analysis however,

the 1st respondent will abide the decision of the Court with respect to the merits of the matter.

6. Ad Para 1-4

No issues arise apart from those raised *in limine* viz. the legal status of the applicant. The 1st respondent's address for service is c/o Messrs Nyika, Kanengoni & Partners of 3rd Flr, ZIMDEF House, off Mother Patrick Road, Rotten Row, Harare.

7. Ad Para 5-8

No issues save to reiterate the points taken *in limine* viz. the applicant's legal incapacity to be vested with rights in terms of Chapter 4 of the Constitution of Zimbabwe and the consequent inability of the applicant to be the repository of any cause of action at law including the cause that it purports to pursue in the present matter. This in turn divests it of *locus standi.*

8. Ad Para 9- 21

8.1. No issues arise regarding the factual perspectives captured from the two reports that are relied upon by the applicant namely that of the African Union Election Observer Mission (AUEOM) and that of the Parliamentary Portfolio Committee on Justice, Legal and Parliamentary Affairs.

8.2. The issues that require further elucidation relate to the applicant's averment that the provisions it has impugned through its application are in fact unconstitutional and are beyond what is reasonably necessary in a democratic society to achieve their stated ends. These are more conveniently dealt with in conjunction with the applicant's specific averments viz. each of the impugned provisions. This appears under the next paragraph.

9. Ad Para 22-53

9.1. In response it is important to identify the constitutional provisions that underpin voter education in Zimbabwe. In terms of s239 (h) of the Constitution of Zimbabwe, the Zimbabwe Electoral Commission is vested with the function/responsibility *"to conduct and supervise voter education"*.

9.2. The creation of that function by the Constitution is unequivocal in its vesting of all power and, by extension, all discretion, exclusively in the 1st respondent viz. questions of voter education.

9.3. The constitution in turn provides, with respect to the general functioning of the 1st respondent, that it is not subject to the direction or control of anyone and must exercise those functions without fear, favour or prejudice, (see s235(1) of the Constitution).

9.4. Section 235 (3) of the Constitution then goes further to provide that no person may interfere with the functioning of the independent commissions, of which the 1st respondent is one.

9.5. Going by the principle that no one constitutional provision can be deemed to override or take supremacy over another, (save where this is clearly legislated), one must consider the constitutional provisions cited herein above to be at par with those cited in the applicant's founding papers as having been violated by the impugned provisions of the Electoral Act.

9.6. The consequence of this is that when the constitutionality of the impugned provisions of the Electoral Act is considered, it must be considered in the light not only of those provisions that are cited by the applicant in its founding papers but also in the light of the constitutional provisions that clearly establish the exclusive function of the 1st respondent to conduct and supervise all voter education cited herein above. It is from this analysis that one can then determine the reasonableness or unreasonableness of the impugned provisions.

9.7. A further function/ obligation of the 1st respondent must be noted at this point. It appears in s239(a) of the Constitution and enjoins that the 1st respondent must ensure that all elections and referendums in Zimbabwe are conducted efficiently, freely, fairly, transparently and in accordance with the law. The responsibility, and therefore the consequences, attaching to this function all fall upon the 1st respondent. This naturally includes questions related to the conduct of voter education and any issues affecting the efficiency, freeness, fairness and transparency of any such voter education.

9.8. How then is the 1st respondent meant to practically exercise its supervisory role in voter education matters such as to ensure that the principles of efficient, free, fair and transparent elections and referendums are respected and maintained? This is where the necessity and importance of the impugned provisions of the Electoral Act arise.

9.9. As regards sections 40C(1)(g) and 40C(2) of the Electoral Act they provide the 1st respondent with a means to evaluate any intended voter education materials generated by a third party to ensure that the principles underpinning any election i.e. efficiency, freeness, fairness and transparency are not violated by the proposed voter education materials. It cannot be gainsaid that preventing harmful or biased misinformation from entering the public sphere is infinitely preferable to attempting to remedy a situation where such harmful information has already been disseminated in the public sphere. The conduct of democratic elections being reliant on an informed populace, the 1st respondent has a constitutional duty to ensure that whatever information the public receives under any program of voter education must be free of bias or misinformation.

