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

HEADS OF ARGUMENT ON BEHALF OF THE APPLICANT

1606
KAWADZA

BACKGROUND

1. The Applicant is a Zimbabwean civil society organisation that wishes to conduct voter education ahead of the 2018 election. However, it is restricted from doing so due to provisions of the Electoral Act that place onerous obstacles in the way of certain persons conducting voter education which the Applicant cannot comply with. The same provisions also restrict churches, independent candidates, and private individuals who would like to conduct voter education (even if they have the competency to do so). The provisions favour the First Respondent and political parties who are

able to conduct voter education without following the restrictive procedures and requirements.

2. Zimbabwe's restrictive voter education laws have been criticized by both an African Union Election Observation Mission (AUEOM) as well as the Parliamentary Portfolio Committee on Justice, Legal and Parliamentary Affairs. In their recommendations, which are outlined in greater detail in the Founding Affidavit and the relevant Annexures, both the AUEOM and the Parliamentary Portfolio Committee called for the reform of the electoral law to remove these unnecessary hindrances to civil society organisations conducting voter education. However, Parliament has failed to make the amendments.

3. Therefore, the Applicant wrote to the Zimbabwe Electoral Commission (ZEC and 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 and urging the First Respondent to make a public statement that all interested organisation will be allowed to conduct voter education. The First Respondent responded that it was not able to grant the Applicant's request for a public statement but recommended that, if Applicant was of the conviction that the law was unconstitutional, then due process should be followed. Therefore, in response to the recommendation of the First Respondent, the Applicant brought this application before this court to seek a declaration on the correct position at law.

ISSUES FOR DETERMINATION IN THIS APPLICATION

4. The provisions in question are sections 40C(1)(g), 40C(1)(h), 40C(2) and 40F of the **Electoral Act** [Chapter 2.13] which in this application are referred to collectively as 'the impugned provisions'. The provisions in question are quoted in full in the Founding Affidavit and therefore will not be repeated here. But for ease of reference, they may be separated into two groups: firstly, those provisions that create an approval process which the Applicant and others in its position must follow before they can conduct voter education (i.e. sections 40C(1)(g) and 40C(2)) and, secondly,

those provisions that place restrictions on the source of funding the Applicant and others in its position use to conduct voter education (i.e. sections 40C(1)(h) and 40F). But in essence, all of the impugned provisions have the same effect: they place such onerous obstacles in the path of the Applicant that it is unable to exercise its right to freedom of expression through conducting voter education, without opening itself and its employees to the possibility of criminal prosecution.

5. The primary issue before the court is whether the impugned provisions are unconstitutional. This issue may be broken down into several sub-issues:

   a. Do the impugned provisions violate the right to freedom of expression enshrined in section 61 of the Constitution? It is submitted that section 61 is violated because:

      i. Voter education is protected speech and the impugned provisions purpose is to restrict that expressive activity

      ii. The impugned provisions constitute an unlawful prior restraint on freedom of expression

      iii. The impugned provisions create an unlawful state monopoly

   b. Do the impugned provisions violate the right to equality and non-discrimination enshrined in section 56 of the Constitution?

   c. Do the impugned provisions violate the political rights enshrined in section 67 of the Constitution?

   d. Is the limitation of rights justifiable in terms of section 86 of the Constitution?

6. Each of the above issues will be dealt with separately in these heads of argument outlining the case law from Zimbabwe and, where applicable, other jurisdictions.

ON THE POINTS *IN LIMINE*

7. The First Respondent raised several points *in limine* which will be addressed before turning to the merits of the matter. It is extremely unfortunate that the First Respondent is seeking to place procedural obstacles designed to deprive this Honourable Court of its role in constitutional protection. One would expect the First Respondent to welcome the challenge as it would wish to ensure that it complies with its constitutional obligations. It is clearly in the interests of the First Respondent and indeed all interested parties (including the general public) that these pertinent constitutional issues are decided on the merits and are clarified by the Courts ahead of the elections. For that reason, it is submitted that this Honourable Court should dismiss the First Respondent's points *in limine*.

8. The first of the points *in limine* is that a trust is not recognised as a juristic *persona* with the requisite legal capacity to sue and be sued in its own name and therefore the citation of the Applicant is a nullity. It seems that the First Respondent's contention is based upon a mistaken belief that the trustees of a trust must be cited in order to bring matters relating to a trust before a court. Order 2A, Rule 8 of the Rules of this Honourable Court clearly states that:

> *"Subject to this Order, associates may sue and be sued in the name of their association."*

9. Rule 7 of the Rules of this Honourable Court includes a "trustee" in its definition of an "associate" and a "trust" in its definition of an "association". Therefore, Rule 8 clearly applies to the Applicant and empowers the trustees to sue in the name of the trust.

10. This issue has was discussed in *Ignatious Musemwa and Others v Estate Late Mischeck Tapomwa and Others* HH 136/16 in which the Court discussed the import of Rule 8 and decided the issue as follows:

> ***"These rules modify trust law to permit and create locus standi for a trust. The rules give a trust independent locus standi from its trustees. This position has been endorsed in our jurisdiction.***

See Women & Law in Southern Africa Research and Education Trust and Elizabeth Shongwe and Ors (supra). In Gold Mining and Minerals Corporation v Zimbabwe Miners Federation HH 20\06, the court reviewed a number of legal authorities that support the proposition that a trust is merely a legal relationship and is not legally clothed with locus standi to bring proceedings in its own name. The court relied on and agreed on the sentiments of Dr Ribbens (supra) and other authorities for the proposition that a trust is not a legal persona. ***The court also observed that our rules clothe trustees with legal personality, entitling them to sue and be sued in the name of the trust."*** *(emphasis added)*

11. Therefore, it is submitted that the first point *in limine* is meritless as the citation of the Applicant is provided for in the Rules of this Honourable Court.

12. The second point *in limine*–that the Founding Affidavit is invalid–is equally meritless. The First Respondent is misguided in assuming that the deponent to the Founding Affidavit derives her authority *ex officio* as Director of the Applicant. She merely stated that she has been duly authorised to bring the proceedings. The trustees are entitled to delegate their power to institute proceedings and depose to affidavits on behalf of the Applicant to the Director of the Applicant. That fact that she was duly authorised is clearly proven by the Board Resolution attached to the Answering Affidavit marked **Annexure "F".**

13. Lastly, the third point in *limine* is that there is no cause of action because the Applicant cannot possess rights enshrined in Chapter 4 of the Constitution of Zimbabwe since it is not a legal *persona*. It is submitted that this point is baseless for the same reasons outlined above. Rule 8 of the Rules of this Honourable Court creates a legal fiction whereby trustees may sue in the name of the trust. Thus trustees may choose to vindicate their own constitutional rights enshrined in Chapter 4 of the Constitution, or the rights of the public, through the name of the trust. It is not in dispute that the trustees have constitutional rights as they are natural persons.

