

TRUSTEES OF ELECTION RESOURCE CENTRE TRUST
versus
ZIMBABWE ELECTORAL COMMISSION

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 29 May 2018 and 6 June, 2018

Urgent Chamber Application

T. Maanda, for the applicant
T.M Kanengoni, for the respondent

CHITAPI J: This application was filed on 28 May 2018. It was placed before me at 4.40pm. I quickly perused it and noted that the applicant inter-alia based the urgency of the application upon the allegation that the relief it sought would be defeated if the relief sought was not granted before the 29th May, 2018. I therefore rescheduled my diarized work of 29 May, 2018 and directed that the application be set down for hearing at 11.30am on 29 May, 2018. At the end of the hearing at about 1.20pm, I advised the parties to check with my clerk at 4.00pm if I was ready with the judgment. After further consideration of the papers and the submissions by counsel for the parties, I resolved to compose a full judgment and advised the parties accordingly. I therefore reserved judgment. This therefore is my judgment on the application.

The applicant claims the following relief as set out in the provisional order:

Terms of the final order sought

That the respondent show cause if any why a final order should not be granted in the following terms:

1. The provision of the provisional voters roll to the applicant is in the interests of public accountability.
2. The refusal by respondent to supply the provisional voters roll infringes the applicant's right to information and enjoyment of its and other citizens' rights dependent on access to the information.

3. That the respondent shall pay costs of this application on a legal practitioner and client scale.

Interim relief granted

Pending determination of this matter, the following interim relief is granted:

1. The respondent shall forthwith furnish applicant with the provisional voters roll in both printed and electronic forms, for inspection before closing of the period of inspection on 29 May 2018.
2. That this order shall be served by the applicant's legal practitioners or the Deputy Sheriff.

The respondent did not file a written opposition on account of time constraints because of the short notice which it was given, the application having been set down for hearing within 24 hours of its filing. The respondent's counsel Mr *Kanengoni* sought leave to make oral submissions in opposition and there being no objection by Mr *Maanda* for the applicant, I indulged the respondent to respond to the application orally as requested.

On the face of it, the application would, to the undiscerning reader, appear simple and straight forward. However, closely analysed, the application is hardly a simple one. It involves difficult issues of law and fact as will unfold hereunder.

The applicant is a registered trust. Its beneficiaries in terms of the amended Deed creating it as registered on 12 February, 2012 are captured as:

“The Beneficiaries:- shall mean all Zimbabweans who behave and participate in elections and electoral processes for choosing leaders including grassroots based organisations which are *bona fide* concerned with participatory and electoral democracy.”

The objectives of the Trust are listed in clause 5 of the Deed of Trust. Clause 5 aforesaid reads as follows:

“5. Objectives

The objects for which the Trust is established are:

- 5.1 to facilitate the identification and establishment of polling station based and institution based voters' clubs in Zimbabwe.
- 5.2 to facilitate capacity building of election stakeholders in voter education and election monitoring.
- 5.3 to ensure accessibility of credible election related information to electoral stakeholders in Zimbabwe.
- 5.4 to facilitate the undertaking of legal proceedings, in Zimbabwe and elsewhere, on behalf of victims of electoral violence and fraud, and in that regard, to give legal advice to such victims.

5.5 to facilitate the engagement of election stakeholders in electoral reform and voter mobilization.

5.6 generally, to do anything that the Board considers necessary or desirable to advance participatory electoral democracy in Zimbabwe.”

