IN THE HIGH COURT OF ZIMBABWE **HC230/18**
HELD AT MASVINGO

In the matter between:

FIRINNE TRUST operating as VERITAS	**1ST APPLICANT**
VALERIE INGHAM-THORPE	**2ND APPLICANT**
BRIAN DESMOND CROZIER	**3RD APPLICANT**
AND	
ZIMBABWE BROADCASTING CORPORATION	**1ST RESPONDENT**
ZIMBABWE NEWSPAPERS (1980)LIMITED	**2ND RESPONDENT**
ZIMBABWE ELECTORAL COMMISSION	**3RD RESPONDENT**
ZIMBABWE MEDIA COMMISSION	**4TH RESPONDENT**
BROADCASTING AUTHORITY OF ZIMBABWE	**5TH RESPONDENT**

1ST RESPONDENT'S HEADS OF ARGUMENTS

1. These heads of arguments are filed in augmentation of the opposition filed by the 1st Respondent to the Applicants' application.

2. On the merits of the matter, 1st Respondent submits that Applicants have failed to establish the requirement for a final interdict that there must be an injury actually permitted or reasonably apprehended.

A. IN LIMINE

3. Authority to depose to the affidavit

3.1. In their answering affidavit, the Applicants raise a procedural objection to the 1st Respondent's notice of opposition which was deposed to by the company secretary. Unfortunately, the allegations made by the Applicants are not informed by the legal requirements of an affidavit. **Rule 227 (4) of the High Court Rules, 1971** is very clear and provides as follows:

> *An affidavit filed with a written application—*
>
> *(a) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out in therein;*

3.2. Suffice it to state the only requirement in terms of our Rules is that the deponent must be able to swear to the facts. In this case it is submitted that the duties of a company secretary cuts across all departments within the 1st Respondent as she is responsible for legal compliance. Evidently, this matter involves the 1st Respondent's compliance with the Electoral Act, electoral regulations as well as the Constitution. This falls well within the purview of the legal department which is headed by the company secretary. Thus, the averment as to herknowledge of the facts cannot be undermined by the applicant's bare assertion to the contrary. The issues in dispute fall within the ordinary duties of a company secretary.

3.3. Applicants also question the deponent's authority in deposing to the affidavit. This question which is consistently brought up by legal practitioners has been

answered by this court in numerous cases. One such case is **African Banking Corporation of Zimbabwe Limited t/a BancABC v PWC Motors (Pvt) Ltd & 3 others HH-123-13**whereMathonsi J held as follows:

> *"I am aware that there is authority for demanding that a company official must produce proof of authority to represent the company in the form of a company resolution. However, it occurs to me that that form of proof is not necessary in every case as each case must be considered on its merits:* ***Mall (Cape) (Pvt) Ltd v Merino Ko-Opraisie BPK 1957 (2) SA 345 (C).*** *All the court is required to do is satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not the unauthorized person".*

3.4. Similarly, in **Byo City Council v Button Armature Winding (Pvt) Ltd HB 36/2015**the court had this to say:

> *"To my mind the attachment of a resolution has been blown out of proportion and taken to ridiculous levels. Where the deponent of an affidavit states that he has the authority of the company to represent it, there is no reason for the court to disbelieve him unless it is shown evidence to the contrary [but] where no such contrary evidence is produced the omission of a company resolution cannot be fatal to the application ..."*-

3.5. In *casu* no evidence has been shown which may lead to the conclusion that it is not the Zimbabwe Broadcasting

Corporation that is litigating or that the deponent is on a frolic of her own.

3.6. As such the issue of lack of authority raised by the Applicants is baseless and must not further detain this court.

4. A case stands or falls by its founding affidavit and the facts alleged in it

4.1. In its answering affidavit, Applicant has attached Annexures A1, A3 and A4 which purportedly supplement allegations raised in the founding affidavit.

4.2. It is submitted that these documents fall foul of the rules of procedure particularly the rule that a case must stand or fall on the averments made in its founding affidavit.