ON THE MERITS

FIRST SUBMMISSION: THE APPLICATION IS UNOPPOSED AND THEREFORE SHOULD SUCCEED

14. The application is unopposed and on that basis the application it should succeed.

15. Only the Second Respondent (the Minister of Justice, Legal and Parliamentary Affairs) can oppose the application, since the Minister is the charged with the administration of the Electoral Act in terms of section 4 of the same. The Second Respondent has not opposed the application. By failing to respond, the Minister has, by operation of law, admitted that indeed the impugned provisions unjustifiably limit fundamental rights, as averred by the Applicant in its Founding Affidavit. As such, the provisions are inconsistent with the Constitution and therefore invalid.

16. The First Respondent's position is to abide by the decision of the Court and accordingly cannot oppose the application. This is the correct position since it is the Second Respondent who is mandated to administer the Act.

17. Similarly, the Third Respondent has also not opposed the application.

18. On this basis alone, it is submitted that the Court is justified in granting the relief sought by striking down the offending provisions. Nevertheless, for the benefit of the Court, submissions on the merits of the application are outlined in some detail below.

SECOND SUBMISSION: THE IMPUGNED PROVISIONS VIOLATE THE RIGHT TO FREEDOM OF EXPRESSION ENSRINED IN SECTION 61 OF THE CONSTITUTION

19. It is submitted that the impugned provisions violate the right to freedom of expression enshrined in section 61 of the Constitution of Zimbabwe. Section 61 of the Constitution states as follows:

S61. Freedom of expression and freedom of the media

1. Every person has the right to freedom of expression, which includes-

a. freedom to seek, receive and communicate ideas and other information;

b. freedom of artistic expression and scientific research and creativity; and

c. academic freedom.

2. Every person is entitled to freedom of the media, which freedom includes protection of the confidentiality of journalists' sources of information.

3. Broadcasting and other electronic media of communication have freedom of establishment, subject only to State licensing procedures that-

a. are necessary to regulate the airwaves and other forms of signal distribution; and

b. are independent of control by government or by political or commercial interests.

4. All State-owned media of communication must-

a. be free to determine independently the editorial content of their broadcasts or other communications;

b. be impartial; and

c. afford fair opportunity for the presentation of divergent views and dissenting opinions.

5. 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[1]

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[1] The framing of this section is very similar to the South African Constitution's freedom of expression Article 16, which states:

20. While the substantive issue that arises in the present application has not yet been considered by the courts, the case law is consistent with the thrust of the order sought by the Applicant.

21. In *Chavunduka and others v. Minister of Home Affairs and another* [2000] JOL 6540 (ZS) the court found unconstitutional section 50(2)(a) of the Law and Order (Maintenance) Act. In reaching its decision, the Court asked itself two preliminary questions to establish whether the right to freedom of expression had been violated: Firstly, was the publication protected under section 20(1) of the former Constitution, which protected freedom of expression? Secondly, is the purpose of the impugned provision to restrict freedom of expression? The Court answered both questions in the affirmative.[2]

Voter education is protected speech under section 61 of the Constitution

22. There can be no doubt that voter education is protected speech under section 61 of the Constitution. Voter education is essential for the promotion of political participation and to strengthen the capacity of individuals to participate in decision-making processes, namely elections. Voter education is a means to the protection of other rights, most

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"(1) Everyone has the right to freedom of expression, which includes—
(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.
(2) The right in subsection (1) does not extend to—
(a) propaganda for war;
(b) incitement of imminent violence; and
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

The Constitutional Court stated that "Section 16(2) provides an exclusionary list of the varieties of expression not protected by the right. Section 16(1), on the other hand, is merely illustrative of the kinds of protected expression and is non-exhaustive in character. It necessarily follows that whatever expression does not fall under section 16(2) must do so under the purview of section 16(1). Put differently, any expression, which is not excluded from protection under the Constitution, benefits from the preserve of the right." (*Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC)). While the Zimbabwean courts have not made a pronouncement of the interpretation of their statute, they could take guidance from the South African Constitution of their interpretation of this similar provision.

[2] *Chavunduka and other v. Minister of Home Affairs and another* [2000] JOL 6540 (ZS) 10.

importantly the right to make free and informed political choices which goes to the very heart of any democratic society.

23. Voter education falls squarely into the purview of section 61(1)(a) which protects the right to *"seek, receive and communicate ideas and other information"*. Furthermore, voter education does not fall into any of the categories of expression outlined in section 61(5) of the Constitution which are specifically excluded from its protection. Therefore, voter education must be presumed to be protected speech.

24. This principle—that expression is presumed to be protected speech if it is not explicitly excluded—is supported by case law. In *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) the Constitutional Court found that expression of sexual conduct was protected by the free speech provision of section 16 of the South Africa Constitution, as it was not explicitly referred to as non-protected speech in section 16(2) of the Constitution. Section 16 of the South African Constitution is worded very similarly to section 61 of the Constitution of Zimbabwe.

25. Voter education falls squarely within the special objectives that courts have stated the right to freedom of expression serves. For example, in *Chavunduka and others v. Minister of Home Affairs and another* [2000] JOL 6540 (ZS) had the following to say about the right to freedom of expression, its connection to democracy, and the objectives it serves:

> *"This Court has held that section 20(1) of the Constitution is to be given a benevolent and purposive interpretation. It has repeatedly declared the importance of freedom of expression to the Zimbabwean democracy.... Furthermore what has been emphasised is that freedom of expression as four broad special objectives to serve: (i) it helps an individual to obtain self-fulfillment; (ii) it assists in the discovery of truth, and in promoting political and social participation; (iii) it strengthens the capacity of an individual to participate in decision-making; and, (iv) (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change...."*[3]

[3] *Chavunduka and other v. Minister of Home Affairs and another* [2000] JOL 6540 (ZS) 7.

26. In *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S), the Supreme Court considered whether provisions of the Political Parties (Finance) Act [Chapter 2:04] that restricted an opposition party's access to public funds violated its right to freedom of expression. The Court underscores that value of the right to freedom of expression (which at that time was enshrined in section 20 of the 1980 Constitution) for a democratic society. At 268C-D of the judgment, the Court states:

> *"The profound role of this protected right, as one of the fundamental freedoms, has been underlined by this Court in several decisions. The most recent is* Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation & Anor supra *in which ... freedom of expression is characterised as a core value of society.*
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> *But self-expression by the communicator is not the single value encompassed by s 20(1) of the Constitution. One of its functions is to protect the obtaining of information and the interchange of ideas. Any dissemination thereof and, consequently, any expenditure of funds that makes it possible, advances the purposes of this freedom."*

27. The above passage contains a number of applications to the present matter which help to show how and why voter education is protected under section 61 and to what extent. These will be outlined in greater detail below.

Freedom of expression entails the right to exchange ideas and receive information independent of government sources

28. Voter education is by definition communication with the electorate and the exchange of ideas and information about an election. It is important and valuable not just for the speaker but also for the listener. All communication of this nature is protected under the Constitution and communication that informs the electorate about issues pertaining to an election, independent of the government, is given special protection due to its value to creating and maintaining a democratic society. This principle has been emphasised by the courts in the following passages.

