ETHEL TSITSI MPEZENI

versus

ZIMBABWE ELECTORAL COMMISSION

and

MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS

and

THERESA MANASE

and

EVAN MAWARIRE

and

HARRISON NKOMO

and

DOUGLAS COLTART

and

WARSHIP DUMBA

and

JEREMIAH BAMU

and

MOVEMENT FOR DEMOCRATIC CHANGE ALLIANCE

and

RENEWAL DEMOCRATS OF ZIMBABWE

And

PEOPLE’S DEMOCRATIC PARTY

and

COALITION FOR DEMOCRATS

and

NATIONAL CONSTITUTIONAL ASSEMBLY

HIGH COURT OF ZIMBABWE

ZHOU J

HARARE, 19 July 2018 & 20 July 2018

**Urgent Chamber Application**

*T. Chinyoka,* for the applicant

*T. M. Kanengoni,* for the 1st respondent

Miss *P. Macheka,* for the 2nd respondent

*D. Halimani,* for the 3rd – 13th respondents

ZHOU J: This is an urgent chamber application for an interim order interdicting the first respondent from publishing a voters’ roll with the photograph of the applicant. The final relief sought is for s 9 (c) of the Electoral (Voter Registration) Regulations, 2017, which are contained in Statutory Instrument 85 of 2017 to be declared ultra vires s 57 of the Constitution of Zimbabwe. The application is opposed by the third to thirteenth respondents. The first and second respondents elected to abide by the decision of this court. The first defendant filed an affidavit solely for the purpose of placing certain pertinent information on record.

The third to thirteenth respondents were joined as parties to this application by an order which was granted pursuant to their application for joinder.

The facts upon which the application is founded can be summarized as follows. The applicant is a registered voter. In her private live she is active on the social media platform commonly referred to as “Facebook” on which she uses a name which is not her official name. She has publicly proclaimed her political inclinations on that platform. She has adduced evidence of the abuse to which she has been subjected on that social media platform for expressing her opinions. Some of the abuses constitute a threat upon her person. She uses her correct photograph on Facebook, and contends that the publication of her photograph in a voters’ roll to be given to members of the public and political actors such as the third to thirteenth respondents would violate her right to privacy which is protected under s 57 of the Constitution of Zimbabwe. Mr *Chinyoka* for the applicant submitted that the applicant has no difficulty with a voters roll with her photograph being availed to the polling officers at the polling stations for the purposes of identifying the voters. Her complaint is that the publication to members of the public of a voters’ roll containing her photograph apart from being an invasion of her privacy constitutes a threat upon her security as her photograph can be readily linked to her correct name and residential address.

The first respondent states that stakeholders and other interested persons have been furnished with copies of the voters’ roll the electronic version of which is searchable and analyzable as required by law. In the affidavit filed on behalf of the first respondent certain disclosures were made regarding how attempts have been made to hack the electronic voter’s roll. Notwithstanding the encryption of on the voters’ roll to prevent its editing, the first respondent expresses the concern that security features can be by-passed by those intent on hacking.

The third to thirteenth respondents oppose the application on the ground that the publication of the applicant’s photograph in the voters’ roll is authorized by law because s 9 (c) of the Electoral (Voter Registration) Regulations provides for the compilation of a voters roll with each voter’s photograph. The third to thirteenth respondents argued that the personal details contained in the voters roll would still expose a voter to the risks which the applicant is concerned about even if the photograph was to be left out.

The applicant objected to the *locus standi* of the ninth respondent on the ground that it is not a juristic *persona.* Mr *Chinyoka* for the applicant submitted that the ninth respondent is a coalition of political parties each with a distinct personality. He pointed to the fact that the eleventh respondent which is said to be a partner in the alliance constituting the ninth respondent applied to be joined and has defended the matter separately. In the application for joinder the ninth respondent presented itself as a juristic person with the capacity to sue and be sued in its own name. The dispute of fact pertaining to its juristic status is not one that can be determined on the papers. In any event, if the concern is about the payment of costs in the event that the applicant succeeded that is relief which falls for determination on the return date. Nothing prevents the applicant from inviting the court to consider awarding costs against those who deposed to the affidavit on behalf of the ninth respondent should it turn out to be a non-existent entity at law.

Regarding the fourth respondent, the name of one Evan Mawarire appears in the papers. However, one Kuzivakwashe Agnes Ngodza deposed to an affidavit on behalf of the fourth respondent. Although she states that the authority to do that is in terms of a power of attorney no such power of attorney is attached to the affidavit. I find that the fourth respondent is not properly before the court and his name must be struck out from the papers. Any costs occasioned by the purported involvement of the fourth respondent must be paid by the deponent to the affidavit, Kuzivakwashe Agness Ngodza.

What must be determined in the present case is whether the applicant has established the requirements for the interdict which is being sought. What is being sought in the present case is an interim interdict. An interim interdict, which is also referred to as an interlocutory or a temporary interdict or an interdict *pendente lite* is one that is sought pending the outcome of proceedings between the parties, Cilliers *et al*, Herbstein & van Winsen *The Civil Practice of the High Courts of South Africa* 5 ed, Vol. 2*,* p. 1455. Its primary purpose is normally to preserve or restore the *status quo* pending the final determination of the rights of the parties. It does not impact upon or entail the final determination of such rights, see *Radurum (Pty) Ltd* v *Weider Gym Athlone (Pty) Ltd* 1997 (1) SA 646(C). In the case of *Winkelbauer & Winkelbauer* v *Minister of Economic Affairs* 1995 (2) SA 570 (T) at 574 BOTHA J said:

“The purpose of interim relief *pendent lite* is to obviate an injustice to a party who *prima facie* has been (or believes on reasonable grounds that he is about to be) wronged, but who needs time to obtain redress through the due process of law.”