The trust can aptly be described as an educational and benevolent trust founded upon the broad desire to promote the informed participation of the Zimbabwe citizenry in election related matters. Elections are an integral part of a constitutional democracy. Zimbabwe is a constitutional democracy and its constitution provides in s 67 thereof for the right of every Zimbabwean citizen to engage in political activities including voting in all elections and referendums to which the constitution applies, subject to the constitutional and constitutionally provided for legislative limitations. The objectives of the trust are varied, and if adhered to, noble. They present themselves for commendation by constitutionalists and human rights advocates alike. The applicants’ objectives are in sync with s 44 of the constitution which reposes upon the state and virtually all and sundry to respect, promote and fulfil fundamental human rights and freedoms set out in Chapter 4, (Declaration of Rights). I have digressed a bit to comment on the judicial character and objectives of the applicant in order that its objectives at least on paper, are not misunderstood given the focus which applications to do with elections and electoral processes attract. Indeed Mr *Kanengoni* in the course of his oral submission which I will deal with later adverted to what he perceived as the opaqueness of the applicant’s intentions in asking for the relief which it seeks. He submitted that the applicants’ request for the provisional voters roll was precipitate or premature at this stage.

The applicant avers that its trustees, acting on its behalf, petitions the court on the back of the *locus standi* given in s 85 (1) of the Constitution. Section 85 (1) (a) entitles any person acting “in their own interests” to approach a court for appropriate relief including a declaration of rights and a compensatory order where such person proves or establishes an infringement, actual or prospective, of a fundamental right or freedom enshrined in Chapter 4 of the Constitution. In *Chihava and another v Provincial Magistrate Mapfumo and another CCZ 6/2015*, GWAUNZA JCC in her judgment wherein the whole Constitutional bench agreed, stated that upon its literal interpretation, s 85 (1) (a) in its wording does not place any restrictions on the type of person who is given entitlement in terms thereof to approach the Constitutional court directly. I however note that the constitution in this regard and in s 332 thereof describes person as “... an individual or a

body of persons whether incorporated or unincorporated”. The definition is wide and not restrictive. *A fortiori*, the applicant can approach this court in terms of the same section because the provision refers to a Court and not just the Constitutional court. The applicant *in casu* is juristic in nature unlike the usual run of trusts which are not juristic persona as they are constituted of property which is then managed for the benefit or advantage of beneficiaries. Contrary to Mr *Kanengoni’s* submission as to some sinister motive by the applicant in bringing this application, I would hold that the applicant established its *locus standi* to bring this application in terms of s 85 (1) (a) of the Constitution. I dismiss any insinuations of *mala fides* or lack of *bona fides* on the part of the applicant because I find none established. The applicant’s objectives in terms of its deed of trust have been set out hereinbefore and there was no challenge that the application fell outside its objectives.

The applicant has also given an overview and history of its work in regard to election related processes including petitioning Parliament on election issues. The applicant avers that it has collaborated with the respondent in the respondent’s election related programmes and activities. It is noted that in a letter, annexure E to the applicant’s papers, dated 11 May, 2018, the respondent’s chairperson implored the applicant to “scrutinize the provisional voters roll as you wish and hopefully share with us your findings in order for us to make good any issues requiring amendment”. The juristic nature of the applicant and the applicants activities are therefore acknowledged by the respondent. It therefore stands to reason that the applicant qualifies to be “any person” within the meaning of “any person”, as envisaged in s 85 (1) (a) of the Constitution as read with s 332. Being a person, albeit juristic, the applicant can act in its own interests. Its interests transcends therefore to the realization of its objectives which as already observed dovetail with the promotion, fulfilment and safeguard of fundamental human rights and freedoms in the form of political rights as given in s 67 of the Constitution.

Mr *Maanda* also submitted that the *locus standi* of the applicant was further based on or informed by s 85 (1) (d) of the Constitution. The said section entitles any person acting in the public interest to similarly approach a court in circumstances as would entitle any person to petition the court relying on s 85 (1) (a). To the extent that I have dealt with the circumstances of justifying an approach to a court, I refrain from repeating the same save to incorporate them by reference. In the celebrated case of *Mudzuru and another v The Minister of Justice, Legal & Parliamentary*