29. In *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S) the Supreme Court stated at 269A:

> "I have no hesitation in accepting that freedom of expression concerning the activities of the political party in power, and of other opposing parties, should be protected from hindrance. This is essential to the proper functioning of a democratic system. **Any abridgment affects the right of the people to be informed, through sources independent of government, about matters of public interest.**" (emphasis added)

30. The same court refers with approval to an excerpt from a Canadian case, *Reform Party of Canada v Canada (Attorney General)* (1995) 27 CLR 254 (Alberta Court of Appeal) which states:

> *"In the arena of elections, I am satisfied that the guarantee is not merely to protect the right of the person to speak, but the right of the public to hear: Communication is fundamental to expression of any kind."*

The expenditure of funds is an essential aspect of the right to freedom of expression

31. The expenditure of funds that are necessary for the exercise of the right to freedom of expression is in fact and integral part of that right. Any limitation on access to funding for exercising freedom of expression is a limitation of the right itself. Thus section 40C(1)(H) and 40F of the Electoral Act violate the right to freedom of expression because the restrict and inhibit the Applicant (and others in its position) from accessing funding which is essential for the exercise of the right. This is especially true given the economic conditions prevailing in Zimbabwe.

32. This principle is clearly supported by the following paragraph at 269G-270C of *United Parties, supra* which states as follows:

> *"Effectual communication requires the expenditure of money. The distribution of leaflets entails printing, paper and circulation costs. ... Dependence upon the private sector of Zimbabwe to provide enough funding ... is not a viable option. ... [I]n poorer societies, where private funding is either not available or offers inadequate assistance, in inability to obtain*

State funding, because the qualification is set too high, cause a reduction of the effective freedom of expression of political parties."

The impugned provisions' purpose is to restrict protected speech

33. The consequences attached to non-compliance with the impugned provisions make it clear that the purpose of the legislation is to curtail the exercise of protected speech, namely voter education. Non-compliance is a criminal offence in terms of section 40C(3) of the Electoral Act and anyone found guilty shall be liable to imprisonment for up to six months and a fine. Furthermore, as will be explained in more depth in the Third Submission, the legislation has the manifest intention of constraining the Applicant, and others in its position, from exercising their right to freedom of expression until they have complied with the provisions.

34. The case law makes it clear that such consequences are indicative of that fact that the purpose of legislation is to curtail freedom of expression. In *Chavunduka, supra* the Court said the following:

> *"It is not open to doubt that both the state's purpose in, and the effect of, section 50(2)(a) is to restrict expressive activity. Both the facial purpose of the legislative technique and the particular consequence of the proscribed activity offend. The reality of being liable to criminal conviction and imprisonment for a period not exceeding seven years results very definitely in a curtailment of free expression."*

35. Additionally, as was held in *United Parties, supra,* "an enactment neutral on the face of it may, in its application nonetheless offend the constitutional mandate if it denies, or unduly burdens, the exercise of a protected freedom." Clearly, the impugned provisions place an undue burden on the Applicant which ensures that it is unable to exercise its right to freedom of expression. Whether or not the enactment is shown to be neutral on the fact of it, the effect of the provisions violate the right to freedom of expression.

THIRD SUBMISSION: THE IMPUNGED PROVISIONS CONSTITUTE AN UNLAWFUL PRIOR RESTRAINT ON THE EXERCISE OF THE RIGHT TO FREEDOM OF EXPRESSION

36. It is further submitted that the impugned provisions constitute a prior restraint of speech, which is internationally considered to be the worst type of limitation on free speech and is restricted to a very small set of circumstances in which it is permitted. Prior restraint means any restraint of speech before it is publicized or disseminated in contrast to punishing speech afterwards such as civil liability for defamation. *In casu*, sections 40C(1)(g) and 40C(2) of the Electoral Act create an approval process which must be complied with *before* the right is exercised. Additionally, the strict funding requirements created by section 40C(1)(h) and 40F also have to be complied with *before* the Applicant, or other persons, can exercise their rights. Therefore, the provisions clearly create a prior restraint on the Applicant's and the general public's right to freedom of expression.

Prior restraint is a drastic encroachment on the right to freedom of expression

37. Case law from South Africa, the United States, the United Kingdom and Canada consistently states that prior restraint is a drastic encroachment on the right to freedom of expression that would only be constitutional in the most exceptional circumstances.

38. In *Attorney-General v British Broadcasting Corporation* (1981) AC 303 (CA) at 362 the court commented on how drastic a measure prior restraint is:

> *"[T]he prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice"*[4]

39. The United States Supreme Court has also addressed the issue of prior restraint many times. There is a strong presumption against prior restraint

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[4] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at para 44 (citing *Attorney-General v British Broadcasting Corporation* (1981) AC 303 (CA) at 362).

even when ordered by judges except in exceptional circumstances such as times of war, the publication of obscenity, and national security.[5]

40. In *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)*[6] the South African Supreme Court stated that the test to allow prior restraint "has always been considerable."[7]

Prior restraint is only justifiable if there is a real risk of prejudice if the publication is allowed

41. The Respondents have not provided any evidence to this Honourable Court to demonstrate that there is demonstrable, substantial and real risk that prejudice will occur if the First Respondent is not allowed to engage in prior restraint over the exercise of the Applicant's and other persons right to freedom of expression through conducting voter education. Instead the First Respondent has made speculative remarks without any substance or evidence. Even if there were such a risk, the Respondents would need to satisfy the Court that the advantages of curtailing the free flow of information outweighs the disadvantages. No attempt to do so has been made.

42. The case law is very clear that prior restraint of the right to freedom of expression is not justifiable unless these criteria have been met.

43. In *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* the court articulated the proper analysis by a court if they order prior restraint where publication would interfere with the administration of justice:

> *"In summary, a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then*

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[5] *Near v. Minn.*, 283 U.S. 697, 715-716 (1931).
[6] [2007] 3 All SA 318 (SCA).
[7] *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* [2007] 3 All SA 318 (SCA) at paras 14-15.

publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information. Applying the ordinary principles that come into play when a final interdict is sought, if a risk of that kind is clearly established, and it cannot be prevented from occurring by other means, a ban on publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered.

Those principles would seem to me to be applicable whenever a court is asked to restrict the exercise of press freedom for the protection of the administration of justice, whether by a ban on publication or otherwise. They would also seem to me to apply, with appropriate adaptation, whenever the exercise of press freedom is sought to be restricted in protection of another right."[8] (emphasis added)

44. Perhaps the most famous prior restraint case in the United States, *New York Times Co. v. United States*,[9] the Supreme Court held that the Washington Post and New York Times could not be enjoined from publishing a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." The government argued that the publication of this study would endanger national security.[10] Even though this aim is one of the most important objectives a government can pursue, the justices did not find that there was a good enough reason to enjoin this publication, although there were nine separate opinions as to why. Justice Stewart found in his concurrence that there was danger in releasing some of the documents involved, but he still believed they could not constitutionally be prohibited because he could not "say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people."[11]

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[8] *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* [2007] 3 All SA 318 (SCA) at paras 19-20.
[9] 403 U.S. 713 (1971).
[10] *New York Times Co. v. United States*, 403 U.S. 713, 718 (1971).
[11] *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971).

