

In the matter between:-

PROMISE MKWANANZI

APPLICANT

AND

THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE  
THE MINISTER OF JUSTICE, LEGAL &  
PARLIAMENTARY AFFAIRS

1<sup>ST</sup> RESPONDENT

2<sup>ND</sup> RESPONDENT

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## APPLICANT'S FOUNDING AFFIDAVIT

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I, **PROMISE MKWANANZI** do hereby make oath and state that:

1. I am a Zimbabwean, a registered voter, and a Human Rights Activist operating by the theme "tajamuka"(meaning we refuse and we have had enough) .
2. The submissions deposed herein are to the best of my knowledge and belief, true and correct; where I make legal submissions I do so as a qualified legal professional and Human rights Activist and after seeking adequate legal advice.

### **ADDRESS OF SERVICE.**

3. The First Respondent is the President of the Republic of Zimbabwe cited in his official capacity; he is appointed as such in terms of Part 2 of the Constitution of Zimbabwe as the Head of State and Government and the Commander in Chief of the Defence Forces. The typology of his duties in terms of section 90(1) of the constitution is to uphold, defend, obey and respect the constitution as the supreme law of the nation and must ensure that the constitution and all the other laws are Faithfully observed. His address is Munhumutapa Building, Samora Machel Avenue, Harare

4. The Second Respondent is the Minister of Justice, Legal & Parliamentary Affairs; duly appointed as such by the President in terms of Part 5 of the Constitution of Zimbabwe. He is responsible for the administration of the **Constitution** and his address of service is care of Block B, New Government Complex, Central Avenue, Harare.
5. I was born on the 7<sup>TH</sup> of April 1981. Though I was born after the war of the liberation struggle(born free), my parents in one way or the other actively participated in the war of the liberation struggle, albeit, for my benefit and generations to come.
6. During my formative years ,my parents drilled within me that they had gone to war to fight for freedom, transparency, accountability, national peace, equality, rule of law, good governance and justice for all. These are the same values that the nation adopted in Section 3 of the Constitution.
7. They also taught me that I should fight for these ideals if anyone tried to subvert or undermine them, even if it where them. It is the indiscriminate disregard of these values by the 1<sup>st</sup> Respondent that has compelled me to institute these proceedings.
8. By instituting these Proceedings, I am not only praying that I will Protect the values upon which I and my Generation are governed, but that they also become a foundational standard and legacy that we shall hand over to posterity.

### **NATURE OF APPLICATION**

9. This is an application in terms of Section 167 (2) (d) of the Constitution of Zimbabwe For The Determination of whether The

President has failed to fulfil his constitutional obligation and duties as required by Section 90 (1) and (2).

10. The mandate of the 1<sup>st</sup> Respondent is centred upon these core duties provided in section 90 (1) and (2) and any act or conduct inconsistent with these duties amounts to a breach of his constitutional obligation.
11. One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the colonial era and the first 20 years of our independence. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. This is the only tool upon which public office-bearers are accountable to any disregard of their constitutional obligations. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword in the hands of the citizens to recall or audit the people they would have elected into power.

### EXCLUSIVE JURISDICTION

12. The exclusive jurisdiction of this honourable Court is governed by section 167(2)(d) of the Constitution which says:  
*“(4)Subject to this constitution, Only the Constitutional Court may–  
... (d) determine whether Parliament or the President has failed to fulfil a constitutional obligation.”*
13. I am aware that the question of whether or not this Court has exclusive jurisdiction in a matter involving the President or Parliament is not a superficial function of pleadings merely alleging a failure to fulfil a constitutional obligation. I am further aware that though the starting point is the pleadings, much more is required.
  - a. First, I must establish that a constitutional obligation that rests on the President or Parliament is the one that allegedly has not been fulfilled.

- b. Second, that obligation must be closely examined to determine whether it is of the kind envisaged by section 167(2)(d)
14. It is my humble submission that the dispute herein pleaded falls within the exclusive jurisdiction of this Court, section 167(2)(d) because of the special role this apex Court was established to fulfil.
15. The court is not only the Apex court, but is the ultimate guardian of the Constitution and its values. It must adjudicate to finality all issues which would inexorably have important political consequences. It should be the one to deal with disputes that have vital and sensitive political implications. This is indispensable to preserve the comity connecting the judicial branch and the executive and legislative branches of government.

