

GWAUNZA JA

14/2/18

105

IN THE CONSTITUTIONAL COURT OF ZIMBABWE

CASE NO. CCZ 3/18

HELD AT HARARE

In the matter between:

GABRIEL SHUMBA

1<sup>st</sup> Applicant

SIBONILE MFUMISI

2<sup>nd</sup> Applicant

DARLINGTON NYAMBIYA

3<sup>rd</sup> Applicant

And

MINISTER OF JUSTICE, LEGAL AND

PARLIAMENTARY AFFAIRS

THE CHAIRPERSON OF THE ZIMBABWE

ELECTORAL COMMISSION

2<sup>nd</sup> Respondent

ZIMBABWE ELECTORAL COMMISSION

3<sup>rd</sup> Respondent

THE MINISTER OF FOREIGN AFFAIRS

✓ 4<sup>th</sup> Respondent

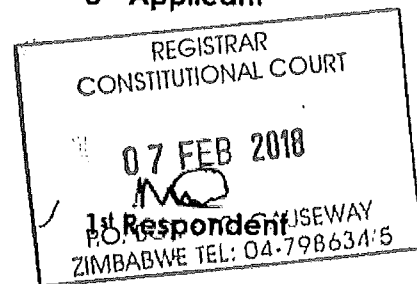
THE MINISTER OF FINANCE AND

ECONOMIC DEVELOPMENT

✓ 5<sup>th</sup> Respondent

THE ATTORNEY GENERAL OF ZIMBABWE

✓ 6<sup>th</sup> Respondent



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**1<sup>ST</sup>, 4<sup>TH</sup>, 5<sup>TH</sup> & 6<sup>TH</sup> RESPONDENT'S HEADS OF ARGUMENT**

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**1. BACKGROUND**

1.1. The Applicants are Zimbabweans who are residing abroad for alleged political and economic reasons. They seek an order in the following terms:

The failure to afford voting facilities to the Applicants and similarly placed Zimbabweans based abroad be and is hereby declared unconstitutional in that it violates the Applicants' rights enshrined in section 67 and 56 of the Constitution.

Accordingly that it is ordered that:

- 1.1 Section 23 of the Electoral Act [Chapter 2:13] be declared constitutionally invalid as it excludes citizens not resident in Zimbabwe from registering as voters in contravention of section 67(3) as read with paragraph 2 of the 4<sup>th</sup> Schedule to the Constitution;
- 1.2 Section 72 of the Electoral Act be declared constitutionally invalid as it excludes citizens of Zimbabwe who are not in Government service from exercising their right to vote in contravention of section 56(1), 56(3) and 56(4) and 67(3) of the Constitution of Zimbabwe; and
- 1.3 An order that the Respondents put in place all appropriate measures to enable the Applicants and any other Zimbabweans based abroad to participate in the 2018 Presidential, Parliamentary and Local Authority elections as voters.
- 1.4 Each party to bear its own costs.

## **2. SUMMARY OF RESPONSE BY THE RESPONDENTS**

- 2.1 It is respectfully submitted that the issues that are before this honourable court were already decided in **Tavenawa Bukaibenyu versus the Chairman of the Zimbabwe Electoral Commission and 3 Others** CCZ12/17. The fact that we have a new Constitution has not changed the position of the law, if anything the law has actually strengthened the fact that there is no diaspora vote in Zimbabwe.
- 2.2 Section 67(3) as read with the Fourth Schedule provides for a constituency based election system, as it sets out the residential requirement. In addition section 160 provides that Zimbabwe can only be divided into 210 constituencies for the elections of Members of Parliament and Local Authority. Section 92(4), on the election of the President provides that the qualifications for registration as a voter and for voting in an election for the President are set out in the Forth Schedule.