Affairs and 2 others CCZ 12/2015 in which the Constitutional Court, declared all marriages involving persons below the legal age of majority (18 years) to be unlawful, and struck out offending provisions of the law in this aspect from Marriages Act Statutes, the purport of s 85 (1) (d) of the Constitution was authoritatively interrogated. In short, the court held that s 85 (1) should not be restrictively interpreted. It should be given a wide interpretation. The wide interpretation would necessarily mean that a person needs not only have a direct interest in the matter but an indirect interest would equally give the applicant *locus standi*. It follows that given the objectives of the applicant and its activities as acknowledged by the respondent, the applicant would have *locus standi* on this additional ground of public interest under s 85 (1) (d). Mr *Kanengoni's* argument that the applicant's trustees can only act for themselves individually and not for the generality of the public does not appeal to me, is misplaced, and I see no merit in it. In any event, in terms of order 2A rule 8 of the High Court Rules, 1971, an association can sue or be sued in the name of the association and the word "association" is defined as including, a trust. See *Ignatius Musemwa & Ors v Gwanyai Family Trust & Ors* HH 136/16. Electoral issues undoubtedly raise the public interest since entrenched human rights whose infringement, actual or reasonably contemplated infringement not only concern but affect the public's enjoyment and exercise of political rights to choose their leaders and in the process ensure a creation and existence of a constitutional democracy which the Constitution has decreed Zimbabwe to be.

Having determined that the applicant has *locus standi* and is acting *bona fides*. I express my reservation on whether or not the applicant can properly wear two hats and allege two, *locus standis*. The applicant should choose one *locus standi* and not plead an alternative *locus standi*. The issue of alternative *locus standi* was dealt with obiter in the *Mudzuru* case. The constitutional court indicated therein that a person can only properly found *locus standi* under s 85 (1) of the Constitution on one of the grounds of *locus standi* set out therein. The applicant must choose which *locus standi* to rely upon and not plead alternative *locus standi*.

I now turn to the substance of the application. In considering the merits of the application, I mention in passing that the urgency of the application was common cause between the parties. Secondly, I remain mindful that what the applicant seeks from the court is an interim order. In terms of order 32 r 246 (2) of the High Court Rules, 1971, I am legally obligated to grant the provisional order as sought, or as varied by myself if on the papers filed, which I must consider

together with any other information solicited in terms of r 246 (1), I am satisfied that a *prima facie* case is established. A *prima facie* case is established by proof of facts which establish a right in substantive law.

The background to this application as I established during the hearing was that, the respondent in the discharge of its constitutional and legislative mandates issued the following public statement on 2 May 2018.

“ZimElections2018

ZEC has released the following statement advising the official dates for the inspection of the voters’ roll.

It is hereby notified for the general public that the Zimbabwe Electoral Commission (ZEC) shall lay open the country’s Provisional Voters’ Roll for inspection by the public from 19 May 2018 to 29 May 2018 in accordance with Section 21 of the Electoral Act [*Chapter 2:13*].

The purpose of the Provisional Voters’ Roll inspection is to allow members of the public to check if their details were correctly captured and if not, have the anomalies corrected.

The electorate should bring burial orders of deaths certificates for their deceased registered relatives so that they are removed from the Provisional Voters’ Roll.

Registrants may also take the opportunity to transfer their registration to appropriate polling stations based on new proof of residence. Once all the corrections have been taken on board, the Commission will then produce the Final Voters’ Roll that will be used in the forthcoming 2018 Harmonised Elections. This means that the Provisional Voters’ Roll may undoubtedly contain some errors and therefore registrants are urged to go and inspect their details to avoid disappointment on polling day. The Commission will shortly publicise the manner in which inspection shall be done.

The commission urges all members of the public to take a keen interest in this important process by coming out in large numbers to inspect the voters’ roll.

The commission will open inspection centres at all polling stations. These centres will be published in the media and on the ZEC website www.zec.gov.zw. The Electorate can also call the following toll free numbers for more information:

- 08010265 for NetOne subscribers
- 08080265 for Econet subscribers
- 265 for Telecel subscribers

ZEC encourages those who have not yet registered as voters to visit its 63 district and 10 provincial offices during working hours.”

