

IN THE HIGH COURT OF ZIMBABWE

CASE NO. HC3484/18

HELD AT HARARE

*In the matter between:*

VALERIE INGHAM-THORPE



1<sup>st</sup> APPLICANT

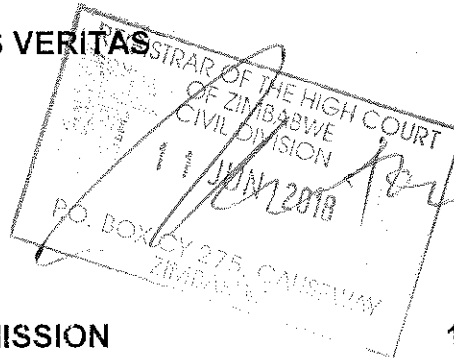
BRIAN DESMOND CROZIER

2<sup>nd</sup> APPLICANT

FIRINNE TRUST OPERATING AS VERITAS

3<sup>rd</sup> APPLICANT

AND



ZIMBABWE ELECTORAL COMMISSION

1<sup>st</sup> RESPONDENT

ATTORNEY GENERAL OF ZIMBABWE

2<sup>nd</sup> RESPONDENT

APPLICANTS' HEADS OF ARGUMENT



## BACKGROUND

1. This is an application in which the Applicants seek certain declaratory orders from the court, which orders revolve around their rights to a free, fair and transparent election as well as the corresponding constitutional obligation on the First Respondent to deliver such an election. The First and Second Applicants are citizens of Zimbabwe, and are registered voters. They undoubtedly have a substantive and legally recognized interest in this matter.
2. The Third Applicant is a well-known non-profit organization, which works in the area of human rights and the rule of law. Its interest in the matter is also very clear. Overall, the standing of the Applicants to bring this suit is not in issue, and the Applicants' rights to a transparent electoral process are undisputed. This issue of interest also speaks to the foremost requirement of a declaratory order, which is that it must be brought by an "interested person". We will deal more decisively with the issue of interest in detail over the course of these submissions.
3. The gravamen of this case, we would submit, appears to be whether or not the court may properly make the orders sought by the Applicants, and whether the orders can be classified as declaratory relief. This is because without substantially disputing the existence of the right to a free, fair and transparent election as well as its corresponding constitutional obligation to deliver such an election, the First Respondent merely disputes the propriety of the relief sought, which is claimed to mainly to constitute "administrative directions" from the court. This is obviously an attempt to skate the real issue of electoral transparency, and we will deal with this

point in more detail in these submissions. Suffice to only point out at this stage that there is no legal basis for this contention by the First Respondent.

4. Further, a key question in this suit is whether the relief sought, if granted, would undermine the independence of the First Respondent as it contends. Essentially, this raises the question of how the courts may constitutionally interact with independent commissions within the Constitution of Zimbabwe. As will be shown, the courts have the duty to interpret and apply the law, and to pronounce the obligations of independent commissions established by the Constitution. As will be illustrated, there is simply no legal basis to argue that the court has no role to play in spelling out the obligations of the First Respondent in delivering its constitutional mandate. The effect of accepting this argument would be to make the First Respondent a law unto itself, which is self-defeating.
5. In the course of the next few pages, the Applicants will illustrate that the relief sought is declaratory in nature, in that it is brought by interested persons and invites the court to give meaning to the constitutional standard of transparency. The existence of that standard within the Constitution is common cause between the parties, and there is no argument that the Applicants have a right to a transparent electoral process. The Applicants will show that in granting the orders sought, the court will be simply affirming the constitutional obligation of transparency that firmly rests on the First Respondent. There is nothing in the orders sought which introduces an obligation that is extrinsic to transparency.
6. On its part, the First Respondent's opposition rests on a conspiracy theory, to the effect that the court cannot make orders in execution of its functions which speak to the constitutional obligations of the First Respondent. They essentially contend

that it is not for the court to determine those things which it must do to meet its constitutional obligation of transparency. This argument obviously fails the test of constitutional reason, as will be illustrated in the scheme of these submissions. The Applicants will show that none of these contentions by the First Respondent is tenable. For the reasons provided, we will submit that the interests of justice and the public interest strongly militate in favour of granting the declaratory relief sought by the Applicants in this matter.