45. The *New York Time Co.* case illustrates how serious an incursion on the right to freedom of expression prior restraint is and how absurdly drastic a measure it is as a mechanism for regulating voter education. The risk posed to the State in the present matter is not even remotely as serious as the risk posed to the State in *New York Times Co., supra.* National security is certainly not at stake in the present case and it would be absurd to claim that allowing the Applicant and others to conduct voter education would "surely result in direct, immediate, and irreparable damage to our Nation or its people".

Prior restraint is even more drastic when implemented by an administrative body, rather than by a court

46. The approval process set out by the impugned provisions is subject to the whim of the First Respondent, an administrative body, without judicial procedural protections. The case law is clear that prior restraint is considered an even more drastic and unjustifiable limitation of the right to freedom of expression when implemented by an administrative body, rather than by a court. Therefore, this Honourable Court should be *even more* reticent to allow prior restraint by the First Respondent, than was the case in the *Midi Television, supra* and *New York Times Co., supra* decisions cited above.

47. This issue was addressed by the Canadian Supreme Court in the matter of *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*[12] where the court discussed the distinction between prior restraint ordered by a judicial or quasi-judicial body and that determined by an administrative body, such as the First Respondent. In reaching its decision, the Court stated the following:

> "In Taylor, supra, *the restriction on free speech was imposed by an independent, specialized tribunal that had many of the trappings of a*

[12] [2000] 2 S.C.R. 1120.

judicial body. A prior restraint was imposed only after a determination, in an adversarial setting, that Mr. Taylor had violated Canada's provisions regarding hate speech. The Customs legislation, by contrast, offers none of the protections of a criminal trial; it is enforced by relatively untrained bureaucrats rather than a judge or specialized adjudicator...."[13]

48. South Africa's Constitutional Court has also dealt with the dangers of allowing administrative bodies (such as the First Respondent) to impose prior restraint on freedom of expression. In *Print Media South Africa and Another v Minister of Home Affairs and Another*[14], the Constitutional Court found that provisions of the Films and Publications Act which required that any publication which contained certain sexual conduct must be submitted for review before it is distributed publically were unconstitutional. The court stated the following:

> *"In essence, the person seeking to publish is required to submit the material to the administrative body, which decides whether to grant or deny permission to publish. If the administrative body concludes that the material is prohibited, the prospective publisher is prevented from publishing it. This amounts to a form of prior restraint, which is an inhibition on expression before it is disseminated."*[15]

49. The Court found that the classification scheme was inconsistent with section 16 of the South African Constitution, which is phrased very similarly to section 61 of the Zimbabwean Constitution.[16]

The negative effects of prior restraint must be considered even if there is a legitimate government objective

50. The First Respondent has averred that the purpose of the impugned provisions is to ensure that voter education is accurate and adequate. While the Applicant does not dispute that this is a legitimate government

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[13] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* [2000] 2 SCR 1120, 2000 SCC 69 at para 240.
[14] 2012 (6) SA 443 (CC).
[15] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at para 16.
[16] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at para 46.

objective, the Court must still take into account, among several other factors, what the negative effects are of using prior restraint to achieve that purpose.

51. This principle is confirmed in *Print Media South Africa and Another v Minister of Home Affairs and Another, supra* where the court accepted that the purposes of the act[17] were legitimate government objectives; but found that the effects of such a prior classification scheme had too great an effect on fundamental rights. The Court remarked:

> *"By investing an administrative body with the exclusive power to grant permission to publish certain material, as well as the power to punish for denying it the opportunity to do so, what is engendered is a scheme in which expression must be justified before, and as a necessary condition for, its release into the public realm. There is a shift in the locus of control to an administrative body from the right-bearer, whose liberty to exercise freely his right to freedom of expression is curtailed."*[18]
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> ...
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> *"Section 16(2)(a) of the Act also creates the immediate and long-term effects of delaying the flow of expression, which in some instances may drastically impede the ability of the right-bearer from receiving information or ideas. The result is a reduction in, rather than an enhancement of, choice."*[19]
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> ...
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> *"Encumbering choice creates the danger that the autonomy of the individual to formulate and inform opinion on received expression, which might not otherwise have been restricted but for the administrative prior classification system, is eroded. In other words, hampering the individual's ability to choose freely those publications, to which exposure is not unlawful, whittles away at his capacity as a free moral agent. This is all the more indefensible when one*

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[17] (i) to provide consumer advice; (ii) to protect children from exposure to harmful or age-inappropriate material; and (iii) to ban child pornography. The means by which this is achieved is to disallow, as far as possible, the dissemination without prior classification of material that may ultimately be banned or, if not banned, that may be published subject to constraints.

[18] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at para 58.

[19] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at para 64.

has regard to the availability of less restrictive means, to which I now turn."[20]

Prior restraint should not be used where there are alternatives to it

52. The courts have also found that prior restraint should not be used where there are other alternatives to achieving the objective. *In casu*, it is clear that there are clear alternatives. One such alternative which has already been mentioned is section 40E of the Electoral Act which empowers the First Respondent to monitor voter education activities and sanction those whose materials are inaccurate, inadequate or biased.

53. In *Print Media South Africa and Another v Minister of Home Affairs and Another* Court found that there were alternatives to such administrative prior classification including a court interdict where the burden of proof would be on the government rather than the person seeking to express themselves, the possibility of instituting age restrictions by the administrative body on certain works, and child pornography was already prohibited by other statutes.[21]

There must be a rational connection between the objective and the prior restraint

54. It is submitted that it is also irrational that political parties are exempt from the requirements of the impugned provisions, while the Applicant and other civil society organisations, churches, independent candidates et cetera are not.

55. This principle was also applied in *Print Media South Africa and Another v Minister of Home Affairs and Another* where the court held that exempting newspapers from this scheme, but not magazines was irrational.[22]

The must be a mechanism for judicial review of the prior restraint

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[20] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at para 65.
[21] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at paras 64, 71.
[22] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at paras 79-82

56. The approval process created by the impugned provisions has no mechanism for judicial review if material that is submitted to the First Respondent is not approved. In fact, there is no recourse whatsoever for a potential provider of voter education whose approval is rejected. There is no distinction made between protected and unprotected speech. All expression that might be deemed voter education in terms of definitions of the Act must first go through the prior approval process lest the provider be prosecuted for committing a criminal offense.

57. The case law is clear that such a scheme is unconstitutional. In the case *Freedman v. Maryland*[23] the plaintiff challenged the constitutionality of a statute that required him to submit his film to a board of censors before showing it, which he argued was an invalid prior restraint as it had the effect of unduly suppressing speech without any court involvement. The scheme here required that the exhibitor submit his film to the board of censors, and could only challenge the decision to ban the film on appeal to a court which was a lengthy and costly process. The Court noted the problematic elements of this prior restraint scheme:

> *"First, once the censor disapproves the film, the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted. Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity of the film. Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination."*[24]

58. Because of these reasons, the Court held that "[t]he Maryland scheme fails to provide adequate safeguards against undue inhibition of protected expression, and this renders the § 2 requirement of prior submission of

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[23] 380 U.S. 51 (1965).