The above statement was published in the media. The contents of the statement are self-explanatory. The respondent announced that it had opened for inspection by all and sundry, a provisional voter’s roll. The purposes of the inspection were set out in the statement. The purposes included, giving an opportunity to members of the public to check the Provisional Voter’s Roll for any inaccuracies in the data captured and to afford registered voters the chance to cause corrections to be made on their registrations where anomalies were discovered. “Registrants” would also use

the opportunity to transfer their registrations to polling stations within their new residences where such registrants had between the date of registration and inspection, changed residences. The statement encouraged the electorate with any relatives registered as voters who had since passed on, to bring death certificates to the inspection centres so that the deceased's names could be deleted from the roll. The respondent in the statement acknowledged that the Provisional Voters Roll would without doubt contain errors. The respondent encouraged the members of the public to take a keen interest in the exercise to avoid disappointments when polling day came. I envisage such disappointment being manifested in the failure to vote by an intending voter because of anomalies in data captured relative to the particular voter as captured in the Final Voters Roll where there variances in details. The respondent encouraged people intending to be registered as voters to visit any of the 63 district and 10 provincial offices to register as voters. The applicant further provided toll free numbers for the public to access it for information and clarifications.

The applicant responded to the statement by generating a letter to the applicant. The letter was not dated. It was however received by the respondent on 3 May 2018. The contents of the letter are self-explanatory. For the avoidance of doubt and for posterity, I reproduce the letter by the applicant. It reads as follows:

“The chairperson
Zimbabwe Electoral Commission (ZEC)
Mahachi Quantum Building
1 Nelson Mandela Avenue
Harare

Dear Justice Priscilla Chigumba

RE: REQUEST FOR A PROVISIONAL VOTER'S ROLL

The Election Resource Centre (ERC) notes and welcomes the announcement by the Zimbabwe Electoral Commission (ZEC) that a provisional voter's roll will be made available for inspection to the public from the 19th of May 2018. It is fully appreciated that the provisional voter's roll that will be availed for inspection will contain some errors and the intention of the inspection process is to assist in the finalization of a voter's roll with as little challenges as could be reasonably accepted.

It is likewise appreciated that the Constitution of Zimbabwe has a provision that our elections should be verifiable. As such, by extension, electoral processes should equally be verifiable in line with the constitutional provision. It is therefore essential that as far as is possible ZEC creates opportunities for election stakeholders to verify personal details on the voter's roll. In addition, it is essential ZEC avails the provisional voters' roll for inspection to stakeholders, allowing stakeholders to track any changes to the data collected at registration and the final voters' roll that will be used in the 2018 elections.

ERC urges the ZEC to appreciate the importance of sharing the provisional voter's roll with stakeholders in the spirit of transparency and accountability, and in pursuit of verifiability of the work being undertaken on the voter's roll. These efforts will contribute significantly to building public confidence and enhancing the credibility of our elections.

ERC therefore requests a copy of the provisional voter's roll that will be availed for inspection starting on the 19th of May 2018 once it is ready. The document will be used to support ZEC in finalizing a credible voter's roll for our 2018 harmonized elections. The document once provided, will be used as a reference point to track any changes that will be made to data contained in order final voter's roll.

Your favourable consideration of our request would be appreciated.

Yours sincerely,

Tawanda Chimhini
Executive Director

The respondent responded to the applicant's letter on 8 May 2018. The applicant received the response on 11 May 2018. It is convenient and in order to lay bare the paper and parties interaction trail, to reproduce the letter. It reads as follows

Ref B/17/589

08 May, 2018

The Executive Director
Election Resource Cnetre
3 Dacomb Drive
Chisipite
Harare

RE: **REQUEST FOR PROVISIONAL VOTERS ROLLS**

Your undated letter regarding the above subject matter refers.

We regret to advise that at this juncture the Commission is unable to accede to your request for a copy of the Provisional Voters Roll. Kindly be advised that the production of the voters roll is an on-going process especially because the voters roll has not yet been closed for purposes of the harmonized election. As such the Commission would not want to confuse stakeholders by providing copies at this early juncture. However, once the provisional roll is ready for inspection, the various polling station voters rolls will be made available for those persons who, for one reason or the other will be able to present themselves physically at the inspection centres for inspection. We trust that you will take advantage of these opportunities to scrutinize the provisional voters roll as you so wish and hopefully share with us your findings in order for us to make good any issues requiring amendment.