4.3. This celebrated principle of law has been the subject of various court judgments. For example, in **Turner & Sons (Pvt) Ltd v Master of the High Court & Others HH498/15**the court held that:

> *Answering affidavits should not contain new material or bring fresh allegations against the respondent. They should also be brief, not voluminous. If they are unnecessarily prolix or do not comply with the requirements of r 227 regarding the layout and contents of affidavits, an adverse order of costs may be made.*

4.4. More to the point are the remarks of MCNALLY JA in **Keavney& Anor v Msabaeka Bus Services (Pvt) Ltd 1996 (1) ZLR 605 (S).** At **page 608 C**, the learned judge cited with approval the remarks by **MULLINS J in Nieuwoudt v Joubert 1988(3) SA 84c**that:-

> *"The purpose of pleadings is to define the issues, and to enable the other party to know what case he has to meet."*

4.5. The learned judge further cited with approval the remarks of MILNE J in **Kali v Incorporated General Insurance Ltd 1976 (2) SA 179(D) at 182A** that:

> *"A pleader cannot be allowed to direct the attention of the other party to one issue; and then at the trial attempt to canvass another." (at 608 B).*

4.6. The revered authors **Herbstein& van Winsen the Civil Practice of the Superior Courts in South Africa 3rd ed p 80**also state:

> *"The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny.* ***If the applicant merely sets out a***

skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavits will be struck out"*(own emphasis).*

4.7. At the end of the day the enquiry remains whether or not the Applicant knew of the facts at the time when the founding affidavit was prepared and simply didn't include them, or ought reasonably to have ascertained them before launching the proceeding. See**Driefontein Consolidated GM Limited v Schlochauer 1902 TS 33 at 38.**

4.8. In this case Applicants have added to its answering affidavit Annexure A1 which is titled as follows:

Media Coverage of the first ten days of the electoral period May 31 – June 2018

4.9. The report allegedly covers events reported by the media since elections were proclaimed through Proclamation 2 of 2018 (SI83 of 2018) from 31 May to June 2018.

4.10. Evidently this document contains allegations of events which had not taken place at the time the present suit was filed with the court.

4.11. Similarly,and through Annexure A4, Applicant allegesthat only 14 political parties were covered by the 1st Respondent as opposed to the 24 which is listed in Annexure J.

4.12. By seeking to add this material Applicant is extending the issues in dispute between the parties by making fresh

allegations in the replying affidavits. Pleadings having been closed, 1ST Respondent no longer has an opportunity to respond to these fresh allegations.

4.13. It is thus submitted that Annexure A1and A4 must be disregarded by the court as it seeks to introduce fresh allegations in a replying affidavit in violation of the rule that such allegations must be contained in the founding affidavit.

4.14. The same fate must befall Annexures A3. In paragraph 44 of its founding affidavit Applicant merely asserts that for the period January to March 201 1st Respondent allocated a total of 10 901 seconds to ZANU PF while 1618 seconds were allegedly allocated to other political parties and independent candidates. As highlighted in the 1st Respondent's notice of opposition these are bare allegations which are not supported by any evidence of where and how these statistics were derived. To make matters worse those termed 'other political parties' remain unidentified. It became a mission impossible for 1st Respondent to respond to these bare and unsubstantiated allegations. The statistics which were thrown about in the founding affidavit represent what the authors **Herbstein& van Winsen**(supra) term making a 'skeletal case' which they now seek to fortify in the answering affidavit.

4.15. Now in the replying affidavit, Applicant seeks to patch up its case through a belated report of how the media monitors extracted these figures including the methodology

adopted. Never mind the fact that the methodology so adopted by the media monitors is not even guided by the requirements for broadcasters foundin the **Zimbabwe Electoral Commission (Media Coverage of Elections) Regulations, 2008**or any international guidelines to broadcasters (an issue which 1st Respondent no longer has an opportunity to properly raise at this stage.

4.16. By the dictates of the laws of procedure, this information should have been correctly contained in the founding affidavit inorder to give 1st Respondent an opportunity to respond. Indeedin the **Kali** case supra the learned judge went further to suggest that the failure to plead the real defence or cause of action may suggest shear idleness or incompetence on the part of the legal practitioner, or a deliberate and unconscionable attempt to avoid attracting an onus or burden of adducing evidence or, lastly, that the defence was an afterthought.

4.17. The above sentiments apply with equal force to this matter.Applicant should obviously have anticipated that in a founding affidavit, where necessary as in this case, all allegations must be supported by available evidence. To make matters worse this was information available to the Applicant at the time of application which was inexplicably withheld from the founding affidavit.Having missed its window, Applicant cannot fortify its case in an answering affidavit.

4.18. On the basis of the above it is submitted that Annexures A 1, A3 and A4 are improperly before the court and must be disregarded in the determination of the matter before the court.