### **FACTUAL BACKGROUND**

7. The Applicants filed an application for declaratory relief on the 20<sup>th</sup> April 2018, and the full extent of the orders sought appears in the draft order attached to the notice of motion in this matter. The application was opposed by the First Respondent, and a notice of opposition was filed on the 11<sup>th</sup> May 2018. This opposition was filed out of time, and as matters stand, the First Respondent is barred from these proceedings. The application was also opposed by the Second Respondent, who cited misjoinder, and filed a notice of opposition on the 4<sup>th</sup> May 2018. An answering affidavit was consequently filed by the Applicants, who substantively answered to the opposition by the First Respondent, and accepted the contentions of misjoinder by the Second Respondent.
8. On the 6<sup>th</sup> June 2018, an urgent chamber application for directions was brought by the Applicants in this matter under Case No. HC 5224/18, seeking directions as to set down and filing of heads of argument in this matter. This was because at that time, the President of Zimbabwe had proclaimed 30<sup>th</sup> July 2018 as the election date, which meant that the present application was had to be determined without any further delay. On the 7<sup>th</sup> June 2018, the Honourable Munangati-Manongwa of

the High Court issued directions as to set down of the matter and filing heads of argument. These heads are filed pursuant to those directions.

9. The general facts of this matter are that the First and Second Applicant are citizens of Zimbabwe who are registered voters. The Third Applicant is a non-profit, working in the area of human rights and the rule of law. The Applicants jointly seek declaratory orders which relate to the transparency of the First Respondent. The orders include the publications of manuals and procedures relating to the work of the First Respondent, publication of names of persons seconded to the First Respondent, publication of the role and membership of the National Logistics Committee and various other orders as more fully set out in the draft order.

### **THE ISSUES**

10. The Applicants submit that the following issues arise for determination in this matter:
- 10.1 Whether the order sought by the Applicants in this matter are declaratory orders which the court may properly make?
- 10.1.1 Whether it is necessary for the court to consider making the declarations sought, specifically whether the matter is not abstract or academic.
- 10.1.2 Whether the Applicants are interested persons within the context of the requirements for a declaratory order?
- 10.1.3 Whether the present matter requires the court to declare an existing, future or contingent right accruing to the Applicants?
- 10.2 Whether the relief sought, if granted, undermines the independence of the First Respondent?

10.2.1 Whether the court is barred by the provisions of sections 235 and 321 of the Constitution of Zimbabwe from considering and making orders as to the constitutional obligations of the First Respondent?

11. We deal with these issues in turn below, and the submissions follow the scheme set out above.

### **WHETHER THE RELIEF SOUGHT IS DECLARATORY RELIEF**

12. In order to succeed in the relief sought, the Applicants must conquer two hurdles. First, the court must agree with the Applicants that it is necessary to consider the question of the declaratory orders in that they are neither abstract nor academic. Second, the Applicants ought to establish all the requirements of declaratory relief which speak to interest and the question of existing, future or contingent rights accruing to the Applicants. We deal with these hurdles in turn below.

**The present matter concerns live issues which are neither abstract nor academic**

13. This submission arises from the well-known position that declaratory relief is discretionary and that before the court grants declaratory relief, it must consider whether it is necessary to do so, based on considerations of ripeness and mootness (see **T PUBLISHING (PTY) LTD & OTHERS V MINISTER OF SAFETY AND SECURITY & OTHERS 1997 (3) SA 514 (CC)**). The Applicants in this matter submit that it is absolutely necessary for the court to consider the issue of the declarations sought. This is because the matter presents live issues, which are neither abstract nor hypothetical. The issues relate to an important process such as elections, which are arguably at the heart of any democratic process. More

specifically, the right to a free, fair and transparent electoral process is fundamental, especially considering that the Constitution of Zimbabwe makes free and fair elections a founding principle of the republic. This makes it clear that it is necessary to consider the declaratory relief sought by the Applicants.