[24] *Freedman v. Maryland*, 380 U.S. 51, 59-60 (1965).

films to the Board an invalid previous restraint."[25] The Court acknowledged that it was unconstitutional prior restraint for an administrative body, like a board of censors, to prohibit the release of a publication without proper procedural protections such as prompt judicial review and determination that the film constitutes unprotected speech.

FOURTH SUBMISSION: THE IMPUGNED PROVISIONS CONSTITUTE AN UNLAWFUL STATE MONOPOLY

59. It is submitted that the impugned provisions constitute an unlawful State monopoly over the provision of voter education. This is because the First Respondent (which is an agency of the State) has virtually exclusive control over who is allowed to conduct voter education as well as the content of that voter education (since the materials must either be ZEC materials or approved by ZEC). Additionally, the impugned provisions which restrict the Applicant's access to funding which is necessary for the exercise of the right—such funding which the First Respondent is free to receive—also has the effect of creating a state monopoly.

60. The Constitution clearly envisages that others besides the First Respondent should also be allowed to conduct voter education. Section 239(h) states that the First Respondent must "conduct and supervise voter education". As one cannot supervise oneself it is clear that others must be allowed to conduct voter education. And yet, the impugned provisions make it almost impossible for others to do, so they smack of an attempt to create a State monopoly.

61. The limitation by statute making it extremely difficult for non-State actors such as the Applicant to conduct voter education is an unlawful limitation on the right to freedom of expression. This is true notwithstanding the exception to political parties. Our courts have made clear that attempts to create State monopoly through stifling and restricting non-State actors will still be regarded as constituting an unlawful state monopoly and a violation

[25] *Freedman v. Maryland*, 380 U.S. 51, 60 (1965).

of the right to freedom of expression even if it is not an absolute monopoly.

62. For example, in *Capital Radio (Pvt) Ltd. v Broadcasting Authority of Zimbabwe and Others* (162/2001) (Pvt) [2003] ZWSC 65 the Supreme Court addressed the issue of government monopolies regarding radio broadcasting and struck down section 9(1) and (2) of the Broadcasting Act, notwithstanding the fact that the provisions did not give the national broadcaster an absolute monopoly over radio broadcasting. In reaching its decision the Court stated:

> *"The limitation by statute to one licence to provide a national free-to-air broadcasting service smacks of the State wishing to monopolise the airwaves."*

63. In our law, the courts have drawn a nexus between the State monopolies and the violation of the right to freedom of expression. In *Retrofit (Pvt) Ltd v Minister of Information, Posts and Telecommunication*[26] the Supreme Court of Zimbabwe addressed the issue in relation to the State's monopoly on telecommunication services. The Court stated at 216B that "any monopoly which has the effect, whatever its purpose, of hindering the right to receive and impart ideas and information, violates the protection of this paramount right".

64. Both the African Union Election Observation Mission's report on the 2013 election and the Parliamentary Portfolio Committee's report on ZEC's preparedness for bi-elections (page 9 and 10 of the Founding Affidavit) conclude that the Respondents failed to provide citizens with adequate voter education, and that this is due to the state monopoly and failure to collaborate with civil society. This is a severe restraint on the right to freedom of expression.

65. This contention is clearly supported by the following paragraph from *Retrofit (Pvt) Ltd, supra* in which the Court stated at 219B:

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[26] 1995 (2) ZLR 199 (S).

"Persons in every walk of life, be they professional men and women, academics, artisans, domestic workers or simple rural dwellers, are entitled to a telephone service which affords them a rapid and reliable means of receiving and imparting ideas and information on any matter, however mundane. A public monopoly that fails to fulfil that essential role imposes a severe restraint on the constitutionally protected freedom of expression."
(emphasis added)

66. In *Retrofit (Pvt) Ltd. v Minister of Information, Posts & Telecommunications*[27] the Supreme Court asked three questions in determining whether the suppression of freedom of expression by a State monopoly over telecommunications was "nonetheless justifiable in a democratic society":

> *i) Is the legislative objective, insofar as it vests in the Corporation the exclusive privilege of establishing, maintaining and working a public mobile cellular telephone service, sufficiently important to justify hindering the right of every person to receive and impart ideas and information without interference?*
> *ii) Is there a rational connection between the retention of the Corporation's monopoly and its stated objectives?*
> *iii) Is the monopoly in the provision of a public mobile cellular telephone service the least drastic means by which the objectives of the Corporation may be accomplished?*

67. The Court agreed with the State's point that there was a rational connection between maintaining its monopoly and its objectives of providing universal public telecommunication services. The State argued that introducing private telecommunications would cause the government to lose money, as the private companies will focus on the profitable urban areas, and the government would not be able to support the operation enough to provide universal telecommunications to the rural areas.

68. However, in reaching its decision that the State monopoly on telecommunications was a violation of the right to freedom of expression, the Court stated the following:

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[27] 1995 (2) ZLR 422 (S).

> *"For this court to hold that the retention of a monopoly over the operation of a public mobile cellular telephone service in Zimbabwe is absolutely essential in order for the Corporation to be able to develop and extend affordable telephonic communication to outlying areas, would be to justify, in my view, a State monopoly in virtually every sector of the economy. In any event, any loss of profit to the Corporation resulting from the privatisation of a mobile cellular telephone service is purely speculative."*[28]

69. It is submitted that for the Court to find that it is absolutely essential for the State to have a monopoly over voter education for the reason, say, that it needed to ensure that the educational material was not misleading would be to justify a State monopoly over all educational material. Furthermore, the seeming belief that voter education which is not approved by the State or which is provided through the use of foreign funding will necessarily be biased or misleading is speculative and lacks a rational basis.

FIFTH SUBMISSION: THE IMPUGNED PROVISIONS VIOLATE THE APPLICANT'S AND THE GENERAL PUBLIC'S RIGHT TO EQUALITY AND NON-DISCRIMINATION ENSHRINED IN SECTION 56 OF THE CONSTITUTION

70. It is submitted that the impugned provisions violate the Applicant's and the general public's right to equality and non-discrimination. The relevant provisions of section 56 of the Constitution state as follows:

> ***56. Equality and non-discrimination***
>
> *1.* *All persons are equal before the law and have the right to equal protection and benefit of the law.*
>
> *2.* ...

[28] *Retrofit (Pvt) Ltd. v Minister of Information, Posts & Telecommunications* 1995 (2) ZLR 422 (S) 425.

3. Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.

4. A person is treated in a discriminatory manner for the purpose of subsection (3) if–

a. they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or

b. other people are accorded directly or indirectly a privilege or advantage which they are not accorded.

5. Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

6. ..."