**Constitutional obligation that rests on the President not fulfilled.**

16. In terms of Section 90 of the Constitution of Zimbabwe ,  
“*(1) The President must uphold, defend, obey and respect this Constitution as the supreme law of the nation and must ensure that this Constitution and all the other laws are faithfully observed.*  
*(2) The President must–*  
*(a) promote unity and peace in the nation for the benefit and well-being of all the people of Zimbabwe;*  
*(b) recognise and respect the ideals and values of the liberation struggle;*  
*(c) ensure protection of the fundamental human rights and freedoms and the rule of law; and*  
*(d) respect the diversity of the people and communities of Zimbabwe”.*  
Accordingly, any conduct by the president that contradicts the above duties amounts to a contravention of his constitutional Mandate.

17. The presidential duties and obligations are not only as listed in Section 90 of the constitution but can be expanded by conduct and custom.
18. The President is the Head of State and Government and the Commander-in-Chief of the Defence Forces. He is indeed the highest calling to the highest office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed.
19. To meet the requirements for this Court to exercise its exclusive jurisdiction over the President, I have to first rely on a breach of a constitutional duty or obligation that rests squarely on the President as an individual as listed above. I understand that the obligation must have a demonstrable and inextricable link to the need to ensure compliance with the duties listed in section 90 of the constitution.
20. Ultimately the President, as the supreme upholder and protector of the Constitution, is its servant. Like all other organs of state, the President is obliged to obey each and every one of its commands and not to threaten its very existence.  
The factual background and fact hereunder justify our cause of action.

### **FACTUAL BACKGROUND**

21. On or about the 31<sup>st</sup> of July 2013 the 1<sup>st</sup> Respondent was elected as the President of Zimbabwe and on or about the 22<sup>nd</sup> of August 2013, 1<sup>st</sup> Respondent was sworn in as The President of Zimbabwe

for the 7<sup>th</sup> time since National independence in 1980. He has been My president for the past 36 years and I acknowledge that.

22. Prior to being elected the 1<sup>st</sup> respondent made various undertakings and promises that were couched in his election Manifesto and an Economic Blueprint which 1<sup>st</sup> respondent and his political party Zanu PF, called “Zim Assert.” According to these documents the 1<sup>st</sup> Respondent, fully aware of the sanctions and economic challenges surrounding him and the nation, promised the nation Sustainable Socio-Economic Transformation including Two million jobs. Very few, if not None of these promises materialised.
23. This resulted in me and other citizens to call for the fulfilment of the said undertakings by the 1<sup>st</sup> Respondent through peaceful demonstrations as provided in section 59 of the constitution. I and other citizens also requested that the 1<sup>st</sup> Respondent curtails the Rampant corruption that had been Reported by the Auditor General in Her Annual report.
24. As a citizenry we took it upon ourselves to demonstrate against the Vice -president who had been staying for over 550 days in a five-star Harare hotel on taxpayers’ money, despite reports of him having been allocated alternative accommodation. I and other citizens further took it upon ourselves to encourage each other and peacefully demonstrate by staying at our Homes in order to petition the 1<sup>st</sup> respondent to address our concerns regards employment, socio and economic transformation. A video recording of the Demonstration will be submitted at the hearing and is an attachment hereto.
25. The Demonstrations were met with a heavy hand resulting in members of the defence forces torturing innocent children and babies. Resulting in the death of children and physical abuse of women and men. I attach Herewith a report of the violation of human rights by the defence forces, to which the 1<sup>st</sup> respondent is the commander in chief. Pictures of the use of force by the security forces are attached hereto marked **B series**

26. This did not end there. The same Members of the defence forces proceeded to effect unlawful arrests to members of the public who had called for the stay away including a Clergy man by The name of pastor Evan Mawarire and a Tajamuka protester by the name Linda Musariri. The Mawarire arrest had to be declared unlawful and unconstitutional by the Magistrates Court for him to be accorded his liberty. As i depose to this affidavit Linda is still being held in Custody for exercising her constitutional right to demonstrate against the 1<sup>st</sup> Respondent. I was also arrested for exercising my right to demonstrate against the 1<sup>st</sup> Respondent in July 2016 and I was only released upon paying US\$300.00 bail. I was remanded to the 13<sup>th</sup> of August 2016 for Trial continuation.
27. It now seems as if our Honourable President now views everyone who requests his audiences' to air a different view as an enemy.
28. Sometime in July 2016 members of the Zimbabwe liberation War Veterans Association met and came up with a declaration on their position regarding their allegiance to the 1<sup>st</sup> respondent and the fact that 1<sup>st</sup> respondent had failed to uphold and respect the ideals of the liberation struggle. The alleged authors where arrested for airing those views or some other reason linked to their views.
29. I and many other colleagues now live in fear of the 1<sup>st</sup> Respondent. We cannot air our views as anything, including a request for employment or food, can now be regarded treasonous or subversive to the 1<sup>st</sup> Respondent or the Government, and thus considered a crime.
30. As these events where unfolding i wondered why our once human rights respecting and peace loving security forces where conducting themselves in such a manner. The answer came when the 1<sup>st</sup> respondent verbally admitted that the "police" are his and he will use them for such. It is these utterances by the 1<sup>st</sup> respondent that form the factual basis of this application.