**The relief sought is declaratory, and may be properly issued in terms of section 13 of the High Court Act.**

14. The Applicants submit that the orders being sought are declaratory orders, contrary to the contentions by the First Respondent. The requirements for the grant of such relief are well known in our law.<sup>1</sup> In this respect, the requirements for a declaratory order are simply that the Applicant must be 1) an interested party in the sense of having a direct and substantial interest in the subject matter and 2) the interest must concern an existing, future or contingent right.
15. From a general perspective, we submit that the Applicants have a direct and substantial interest in ensuring that the laws of Zimbabwe are observed, and particularly that the right to a free and fair election as guaranteed by 67 (1) (a) of the Constitution is observed. The First and Second Applicants are also registered voters, who have a direct interest in the proper conduct of an election in Zimbabwe. Further, the Third Applicant also has an interest in ensuring that the Respondent fulfils its function to ensure that an election is conducted efficiently, freely, fairly and transparently in terms of the Constitution. On that premise, there can be no

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<sup>1</sup> These requirements arise from section 13 of the High Court Act which provides as follows: *"The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."*

doubt that the Applicants meet the first requirement that they must have a direct and substantial interest for the purposes of the declaratory order sought.

### **The suit relates to existing, future or contingent rights**

16. A further requirement of declaratory relief is that the suit must concern the declaration of existing, future or contingent rights. In relation to this, the Applicants would submit that the rights and obligations relating to electoral transparency are very clear from the Constitution. Section 156 (1) and section 239 (a) of the Constitution of Zimbabwe, as read with section 3 of the Electoral Act provide that elections must be conducted efficiently, freely, fairly and transparently. Importantly, the Constitution in section 239 (a) provides that the First Respondent must ensure that elections are conducted efficiently, freely, fairly and transparently in accordance with the law. There is most certainly a constitutional standard of transparency which cannot be seriously disputed by the First Respondent.

17. These principles of transparency also transcend domestic law, as they also find prominence in international law. Particularly, the SADC Principles and Guidelines Governing Democratic Elections provide for electoral transparency, and these guidelines are binding on Zimbabwe as a SADC member state, by virtue of Guideline 3.1.1 of those principles. Specifically, the Constitution of Zimbabwe recognizes international law as an interpretational and substantive guide for the court, and from an interpretational perspective, the present application invites the court to interpret the Constitution and the Electoral Act with due regard to the SADC Principles and Guidelines Governing Democratic Elections.

18. A key point to be made is that the Constitution does not provide a definition of the word transparency, which as per our rules of interpretation must be given its



ordinary grammatical meaning. In this respect, the Cambridge Dictionary defines transparency as “the quality of being done in an open way without secrets”. This obviously means that the First Respondent must conduct its business openly and without any secrets. The above standard and definition clearly illustrates that there is a constitutional obligation on the First Respondent to act openly and without any secrets.

19. In this respect, all the declarations sought naturally flow from this constitutional standard, and there is simply no argument that they relate to anything other than an already existing obligation requiring openness. More specifically, and as will be illustrated below, the declarations sought do not introduce new obligations for the First Respondent, but are simply an expression of an already existing obligation of openness in the electoral process. There can be no merit in the submission that the suit seeks to introduce new obligations for the First Respondent. We deal with the orders sought in brief below, to illustrate that they all speak to the question of the constitutional obligation of the First Respondent to conduct its business openly and without any secrets.

**Provision of standard operating procedures, processes, policies and internal manuals which relate to the conduct of elections**

20. The Applicants contend that the right to a free, fair and transparent electoral process requires the First Respondent to make public all standard operating procedures, processes, policies and internal manuals which relate to the conduct of elections. This would ensure that the Applicants and similarly placed individuals know how the election is administered, in line with the clear obligation of transparency under the Constitution. The First Respondent has no basis

whatsoever, to not have this information available publicly, as it relates to a process which the Constitution sets up as transparent. Surely, the obligation of transparency and openness would be meaningless if a narrow interpretation such as one that allows the First Respondent to not publish its operating procedures and manuals is adopted. As already submitted, the word transparency has a clear and unambiguous meaning, and it speaks to openness and lack of secrets. This means that the First Respondent cannot keep the information sought as a secret, as there is a constitutional obligation to be open and to publish such information. Without this, the First Respondent would have failed in its obligation to be transparent. In this respect, therefore, the court is properly placed to make an order declaring that in line with the obligation of transparency, the First Respondent has the legal duty to publish all standard operating procedures, processes, policies and internal manuals which relate to the conduct of elections.