Yours faithfully

Mrs Priscilla M. Chigumba (J)
CHAIRPERSON
ZIMBABWE ELECTORAL COMMISSION

It is evident from a reading of the correspondence that the applicant requested the respondent to furnish it with a copy of the Provisional Voters Roll referred to as having been opened for public inspection. The expressed purposes of requiring a copy of the Provisional Voters Roll were *inter-alia*, to enable stakeholders like the applicant to “track any changes to the data collected at registration with the final voters roll” to be used in the 2018 elections. The applicant submitted in its letter that the provision to it of the Provisional Voters Roll was consistent with transparency and accountability as well as the verifiability of work being done by the respondent on the Voters Roll. The applicant emphasized on the need to build public confidence and ultimately the credibility of elections. The applicant undertook to use whatever information it gathered from the Provisional Voters Roll to support the respondent’s finalization of the final Voters Roll.

The respondent refused to accede to the applicant’s request. In refusing to provide the copies, the respondent did not plead that the requested for Provisional Voters Roll was not available. In fact, it would have been absurd for the respondent to argue so because its statement inviting inspection of the Provisional Voters Roll is clear that there is in existence, a public document, *viz*, a Provisional Voters Roll opened for inspection. Whether the Roll is in electronic form in that the inspection process entailed punching details into the computer and information would reflect on screen which is then used to verify the correctness of captured data, or the roll is printed on paper is neither here nor there. I say so because there is acceptance by the parties and in legislation, in particular, the Electoral Act, [*Chapter 2:13*] that information may be printed or electronic.

Mr *Kanengoni* submitted that the verification exercise being carried out by the respondent was work in progress and that the reference to a Provisional Voters Roll was in fact a reference to captured data which was being subjected to correction so that a proper Provisional Voters Roll would then be prepared, followed by the gazetting of the Final Voters Roll. Mr *Kanengoni* submitted that the applicants’ request was very much like the case of a litigant or other interested

party requesting for a draft of the judge's written judgment. He submitted that such a request was unreasonable because what was reasonable was for a party to request for the final judgment. Mr *Kanengoni's* argument and the parallel of a draft judgment which he sought to draw, is not soundly based in law when one considers the factual scenario. I say so because a draft of a judicial officer's judgment cannot be classified as "information held by the state or by any institution or agency of government." What may be classified as information held would at best be the record of proceedings because what is captured in it is information given by and recorded from the litigants and their counsels. A draft judgment remains a draft susceptible to alteration or even a total discard by the judge, something the judge cannot do to information or evidence which the judge has recorded or captured during proceedings. The judge does not invite the public to scrutinize or verify a draft judgment as was done by the respondent respecting the Provisional Voters Roll.

The upshot of the respondent's refusal to accede to the applicant's request was clearly expressed in its letter. The first point it made was that the production of the Voters Roll was an ongoing exercise until closed for purposes of the elections. I observe that the issue of voter registration and hence production of the Voters' Roll, being an ongoing exercise is given in law. Section 26 A of the Electoral Act, as recently amended provides for the closure of the Voter's Roll for registration of a voter or any claims arising from the roll. The Voters Roll is sealed and shut on publication of the Presidential proclamation of election dates as provided for in ss 38 and 39 of the Electoral Act. Any claims for registration as a voter or transfers of registrations must be lodged within 2 days of the publication of the proclamation. Any new registration would have to be for purposes of a next election.

The respondent then indicated that, providing the applicant with copies of the Provisional Voters Roll would confuse stakeholders. The nature of the likely confusion was not spelt out. I read the respondent's statement to mean nothing more than to say, "It is too early to provide you with the Provisional Voters Roll in the format it is in." In other words, the respondent was taking the position that it was a matter within its discretion whether or not it was opportune or convenient to provide the applicant with the Provisional Voters Roll before effecting any corrections made following the inspection exercise.