31. I must admit at this point that this application is not necessarily based on the background issues above. The pith of this application is hinged on the conduct and utterances of the 1<sup>st</sup> respondent as an aftermath of the above stated events. The 1<sup>st</sup> respondent through various speeches has now Taken it upon himself to subvert the constitution and our fundamental human rights .It is his utterances of an intension and threat to disenfranchise citizens of their fundamental human rights that has forced me to approach this court to declare such utterances inconsistent with the 1<sup>st</sup> respondent's duties and obligations in terms of section 90 of the constitution.
32. It is my understanding that this court does not expect people to appear before it when they are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat.
33. This unconstitutional and un-President like verbal onslaught reached alarming levels on the 19<sup>th</sup> of July 2016 at the burial of Dr Utete where the 1<sup>st</sup> respondent said that anyone who does not think like them is not a part of this country and should leave and go and stay in countries that tolerate such .

*He said :- "Charles was a man of love. Man of real source of harmony with others. I never heard of a single quarrel that might have taken place between him and others . . . And (Evan) Mawarire. I don't even know him. Mawarire and those who believe in that way of living in our country, well, are not part of us. They are not part of us in thinking. They are not part of us, as we try to live together.*

*If they don't like to live with us, let them go to those who are sponsoring them. To*



the countries of those who are sponsoring them.....

First Corinthians, what does it say? Love one another. Not destroy one another, fight one another. So, beware these men of cloth, clock, not all of them are true preachers of the Bible. I don't know whether they are serving God. Well, we spell God, G.O.D, they spell God in reverse.”

34. In the above stated quote the 1<sup>st</sup> respondent clearly stated that :
  - 34.1. anyone who did not agree with him or his thinking should leave the country to some other country that agrees with his way of thinking. Clearly such utterances create disunity among the citizens. To him ,he who is not with him is against him. He is an enemy.
  - 34.2. Any Minister of religion who challenges him does not pray to GOD but to a Dog( “they spell God in reverse”)
35. This is clearly in contravention of the right to freedom of Association, Expression and Freedom of conscience as provided for in sections 58, 61, 60 the constitution respectively. It flies in the face of his constitutional duty to unite the nation notwithstanding their diverse views.
36. The man who is supposed to unite the nation is now at the fore front of creating divisions and factions amongst the citizenry. Such conduct is not becoming of a head of state that is enjoined by the constitution to embrace the diversity of the citizens.
37. I now live in a nation where i cannot criticize my president for fear of those who support him or his faction. If anyone criticises the 1<sup>st</sup> respondent, there is a march or rally that is arranged in solidarity of the first respondent to denounce the criticism and threaten such person.
38. The first respondent has no right to threaten the very same citizen that voted him into power, from exercising their rights, the same rights he is required to protect. He is not above the constitution.
39. On or about the 27<sup>th</sup> of July 2016, the 1<sup>st</sup> respondent acting in his capacity as ,1<sup>st</sup> secretary and leader of his political party Zanu PF,

while addressing War Veterans went further with the disdain disregard and condescending attitude against citizens' rights and threatened all citizens who dared to challenge him or oppose him. Video recording of the speeches shall be produced on the day of the hearing.

40. Specifically he said:-

*“During the war, we would punish defectors severely . . . we kept them underground like rats, in bunkers . . . it is the same thing we are going to do here in independent Zimbabwe.*

*The police are ours and they should see to it that these small party protesters are thrown into jail so that they can taste the food there...*

*I want to warn them very strongly, Zanu PF will not tolerate any nonsense done in the name of religion, keep to your religious side and we will respect you. If you wade into politics, you are courting trouble and we know how to deal with enemies,”*

41. The said utterances raise 3 issues if not more:-

41.1. That the 1<sup>st</sup> respondent has a historically admitted history of human rights abuses on defectors of his party. He admits to torturing citizens and boasts of such conduct. He has admitted to committing human rights atrocities on his fellow citizen. Such conduct is not becoming of a leader or a person in the office of the 1<sup>st</sup> Respondent. He has no legal or moral basis to continue being entrusted with the duties of a custodian of the constitution. This is in breach of section 90(1) and 90(2) of the constitution.

