

IN THE CONSTITUTIONAL COURT OF ZIMBABWE
HELD AT HARARE

CASE NO. CCZ 3/18

In the matter between:

GABRIEL SHUMBA

1ST APPLICANT

AND

SIBONILE MFUMISI

2ND APPLICANT

AND

DARLINGTON NYAMBIYA

3RD APPLICANT

AND

MINISTER OF JUSTICE, LEGAL AND
PARLIAMENTARY AFFAIRS

1ST RESPONDENT

AND

THE CHAIRPERSON OF THE ZIMBABWE
ELECTORAL COMMISSION

2ND RESPONDENT

AND

ZIMBABWE ELECTORAL COMMISSION

3RD RESPONDENT

AND

THE MINISTER OF FOREIGN AFFAIRS

4TH RESPONDENT

AND

THE MINISTER OF FINANCE AND
ECONOMIC DEVELOPMENT

5TH RESPONDENT

AND

THE ATTORNEY GENERAL OF ZIMBABWE

6TH RESPONDENT

1ST APPLICANT'S ANSWERING AFFIDAVIT

I, the undersigned **GABRIEL SHUMBA**, do hereby make oath and state that:

1. I am the 1st Applicant in this matter. I depose to this affidavit on my own behalf. I depose to the facts hereunder in my personal capacity and also on behalf of 2nd and 3rd Applicants who have authorised me to depose to this and any subsequent affidavits on their behalf.
2. The matters of fact I depose to herein are within my personal knowledge and belief. Where I make averments on the law, I do so under the advice of my legal practitioners of record, which advice I accept.

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3. Ad paragraphs 1-2

No issues arise from these paragraphs.

4. Ad paragraph 3

The Applicants in this matter all reside and/or work outside Zimbabwe, as they have attested under oath to this Honourable Court. However, for the avoidance of doubt, I attach hereto a copy of my refugee passport issued to me in confirmation of my status as a refugee by the Department of Home Affairs of the Republic of South Africa, the 2nd Applicant's permit and the 3rd Applicant's proof of residence in the UK as Annexures 'A', 'B' and 'C' respectively.

5. Ad paragraph 4

There are no issues arising from this paragraph.

6. Ad paragraph 5 - 6

The fact that I was tortured is more than an allegation and a quasi-judicial body, the African Commission on Human and People's Rights, made a finding to this effect in the matter of *Gabriel Shumba v. Republic of Zimbabwe* Communication No. 288/2004, a matter which is in the public domain.

7. Ad paragraph 7

I am barred from participating in electoral process by the residence requirements set out in the Electoral Act, which are in violation of the Constitution, and to that extent these provisions bar citizens like me who are living and working abroad, save on government duty from participating in elections, they are restrictive.

8. Ad paragraph 8 -9

No issues arise.

9. Ad paragraph 10 - 11

This is denied. The obligation is on the State, as represented by various government departments to ensure that the legal machinery is in place and gives effect to the fundamental right to vote as set out in section 67(3) of the Constitution. The impugned

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provisions negate this right as paragraph 2 of the Fourth Schedule clearly provides that, 'the Electoral Law may prescribe additional residential requirements to ensure that voters are registered on the most appropriate voters roll, but any such requirements must be consistent with this Constitution, in particular with section 67.'

Put simply any residence requirements set out by the Electoral Act, while administrative in nature cannot limit the right to vote of Zimbabwean citizens over the age of 18. The residence requirements have the sole purpose of ensuring that **voters are registered on the most appropriate voters roll.**

10. Ad paragraph 12

The fact that sections 72 and 73 create a special voting status for Zimbabweans working abroad on government service amounts to discrimination and this is an unreasonable limitation on the rights set out in section 56 (3) of the Constitution of Zimbabwe, which provides for equality before the law and equal protection and benefit of the law. The exclusion of all other Zimbabweans living and working abroad from voting does not meet the threshold set out in section 86 of the Constitution as it is not fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

11. Ad paragraph 13

This is denied. Sections 67 and 155(1) and (2) "*it is evident [...] that, regardless of where they are resident, all citizens of Zimbabwe who are of or above the age of eighteen years have a right to participate in elections conducted in Zimbabwe*". This means that every election held by Zimbabwe entitles Zimbabwean qualified citizens to vote. Confining the right to vote only to Zimbabweans resident in country or those outside the country on government duty is contrary to the meaning and import of these constitutional provisions. Further, the Constitution need not state in express terms that State is obliged to set up polling stations outside Zimbabwe for it to be a constitutional obligation. It is, after all, a Constitution, and not a piece of legislation that provides to the minute detail every conceivable situation under law. What the Constitution sets out, as it ought to, are the rights, principles, obligations and duties of the State to ensure those rights are met. It is an incident of these principles, provisions and duties and responsibilities that the state must

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ensure that all appropriate measures are taken to ensure that those eligible to vote are registered to vote and do cast their votes, and this includes Zimbabweans abroad, whether or not they are on government duty.

12. Ad paragraph 14

This denial is disingenuous. The various international treaties, protocols and conventions Zimbabwe is party to, at SADC, AU and international level, provide for universal adult suffrage and requires that all who are eligible to vote are able to do so. The specific international instruments are enumerated in my Founding Affidavit, and are incorporated herein by reference.

13. Ad paragraph 15

This is denied. It is not true and correct to say that those countries that allow for external voting have their Constitutions stipulating so. Rather, the external vote is always implied and read-in in the right to vote and the universal adult suffrage principle. It cannot be that there must always be an express provision in the Constitution for something to be said to be constitutionally permitted. In reality, external voting is seldom provided for explicitly in the constitutions. Notable exceptions include Portugal (article 172 of the Constitution) and Spain (article 68/5 of the Constitution). Most countries enable external voting through general provisions in their electoral laws. Additional regulations on its implementation are also often set out by legislatures or electoral management bodies. The Constitution does not need to state in express terms that the Zimbabwe Electoral Commission must set up polling stations outside Zimbabwe for that to be required by the Constitution.

14. The type of electoral system a country has is no reason to limit the right to vote. What is required is for the Respondents to put the administrative machinery in place to ensure that all Zimbabweans, wherever they may be are able to exercise the right to vote.

15. Ad paragraph 16

This is disputed. I did not state that the Diaspora Policy was a part of the country's electoral laws. The argument advanced therein is simply that the Diaspora Policy is a recognition of the immense contribution the Zimbabwean diaspora makes to the country. It makes no policy sense to exclude those in the diaspora from political process when every effort is being made to maximise economic benefit from them. Economics and politics do not exist

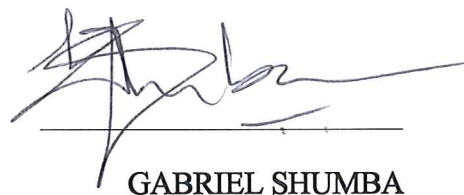
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in vacuums. The Zimbabwe Diaspora Policy is very much a part of the conversation when it comes to regulating, legislating and discussing the role of the Zimbabwean diaspora.

16. Ad paragraph 17

This is denied. It has been shown above as well as in my founding affidavit that sections 23, 72 and 73 of the Electoral Act are not merely administrative requirements as alleged but are substantive provisions limiting the rights of Zimbabweans based abroad from participating in electoral processes. These provisions do not pass the limitations threshold set out in section 86 of the Constitution, and must be declared unconstitutional and invalid to the extent of their consistency with the Constitution.

THUS DONE and SWORN TO at JOHANNESBURG this¹⁵ day of FEBRUARY 2018.



GABRIEL SHUMBA

Before me:

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