The rest of the respondent's letter is difficult to logically follow and comprehend in making sense of the grounds for refusing to accede to the applicant's request. The letter avers that "once

the Provisional Voters Roll is ready for inspection, the various polling station voters rolls will be made available for those persons who, for one reason or other will not be able to present themselves physically at inspection centres for inspection.” The statement is a curious one. It says “ once the Provisional Voters Roll is ready for inspection ...”, virtually insinuating that there is no ready and available Provisional Voters Roll, yet the public was advised of the existence of the Provisional Voters Roll and encouraged to check it for errors and changes which the registrants considered convenient to make like changing polling stations. What is implied in the statement is that there will be another Provisional Voters Roll. Assuming that this will be so, the question is whether or not the respondent can choose which Provisional Voters Roll to release and which one to withhold if both are public documents. The respondent then stated that the Provisional Voters Roll will be availed to persons who will have failed to present themselves physically at inspection centres to verify their registrations. I could not find nor was I addressed by Mr *Kanengoni* as to the provisions of the law which allow the respondent to give directives and qualifying conditions for a voter to obtain a copy of the Voter Roll. In other words, it is not open to the respondent on receiving a request for a copy of the Voters Roll to require that the person making the request should first show why he or she did not present himself or herself physically at an inspection centre. In terms of s 21 of the Electoral Act as amended, a Voters Roll, be it a Constituency Voters Roll or a Consolidated Voters Roll is a public document open for inspection where the respondent keeps it. Further, the respondent is under legal obligation upon request by any person for a copy of any Voters Roll to provide such copy in printed or electronic form as the person might request subject to the condition that the person requesting for the copy pays the prescribed fee.

Argument was presented by Mr *Kanengoni* that whilst the Electoral Act provided for “any person’s” right to access a Voter Roll, the Act envisaged such rights to relate to a final Voters Roll and not a Provisional Voters Roll still undergoing corrections. Admittedly, there is no definition or mention of a Provisional Voters Roll in the Electoral Act. The Act defines Voter Roll as; “Voters Roll” means (unless expressly otherwise specified) the Voters Roll for a Ward.” I will not detain myself with the argument whether a Provisional Voters Roll, so called, by the respondent falls within the meaning of a Voters Roll to which every person has access and entitlement to request for a copy. The argument does not detain me because the crux of the applicant’s argument on its

papers is that the Provisional Voter's Roll should be availed to it by virtue of the provisions of s 62 (1) and (2) of the Constitution.

Sections 62 (1) and (2) of the Constitution provide for the right to every Zimbabwean citizen, permanent resident or juristic person to access any information held by the State or any of its organs at every level provided that the information is required in the interests of public accountability or for the exercise or protection of a right. For the avoidance of doubt, s 62 of the Constitution reads as follow:

“Access to information

1. Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, had the right of access to any information held by the state or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability.
2. Every person, including the Zimbabwean media, has the right of access to any information held by any person, including the state, in so far as the information is required for the exercise or protection of a right.
3. Every person has a right to the correction of information, or the deletion of untrue, erroneous or misleading information, which is held by the state or any institution or agency of the government at any level, and which relates to that person.
4. Legislation must be enacted to give effect to this right, but may restrict access to information in the interests of defence, public security or professional confidentiality, to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.”

Section 62 (1) gives a right to persons listed therein to any information held by the State or other organs as quoted. It does not appear to me that the Provisional Voters Roll which was opened for inspection by the respondent falls outside the scope of what could be classified as “any information”. Mr *Kanengoni* did not argue otherwise and neither did he argue that the Provisional Voters Roll was not in custody of or held by the respondent in which case it would not be feasible for the applicant to apply for access to information which was not available. Information within context, must in logic refer to facts, or details about something. In *casu* the nature of the information was known. It was such information as contained in the Provisional Voters Roll.

