HH-58-03
HC -5182/2002

MORGAN TSVANGIRAI **1ST APPLICANT**

And

THE MOVEMENT FOR DEMOCRATIC CHANGE **2ND APPLICANT**

And

THE EDITOR, THE HERALD NEWSPAPER **1ST RESPONDENT**

And

ZIMBABWE NEWSPAPERS (1980) LIMITED **2ND RESPONDENT**

HIGH COURT OF ZIMBABWE
HLATSHWAYO J
HARARE 12 July 2002 and 9 April 2003

Oppose Civil Application

Mr. B W Elliot, for the applicants.
Ms. Maureen Chitewe, for the respondents.

HLATSHWAYO J: The first applicant, Morgan Tsvangirai (hereinafter "the applicant") is the leader of the second respondent, a political party called the Movement for Democratic Change (MDC). The applicant contested the Presidential Election held on 9-11 March 2002 and lost to Mr R G Mugabe of the Zimbabwe African National Union-Patriotic Front (ZANU-PF). On 12 April 2002, the applicant filed an election petition challenging the result of the election. Thereafter, beginning on 13 April 2002, the Herald newspaper, which is edited by the first respondent and published by the second respondent, produced a number of articles on the election petition: for example, on its issue of 13 April 2002, on pages 1 and 2, it published an article entitled "MDC files petition seeking presidential election re-run" dealing with the issues that the applicant had raised in his election petition. On 8 June 2002, and again on its pages 1 and 2, following the filing on 7 June 2002 by President Mugabe of his opposing affidavit to the election petition, *The Herald* published an article entitled: "MDC petition opposed: Tsvangirai had poorly managed presidential campaign: President". The applicant alleges in his founding affidavit that the article dated 8 June 2002 gives more information of the contents of President

Mugabe's opposing affidavit than the article dated 13 April 2002 did of the applicant's election petition, but quickly, and rightly so in my view, adds that this is not the cause of complaint in this application.

> The basis of complaint in this application is an article published on 10 June 2002, headed "President speaks on MDC Petition" and quoting verbatim the preliminary remarks of President Mugabe's response to the applicant's petition. The following statement prefaced the 10 June article:
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> "The High Court Petition by the leader of the MDC, Mr. Morgan Tsvangirai, challenging the results of the March 9-11 Presidential Election won by President Mugabe by over 400 000 votes has raised a lot of debate both at home and abroad. In the interest of our readers, we produce President Mugabe's preliminary response to the issue raised by Mr Tsvangirai in his application to have the election set aside."

On 13 June 2002 the applicant's lawyers wrote to *The Herald* editor demanding 'by return of mail" confirmation of their client's right of reply on the basis that the article in question "contains many grave falsehoods and seeks to denigrate our client's good name and reputation in the minds of the public who reads your newspaper". On 17 June 2002, the lawyers acting for *The Herald* replied indicating that they were seized with the matter and undertaking to "revert to you soonest" after obtaining detailed instructions from the newspaper. Two days later, on 19 June 2002, the applicants filed the present application on an urgent basis, seeking the following order:

> "IT IS DECLARED:
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> 1. That in accordance with section 89(1) of the Access to Information and Protection of Privacy Act [Chapter 10:27], the Applicant has a right of reply in The Herald newspaper, at no cost to him, to the article which appeared on page 9 of The Herald newspaper dated Monday 10 June 2002 under the heading "President speaks on MDC Petition".
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> ACCORDINGLY, IT IS ORDERED
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> 1. That the Respondents shall comply with the above Declaration within three (3) days of the receipt by them from the Applicant of the said reply to the said article in The Herald newspaper dated Monday 10 June 2002.

2. That the Respondents shall publish the said reply from the Applicant without amendment and without any comment and shall give it the same prominence as the said article, which appeared in The Herald newspaper dated Monday 10 June 2002.
3. That the Respondents shall pay the Applicant's costs of suit, jointly and severally, the one paying, the other to be absolved."

In their opposition to the application, the respondents denied that the applicant is entitled to the right of reply because, firstly, the article did not seek to denigrate the good name and reputation of the applicant as alleged but was one in a series aimed at covering the litigation pertaining to the Presidential election petition in the public interest and secondly, the applicant failed to specify the alleged "grave falsehoods".

In order to make a decision in this dispute, I need to examine the law on and the concept of the right to reply.
Section 89 of the Access to Information and Protection of Privacy Act [Chapter 10:27] (hereinafter "the Act") states as follows:

"(1)A person or organization in respect of whom a mass media service has published information that is not truthful or impinges on his rights or lawful interests shall have a right of reply in the same mass media service at no cost to him, and the reply shall be given the same prominence as the offending story.

"(2) The reply shall be featured in the next issue of the mass media service."

