IN THE HIGH COURT OF ZIMBABWE **CASE NO: HC3584/18**

HELD AT HARARE

In the matter between:

VALERIE INGHAM-THORPE **1ST APPLICANT**

AND

BRIAN DESMOND CROZIER **2ND APPLICANT**

AND

FIRINNE TRUST *operating as* VERITAS **3RD APPLICANT**

AND

ZIMBABWE ELECTORAL COMMISSION **1ST RESPONDENT**

AND

ATTORNEY-GENERAL OF ZIMBABWE **2ND RESPONDENT**

1ST RESPONDENT'S HEADS OF ARGUMENT

PRECIS

i. As outlined in the 1st respondent's opposing papers, the thrust of the opposition to the relief sought herein is that it is not declaratory relief as contemplated by our law over which this Honourable Court has discretion in terms of s14 of the High Court Act, [Cap 7:06]. It lies more in the realm of an order seeking various administrative directives in contravention of the constitutional and statutory provisions that guarantee the independence of the 1st respondent.

ii. Once the relief claimed by the applicants is shown to fall within this later category, and there being no averments or evidence placed before the court to justify a departure from the constitutional standard set viz. the 1st respondent's independence, the application must fail.

iii. Firstly, however, these heads will deal with the preliminary issue of the bar alleged to be in operation against the 1st respondent.

1. WHETHER 1ST RESPONDENT IS BARRED

1.1. The 1st respondent is not barred in this matter. Its opposing papers were duly filed within the ten day *dies induciae* prescribed by the Rules of Court.

1.2. The application was filed on the 20th of April 2018 and served on the 1st respondent on the 23rd of April 2018. Opposing papers were thus due to be filed by the 1st respondent on or before the 8th of May 2018.1st respondent's opposing papers were duly filed on the 8th of May 2018.

1.3. The position taken by the applicants that the 1st respondent failed to file its opposing papers within the *dies induciae* may have arisen from an omission to exclude the 1st of May 2018 from the computation of the *dies induciae*, which day was a public holiday.

2. THE INDEPENDENCE OF THE ZIMBABWE ELECTORAL COMMISSION

2.1. In terms of s235(1)(a) of the Constitution:

> *"The independent Commissions are independent and are not subject to the direction or control of anyone."*

2.2. Section 235(3) of the Constitution puts the issue of the independence of the 1st respondent, thus:

"No person may interfere with the functioning of the independent Commissions."

2.3. This constitutional standard is given expression in the electoral law through the provisions of s4B and s10A of the Electoral Act [Cap 2:13]. Section 4B provides that:

"No legal proceedings shall lie against the Commission or any of the Commissioners or the Chief Elections Officer or any member of the staff of the Commission acting under the direction of the Commission or the Chief Elections Officer in respect of anything done in good faith and without gross negligence in pursuance of this Act."

2.4. Section 10A(2) of the Electoral Act buttresses this perspective by providing that:

"The State and any private person (including a private voluntary organisation), and any other person, body, organ, agency or institution belonging to or employed by the State or any private person a local authority or otherwise, shall not interfere with, hinder or obstruct the Commission, its Commissioners or any member of staff of the Commission, in the exercise or performance of their functions."

2.5. The starting point, therefore, in any suit against the 1st respondent, is a recognition of the fact that it enjoys a constitutionally guaranteed independence and statutorily enshrined immunity from suit save in certain specified instances. Relief sought in any suit brought against the 1st respondent, and indeed any of the independent Commissions established by the Constitution, must be construed against this constitutional and statutory standard.

2.6. Whilst the applicants contend that the 1st respondent cannot seek to place itself beyond the scope of judicial oversight or review, that, with respect, is not the proposition that is put across by the 1st respondent in referring to its constitutionally enshrined independence. The point sought to be made by the 1st respondent, is that the relief that is sought in the present matter, constitutes an undue violation of the said constitutional independence afforded to the 1st respondent. There are instances where relief can properly be sought against the 1st respondent but the present application, with respect, is not such an instance.