**Publication of the names and designations of persons seconded from the Public Service to the Respondent during an election**

21. There is also no doubt that electoral transparency requires the First Respondent to publish the names and designations of persons seconded to it during an election in terms of the relevant provisions of the electoral law. The rationale for this is clear, and arises from the obligation of the First Respondent to conduct its operations in a transparent manner. More importantly, the Applicants obviously have the right to know the personnel who are responsible for conducting a process of such constitutional prominence as an election. To argue that the First Respondent somehow has a discretion to keep this information private obviously flies in the face of the constitutional obligation of transparency. The same arguments above

would also apply to the orders sought relating to the role and personnel of the National Logistics Committee, voter education schedules, delegation of voter registration and removal of persons from the voters' roll. As already submitted, the Constitution requires the First Respondent to be open, and publication of this information fits fairly and squarely into that existing obligation.

**The publication of standard operating procedures for sealing and storage of ballot boxes and procedures for compilation and collation of results**

22. There is no doubt that an electoral process includes all processes related to an election, and is not only limited to the casting of votes by voters such as the First and Second Applicants. The process obviously includes registration, polling and all processes which follow polling day. A reading of the Constitution makes this point clear, and there is no doubt that the right to vote and the right to a free and fair election applies to all these processes. In this respect, it should follow that the First Respondent's duty extends to pre-election processes such as voter education, as well as processes such as sealing and storage of ballots and compilation of results after polling. Under the constitutional standard of transparency, there is simply no basis for the First Respondent to be secretive about these processes. The obligation of transparency clearly encompasses the publication of such information, and there is simply no basis for not publishing such information.

23. In relation to the general substance of the declaratory orders, it suffices to point out that they are all encompassed in the obligation of the First Respondent to conduct the electoral process openly and without secrets, and are not new constitutional obligations on the First Respondent as contended. This means that

the relief sought fits fairly and squarely within the context of a declaratory order. There is therefore no merit in the contention that the present application speaks to new rights which did not exist at the time the application was filed. The fact that the First Respondent has decided not to specifically address the connection between the orders sought and the constitutional obligation of transparency essentially means that the application is not opposed on the substance by the First Respondent.

24. There is also a point to be made in relation to the argument that the orders sought are administrative directions. This submission, with respect, is based on a misunderstanding of the relief sought by the Applicants. First, for the orders sought to be considered as administrative, it must be illustrated that in granting the orders, the court would be exercising an administrative function, and not a judicial one. It is beyond doubt that the court in granting the orders sought, would be exercising a judicial function, and that judicial functions entail that the court has the mandate to interpret the Constitution and to lay out the obligations of various bodies in terms of the Constitution. In this respect, therefore, any orders made by the court in its interpretation of the Constitution would not be administrative directives, but would be an exercise of the judicial function of the courts.

25. In order to give context to what constitutes the role and function of the judiciary, it is worthy to refer to some authorities of the subject. The judicial function was described in the South African case of **S V MAKWANYANE** as follows:

*“...Our task is to give meaning to the Constitution and, where possible, to do so in ways that are consistent with the underlying purposes and are not detrimental to effective government. The issues raised in the present case... concern the powers of Parliament and how it is required to function under the*

*Constitution... Constitutional control over such matters goes to the root of democratic order... It is of crucial importance at this early stage of the development of our new constitutional order to establish respect for the principle that the Constitution is supreme.”*

26. The above sentiments make it clear that the role of the court is to give meaning to the Constitution. This is exactly what this case seeks to do, in that it invites the court to give meaning to the provisions of electoral transparency in the Constitution. The First Respondent is not immune from such scrutiny from the courts, and cannot argue that the court cannot speak on its constitutional obligations in fulfilment of its judicial mandate. To allow this interpretation would obviously make the First Respondent a law unto itself, giving it discretion to choose not to be transparent even when the Constitution is clear that there is an obligation to be transparent. For instance, it is shocking that the First Respondent contends, in its opposing affidavit, that it has the discretion to keep secret the names of persons seconded to it during an election. This obviously would fly right in the face of electoral transparency, and the court would be well within its powers to declare that under the obligation of transparency, the First Respondent has a legal duty to publish such information.

#### **The issue of the existence of a dispute or an allegation of a violation**

27. The First Respondent also makes the shocking point that the Applicants ought to have alleged that it was failing in its obligation of transparency in order to succeed in this suit. This contention has no legal basis. This is because section 13 of the High Court Act does not make the existence of some dispute a *sine quo non* of an application for declaratory relief. This much is clear from the ordinary grammatical

meaning of the words contained in the provision. This position has also been clarified by the courts in this jurisdiction and elsewhere. (see **CORDIANT TRADING CC V DAIMLER CHRYSLER FINANCIAL SERVICES (PTY) LTD 2005 (6) SA 205 (SCA)**).