### 3. **BUKAIBENYU JUDGEMENT**

- 3.1 The **Bukaibenyu** judgement dealt with section 23A (2) as read with the Third Schedule of the old Constitution in determining whether section 23(3) and the then section 71 Electoral Act, interfered with the Applicant's right to vote as enshrined in the Constitution.
- 3.2. It is the Respondents' contention that there is no difference in the manner in which the right to vote is now to be exercised. This is because the current Constitution has not resulted in a changed legal position. If anything it has merely widened the provisions relating to political rights.
- 3.3. In **Bukaibenyu** this Honourable Court considered the right to vote as it was set out in section **23A (2)**. The section provided as follows:
- "Subject to this Constitution, **every adult Zimbabwean citizen** shall have the right –*
- a) **to vote in referendums and elections for any legislative body established under this Constitution, and***
  - b) **to do so in secret; and to stand for public office and if elected, to hold office.**"*
- 3.4. Section **67(3)** of the current Constitution provides for the right to vote as follows:
- "(3) **Subject to this Constitution**, every Zimbabwean citizen who is of or over eighteen years of age has the right —*
- (a) **to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret;***  
*and (my emphasis)*
  - (b) **to stand for public office and, if elected, to hold such office.**"*
- 3.5. Both the above provisions give every Zimbabwean citizen, who is eighteen years and older, the right to vote, subject to the Constitution.

In both cases, the right is not an absolute right, as there are qualifications relating to age and citizenship.

4. **The Third Schedule of the old Constitution**

- 4.1 This Honourable Court also considered the Third Schedule of the old Constitution which provided as follows:

***"3 Qualifications and disqualifications for voters***

***(1) Subject to the provisions of this paragraph and such residence qualifications as may be prescribed in the Electoral Law for inclusion on the electoral roll of a particular constituency, any person who has attained the age of eighteen years and who—***

***(a) is a citizen of Zimbabwe;***

***(b) ....***

***Shall be qualified for registration as a voter."***

4.2 **The Fourth Schedule of the current Constitution**

The Fourth Schedule of the current Constitution provides as follows:

***"Qualification for registration as a voter***

***1. (1) Subject to subparagraph (2) and paragraph 2, a person is qualified to be registered as a voter on the voter's roll of a constituency if he or she—(my emphasis)***

***(a) is of or over the age of eighteen years; and***

***(b) is a Zimbabwean citizen.***

***(2) The Electoral Law may prescribe additional residential requirements to ensure that voters are registered on the most appropriate voter's roll, but any such requirements must be consistent with this Constitution, in particular with section 67." (my emphasis)***

- 4.3 It is respectfully submitted that both the Third and Fourth Schedule specifically vested the Electoral Law with power to prescribe residential qualifications for voters in order for them to register as voters on the

voters' roll of a particular constituency. The only difference being that the Fourth Schedule goes further to provide that such residential requirements must be consistent with the Constitution, in particular section 67. The import of the provisions of both Schedules has not changed, if anything, there has been a rearrangement of words.

- 4.4 Both provisions give every Zimbabwean the right to vote with two internal qualifications, you have to be:

- a) a citizen;
- b) of or above the age of eighteen years.

- 4.5 The Schedules then go further to provide for a third qualification, the residential qualification, which demands that for you be registered on the voters' roll of a constituency and for you to be so registered, you must be ordinarily resident in that particular constituency.

## 5 THE FOURTH SCHEDULE IN DETAIL

- 5.1 Subparagraph (1) of paragraph 1 of the Fourth Schedule, provides for qualification for registration as a voter and provides as follows:

*"Qualification for registration as a voter*

*1.(1) Subject to subparagraph (2) and paragraph 2, a person is qualified to be registered as a voter on the voter's roll of a constituency if he or she—(my emphasis)*

*(c) is of or over the age of eighteen years; and  
(d) is a Zimbabwean citizen."*

- 5.2 It is submitted that the import of the provision is that, before any Zimbabwean citizen can vote, they have to qualify to register as a voter on the voter's roll of a constituency. It therefore means that any person wishing to register has to belong to a particular constituency.

- 5.3 Subparagraph (2) of the Fourth Schedule goes further to provide—

*"(2) The Electoral Law may prescribe **additional residential requirements** to ensure that voters are registered on the **most appropriate voter's roll**, but any **such requirements must be consistent with this Constitution, in particular with section 67.**" (my emphasis)*

- 5.4. It is respectfully submitted that section 67(3) should not be read in isolation, instead it should be read together with the Fourth Schedule.