2.7. The functioning of the 1st respondent, over which much of the protections afforded by s235 of the Constitution apply, is also an issue that is specifically provided for in the Constitution.

2.8. Section 321(1) of the Constitution provides that:

> *"An Act of Parliament may confer additional functions on a Commission and may regulate the manner in which a Commission*

exercises its functions, provided that the Commission's independence or effectiveness is not compromised."

2.9. Section 321(2) of the Constitution provides that:

"An Act of Parliament referred to in subsection (1) may permit a Commission to delegate its functions, but a Commission must not delegate its power to make appointments to, or to make recommendations or give advice on, any office established by this Constitution."

2.10. Section 321(4) provides that:

"An Act of Parliament may provide for the procedure to be adopted by a Commission, and in any respect that is not so provided for the Commission may determine its own procedures, but any such procedures must be fair and promote transparency in the performance of the Commission's functions."

2.11. The 1st respondent's obligation to be transparent is not in dispute in this matter. The means by which it achieves such transparency, (which it is submitted is what arises from the relief sought by the applicants), is a matter that the Constitution places in the hands of the Legislature and where there is no legislation regulating a particular aspect of the 1st respondent's functions, the Constitution

affords the 1st respondent full discretion to determine its own procedures. The determination of such procedures, being an issue that falls within the functions of the 1st respondent, is an issue over which the Constitution protects the 1st respondent from interference or control.

2.12. The determination of the means and procedures by which the 1st respondent achieves its obligation of transparency, where no legislative regulation exists, is a matter that also falls within the administrative functions of the 1st respondent.

2.13. This Honourable Court has had occasion, albeit under the previous constitution, to relate to the import of constitutional provisions that entrench the independence of a commission in the matter of ***Tsvangirai v Mugabe & Anor 2005 (2) ZLR 398 (H)*** wherein it observed that:

> *"The kind of protection that the constitutional provision extends to the ESC, (Electoral Supervisory Commission), is independence in the conduct of its duties of monitoring, for example, the criticism of how its officials discharged their duties quoted at length above is completely inappropriate. No court can interfere or inquire into the manner in which the ESC conducts its duties, no court can order that ESC officials be more active in the discharge of their duties, etc. but if the grievance is that the ESC was not properly constituted, acted illegally or failed to discharge its duties altogether, such a challenge cannot be answered by reference to the provision which*

constitutionally entrenches the independence of the Commission." Pg 406 F-H

2.14. The provision in the old constitution that the court was referring to was s61(6) which provided that:

> *"The Electoral Supervisory Commission shall not, in the exercise of its functions in terms of subsection (3) or (5), be subject to the direction or control of any person or authority."*

2.15. This provision mirrors the provisions of s235 of the current Constitution quite closely and the interpretation given in the ***Tsvangirai*** case *supra,* is instructive in interpreting s235 of the present Constitution i.e. s235 enjoins that apart from where allegations of illegality or failure to perform its obligations in terms of the law are made, the 1st respondent is protected from interference, direction or control in the conduct of its functions.

2.16. Since the issues that arise from the applicants' draft order are more appropriately classified as directions as to howthe 1st respondent ought, (in the applicants' opinion), to discharge its obligation of transparency, the provisions of s235 of the Constitution afford the 1st respondent a full defence against the relief sought herein as such relief constitutes an attempt to direct and interfere with the1st respondent's functions. The case that has been brought before the court is not based on an allegation of unlawful conduct or dereliction of duty by the 1st respondent. In fact, the founding papers assign no blameable conduct upon the 1st

respondent as would warrant deviation from the protection afforded by s235 of the Constitution.