The requirements for an interim interdict to be granted are settled. An applicant for a temporary interdict will succeed if he or she establishes the following:

1. That the right which forms the subject matter of the main action and that the applicant seeks to protect is clearly or *prima facie* established, even though open to some doubt;
2. Where the right is only *prima facie* established, that there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and she or he ultimately succeeds in establishing the right. This requirement is not necessary where a clear right is established.
3. The balance of convenience favours the granting of interim relief; and
4. The applicant has no other satisfactory remedy.

The principle that the existence of a right is a matter of substantive law and whether that right is clearly or only *prima facie* established is a question of evidence is one that has been accepted in many cases and requires no further discussion. The evidence which is adduced by the applicant must establish on a balance of probabilities the existence of a right which is protectable at law.

The applicant seeks enforcement of the right to privacy. That right is protected by the Constitution and by the common law. Section 57 of the Constitution of Zimbabwe provides as follows:

“Every person has the right to privacy, which includes the right not to have –

1. their home, premises or property entered without their permission;
2. their person, home, premises or property searched;
3. their possessions seized;
4. the priacy of their communications infringed; or
5. their health condition disclosed.”

The use of the word “includes” in the above provision means that the ambit of the right extends beyond the instances explicitly stated in paragraphs (a) to (e) of s 57.

In relation to the common law, Iain Currie & Johan de Waal in *The Bill of Rights Handbook* 5 ed*.*, at p 316 state the following:

“The interests underlying the entrenchment of a right to privacy in the Bill of Rights have long been recognized by the common law as important reasons for protecting privacy. The common law recognizes the right to privacy as an independent personality right that the courts consider to be part of the concept of ‘dignitas’. At common law, the breach of a person’s privacy constitutes an *iniuria*. . .”

See also *Mandaza v Daily News & Anor* 2002 (2) ZLR 296 (H).

The courts have held among other things, that the right to privacy is invaded by the publication of a person’s photograph as part of an advertisement without the consent of the person, *O’Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C) at 247F-249 D. There is no reason why the publication of a person’s photograph together with disclosure of particulars such as the person’s address, identity particulars and so on to persons who have no legitimate right to such information should be excused from the ambit of the conduct which constitutes an invasion of the right to privacy. This is particularly so where, as *in casu*, the publication exposes the person to injury, ridicule or other illegitimate or unlawful conduct.

The applicant has therefore proved a *prima facie* right to privacy which would be invaded by the publication of her photograph.

The term injury in the broad sense in which it is used in the context of an interdict includes any prejudice which may be suffered by an applicant as a consequence of the invasion of the right The injury is not confined to bodily harm or one that is capable of pecuniary assessment or evaluation, see *Minister of Law and Order, Bophuthatswana* v *Committee of the Church Summit of Bophuthatswana* 1994 (3) SA 89 (B) at 98 H-I.Injury in the context of contravention of the declaration of rights arises from the mere invasion of the right protected by the Constitution and by the common law. Put in other words, the harm is constituted by the mere violation of the right. If the publication of the applicant’s photo takes place and the impugned regulations are ultimately invalidated the applicant will have no remedy to reverse the infraction which would have taken place. This makes the harm irreversible. The applicant’s apprehension of the impending publication arises not just from the mere fact that there are regulations which permit such publication but from the pressure being put to bear upon the first respondent by political and other actors to publish a voters’ roll with her photograph. Her fears are therefore properly founded.

In considering whether or not the balance of convenience favours the granting of the interdict the court must weigh the harm to the applicant if the interim relief is not granted against the prejudice to the respondents if it is granted. In this case the inclusion of the applicant’s photograph in a voters’ roll is sanctioned by Regulations. Those are the impugned regulations in respect of which a declaration of invalidity is being sought as the final relief in the present application. If the interdict is not granted and the applicant ultimately succeeds in having the regulations set aside her prejudice is irremediable. On the other hand, the granting of the interdict does not irreparably prejudice any of the respondents. The applicant’s case, as outlined earlier on, is not that there should be no photograph in a voters roll as such, but that the voters’ roll with a photograph must be one that is given to the officials who conduct the voting to ensure the correctness of the identity of the person voting. Her objection is to the availing of her photograph to every other person. The non-publication of a photograph to every person who cares to get possession of the voters’ roll is not a matter that can prejudice the conduct of an election which is the respondents’ legitimate concern.

The question of the absence of an alternative remedy must be understood in the context of the remedy envisaged by law. For it to qualify as an alternative remedy, it must:

1. be adequate, having regard to the circumstances of the matter;
2. be ordinary and reasonable;
3. be a legal remedy;
4. grant similar protection.

Herbstein & van Winsen *The Civil Practice of the High Courts of South Africa* 5 ed, pp 1467-1468.

I did not understand the third to thirteenth respondents to have postulated the availability of any remedy to the applicant which would prevent the violation of her right to privacy if the interim interdict being sought in this case is not granted. What is being sought is to interdict the publication of the applicant’s photograph, relief which only these proceedings can provide.

In the result, the provisional order is granted in terms of the draft filed of record.

*Gunje Legal Practice*, applicant’s legal practitioners

*Nyika Kanengoni & Partners*, first respondent’s legal practitioners

*Attorney-General’s Office*, second respondent’s legal practitioners

*Wintertons*, third to thirteenth respondents’ legal practitioners