Now, section 89 of the Act introduces a new concept in our law. The right of reply as a remedy for defamation is found in certain Continental countries in Europe, especially France and Germany. It has not found favour in Common Law countries or in South Africa or Zimbabwe up to now. I am greatly indebted to counsel for the applicants in making available to the court the following insightful internet précis of the right of reply as it obtains in Europe, which I quote below at length:

"A statutory right of reply exists in several European jurisdictions. In France, the *droit de response* gives and individual a right to respond where he or she is named in a newspaper or daily written periodical. The *droit de*

rectification allows ministers, civil servants and other public officials the right to respond at any time where her or his activities have been inaccurately described by a newspaper. Danziger identifies several practical flaws in the operation of the *droit de response*, including its potentially wide availability, which may encourage overuse and misuse. The newspaper may also be encumbered with inept, useless and irrelevant rebuttals. The droit de rectification may be used by officials in a way that misleads the public.

In Germany, the right of reply allows anyone affected by a publication in print, television, radio or film to rebut a statement of fact. In the case of the print media, the reply must be printed within three months and there are provisions dealing with the presentation of the reply which require that it reaches the same audience, and with the same forcefulness as the original material. In the case of the electronic media, the broadcaster must transmit a counter-version, prepared in writing by the person who has been affected by an assertion of fact made in a program. Danziger says that the right of reply can be used by overly sensitive individuals (for example it has been used by theater directors, editors and hotel directors) and says that the requirement that the reply be unedited has the potential to fill a journal with dull, unreadable material.

In Switzerland, the right of reply allows prior restraint of newspaper articles if the editors have not complied with a right of reply. This had occurred in at least one case, in which a magazine was restrained from publishing any further articles about the plaintiff." See generally Danziger, C 'The Right of Reply in the United States and Europe' (1986) 19 *International Law and Politics* 171

From the above summary, it appears that the right of reply enshrined in section 89 of our Act is closest to the German model, with the outstanding difference that our law does not include the provision that the reply should be published unedited. It was submitted on behalf of the applicant that the reply must not be subject to amendment by the respondents, otherwise the effect of the reply will be nullified. Apart from not having a statutory or other legal basis, this proposition puts in sharp focus the objection which freedom of expression campaigners have with a widely framed legally enforceable right of reply, namely that it has a potential of stifling free and robust expression or might lead to the filling of media with dull, unreadable material or worse still prevent editors from excising socially and morally objectionable material.

A distinction must be drawn between editing and comment. The proposition that editorial comment should not be included within the reply but may be contained elsewhere within

the same publication is reasonable, otherwise the reply might be completely negated by pointed, running commentaries. Such a proposition would also be in line with the letter and spirit of section 89. However, to assert an amendment-proof right of reply as the applicant has sought to do, is not only to invite the kind of criticism outlined above and, as submitted by the respondents, "make unwarranted inroads into editorial control in respect of the quality of the material published, and the way in which issues of public interest are treated", but it is also to impinge on the freedom of others to impart ideas and information without interference, which is guaranteed by our Constitution.

In the American case of Miami Herald Publishing Co v Tornillo 418 US 241 (1974), 41 L Ed 2nd 730, the United States Supreme Court considered an appeal on an action based on a Florida State statute granting a political candidate a right of reply where his personal character or official record is assailed by a newspaper. Pat L. Tornillo Jr. had demanded that the Miami Herald Publishing Company print verbatim his replies to the newspaper's editorials, which had been critical of his candidacy. The Florida statute provided that the reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply. The Supreme Court held that the Florida statute operated as a command in the same sense as a statute forbidding the newspaper to publish specific matter, which, it concluded, interfered with editorial judgment and control, and detracted from the freedom of the press, which is guaranteed in the US constitution's Fifth Amendment. The statute was therefore declared unconstitutional. Accordingly, I find favour in the submission made on behalf of the respondents that the part of the order sought by the applicant requiring amendment-proof publication not only lacks any statutory basis, but on the persuasive authority of the Miami Herald Publishing Company case, also makes such intrusions into the constitutionally guaranteed freedom to impart ideas and information as to render it unjustifiable in our democratic society.

There still remains, however, the question whether the applicant on the facts is, nonetheless still entitled to a right of reply, which may be amended or commented upon as explained above. Section 89 of the Act does not specify how the right of reply may be exercised, and detailed regulations may require to be developed by bodies charged with the implementation of the Act to cure the lack of specificity. However, I am of the view that at the very least a party alleging the violation of section 89 must show directly or indirectly in what way the information published is untruthful or that it impinges on its rights or lawful interests. It may do so by spelling out the untruths in the offending

article or by submitting a counterstatement that sets the record straight and exposes the mischief in the impugned article. It is not enough, as the applicants have done in this case, to merely allege grave falsehoods without specifying them or submitting a counterstatement. Therefore the order sought by the applicants cannot be granted.

As far as costs are concerned, the rule that the costs follow the outcome shall apply.

Accordingly, this application is dismissed with costs.

Applicant's legal practitioners: Gill, Godlonton & Gerrans
Respondent's legal practitioners: *Gula-Ndebele & Partners.*