

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

ZIMBABWE ELECTORAL COMMISSION

THE MINISTER OF FOREIGN AFFAIRS

THE MINISTER OF FINANCE AND

ECONOMIC DEVELOPMENT

THE ATTORNEY GENERAL OF ZIMBABWE

1<sup>st</sup> Respondent 29 JAN 2018

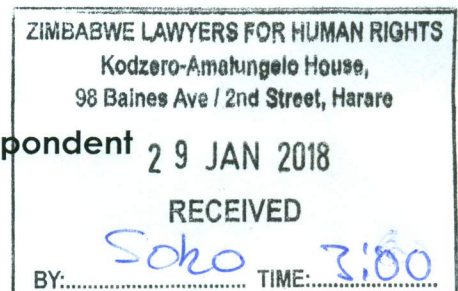
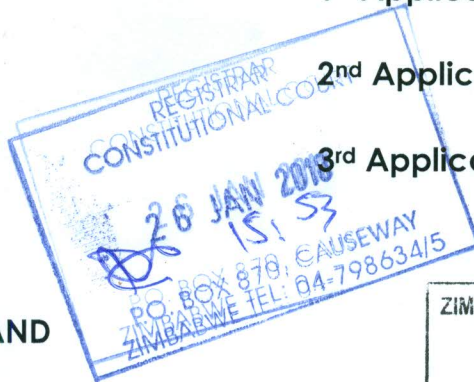
2<sup>nd</sup> Respondent

3<sup>rd</sup> Respondent

4<sup>th</sup> Respondent

5<sup>th</sup> Respondent

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 NOTICE OF OPPOSITION**

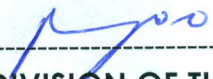
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**TAKE NOTICE** that the Respondents intend to oppose the application on the grounds set out in the affidavits by the Respondents and their address for service is specified below.

The Court Application was served on the Respondent's Legal Practitioners on 24 January 2018.

The attached affidavit(s) will be used in support of the application.

DATED at HARARE this 26<sup>th</sup> day of JANUARY, 2018.

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

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

And

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

IN THE CONSTITUTIONAL COURT OF ZIMBABWE

CASE NO. CCZ 3/18

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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

1<sup>st</sup> Respondent

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 OPPOSING AFFIDAVIT

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I, the undersigned **PRINCE MACHAYA**, do hereby make oath and state that:

1. I am the Attorney General and principal legal advisor to the Government of the Republic of Zimbabwe. I am cited as the 6<sup>th</sup>



Respondent in the above proceedings. I depose to this affidavit on my own behalf and, in addition, I have been authorised to depose to this affidavit on behalf of the 1<sup>st</sup> Respondent, 4<sup>TH</sup> and 5<sup>th</sup> Respondents.

2. The matters of fact which I depose to herein are within my personal knowledge and belief. I have perused the Applicants' Founding Affidavit and respond as follows:

3. **Ad paragraph 1-3**

I have no knowledge of the fact that the Applicants, who are Zimbabweans, reside and work outside the country and I will put the Applicants to the proof thereof.

4. **Ad paragraph 4-10**

I admit the contents of these paragraphs.

5. **Ad paragraph 11-13**

Whilst it may be true that the deponent is a Zimbabwean citizen, I have no knowledge of his alleged persecution and torture which he allegedly faced at the hands of Zimbabwean security agents and will put the Applicants to the proof thereof.

6. **Ad paragraph 14-19**

I have no knowledge of the contents of these paragraphs and will put the Applicants to the proof thereof.

7. **Ad paragraph 20**

This is denied, the impugned provisions of the Electoral Act [Chapter 2:13] (hereinafter referred to as "the Act") which require residential qualifications on Zimbabweans to be included on the voter's roll are in no way restrictive.

8. **Ad paragraph 21-25**

This is admitted.

9. **Ad paragraph 26-30**

This is admitted.

10. **Ad paragraph 31-35**

This is denied. Every Zimbabwean citizen has the right to vote and it is up to them to ensure that they exercise that right. There is no legislation that prohibits such a citizen from exercising their rights as set out in section 67 of the Constitution.

11. The impugned provisions do not negate the right to vote. The Constitution is the supreme law and the Act provides for residential qualifications that ensure that the Constitution is given effect to. Section 67(3) of the Constitution should be read together with the Fourth Schedule of the Constitution.

12. **Ad paragraph 36-42**

This is denied. The provisions of section 23, 72 and 73 are not discriminatory; if anything they are administrative and are consistent with the Constitution. Sections 72 and 73 relate to persons who by the nature of their service to the government, are required to be outside Zimbabwe on duty on polling day, and are thus, unable to vote at a polling station in their constituency. This class of persons is completely different from that class of persons who have voluntarily left the country, in pursuit of their personal interests.

13. **Ad paragraph 42-47**

This is denied. Whilst the State is enjoined to ensure that all appropriate measures, including legislative measures, are taken to ensure effective compliance with section 155(1) of the Constitution, the State has no constitutional or other legal obligation to establish polling stations which are outside the constituencies established in terms of the Constitution, that is, outside Zimbabwe.

14. **Ad paragraph 48-53**

This is denied. Zimbabwe is not in breach of any regional or international laws. The impugned provisions of the Electoral Act do not take away the right to vote, neither are they discriminatory so as to violate any of the rights set out in Chapter of 4 of the Constitution or any international law that is applicable in this jurisdiction.

15. **Ad paragraph 54-55**

As already stated before, the State has no legal obligation to establish polling stations outside its territory for the benefit of those who have voluntarily left the country. There can be no comparison with other countries as voting systems differ. The South African voting system is based on proportional representation whereas our own system is constituency based. Other countries have constitutions which permit polling to take place beyond their borders. Zimbabwe is not like that.

16. **Ad paragraph 56-61**

The Zimbabwe Diaspora Policy is an economic policy which does not form part of Electoral laws of the country. It, therefore, cannot form part of the argument that is before the court.

17. **Ad paragraph 62**

This is denied. Sections 23, 72 and 73 of the Act are not ultra vires the Constitution. There is absolutely no basis for the Applicants to allege that their rights as set out in section 56 and 67 of the Constitution are being or have been violated.

Wherefore, I pray that the application be dismissed, with costs.

THUS DONE and SWORN TO at HARARE this 26<sup>th</sup> day of JANUARY 2018.



  
.....  
**PRINCE MACHAYA**

Before me

  
.....  
**COMMISSIONER OF OATHS**

**TARIRO MUSANGWA**  
**LLBs (UZ)**  
**LEGAL PRACTITIONER,**  
**26 JAN 2018**  
**CONVEYANCER, NOTARY PUBLIC**  
**COMMISSIONER OF OATHS**