The fact that section 67(3) begins with the phrase "Subject to this Constitution...." and subparagraph 2 of paragraph one end with the word "but any such requirements must be consistent with this Constitution, particularly section 67.," means that the two provisions sit at par with each other.

- 5.5. Subparagraph (2) of paragraph 1 is instructive. The residential requirements must be consistent with the Constitution and section 67 in that they should not impose an unreasonable burden on the potential voter. For example you cannot have a provision that requires that a voter must own property, must not be a squatter or must have been resident for ten years. This is because there is a presumption that the Constitution is consistent and coherent.
- 5.6. The right to vote as set out in section 67(3) has two qualifications that is age and citizenship. However, paragraph 1 of the Fourth Schedule to the Constitution provides for an additional qualification of residence. The additional qualification is therefore reasonable and consistent with section 67(3). Although the old Constitution had no such wording this honourable court still arrived at the decision in **Bukaibenyu**.
- 5.7. Paragraph 2 of the Fourth Schedule for disqualification for registration as a voter and provides as follows:
 

*"2. A person is disqualified to be registered as a voter—*

  - (a) while he or she is detained as mentally disordered or intellectually handicapped under an Act of Parliament relating to mental health;*
  - (b) if he or she has been declared by order of a court to be incapable of managing his or her affairs, for so long as the order remains in force; or*
  - (c) is he or she has been convicted of an offence under the electoral Law and declared by the High Court to be disqualified for registration as a voter or from voting, for the period he or she has been declared disqualified, but the period must not exceed five years."*
- 5.8. From the above provision, it is very clear that the Applicants are not disqualified in terms of paragraph 2, yet paragraph 1, of the same Fourth Schedule disqualifies the Applicants by referring to a

constituency and additional residential requirements. It is also clear that the Applicants are not the only ones disqualified from voting by the Constitution and the Electoral law. The Constitution is clear on who should and should not vote and that must be respected.

## **6. THE RESIDENTIAL QUALIFICATION**

- 6.1. In terms of the Constitution, a person can only be registered on the voter's roll of a constituency. For one to belong to a particular constituency, they have to reside in that constituency. That is why subparagraph (2) of paragraph one provides that—

*"The Electoral Law may prescribe additional residential requirements to ensure that voters are registered on **the most appropriate voter's roll...**"*

- 6.2 Literally interpreted "the most appropriate voter's roll could only mean a voter's roll for the constituency in which one is ordinarily resident and there is no way the two can be divorced. You should be resident within your constituency.
- 6.3 Section 23 of the Electoral Act provides for the additional residential requirements which is contemplated by the Constitution in subparagraph 2 of paragraph 1 of the Fourth Schedule, when it states—

### ***"23 Residence qualifications of voters***

*(1) Subject to the Constitution and this Act, in order to have the requisite residence qualifications to be a voter in a particular constituency, a claimant must be resident in that constituency at the date of his claim:*

*Provided.....*

*(2) For the purposes of subsection (1), a claimant shall be deemed to be residing in a constituency while he or she is absent therefrom for a temporary purpose.*

*(3) A voter who is registered on the voters' roll of a constituency, other than a voter who has been registered in that constituency in terms of the proviso to subsection (1), shall not be entitled to have his or her name retained*

on such roll if, for a continuous period of 12 months, he or she has ceased to reside in that constituency. "

- 6.4 Section 23 is ancillary to the provisions of paragraph 1 of the Fourth Schedule and is therefore not ultra vires the Constitution. If anything, it is the Constitution that has set out the residence qualification. The Constitution in subparagraph (1) of paragraph 1 of the Fourth Schedule recognises the constituency representation system as it provides that—