28. In relation to the requirements that are known in our law, and as already submitted, the Applicants in this matter have a clear interest in the subject matter of the orders sought, a position which has not been disputed in the papers. The second requirement is that the court must be called upon to determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination. In relation to this aspect, the Applicants submit that this case concerns the right to a free, fair and transparent election as well as the corresponding constitutional obligation on the First Respondent to deliver such an election. In our submission, such a declaration only requires the court to give meaning to the provisions of electoral transparency in the Constitution, and does not require the existence of a dispute between the parties to succeed.

#### **THE EFFECT OF THE ORDERS ON THE INDEPENDENCE OF THE FIRST RESPONDENT**

29. The First Respondent argues that the Constitution gives it unfettered discretion to run the electoral process. This general averment is common cause, yet it must be submitted that this discretion does not extend to the discretion to act outside its obligations under the Constitution. Specifically, whilst the First Respondent should operate independently without any interference, it still has to act within the Constitution. This is because the Constitution is the supreme law of Zimbabwe,

and the First Respondent is a creature of the Constitution. In that respect, the First Respondent can only act within the Constitution, and must fulfil its obligations under the Constitution.

30. The First Respondent makes reference to various sections in the Constitution, which it contends to be authority for the point that the court cannot issue the declaratory orders sought. With respect, the First Respondent misreads the import of these provisions in as far as they speak to the role of the judiciary. What is clear is that the courts have the power to interpret the Constitution, and to pronounce on rights and to give the Constitution meaning. As already contended, the obligation of transparency entails openness and not keeping any secrets. In that respect, it is clear that the court has the mandate to pronounce on these obligations, and to ensure that the obligations in the Constitution are given meaning.

31. There is also no argument that the Constitution places this obligation of transparency on the First Respondent, and that this obligation must be fulfilled. In this respect, therefore, there can be no legal basis for the First Respondent to extend its discretion beyond what is specifically required by the Constitution. The Constitution, for instance, requires the First Respondent to be transparent, which means it must play its cards face up in an electoral process. For the First Respondent to then argue that it somehow has the discretion to not be transparent clearly shows that the First Respondent does not understand its constitutional obligations, and the role of the court in setting out those obligations.

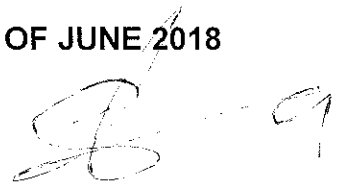
### **CONCLUSION**

32. The Applicants would submit that the present matter is a clear case for the granting of declaratory relief. The importance of the electoral process in a constitutional democracy like Zimbabwe makes it absolutely necessary to consider the matter,

which is neither moot nor abstract. Further, the Applicants have a clear interest in the matter, and the matter generally invites the court to play its role in interpreting and giving life to the Constitution. Furthermore, there is simply no impediment to the application being granted, as it does not seek a declaration of rights which do not already exist in the Constitution. The standard of openness in the electoral process already exists under our Constitution, and it is for the court to declare it. In relation to the effect of the relief sought on the independence of the First Respondent, we would submit that a declaration of an obligation that undisputedly exists in the Constitution does nothing to hinder the independence and discretion of the First Respondent. This is because the independence of the First Respondent does not extend to the independence to act outside the Constitution.

33. In the circumstances, the Applicants will pray for orders in terms of the draft.

**SIGNED AND DATED AT HARARE THIS 11<sup>TH</sup> DAY OF JUNE 2018**



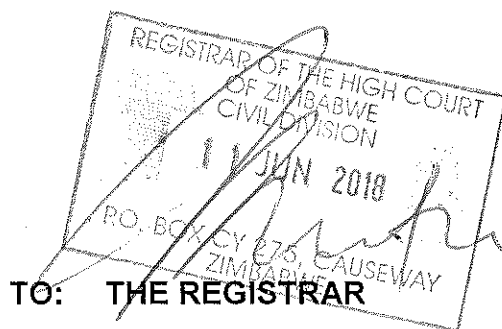
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**AND**

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**HARARE (4/JUST/1170/FC/pm)**