(emphasis added)

71. In South Africa, the Courts have developed extensive jurisprudence interpreting a similarly worded provision of the South African Constitution. In *Harksen v Lane NO & Others 1998 (1) SA 300 (CC)* the court outlined the stages of the enquiry as follows:

> *"(a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of the equality provisions in the Constitution. Even if it does a bear rational connection, it might nevertheless amount to discrimination.*
> *(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:-*
> *(b)(i) Does the differentiation amount to 'discrimination? If it is on a specified ground, then discrimination will have to be established? If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human*

dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has to be has been found to have been on specified ground, and then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complaint and others in his or her situation. If not at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation.

(c) If the discrimination is found to be unfair then determination will have to be made as to whether the provision can be justified under the limitations clause provisions of the Constitution."

72. Although the Zimbabwean courts have not yet given extensive interpretation to section 56 of the Constitution, the approach adopted by our courts under the previous constitution is consistent with the above. See *Wazara v Principal of Belvedere Technical Teachers College and Another* 1997 (2) 508 (H).

73. Applying the *Harksen* test to the present matter, it is submitted that the impugned provisions clearly amount to unfair discrimination:

a. The provisions differentiate between categories of persons i.e. the Applicant and others in its position (private persons, non-partisan organisations, churches, and independent candidates) are subject to the restrictions of the impugned provisions while the First Respondent and political parties are not. The purpose of these provisions according to the First Respondent is to ensure accurate and adequate voter education, which the Applicant does not dispute is a legitimate government purpose. However, there is no rational connection between the differentiation and that purported purpose. If the purpose of the provisions is to ensure that voter education is not biased towards any political party, then it is completely irrational to place restrictions on non-partisan organisations and not on political parties who are much more likely to be biased towards their

own party. The differentiation between political parties and independent candidates is also completely irrational since the two groups have identical roles in the electoral process and yet the latter is subject to the restrictions of the impugned provisions while the former is not. Since there is no rational connection between the differentiation and a legitimate government purpose, it is submitted that the provisions are *ultra vires* section 56 of the Constitution.

b. However, if the court finds that there is a rational connection then the latter stages of the test must be applied to assess whether it amounts to unfair discrimination. It is submitted that the provisions fail these stages of the tests as well:

i. The discrimination is on a specified ground: that of political affiliation. The Applicant's lack of affiliation to any political party is what excludes it from conducting voter education. Similarly, an independent candidate's lack of affiliation to any political party is what would exclude him or her from conducting voter education.

ii. Therefore, the discrimination is presumed to be unfair. The impact of the discriminatory provisions is that the Applicant and others in its position are unable to exercise their constitutional rights to freedom of expression with respect to voter education.

c. It is submitted that the unfair discrimination is not justifiable under section 85 of the Constitution. In Currie and de Waal's *Bill of Rights Handbook (6th ed)* it is argued "It is ... difficult to see how discrimination that has already been characterised as 'unfair' because it is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings can ever be acceptable in an open and democratic society".[29] Indeed, the South African Constitutional Court has

[29] Iain Currie and Johan de Waal (eds), *The Bill of Rights Handbook* (6th edition) Cape Town (2013) at p. 218.

never upheld an impugned law that was deemed to discriminate unfairly.

SIXTH SUBMISSION: THE IMPUGNED PROVISIONS VIOLATE THE APPLICANT'S AND THE GENERAL PUBLIC'S POLITICAL RIGHTS ENSHRINED IN SECTION 67 OF THE CONSTITUTION

74. 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."*

75. It is now widely accepted that voter education is a critical component of a free and fair election. For example, the revised SADC Principles and Guidelines Governing Democratic Elections states at article 11.4.1 that:

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

76. Additionally, the role of civil society as important partners in the provision of voter education has been acknowledged time and again. State parties to the Organisation of African Unity, including Zimbabwe, stated in the Declaration on the Principles Governing Democratic Elections in Africa that:

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

77. The African Union's Guidelines on Electoral Observation and Monitoring Missions provide that voter education is a responsibility of member states and that this responsibility includes a to duty to:

> *"[P]romote civic and voters' education on the democratic principles and values in close cooperation with the civil society groups and other relevant stakeholders;"* (emphasis added)

78. There are at least two aspects of these commitments that are worth noting:

a. Zimbabwe, as a member state of the African Union and before that the Organisation of African Unity, has a responsibility to *promote* rather than *restrict* voter education in order to protect the right to a free and fair election. Therefore, the impugned provisions which restrict the provision of voter education limit the right to free and fair elections.

b. The responsibility that voter education is meant to be done in "close cooperation with civil society" denotes a sense of partnership and teamwork between members states and civil society which is not consistent with the crippling and overreaching nature of the impugned provisions.

79. Zimbabwe's failure to comply with these responsibilities for holding free and fair elections that led to criticism of the impugned provisions in the Electoral Act by the African Union Election Observation Mission cited in the Founding Affidavit (see page 9) and also by the Parliamentary Portfolio Committee Justice, Legal and Parliamentary Affairs (see pages 10 and 11 of the Founding Affidavit).

80. Section 67(2) of the Constitution states as follows:

> *"2. Subject to this Constitution, every Zimbabwean citizen has the right-*
> *a. to form, to join and to participate in the activities of a political party or organisation of their choice;*

b. to campaign freely and peacefully for a political party or cause;
c. to participate in peaceful political activity; and
d. to participate, individually or collectively, in gatherings or groups or in any other manner, in peaceful activities to influence, challenge or support the policies of the Government or any political or whatever cause."

81. It is submitted that the impugned provisions infringe the rights of the Applicant and others in its position to participate in peaceful political activity. Voter education is a form of political activity since it is an essential part of the electoral process.

82. The impugned provisions also infringe on the rights of Zimbabwean citizens living in the diaspora to participate in the activities of an organisation of their choice. Financial contributions towards a voter education programme is undoubtedly a form of participation in an organisation. However, section 40C(1)(h) and section 40F of the Electoral Act—read together with the definition of a "foreign contribution or donation" in section 40A which excludes Zimbabwean citizens domiciled outside of the country—have the effect of preventing Zimbabwean citizens from participating in that manner in an organisation of their choice. This violation of their political rights is arbitrary, discriminatory, and unjustifiable.

83. Additionally, the political rights of independent candidates are severely infringed by the impugned provisions, as the onerous restrictions on voter education apply to them while not to candidates who belong to political parties. This violation of their political rights is equally arbitrary, discriminatory and unjustifiable.

84. Since the Applicant is directly affected by the same clauses which are discriminatory against Zimbabweans in the diaspora and independent candidates, it is entitled to seek an order declaring them unconstitutional on that basis, even on its own standing.

85. This principle was confirmed in *Mudzuru & Anor v Minister Of Justice, Legal & Parliamentary Affairs* CCZ 12/2015 where the Constitutional Court referred with approval to the two Canadian cases of *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 and *Morgentaler Smoling and Scott v R* (1988) 31 CRR in which it was found that a person would have standing to challenge an unconstitutional law that effects them, even if the unconstitutionality of that law is directed at someone else. Of course in the present matter, the Applicant *also* avers that there are direct violations against itself and its members and those of the general public.