**"a person is qualified to be registered as a voter on the voter's roll of a constituency..."**

## **7. WHETHER SECTION 23(3) IS ULTRA VIRES THE CONSTITUTION**

- 7.1 The Black's Law Dictionary Defines resident as—

*"Any person who occupies a dwelling within the state, has a present intent to remain within the state for a period of time, and manifests the genuineness of that intent by establishing an on-going physical presence within the state with indicia that his presence within the state is something other than merely transitory in nature."*

- 7.2. As stated in the above definition, connotes permanency and is not merely transitory. It only makes sense that the legislature makes such a provision where a person has left the country. It cannot be read without looking at section 33 of the same Act which provides for the due process to be followed before the person can be removed from the roll. It is not arbitrary. When read with section 33, it is clear that the section ensure integrity of the voters' roll. This is not *ultra vires* the Constitution.

## **8. INTERPRETATION OF THE RIGHT TO VOTE IN SECTION 67 AS READ WITH THE FOURTH SCHEDULE**

- 8.1 Section 67(3) should not be read in isolation neither should it only be read with paragraph 2 of the Fourth Schedule to the Constitution because there is a presumption that the Constitution is a single document. It should be read with the entirety of the Fourth Schedule to the Constitution and the Constitution as a whole. See **Capital Radio**

Private Limited versus Broadcasting Authority of Zimbabwe 2003(3) ZLR 236.

- 8.2 The starting point in interpreting any provision of the Constitution is found in Section 2(1) of the Constitution of the Republic of Zimbabwe provides as follows:

*"This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct that is inconsistent with it is invalid to the extent of the inconsistency." (my emphasis)*

- 8.3 This honourable court has no option but to confine itself to the provisions of this Constitution in interpreting the provisions set out in section 67(3) as read with the Fourth Schedule. The wording of the said provisions is deliberate, and must be respected.
- 8.4 In **Hewlett v Minister of Finance and Another** 1981 ZLR 571, Fieldsend CJ as he then was correctly held that the starting point in interpreting the Constitution must be found in the words used in the Constitution. It thus stated as follows:

*"..... in general the principles governing the interpretation of a Constitution are basically not different from those governing the interpretation of any other legislation. It is necessary to look to the words used and to deduce from them what any particular section, phrase or word means having regard to the overall context in which it appears."*

- 8.5 That the starting point is the context of the text was also restated by Kentridge JA in **State v Zuma and Others** 1995 (2) SA 642 (cc) wherein he stated as follows:

*".....We must heed Lord Wilberforce's reminder that even a Constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to values the result is not interpretation but divination ....."*

- 8.6 In interpreting the said provisions of the Constitution the principle of purposive interpretation should be considered. According to G.E. Devenish in the book **"Interpretation of Statutes"** at page 36:

*"An authentic purposive approach endeavours to interpret a provision of a statute in accordance with the purpose or ratio*

*under all circumstances regardless of whether there is ambiguity or not."*

- 8.7 It also includes the intent of the reasonable author. In this case it is the Respondents' argument that the Constitution is presumed to be a reasonable instrument and the only reasonable interpretation is that the Applicants who are resident outside the country cannot vote as they are excluded from voting by the Fourth Schedule. Our Constitution now extends Citizenship to persons born outside Zimbabwe in section 37. Had it been the intention of the Legislature to allow the diaspora vote, there would not have been any reference to constituencies because citizens by descent would also claim the diaspora vote.
- 8.8 It is respectfully submitted that the Zimbabwean electoral system is based on the concept of constituency representation. You are only qualified to be registered as a voter on the voters' roll of a constituency if you are a citizen, above the age of eighteen years. It is clear that paragraph 2 of the Fourth Schedule does not expressly disqualify persons in the position of the Applicants from registering to vote. However, it is the Respondents' argument that the constituency system as expressly stated in paragraph 1 of the Fourth Schedules does.
9. **THE CONSTITUTION PRESCRIBES THE RESIDENTIAL QUALIFICATIONS**
- 9.1 It is submitted that it is reasonable to restrict the right to vote to persons who are eighteen years of age and who are not only citizens but residents in a particular constituency. This is because our voting system is constituency based and the Constitution recognises this in paragraph 1 of the Fourth Schedule to the Constitution.
- 9.2 It is respectfully submitted that the residential requirements set out in section 23 of the Electoral Act are consistent with the right to vote as provided for in section 67 (3) of the Constitution. Section 160 (1) provides, that for the purpose of electing Members of Parliament, the Zimbabwe Electoral Commission must divide Zimbabwe into two hundred and ten constituencies. Geographically, the constituencies must be within Zimbabwe. In order to register, a person must register on