9.10. This is the mischief that is addressed by sections 40C(1)(g) and 40C(2). These goals are in line with the 1st respondent's constitutional mandate and are, to that extent, not unreasonable restrictions to free expression.

9.11. The applicant does not challenge the way the 1st respondent has exercised its discretion under the impugned sections but instead challenges the very

existence of such a discretion. This, with respect, is not proper since the 1st respondent's exclusive charge over voter education emanates not from subsidiary legislation but from the Constitution itself.

9.12. Further, I wish to point out that sections 40C(1)(g) and 40C(2) do not place time restrictions as to when a party wishing to embark on voter education can present its materials to the 1st respondent for approval. The bulk of any party's proposed materials can be presented to the 1st respondent and vetted at any time in terms of the provisions of the Electoral Act thus negating the notion that there will always be a limited time in which to have such materials vetted. The limitation of time would in truth arise where the said third party has waited until the last moment to present its materials for vetting by the 1st respondent.

9.13. In practice therefore, the applicant was at liberty to present its proposed materials for voter education for the 2018 general election a day after the conclusion of the last general election if it so wished. Nothing in the Electoral Act prohibits this and as such, should there be need for adjustments in those materials, these could be done well in advance of the 2018 general election. No real-world examples have been presented by the applicant of any issues that may arise at such short notice as to make the impugned provisions of the Electoral Act too onerous to meet the test of constitutionality.

9.14. Further still, the impugned provisions do not create a State monopoly in the voter education process for the reasons set out above and additionally for the simple reason that the 1st respondent is independent in the conduct of its functions.

9.15. The State cannot direct the 1st respondent in the conduct of its functions. It must be remembered that the powers of the 1st respondent viz. voter education are created by the Constitution and as such if any monopoly by the 1st respondent is to be alleged one would have to accept that it appears to be a constitutionally sanctioned one.

9.16. As regards s40C(1)(h) and s40F, the principles of efficiency, freeness, fairness and transparency of elections necessitate the existence of those statutory provisions, particularly that of transparency.

9.17. Since the 2016 presidential election in the United States of America, there has been a protracted debate and ongoing investigation into allegations of interference with the American electoral process by a foreign government and/or foreign agents. So notorious is this ongoing debacle that this Honourable Court can take judicial notice of it. The reason I raise it is to simply provide a practical example of the issues that are sought to be prevented by provisions such as s40C(1)(h) and s40F.

9.18. The electoral process in Zimbabwe must produce a result that reflects the will of the Zimbabwean people in whatever context they may have been voting

without any undue influence from any foreign forces. It follows therefore, that the 1st respondent's ability to vet any proposed voter education materials coupled with the restriction on the manner in which foreign contributions or donations towards voter education are received, works as a means of ensuring, as best as possible, that the possibility of any such undue influence is limited.

9.19. My averments in this respect are not meant to cast any aspersions on the applicant or how it sources its funds and indeed the import of its voter education programs. They are simply meant to illustrate how every individual that wishes to participate in voter education must be treated regardless of their stated or perceived intentions. It is a universal standard applied to all and by which the 1st respondent can ensure that a proper standard in voter education is achieved and maintained as to properly inform the public and by so doing ensure the efficiency, freeness, fairness and transparency of any election or referendum it conducts.

9.20. It is therefore, very reasonable in a democratic society that any foreign funds that are channelled towards the electoral process must be so channelled transparently.