B. MERITS

5. Requirement for an injury actually committed or reasonably apprehended has not been established

5.1. The remedy sought by the Applicants in this court is for a final interdict. It is trite that the requirements for a final interdict are:

i. a clear right which must be established on a balance of probabilities.

ii. irreparable injury actually committed or reasonably apprehended; and

iii. the absence of a similar protection by any other remedy.

5.2. See ***Setlogelo v Setlogelo*** **1914 AD 221 at 227;** ***Flame Lily Investment Company (Private) Limited v Zimbabwe Salvage (Private) Limited & Anor*** **1980 ZLR 378;** ***Sanachem (Pty) Ltd v Farmers Agricare (Pty) Ltd*** **1995 (2) SA 781A at 789B**

5.3. It is submitted that Applicants have failed to meet this requirement and therefore the application must fail.

6. **He who alleges must prove**

6.1. It is submitted that Applicants have failed to establish that an injury has been committed or is reasonably

apprehended. It is trite at law that the burden was upon Applicant to prove such injury according to the rule that he who alleges must prove. In **Book vs Davidson 1988 (1) ZLR page 365 @384C-F** the Supreme Court quoted with approval the case of **Mobil Oil Southern Africa (Pty) Ltd v Mechin 1965 (2) SA 706 (A) at 711E** –G Potgieter AJA, as he then was, said:

> *"The general principle governing the determination of the incidence of the onus is the one stated in the Corpus Iuris: semper necessitasprobandiincumbitilli qui agit (D 22.3021). In other words he who seeks a remedy must prove the grounds therefor. There is, however, also another rule, namely, eiincumbit probation qui dicit non quinegat (D22.3.2). That is to say the party who alleges or, as it is sometimes stated the party that makes the positive allegation, must prove. (Cf***KrieglervsMinitzer&Anor 1949 (4) SA 821 (A) at 828)**

6.2. As highlighted above, Applicants in the founding affidavit make a skeletal case with unsubstantiated allegations of how it arrived at the statistics that it presented to the court. Efforts to buttress its case in an answering affidavit obviously falls foul to the rules of procedure.

6.3. As such it is submitted that Applicant failed to discharge its burden to prove that an injury has been committed by the 1st Respondent or is reasonably apprehended through a failure to ensure equal access to all political parties during this electoral period.

6.4. The failure by the Applicants to discharge its onus of proof is fatal to its case which must accordingly be dismissed.

7. Absence of guiding regulations in terms of Section 160G of the Electoral Act.

7.1. It is clear from the papers that Applicants' main bone of contention is predicated upon an alleged failure by the 1st Respondent to allocate equal time to political parties.Two issues arise. Firstly, there are no regulations in terms of Section 160 G of the Electoral Act which regulate the issue fair allocation of time. Absence of such regulations deprive Applicants of a causa upon which a case can be properly constructed against the 1st Respondent. In other jurisdictions a statutory duty is placed on broadcasters which set rules for a minimum allocation of short party election broadcasts[1]. Secondly Applicants' cause of action is not predicated upon the 2008 regulations which they contend are outdated.

7.2. As already highlighted, the allocation times as appears in paragraph 44 of the founding affidavit are unsubstantiated and are also disputed. In the unlikely event that the court determines that these allegations are sufficient, it is further submitted that the starting point for a fruitful case would have been for Applicants to show the court the guidelines that they have adopted as a basis for the allegation that coverage is unfair and imbalanced.

[1] www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2016/party-election-broadcast-regulations

7.3. This is particularly relevant in the Zimbabwe context where participation by various political parties in the elections is unequal. An analysis of the nomination court results indicates that, of all the contesting political parties, only ZANU-PF managed to field candidates in all the 210 National Assembly seats.On the other hand the MDC Alliance failed to field candidates in four constituencies. The PRC deployed in 74% of the constituencies failing to field candidates in 54 constituencies. The ThokozaniKhupe led MDC-T is contesting in 52% of the 210 seats, having forgone to field candidates in 101 constituencies.[2]**It thus begs the question whether equitable reporting would take into consideration the nature and extent of a political party's participation in the elections and how such participation can be fairly converted or reflected inbroadcast airtime. These are questions that are not canvassed in the founding affidavit which simply gives total (albeit disputed) amounts of airtime allocated to various political parties.**

7.4. This scenario is what the Electoral Act anticipated would require regulation. For this reason Section 160G of the Electoral Act provides as follows:

160G Access to public broadcasting media

(1) Public broadcasters shall afford all political parties and independent candidates contesting an

[2]Statistics relating to candidates are based on the Government Gazette on the Nomination Court results for the National Assembly Direct Election published on the 22nd of June 2018. The report does not factor in changes that happened thereafter such as the withdrawal of some candidates

election such free access to their broadcasting services as may be prescribed.