the most appropriate voter's roll for a constituency in Zimbabwe, in one of the two hundred and ten constituencies. It is for the prescribed constituencies that section 23 of the Electoral Act prescribes residential requirements.

- 9.3 In terms of this Constitution, in order for any person to exercise their right to vote, you must be in one of the two hundred and ten constituencies. If you are not resident in a constituency you cannot exercise your right to vote notwithstanding the fact that you are a citizen of eighteen years and above.
  - 9.4 The qualifications for registering to vote are provided for in the Constitution itself. You are either qualified or not. Parliament is given power to legislate a law which regulates the conduct of elections and the Electoral Act was then enacted providing for a residential qualification for potential voters. Therefore the Electoral Act is constitutional.
  - 9.5 Where local authority and Parliamentary elections are concerned it requires that you vote for an individual candidate, for a specific ward or constituency, as a resident of that area. You should know your candidate and have certain interests in and expectations for your ward or constituency. If you are not resident in a particular constituency and are allowed to vote, you are likely to impose a candidate who is not competent, thereby violating the rights of those who are resident in the constituency and are personally affected by such incompetence. For one to exercise the right to vote without infringing the rights of other voters in that constituency, one has to be resident within the constituency and be familiar with the political, economic and social situation therein.
10. **WHETHER THERE IS ONE CONSTITUENCY FOR THE PRESIDENTIAL ELECTIONS.**
- 10.1 The Applicants argue that there is only one constituency for the Presidential elections and that nothing in the Constitution requires that Zimbabweans use one voters' roll for all elections. It is submitted that whilst section 160 of the Constitution requires appears to limit constituencies to Parliamentary and Local Authority elections, section 92 of the Constitution on Election of President and Vice-Presidents is instructive. It provides—

*"(4) The qualifications for registration as a voter and for voting at an election of a President and Vice-President are set out in the Fourth Schedule."*

- 10.2 In terms of the Fourth Schedule, it is clear that one has to be registered as a voter and the Fourth Schedule requires that you be registered on the voters 'roll of a constituency. A constituency and the residential requirement are hand and glove, the two cannot be separated. Section 92 of the Constitution places the voting qualification of the President and a Member of Parliamentary at the same level.

## 11. **THE DISCRIMINATION ARGUEMENT**

- 11.1 The Applicants allege that section 72 of the Electoral Act is discriminatory and in violation of section 56(1), 56(3) and 56(4) of the Constitution. Section 72 provides—

### ***"72 Persons who may vote by post***

*Where an election is to be held in a constituency, a person who is registered as a voter on the roll for that constituency shall be entitled to vote by post in terms of this Part if, on all polling days in the election, he or she will be outside Zimbabwe—*

- (a) on duty as a member of a disciplined force or as an electoral officer; or*
- (b) on duty in the service of the Government; or*
- (c) as the spouse of a person referred to in paragraph (b);*

*and so unable to vote at a polling station in the constituency."*

- 11.2 The right to equality of all persons before the law and the right to equal protection and benefit of the law and non-discrimination is not one the rights set out in section 86(3) of the Constitution, as being exempt from limitation. Section 86 on Limitation of rights and freedoms provide as follows:

### ***"86 Limitation of rights and freedoms***

- 1. The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.*

2. The fundamental rights and freedoms set out in this Chapter **may be limited only in terms of a law of general application** and to the extent that the limitation **is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom**, taking into account all relevant factors, including-(my emphasis)

- a) The nature of the right or freedom concerned;
- b) The purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
- c) The nature and extent of the limitation;
- d) The need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
- e) The relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
- f) Whether there are any less restrictive means of achieving the purpose of the limitation.