2.17. It may be helpful to spell out the conduct of ESC officials that was found by the court in the ***Tsvangirai*** case *supra*, to be protected by the constitution, for illustrative purposes. It is summarised in the judgment thus:

> *"In paragraph 119 of his affidavit, the petitioner criticizes the fourth respondent directly concerning its conduct at most polling stations, thus: 'the Electoral Supervisory Commission monitors took a passive role in the proceedings and were not seen to be closely involved in monitoring the process of voting. Very rarely did independent observers witness Electoral Supervisory Commission monitors challenging or intervening in any part of the voting, especially on occasions when people were turned away for not being on the electoral register. In most cases, the Electoral Supervisory Commission monitors seemed to limit themselves to sitting in their designated places at polling stations and taking notes, interacting very little with presiding and polling officers'" pg. 40G-406A*

2.18. Further, as it has been submitted that much of what arises from the applicants' draft order consists of administrative functions placed in the 1st respondent's exclusive discretion by s321(4) of the Constitution, authorities that relate to the instances where this Honourable Court may interfere with an

administrative discretion afforded by statute are instructive in considering whether the relief sought can be granted.

2.19. In the matter of ***Director of Civil Aviation v Hall 1990 (2) ZLR 354 (SC)*** the following finding was made:

> *"In my view, there was no justification to run counter to the principle that a court will not normally interfere in the sphere of practical administration. See Baxter, administrative Law at p681 ff. it will only do so where-*
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> *(a) The end result is a foregone conclusion and a referral back would be a waste of time; or*
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> *(b) Further delay would cause unjustifiable prejudice to the applicant; or*
>
> *(c) The statutory tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; or*
>
> *(d) The court is in as good a position to make the decision itself." Pg. 362 E-G*

2.20. None of the four criteria set out in the ***Hall*** case *supra* are applicable in the present matter. In any event such criteria would only come into focus where illegality; irrationality or procedural impropriety are alleged. That is not the case in the present matter. The findings of thisHonourable Court in the matter of ***Tsvangirai***

& Anor v Registrar-General &Ors 2002 (1) ZLR 251 (H) are apposite in this regard. They are thus:

> *"As a general rule, a court has no jurisdiction to intervene in administrative decisions or direct administrative authorities on how they should act. Various decisions of the courts in this country have stressed this principle. The discretion bestowed on an administrator cannot be interfered with in the absence of illegality, irrationality or procedural impropriety. In this regard, I agree with the remarks by McNally JA in Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S) at 21 that:*
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> *'the duty of the courts is not to dismiss the authority and take over its functions, but to ensure, as far as humanly and legally possible, that it carries out its functions fairly and transparently. If we are satisfied it has done that, we cannot interfere just because we do not approve of its conclusion. But at the other end of the scale, if the conclusion is hopelessly wrong, the courts may say that it could only have been arrived at by reference to improper considerations or by failure to refer to proper considerations. In these cases, we reason backwards from the effect to the cause. We say 'the result is so bizarre that the process by which it was reached must have been unfair or lacking transparency.'*
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> *The learned Judge of Appeal went on to quote with approval comments in Baxter's Administrative Law that:*

'the function of judicial review is to scrutinise the legality of administrative action, not to secure a decision by a judge in place of an administrator. As a general principle the court will not attempt to substitute their own discretion for that of the public authority, if an administrative decision is found to be ultra vires the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise 'would constitute an unwarranted usurpation of the powers entrusted [to the public authority] by the Legislature. Thus, it is said that: '[t]he ordinary course is to refer back because the court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. In exceptional circumstances, this principle will be departed from. The overriding principle is that of fairness.'

There can be no doubt that the above remarks reflect the law as applied by the courts in this country. See also Katiyo v Standard Chartered bank Pension Fund 1994 (1) ZLR 225 (H), Hama v National Railways of Zimbabwe 1996 (1) ZLR 664 (S)." pg. 253F- 254E

2.21. The net effect of these judgments being that the relief sought by the applicants, (whilst stated as declaratory in nature is in fact seeking to direct the administrative functions of the 1st respondent), can only be granted where the exceptions to the general rule against interfering with administrative discretion are pleaded and established. That is not the case in the present matter. The decisions

also buttress the principle of independence of the 1st respondent to determine how it will discharge its obligation of transparency.