Whilst the right of access to information is subject to s 62 (4) in terms of which a law must be put in place to give effect to the right and spell out the limitations to the right, I was not addressed on the provisions of the sub-section. The respondent did not plead a denial of access based on any of the restrictive grounds in s 62 (4). This notwithstanding, access to information in terms of s 62 (1) is subject to the requirement that the information is required in the interests of

public accountability whilst in terms of s 62 (2) the information must be required for the exercise or protection of a right.

The applicant averred that it required the Provisional Voters Roll in the interests of public accountability in that the respondent had a duty to account to the citizenry on the conduct of electoral issues. The respondent is created by s 238 of the Constitution. Its functions are set out in s 239. It is mandated to account for its operations and activities to Parliament in terms of s 323 of the Constitution. That it is accountable to the citizenry is implied in its listed functions which are of a public nature. In other words, the public can call the respondent to account because what the respondent does in its functions have a bearing on and affects the enjoyment of political rights of citizens as enshrined in s 67 of the Constitution. Public accountability cannot be divorced from transparency. Accountability and openness in matters of public concern lie at the centre of democratic governance. A public entity and indeed a public servant should not be averse to the scrutiny of its, his or her functions by the public who are the beneficiaries of the services offered through the exercise of the given functions. Bureaucracy is old fashioned and must be discarded in a democratic society. The preamble to the Constitution speaks to the recognition by Zimbabwe of the “need to entrench democracy, good, transparent and accountable governance and the rule of law.” Section 3 of the Constitution speaks to founding values and principles on which Zimbabwe is founded. These include an electoral system which *inter-alia* is based on free, fair and regular elections. A Voter’s Roll is an integral part of any electoral system which is based on universal suffrage and equality of votes. The same section 3, restates the preamble and exhorts all State institutions and agencies of government to exercise good governance informed or punctuated by *inter alia*, “transparency, justice accountability and responsiveness.”

I have considered this application in the light of the facts presented on the papers filed, the arguments proffered by the respondent through its counsel and the various legislative instruments which I cited in the judgment. The respondent accepts that the applicant is an interested party in the voter registration and verification exercises and that the respondent complements the applicant’s work. In fact, the respondent in its letter encouraged the applicant to “scrutinize the Provisional Voters Roll as you wish and hopefully share with us your findings in order for us to make good any issues requiring amendment.” In another breath, however, on being requested for a copy of the same Provisional Voters Roll to enable the applicant to carry out the complementary

verification and scrutinization exercise, the respondent changed colour. Such attitude being contradictory unfortunately leads to suspicion which may be unfounded that there are skeletons within the Provisional Voters Roll which the respondent seeks to withhold. The respondent has a duty and obligation to act and discharge its functions especially in an emotive issue such as the compilation and authenticity of the Voters Roll in a constitutional democracy, in such a manner that unfounded suspicions of impropriety are completely dispelled. It is illogical in my view to tell a person to scrutinize a document to which access has been opened but then refuse to provide a copy of it. What is there to protect? A person scrutinizing the Provisional Voters Roll can take notes of anomalies inasmuch as a person who scrutinizes a copy given to him to carry away with him. So one wonders, where the problem is? In my determination, I can only caution that the respondent should not be averse to scrutiny of the performance of its public functions. If the Provisional Voters Roll is construed as a working document consisting of inputs or data capture of voters made by the respondent's officers and the same has been opened to the public for scrutiny and correction, there would appear to me to be no cognizable and valid reason to withhold the issue of a copy of the information which was captured and has been opened up for scrutiny and corrections. At the end of the day, the corrected, revised and Final Voters Roll is the one that the respondent will use during elections. If any person wants to impugn it using any contrary information obtained from the Provisional Voters Roll surely, the respondent will not be prejudiced as it can always explain any changes. Is this not what transparency and responsiveness entails? Having and allowing interested parties to scrutinize and compare information available at all times should be encouraged.