3. No law may limit the following rights enshrined in this Chapter, and no person may violate them-

- a) The right to life, except to the extent specified in section 48;
- b) The right to human dignity;
- c) The right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;
- d) The right not to be placed in slavery or servitude;
- e) The right to a fair trial;
- f) The right to obtain an order of habeas corpus as provided in section 50(7)(a)."

11.3 The Applicants have not been discriminated because this is a law of general application and it is respectfully submitted that the limitation is in all essence is fair, reasonable, necessary and justifiable, Section 72 applies to persons who are ordinarily resident in Zimbabwe and are registered voters, who are actually on the voters' roll. They, are however outside the country because their duties require that they be

outside Zimbabwe on polling day, are permitted in terms of section 72 to vote by post. This is a class of people who have themselves not made a conscious decision to leave the country but do so, on national duty. They are a different class of persons from the Applicants who have voluntarily left the country are not ordinarily resident in Zimbabwe, are not registered and have no constituency. The two are not in similar positions and cannot be compared.

- 11.4 In this regard, this honourable court is referred to the **Samuel Sipepa Nkomo v Minister of Local Government, Rural and Urban Development and two others CCZ 6/16** a decision of this honourable court in relation to rights under **Section 56 (1) of the Constitution** wherein the court remarked that;

*"The right guaranteed under Section 56 (1) is that of equality of all persons before the law and the right to receive the same protection and benefit afforded by the law to persons in a similar position.....It includes the right not to be subjected to treatment to which others in a similar position are not subjected. In order to found his reliance on this provision the Applicants must show that by virtue of the application of a law, he has been the recipient of unequal treatment or protection that is to say that certain persons have been afforded some protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons".*

- 11.5 Applicants' right are to be treated equally with those of people in a similar position to them and in the present case, people in a similar position to them are those who voluntarily left the country and not those on Government business. In **Prinsloo v Van Der Linde and Another CCT4/96[1997] ZACC5**, it was held that the essence of the equality lie not in treating everyone the same way but in treating everyone with equal concern and respect.

- 11.6 In addition section 56(5) of the same Constitution provides:

*"Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair,*

*reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom."*

- 11.7 Section 56(5) is the exception to the general rule against discrimination and Section 72 of the Electoral Act is justifiable and necessary in that, the State would not want to prejudice persons who are in the service of their country by not facilitating their exercise of the right to vote. In the absence of such a provision no one would be willing to go on national service.

Diplomats, who are posted outside Zimbabwe, have no rights or obligations in the receiving States. They are exempt from the civil and criminal laws of the host States. They have no right to vote and yet persons in the position of the Applicants may in some instances, depending on their residency status be eligible to vote. The Constitution itself does not prohibit this form of discrimination. In section 36(2) of the Constitution, persons born outside Zimbabwe are Zimbabwean citizens by birth if, at the time they were born, either of their parents was a Zimbabwean citizen working outside Zimbabwe for the State or an international organisation. Section 37(a), on the other hand provides that children of person in the position of the Applicants who are born outside this country, are citizens by descent.

## 12. **COMPARITIVE ANALYSIS**

- 12.1 Every country has its own Electoral Laws and their content depends on the different Constitutions and Electoral legislation. Some countries' Constitutions do not even provide for the right to vote.

### 12.2. **Germany**

Only Germans listed on the voters' roll are allowed to vote. The eligibility for Germans permanently living abroad is:

- a) after reaching the age of 14, they were either resident in the Federal Republic of Germany for an uninterrupted period of three months and this stay dates back to not more than 25 years; or
- b) for other reasons they have become familiar, personally and directly with the political situation in the Federal Republic of Germany and be affected by it.

### 12.3 India

In India postal ballot is given to members of the armed forces across the country or abroad and individuals on election duty like the police.

### 12.4 Rwanda

The diaspora vote is limited to the Presidential elections only.

### 12.5 Senegal

In Senegal ten per cent of the seats in parliament are reserved for the diaspora.