41.2. That he intends to inflict similar inhuman treatment in independent Zimbabwe on every person who does not agree with his ideals and beliefs. I have witnessed

systematic abuse of citizen who sought to demonstrate against the 1<sup>st</sup> respondent by Mobs of members of the defence forces and this admission by first Respondent ,who is also their commander in chief ,prove that he sent them. I attach pictures of systematic torture of citizens as **annexure E series**.

41.3. That he or his party controls the police and they are his and he will use them as the agent to affect such systematic torture on citizens. He says "*they are ours*". Ordinarily the defence forces are supposed to be non partisan but he is now using them or threatening to use them on partisan grounds, to torture citizens. In his speech, He actually uses them as a guarantee to his political party of control over other citizens. He insinuates that they (the police) will enforce the party's agenda. He is abusing his office as commander in chief of the defence forces to subvert the constitution.

41.4. That citizens no longer have the right to air their voices on political matters and if they do, they would be courting trouble and he will deal with them. To the 1<sup>st</sup> respondent any different opinion is nonsense which he will not tolerate. This is in breach of his duty to "*respect the diversity of the people and communities of Zimbabwe*" in terms of section 90 (2) (d).

41.5. The 1<sup>st</sup> Respondent has no right to ban demonstrations in Zimbabwe as long as they are conducted in terms of the constitution. He cannot threaten citizens who defect from him or his political party with punishment "in bunkers" "like rats". He has gone to the extent of treating Citizens as enemies if they don't agree with him.

42. The 1<sup>st</sup> respondent has gone to the extent of confirming that the police are partisan and he will use them to punish small party

protesters. The President cannot be seen to torture the citizens for different views or religious beliefs.

43. I now fear that my life is in danger from the all powerful 1<sup>st</sup> Respondent since i hold a different view and belief from the 1<sup>st</sup> Respondent on the way the Country is being run. The 1<sup>st</sup> Respondent has failed to deliver election promises including jobs and it is my right to ask him why and demand same. To demand that people who oppose him should get out of the country or face torture, amounts to treating me as a second class citizen.
44. The 1<sup>st</sup> Respondent by his own utterances has failed to fulfil his constitutional obligations. He is now subverting the constitution instead of upholding and being guided by it.
45. Much is expected of the 1<sup>st</sup> Respondent for him to fulfil his constitutional mandate, the following is a guideline is apposite to the duties:-
  - 45.1. The promotion of national unity and reconciliation falls squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the well-being of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight. To him is the executive authority of the entire Republic primarily entrusted. However the Same protector is now the chief threat to these ideals.
  - 45.2. All the key role players in the realisation of our constitutional vision and the aspirations of all our people are appointed and may ultimately be removed by him. The nation pins its hopes on him to steer the country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination, that all other progress-driven nations strive towards on a daily basis. He is a constitutional being by design, a national pathfinder, the quintessential commander-in-chief of State affairs and the personification of this nation's constitutional project.

- 45.3. He is required to promise solemnly and sincerely to always connect with the true dictates of his conscience in the execution of his duties. This he is required to do with all his strength, all his talents and to the best of his knowledge and abilities. He is after all, the image of the Republic of Zimbabwe and the first to remember at its mention on any global platform.
46. This honourable court is endowed as the only mechanism of checks and balances to regulate the executive powers of the 1<sup>st</sup> respondent. If his conduct is not checked and regulated this nation, its hopes, aspirations and its people would be steered into a sea of hatred, war and instability.
47. It is only this honourable court that can put an end to this hate speech and factionalism, by declaring such conduct to be unconstitutional and contrary to the 1<sup>st</sup> respondent 's core duties as provided in section 90 of the constitution .Unabated this hate speech and threats can degenerate into chaos and potential genocide.

### **THE PRAYER**

48. I believe that Zimbabwe is a constitutional democracy bound by the entrenched provisions of the said sacred document as the supreme law of the land. It should be bound by a growing amount of jurisprudence, locally and internationally on the supremacy of the constitution and checks and balances on the executive.
49. It is my respectful contention that the president cannot threaten citizens and expect them to cower to his demands without such conduct being brought to book. We did not vote a dictator into power, but i fear that circumstances and our silence might end up creating one.