9.21. I must comment briefly at this stage on the seeming exception with respect to political parties that has been highlighted by the applicant in its founding papers. At first glance this may seem like an allowance by the Electoral Act, with respect to political parties, to receive donations and contributions

towards voter education that the applicant is not entitled to receive. It must however, be understood that apart from the Electoral Act, the activities of political parties viz. their financing, are also regulated by the Political Parties (Finance) Act [Cap 2:11], which in turn places restrictions on foreign contributions and donations for political parties. Whatever voter education political parties will conduct in terms of the Electoral Act will therefore, not be funded by any foreign donations or contributions.

9.22. Further when one considers the provisions of s155(2)(c) and (d) of the Constitution, the constitutional imperative highlighted therein is to ensure that political parties and candidates can fully participate in any electoral process. This in turn underpins the designation of political parties as agents for voter education without the need to seek permission from the 1st respondent, (there does however seem to be an omission in the Electoral Act viz. independent candidates). This does not however, imply that voter education conducted by political parties will not be subject to the standards of accuracy and adequacy applicable to other voter education programs.

9.23. Also of note is the fact that the Electoral Act does not outlaw foreign donations for purposes of voter education to persons other than the 1st respondent. It merely mandates that such donations must be done through the 1st respondent thus allowing it to properly scrutinise the source of the funds and if satisfied to distribute those funds to the various participants in the voter education process. This in turn not only ensures transparency but also achieves the standard of fairness required in any electoral process. It also

indirectly dissuades any foreign donors that may have insincere motives in making their donations towards voter education from doing so and thus increases the integrity of the electoral process by eliminating undue influences on the electorate.

9.24. Further logic underpinning the restrictions on foreign donations in voter education is the very nature of our electoral system which is a constituency based system by which the electorate votes for candidates in their constituencies.

9.25. The Constitutional Court of Zimbabwe has previously made a pronouncement to the effect that once a person has become dissociated with their constituency by being away for a protracted period, (the primary example being persons that are out of the country for various reasons), that person had lost sufficient contact with the said constituency to be able to make an informed and meaningful choice with respect to elections therein.

9.26. By extension of that logic it would appear, in my humble opinion, that the definition of *"foreign contribution or donation"*, in the Electoral Act follows the same lines by making domicile one of the key considerations in determining

whether a contribution or donation is to be viewed as one that is foreign or local.

9.27. The applicant makes the averment that it is being unfairly discriminated against. This assertion is, with respect difficult to appreciate when it is applied to the 1st respondent. The 1st respondent has the function of conducting and supervising voter education in terms of the Constitution. Any other party that may be permitted in terms of the Electoral Act to conduct voter education will always have to accept the overriding constitutional mandate of the 1st respondent viz. voter education. How the discrimination then arises in this scenario is not fully explained more so in view of my averments viz. the question of an alleged State monopoly on voter education.

10. Ad Para 54&55

As I have averred herein above, the 1st respondent will abide the decision of the court on the merits of this matter but merely seeks to bring to the attention on the court the various observations made in the preceding paragraph to assist the court in reaching its final determination in this matter.

COSTS

11. In the event that this matter is decided on any one or more of the points taken *in limine* by the 1st respondent, costs are sought against the applicant on the scale as between attorney and client. The reason for such an order for costs being that the points taken *in limine* enjoin basic aspects of civil procedure and of our common law that have found much expression over the years by the courts as to become trite positions of law which the applicant, being legally represented by a reputable firm of lawyers, should have been aware of in making this application. The 1st respondent would, in such an eventuality, have been put to unnecessary expense in expounding issues that are trite and should not have plagued this application had due diligence been exercised in its preparation.

12. If, however, the matter is determined on the merits either for or against the applicant, then the 1st respondent would seek no order for costs against the applicant and would pray that no order for costs be made against it considering the stance it has adopted viz. the merits of the matter.

THUS DONE AND SWORN TO AT HARARE THIS 23rd DAY OF JANUARY 2018.

BY ME:

EMMANUEL MAGADE

BEFORE ME:

COMMISSIONER OF OATHS

ALLEN MOYO LLBS (Hons)
Legal Practitioner
Notary Public, Conveyancer
& Commisssioner Of Oaths