(2) Regulations made for the purposes of subsection (1) shall provide for—

(a) the total time to be allocated to each political party and candidate and the duration of each broadcast that may be made by or on behalf of a party or candidate; and

(b) the times at which broadcasts made by political parties and candidates are to be transmitted; and

(c) the areas to which broadcasts made by political parties and candidates are to be transmitted;

and the regulations shall ensure—

(d) a fair and balanced allocation of time between each political party and independent candidate; and

(e) that each political party and independent candidate is allowed a reasonable opportunity to present a case through the broadcasting service concerned. (own emphasis)

7.5. Evidently the Electoral Act envisages that the regulations would provide for a fair and balanced allocation of airtime which gives more credence to the argument that the extent of a political party's participation in the elections is a significant factor in such allocation.

7.6. A comparative analysis of South African and Botswana regulations supports this contention. In South Africa the regulations are enacted through the **Regulations onParty Elections Broadcast, Political Advertisements, The Equitable Treatment of Political Parties by Broadcasting licensees and Related Matters, General Notice 101/2014**. Section 5 thereof provides that airtime in respect of party election broadcasts shall be allocated in terms of the formulae set out in Annexure A of the regulations. Annexure A goes on to provides for formulae as follows:

> *"Basic allocation-25 % to be allocated to all parties contesting seats in the national assembly.*
>
> ...
>
> *National Allocation List-15% to be allocated according to the number of candidates fielded by parties on the national assembly list...'*

7.7. Similarly, the **Botswana Code of Conduct for broadcasters during elections**provide in section 7.1. as follows:

> *If, during an election period, the programming of any broadcaster extends to the elections, political parties and issues relevant thereto, the broadcaster shall provide reasonable opportunities for the discussion of conflicting views and shall treat all political parties equitably. Equity should be based on the number of running candidates for a particular Party.*

7.8. It is thus submitted that a comparative analysis shows that equity and balanced coverage is much more than the total time amassed by individual political parties as alleged by the Applicants but must be dependent on the level of participation of political parties in the elections concerned.

7.9. The 3rd Respondent has conceded that new regulations have not been enacted in terms of Section 160G but rather contends that the 2008 regulations are still in place and comply with the requirements of the Electoral Act. The point being made is that while Applicants allege that coverage is imbalanced there is no denying the fact that there are no regulations that have been enacted in terms of Section 160G of the Electoral Act to regulate such balance.

7.10. It is common cause that ZANU PF and other political parties and independent candidates have received coverage from the 1st Respondent. The question for determination by the court is whether such coverage has been fair and balanced. It is however submitted thatthe absence of the regulations means that there is no process of control or guidance by established rules and procedures which can be applied by the court to determine fair and balanced coverage of media activities. It thus deprives Applicants of a causa upon which they can seek a legal remedy or properly allege an injury by the 1st Respondent. As such the application must be dismissed.

8. Application was filed before the nomination court

8.4. Thus there can be no allegation of injury to political parties whose identity was unknown at the time of filing of the application.

9. Lack of provision of diaries by political parties

9.1. Applicants have not denied in their papers that only one political party has supplied the 1st Respondent with a diary of their events to assist with coverage.

9.2. The rejection of this useful practice by the Applicants in their answering affidavits is ill-advised. It makes for common sense especially in circumstances where not all political parties and independent candidates are known (i.e. prior to the nomination day) that they assist the 1st Respondent by supplying their event diaries to ensure coverage. No prejudice is suffered by political parties if they do so.

10. Allegations of bias

10.1. In paragraphs 45-48 of the founding affidavit, Applicants allege that 1st Respondent portrays a biased editorial stance in favour of the ruling party. It is submitted that while Annexures H and I are quotations from the sources interviewed by the 1st Respondent, they do not represent 1st Respondent's editorial stance.

10.2. Consequently, the allegations of bias based on the two articles cannot be supported and must accordingly be dismissed.

11. In conclusion it is submitted that Applicants have failed to sustain the requirement that there is an actual or apprehended injury by the 1st Respondent to ensure fair, balanced and impartial coverage to political parties. Accordingly, the application lacks any merit and must fail.

DATED AT HARARE THIS 12TH DAY OF JULY 2018

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