3. THE NATURE OF DECLARATORY RELIEF

3.1. This Honourable Court's power to relate to a prayer for declaratory relief arises from common law and the provisions of s14 of the High Court Act [Cap 7:06], which provides that:

> *"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."*

3.2. Whilst a party is at large to bring an application claiming declaratory relief, whether such application merits the grant of declaratory relief sought is subject to the court's discretion.

3.3. In opposition to this matter, the 1st respondent has challenged whether the relief sought by the applicants is relief that can properly be granted through a declaratory order. Put differently, the 1st respondent questions whether the various paragraphs of the applicants' draft order represent distinct rights that they posses which the court can declare to so exist, or they constitute the mechanics of how one right, the right to transparency, is to be realised which mechanics would in turnbe classified as administrative directives and not rights in themselves.

3.4. The 1st respondent maintains that the relief that is prayed for by the applicants, is relief that seeks to give administrative directives to the 1st respondent viz. the realisation of the right to transparency and its correlative obligation. As already indicated in these heads, this offends against the constitutionally enshrined independence of the 1st respondent and does not meet the requirements for interference with the administrative discretion of the 1st respondent herein.

3.5. Whilst the applicants maintain that the relief they seek constitutes twenty (20) separate and distinct rights, it is apparent that all twenty (20) paragraphs of the declarations sought constitute the mechanics by which, in the applicants' opinion, the right to transparency ought to be realised. They do not present new rights as contradistinguished from the right to transparency. As already indicated in these heads, these mechanics are the sole preserve of the 1st respondent, (s321(4) of the Constitution), and the Legislature, (s321(1) and (2) of the Constitution).

3.6. Illustrative of this is the relief sought under paragraphs (o) and (p) of the draft order which seek to proscribe the delegation by the 1st respondent of any of its functions. These are presented as rights that are extant and should be declared as such by this Honourable Court. The provisions of s321(2) of the Constitution, however, make it clear that the applicants' contention in this respect cannot be correct. As already quoted above, s321(2) of the Constitution in fact allows the delegation of its functions by the 1st respondent with the limitations stated in that subsection. Paragraphs (o) and (p) of the relief sought can thus not be deemed existing rights which this Honourable Court can declare as prayed for.

3.7. With respect, another curious 'right' that is presented by the applicants in their draft order is found in paragraph (m) of the draft order which seeks a declaration that the provision of lanyard identity cards to election agents on election day is an existing right that this Honourable Court should declare to be so. It is clear that such things fall squarely within the administrative functions of the 1st respondent as it conducts its constitutional duties. With respect, it cannot be said that the Legislature ever contemplated precisely micro-managing the 1st respondent's operations as to even determine the type of identity document, if any, it should produce for election agents. Without seeming to trivialise the issue, what if the 1st respondent elects to give such officials t-shirts marked election agent instead of lanyard identity documents. What if it opts for a paper sticker placed on one's clothing indicating that a person is an election agent. What if it opts for a hat that indicates that one is an election agent. This simply illustrates that this is a question of mechanics and not of substantive rights requiring declaration by the court.

3.8. It is thus submitted that the relief that is sought by the applicants in this matter, is not the kind of relief over which this Honourable Court can exercise the discretion afforded under s14 of the High Court Act in favour of the applicants. The substance of what is sought by the applicants relates to administrative issues over which the 1st respondent has exclusive jurisdiction.

4. CONCLUSION

4.1. In conclusion, the applicants have failed to make a case for the relief that is sought in their draft order. The nature of the relief offends against the independence

of the 1st respondent and the instances in which such independence can properly be interfered with by this Honourable Court are neither pleaded nor relied upon in this matter. In the result, the 1st respondent's independence ought to be upheld by dismissing the application with costs.

DATED AT HARARE THIS 15TH DAY OF JUNE 2018.

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