SEVENTH SUBMISSION: THE LIMITATION ON FUNDAMENTAL RIGHTS IMPOSED BY THE IMPUGNED PROVISIONS IS NOT NECESSARY OR JUSTIFIABLE

86. If it is found that the impugned provisions constitute an infringement of any of the rights and freedoms in the Constitution, the next stage of the enquiry is to consider whether such a limitations are justifiable in terms of section 86 of the Constitution.

87. Section 86(2) of the Constitution states as follows:

> *The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including-*
>
> ***a.*** *the nature of the right or freedom concerned;*
>
> ***b.*** *the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;*
>
> ***c.*** *the nature and extent of the limitation;*
>
> ***d.*** *the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;*

e. 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; and

f. whether there are any less restrictive means of achieving the purpose of the limitation.

88. There is fairly developed jurisprudence on the application of the section 20(2) of the former Constitution–which was a limitation clause specific to the right to freedom of expression. This jurisprudence still has valuable import for the present matter.

89. In *Chavunduka and others v. Minister of Home Affairs and another* the Court considered whether the impugned provision, which had been found to infringe freedom of expression, was nevertheless "saved" by an exception under section 20(2) of the former Constitution. The Court asked:

(a) Is the limitation authorised by law?

(b) Is section 50(2)(a) a provision enacted in the interests of public safety or public order?

(c) Is the limitation reasonably justifiable in a democratic society?

90. In answering the first question, the Court found that the section of the Act under scrutiny was void due to vagueness, in that "[i]t criminalises false statements which are *likely to cause* fear, alarm or despondency. There is no requirement of proof of any consequences – of damage to the state or impact upon the public. What the lawmaker has provided for is a speculative offence."[30] It is too broad of an offense which would have a chilling effect on speech.

91. In answering the second question, the Court examined whether the limitation was justified under the permissible aims that can justify a limitation on freedom of speech, including public safety or order.[31] And in pursuing one of these aims, "it is not sufficient that the limitation on

[30] *Chavunduka and other v. Minister of Home Affairs and another* [2000] JOL 6540 (ZS) 14.
[31] *Chavunduka and other v. Minister of Home Affairs and another* [2000] JOL 6540 (ZS) 17.

freedom of expression effects merely incidentally one of the specified legitimate aims. It must be primarily directed at that aim – an overriding objective."[32] The Court decided that this prong of the test was met as it was concerned with ensuring public safety and order were protected from false news.[33]

92. In analyzing whether the limitation on freedom of expression was "reasonably justified in a democratic society" meaning not arbitrary or excessive, the Court applied the following test from Canadian courts:

> *"(i) the legislative objective which is the limitation designed to promote is sufficiently important to warrant overriding a fundamental right;*
>
> *(ii) the measures designed to meet the legislative objective are rationally connected to it and are not arbitrary, unfair or based on irrational considerations;*
>
> *(iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."*[34]

93. Although the purpose of the statute was to protect internal security from threats caused by the dissemination of false statements, the Court noted that this statute had not been used since 1968, which "suggests that it is not rationally connected to, and essential for, the intended objective of avoiding public fear, alarm or despondency and so to the securement of public safety or public order. The anticipated danger is remote and conjectural... And there are other means of achieving the impugned provision's aim far less arbitrary, unfair and invasive to free expression"[35] This suggests that in the present case, the Respondents would have to show that there is a present, demonstrable danger that the limitations on voter education combat, such as an example of someone who has spread false information about voting necessitating the Electoral Act's use.

94. In applying this three-prong test, the Court held "the expansive sweep of section 50(2)(a) gives rise to the inevitable consequence of failing to

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[32] *Chavunduka and other v. Minister of Home Affairs and another* [2000] JOL 6540 (ZS) 17.
[33] *Chavunduka and other v. Minister of Home Affairs and another* [2000] JOL 6540 (ZS) 18.
[34] *Chavunduka and other v. Minister of Home Affairs and another* [2000] JOL 6540 (ZS) 19.
[35] *Chavunduka and other v. Minister of Home Affairs and another* [2000] JOL 6540 (ZS) 22.

confine and impair the exercise by the applicants of their right to freedom of expression as little as possible."[36]

95. Freedom of expression under the old constitution has also be discussed in *Chimakure and another v. Attorney-General of Zimbabwe*[37]. The applicants in this case were charged with violating a statute that prohibited the publishing or communicating a false statement prejudicial to the State. After determining that the law was not impermissibly vague, the Court turned to determining whether the objective of the legislation was constitutionally permissible in that there is a legitimate aim of Parliament[38] and the methods used to achieve that legitimate aim were proportional:

> *"The law should not in its design have the effect of overreaching and restricting expression which is not necessary for the achievement of the objective concerned. The court applies the principle of proportionality to test the relationship between the restriction to the exercise of the right to freedom of expression and the objective pursued. The question is whether the restriction is necessary and proportionate to the objective pursued. Any restriction to the exercise of the right to freedom of expression claiming to be for the protection of any of the public interests listed in section 20(2)(a) of the Constitution must meet strict requirements indicating its necessity and proportionality."*[39]

96. The Court found that in relation to the interest of public order and public safety, the restriction here was "not narrowly drawn and carefully tailored."[40] It would include those who knowingly publish false information and those who believe they are publishing a true fact.[41] Additionally, because of the disproportionate sentence for violating the law, this law has an unacceptable chilling effect on speech. [42]

97. The Court was expansive about the importance of the right of the freedom of expression. It stated:

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[36] *Chavunduka and other v. Minister of Home Affairs and another* [2000] JOL 6540 (ZS) 26.
[37] [2014] JOL 32639 (ZH).
[38] *Chimakure and another v. Attorney-General of Zimbabwe* [2014] JOL 32639 (ZH) 33-34.
[39] *Chimakure and another v. Attorney-General of Zimbabwe* [2014] JOL 32639 (ZH) 54.
[40] *Chimakure and another v. Attorney-General of Zimbabwe* [2014] JOL 32639 (ZH) 60.
[41] *Chimakure and another v. Attorney-General of Zimbabwe* [2014] JOL 32639 (ZH) 69.
[42] *Chimakure and another v. Attorney-General of Zimbabwe* [2014] JOL 32639 (ZH) 79.

"Section 20(1) of the Constitution underscores the importance of freedom of expression in a free and democratic society, subject, of course, to section 20(2). The overriding importance of the right has been widely recognised, for its own sake and as an essential underpinning of democracy and a means of safeguarding other human rights. It is the duty of the State in the exercise of collective power to act in terms of the principles of fundamental human rights and freedoms whilst advancing social justice."[43]

....