In my view, it is consistent with the principles of transparency and responsiveness for the respondent to accede to the request because if as accepted to be the law, voter registration is a continuous exercise until the Presidential proclamation is gazetted, then the Voters Roll whether Provisional or Final should be availed for scrutiny and correction all the time so that there are no electoral disputes which may arise based on the content of the Voters Roll. I am in agreement with Mr *Maanda*'s submission that the respondent is ill advised to hold the view that because the Voters Roll is provisional or is work in progress, there is nothing in it which the applicant will find worthy of analysis. Mr *Maanda* submitted that having possession of and inspecting the so called Provisional Voters Roll will enable the applicant as with any other interested person to raise issues

which can arise in future in the process of scrutinizing the continuous voter registration process and the Final Voters Roll. I therefore determine that the applicant's papers establish a *prima facie* case. This finding compels me in terms of rule 246 to grant the provisional order.

I now need to consider the nature of the provisional relief sought and determine whether to grant it as sought or as varied. One of the grounds relied upon for petitioning the court on an urgent basis was that the period for verification of the Provisional Voters Roll was 29 May, 2018 being the date that I heard the application following its filing the day before. Mr *Kanengoni* however submitted that what was ending on 29 May, 2018 was not the process of correcting the voters roll but that the teams which had been deployed by the respondent to over 10 000 designated points for the verification exercise would break the deployment. The process of corrections, registrations and verification of voters would continue at the respondent's district offices in terms of the law. I observe that the Electoral Amendment Act No.6/18 has since been gazetted and that it became law by virtue of a Gazette Extra-ordinary issued late on 28 May, 2018.

The application was therefore heard after the gazetting aforesaid. The parties and myself were oblivious to the legislative process which had taken place. Mr *Maanda* submitted that the applicant would leave it to the court to determine the most appropriate interim relief to grant.

As I write this judgment, the President in the discharge of his constitutional mandate has by proclamation fixed the dates for nomination and polling, election dates for the harmonized elections 2018 as well the date for the presidential run-off elections in the event that no presidential candidate commands the requisite majority to be declared the winner as required by law. I have already adverted to the fact that any challenges to the voters roll following the proclamation which has now been made as well as corrections and verifications will be dictated by the provisions of the Electoral Act as amended. The applicant had prayed in the interim relief that I order the respondent to furnish the applicant with the Provisional Voters Roll in both printed and electronic forms for inspection before close of the inspection period on 29 May, 2018. It is not feasible to order the respondent to furnish the information by a date which has lapsed. The lapsing of the date does not in my view render the relief sought a *brulmen fulmen* because the applicant indicated that it will also use the information for the future whilst the respondent submitted that the process of cleaning up the voters roll and registration is a continuous process. The respondent's duty to publicly account in regard to any issues relating to the voters roll is not affected by the

promulgation of the Electoral Amendment Act or by the Proclamation of election dates. Accountability, openness and responsiveness as public interest issues must remain a continuous exercise and practice. Public functions are created for the public good and the public should be the main focus of public functionaries.

In the premises I determine that the following order shall issue as the interim relief granted:

1. The respondent is ordered to furnish the applicant with the Provisional Voters Roll which it used for the inspection exercise by the general public during the period that the same lay open for inspection in the period 19-29 May, 2018.
2. The Provisional Voters Roll aforesaid shall be furnished to the applicant in printed or electronic form as the applicant may request, provided that the applicant pays the prescribed fee as provided for in s 21 (3) of the Electoral Act, [*Chapter 2:13*] as amended.
3. The respondent shall furnish the applicant with the Provisional Voters Roll in the form it requests it within a reasonable period following payment of the prescribed fees.
4. For the avoidance of doubt, the reasonable period within which the respondent should furnish the applicant with the copy of the Provisional Voters Roll as per this order is hereby determined to be no more than 5 working days following payment of the prescribed fees.
5. The applicant's legal practitioner is granted leave to serve the copy of this provisional order upon the respondent.

Maunga Maanda & Associates, applicant's legal practitioners
Nyika, Kanengoni & Partners, respondent's legal practitioners