50. However, on my part, I respectfully contend that it is my duty to protect my rights where i see their infringement and or potential infringement. I am now living a life of fear of the 1<sup>st</sup> respondent and his agents, whom he has called his “police”, despite being funded on taxpayers money.

51. Under the circumstance, I pray for an order in terms of the draft.

THUS DONE AND SWORN TO AT HARARE THIS      DAY OF  
AUGUST 2016

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PROMISE MKWANANZI

Before me:-

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COMMISSIONER OF OATHS

IN THE CONSTITUTIONAL COURT OF ZIMBABWE  
HELD AT HARARE

CASE NO CCZ /2016

In the matter between:-

PROMISE MKWANANZI

APPLICANT

AND

THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE  
THE MINISTER OF JUSTICE, LEGAL &  
PARLIAMENTARY AFFAIRS

1<sup>ST</sup> RESPONDENT

2<sup>ND</sup> RESPONDENT

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## COURT APPLICATION

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**TAKE NOTICE** that the intends to apply to the Constitutional Court of Zimbabwe at Harare for an Order in terms of the Draft Order annexed to this notice and that the accompanying affidavits and documents will be used in support of the application.

If you intend to oppose this application you will have to file a Notice of Opposition in Form No. 29A, together with one or more opposing affidavit, with the Registrar of the Constitutional Court of Zimbabwe at Harare within 10 days after the date on which this notice was served upon you. You will have to serve a copy of the Notice of Opposition and affidavit/s on the Applicants at the address specified below. Your

affidavits may have documents annexed verifying the facts set out in the affidavit.

If you do not file an opposing affidavit within the period specified above, the application will be set down for hearing in the Constitutional Court of Zimbabwe at Harare without any further notice to you and will be dealt with as an unopposed application.

DATED AT HARARE THIS -----DAY OF AUGUST 2016

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PROMISE MKWANANZI  
*Applicant*  
HARARE

THE REGISTRAR

Constitutional Court of Zimbabwe

HARARE

THE PRESIDENT OF ZIMBABWE

*1<sup>ST</sup> Respondent*

Munhumutapa Building

Samora Machel Avenue

HARARE

THE MINISTER OF JUSTICE, LEGAL &



**PARLIAMENTARY AFFAIRS**

*2<sup>ND</sup> Respondent*

52. Block B, New Government Complex,  
Central Avenue,  
**HARARE**

In the matter between:-

PROMISE MKWANANZI

APPLICANT

AND

THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE  
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1<sup>ST</sup> RESPONDENT

2<sup>ND</sup> RESPONDENT

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ADDRESS FOR SERVICE

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BE PLEASED TO TAKE NOTICE that the Applicant's address for service for purposes of this Application is care of **the Applicant**

DATED AT HARARE THIS -----DAY OF AUGUST 2016

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PROMISE MKWANANZI

*Applicant*

HARARE

THE REGISTRAR

Constitutional Court of Zimbabwe

HARARE

THE PRESIDENT OF ZIMBABWE

*1<sup>ST</sup> Respondent*

Munhumutapa Building

Samora Machel Avenue

HARARE

THE MINISTER OF JUSTICE, LEGAL &

## PARLIAMENTARY AFFAIRS

*2<sup>ND</sup> Respondent*

53. Block B, New Government Complex,  
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1<sup>ST</sup> RESPONDENT

2<sup>ND</sup> RESPONDENT

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## DRAFT ORDER

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WHEREUPON after reading the documents filed of record and hearing Counsel:

### IT IS ORDERED

1. That the 1<sup>ST</sup> Respondent's utterances on the 27<sup>th</sup> of July 2016 that:-

*"During the war, we would punish defectors severely . . . we kept them underground like rats, in bunkers . . . it is the same thing we are going to do here in independent Zimbabwe.*

*The police are ours and they should see to it that these small party protesters are thrown into jail so that they can taste the food there....*

*I want to warn them very strongly, Zanu PF will not tolerate any nonsense done in the name of religion, keep to your religious side and we will respect you. If you wade into politics, you are courting trouble and we know how to deal with enemies,"*

Are in contravention of his constitutional duty in terms of section 90 (1) and 90(2) of the constitution of Zimbabwe.

2. That the 1<sup>st</sup> respondent has failed to fulfil a constitutional obligation.;

3. That the 1<sup>st</sup> Respondent pays costs of this application on an attorney and client scale.

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BY THE COURT/  
REGISTRAR