"A law cannot be used to restrict the exercise of freedom of expression under the guise of protecting public order when what is protected is not public order. This is because the maintenance of public order or preservation of public safety is synonymous with the protection of fundamental human rights and freedoms. The State cannot therefore violate fundamental human rights and freedoms under the cover of maintaining public order or preserving public safety. It is always important to understand and appreciate the meaning of the concepts of public order and public safety. They describe the definitional balancing line between the exercise of the right to freedom of expression and the public interests for the protection of which the State may restrict the exercise of that right."[44]

98. Finally, the Constitutional Court again interpreting the old Constitution discussed the constitutionality criminal defamation in *Madanhire v. Attorney General.*[45] The Court was determining "whether or not [this provision] is a limitation that is reasonably justifiable in a democratic society."[46] In articulating this test, the Court applied the prongs used in the *Chavunduka* case:

(i) *"the legislative objective is sufficiently important to justify limiting a fundamental right;*

(ii) *the measures designed to meet the legislative object are rationally connected to it; and*

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[43] *Chimakure and another v. Attorney-General of Zimbabwe* [2014] JOL 32639 (ZH) 15.
[44] *Chimakure and another v. Attorney-General of Zimbabwe* [2014] JOL 32639 (ZH) 40.
[45] Judgment No. CCZ 2/14, Const. Application No. CCZ 78/12 (2014).
[46] *Madanhire v. Attorney General* Judgment No. CCZ 2/14, Const. Application No. CCZ 78/12 (2014) 8.

(iii) *the means used to impair the right or freedom are no more than is necessary to accomplish the objective."*[47]

99. The Court found that the objective of protecting the rights and reputations was a sufficient legislative objective and the measures used were rationally connected to it;[48] however, the Court found that the chilling effect of the criminal sanction was excessive and not reasonably justifiable in a democratic society.[49] The Court noted that this might not be the case under the new Constitution, which expressly makes malicious injury to another's reputation an exception to protected speech.[50]

100. While a freedom of expression case has not been heard by the Constitutional Court under the new Constitution, the older cases do lay out a strong foundation that freedom of expression, which is strongly connected to the ability to vote, is essential for a well-run democracy and that is may only be limited in certain circumstances.

101. In applying this to the present matter, it is submitted that the means used are not proportional nor narrowly tailored. In protecting free and fair elections, the government could solve the problem by something as simple as fining people for spreading misleading information. By adopting strict limitations on everything from an organization's funding to its registration and membership, the legislation's encroachment on the right to freedom of expression is far more extensive than necessary. In addition, these limitations, especially the prohibitions on foreigners or foreign funds, are not necessarily related to any legitimate government objective.

102. The Electoral Act already provides the alternative to such limitations as it gives the First Respondent the authority to monitor voter education by others and to cause the prosecution of anyone conducting false or misleading voter education. Section 40E of the Electoral Act states:

40E Commission to monitor voter education by other persons

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[47] *Madanhire v. Attorney General* Judgment No. CCZ 2/14, Const. Application No. CCZ 78/12 (2014) 9.
[48] *Madanhire v. Attorney General* Judgment No. CCZ 2/14, Const. Application No. CCZ 78/12 (2014) 9.
[49] *Madanhire v. Attorney General* Judgment No. CCZ 2/14, Const. Application No. CCZ 78/12 (2014) 9-11, 16.
[50] *Madanhire v. Attorney General* Judgment No. CCZ 2/14, Const. Application No. CCZ 78/12 (2014) 16.

(1) The Commission shall monitor programmes of voter education provided by other persons in Zimbabwe.

(2) If the Commission considers that any programme of voter education is–

(a) false, in that the information provided by it is materially false or incorrect; or

(b) misleading, in that while the programme purports to be impartial it is materially and unfairly biased in favour of or against a political party or candidate contesting the election; and that the programme is likely to prevent a substantial number of voters from making an informed political choice in an election, the Commission may by written notice direct every person responsible for providing and publishing the programme to cease providing or publishing it or to make such alterations to it as the Commission may specify to render it accurate and fair.

(3) Before giving a direction under subsection (2), the Commission shall afford every person responsible for providing and publishing the programme concerned an adequate opportunity to make representations in the matter.

(4) A person to whom a direction has been given under subsection (2) shall immediately take all necessary steps to comply with the direction.

(5) Any person who contravenes subsection (4) shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

103. Section 40E is more than sufficient to deal with the mischief that the impugned provisions purportedly seek to address. Therefore, the impugned provisions are unnecessary and thus fail to meet the tests outlined in section 86 of the Constitution.

104. An analysis of comparative legislation from the southern African region further demonstrates that it is not necessary to have such restrictive provisions in order to ensure accurate and adequate voter education. On the contrary, the electoral law on voter education is much less restrictive in other countries in southern Africa.

105. For example, Zambia's Electoral Act, No. 12 of 2006 provides that anyone can participate in voter education. It states at section 78:

> *"78. (1) Any natural or juristic person may provide voter education for an election. (2) Any natural or juristic person providing voter education shall do so in a manner– (a) that is impartial and independent of any registered party or candidate contesting an election; and (b) that shall promote conditions conducive to free and fair elections."*

106. Zambia's Electoral (Code of Conduct) Regulations, 2006 states in article 7 that:

> *"(1) A person shall not –... (e) Impede the democratic right of any person or party, through their candidates, campaigners or representatives, to have reasonable access to voters for the purposes of conducting voter education, fund raising, canvassing membership or soliciting support;"*

107. South Africa's Electoral Act 73 of 1998 provides that the Commission may accredit those who apply to conduct voter education. Section 86(2) outlines the accreditation criteria as follows:

> *(2) The Commission may accredit an applicant to provide voter education for an election after considering the application, any further information provided by the applicant, and whether-*
>
> *(a) The services provided by the applicant meet the Commission's standards;*
> *(b) The applicant is able to conduct its activities effectively;*
> *(c) The applicant or the persons appointed by the applicant to provide voter education will-*
>
> *(i) Do so in a manner that is impartial and independent of any registered party or candidate contesting that election;*
> *(ii) Be competent to do so; and*
> *(iii) Subscribe to a Code issued by the Commission under section 99 governing persons accredited to provide voter education; and*
>
> *(d) The accreditation of the application will promote voter education and conditions conducive to free and fair elections."*

108. What is notable about the accreditation procedure in South Africa, as compared to the impugned provisions, is that it focuses on the competency of the applicant, rather than their personal traits, sources of funding, or the require approval of the content of individual voter education materials. Furthermore, it does not prohibit or criminalise non-accredited providers of voter education.

109. The Namibian Electoral Act contains a similar accreditation procedure to the South African provisions and does not explicitly prohibit unaccredited persons from providing voter education, but instead states that organizations "may" be accredited. In addition it explicitly provides that registered parties and organizations may provide voter education without being subject to the accreditation procedure.

110. It is clear, therefore, that it is not necessary or justifiable in an open and democratic society to have such restrictive measures as the impugned provisions on the statute books which violate the right to freedom of expression, the right to equality and non-discrimination and political rights.

Dated at **HARARE** on this the 26th day of **MARCH 2018**

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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: NYIKA KANENGONI & PARTNERS
1st Respondent's Legal Practitioners
3rd Floor, North Wing
ZIMDEF House
Off Mother Patrick 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 [4/JUST/1142 KC]