### 12.6 Namibia

In section 23 of the Electoral Act, 2014, the Electoral Commission is enjoined to establish temporary registration points for persons who are temporarily outside Namibia to be registered as voters and take part in the election of the President and members of the National Assembly.

### 12.7 United State of America

United State Council Elections are not a Federal issue. Different States make different electoral laws.

### 12.8 South Africa

The Applicants Argument is based on the South African case of Ritcher versus the Minister for Home Affairs and others 2009(3)SA 615(CC), It is of importance to note that there is no mention of the residence requirement in the South African Constitution. In section 19(3) which sets out the right to vote it provides—

"(3) Every adult citizen has the right—

a) to vote in elections for any legislative body established in terms of the Constitution and to do so in secret; and...."

12.9. In addition the South African Electoral System is based on the concept of proportional representation, soothing which this honourable court expounded on in **Bukaibenyu**.

### 13. CONCLUSION

- 13.1. The Application before this honourable Court is made in terms of section 85(1) (a) of the Constitution as they are purporting to act in their own interests. However, the Applicants in paragraph 3 of their draft order go on to seek relief on behalf of Zimbabweans who are in a similar position as themselves. They have no locus standi to seek the relief they seek on behalf of other Zimbabweans as their Application is not made in terms of section 85(1)(d).
- 13.2 The wording of the key provisions in our Constitution that provide for the right to vote which are section 67(3) as read with the Fourth Schedule makes it clear that the diaspora vote was not anticipated. In addition section 160 of the same Constitution create 210 constituencies which are geographically within Zimbabwe. Section 92(4) on the election of the President, further confines the right to vote to the prescribed constituencies, as it refers to the Fourth Schedule. Section 23 of the Electoral Act is not ultra vires the constitution as it provides for a reasonable and justifiable limitation that is consistent with the Constitution. The section does not take away the right to vote.
- 13.3 Section 72 of the Electoral Act does not violate the rights of the Applicants as set out in section 56 of the Constitution. The Constitution itself allows such discrimination as has been demonstrated in our submissions.
- 13.4 It is submitted that what the Applicants seek is not an order to have section 23 and 73 impugned as their application has no legal basis in terms of the Constitution. Instead they should have lobbied for an amendment of the Constitution.
- 13.5 As the court rightly put in in **Bukaibenyu**, a distinction should be drawn between a situation where there is no right to vote and on where there the right to vote is provided for under the law and a voter chooses not to exercise the right. To compel the Respondents to put in place all the appropriate measures to enable the Applicants to exercise the right to vote outside the 210 constituencies would be a violation of this Constitution. By not registering to vote and ensuring that they exercise their right to vote the Applicants have not lost their right to vote, but simply disabled themselves from voting by being in the wrong constituency. See Registrar General of Elections and Others versus Morgan Tsvangirai SC2002(1) ZLR (S) 204

WHEREFORE, I pray that the application is without merit and should be dismissed.

DATED at HARARE this 7<sup>th</sup> day of FEBRUARY 2018.

.....  
**CIVIL DIVISION OF THE**  
**ATTORNEY GENERAL'S OFFICE**  
 Respondent's Legal Practitioners  
 2<sup>nd</sup> Floor, New Govt. Complex  
 Cnr Samora Machel/4<sup>th</sup> Street  
**HARARE (4/JUST/1116 FC/IM)**

TO : **THE REGISTRAR**  
 Constitutional Court of Zimbabwe  
**HARARE**

And

TO: **ZIMBABWE LAWYERS FOR HUMAN RIGHTS**  
 Applicant's Legal Practitioners  
 Kodzero Amalungelo House  
 98B Baines Avenue  
**HARARE (BRC/ACJ)**

And

TO: **MESSRS NYIKA, KANENGONI AND PARTNERS**  
**LEGAL PRACTITIONERS**  
 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Legal Practitioners  
 3<sup>rd</sup> Floor, Northwing, Zimdef Headquarters  
 Off Mother Patrick's Ave  
 Rotten Row  
**HARARE** (Mr Kanengoni)