

IN THE CONSTITUTIONAL COURT OF ZIMBABWE

CASE NO CCZ 3/18

HELD AT HARARE

In the matter between:

GABRILE SHUMBA

1<sup>ST</sup> APPLICANT

And

SIBONILE MFUMISI

2<sup>ND</sup> APPLICANT

And

DARLINGTON NYAMBIYA

3<sup>RD</sup> APPLICANT

And

MINISTER OF JUSTICE LEGAL & PARLIAMENTARY AFFAIRS

1<sup>ST</sup> RESPONDENT

And

THE CHAIRPERSON OF THE ZIMBABWE ELECTORAL COMMISSION

2<sup>ND</sup> RESPONDENT

And

ZIMBABWE ELECTORAL COMMISSION

3<sup>RD</sup> RESPONDENT

And

THE MINISTER OF FOREIGN AFFAIRS

4<sup>TH</sup> RESPONDENT

And

THE MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT

5<sup>TH</sup> RESPONDENT

And

THE ATTORNEY GENERAL OF ZIMBABWE

6<sup>TH</sup> RESPONDENT

### applicant's heads of argument

*"The wellbeing of democracies regardless of their type and status is dependent on one small technical detail.*

*The right to vote. Everything else is secondary". Jose Ortega Y Gasset.*

#### a. Introduction

- 1.1 This application invites the court to declare that sections 23 and 72 of the Electoral Act (Chapter 2:13) are invalid for being inconsistent with provisions of the

Constitution of Zimbabwe. The applicants seek to enforce their right(s) to what has generally been referred to as the diaspora vote. No coherent, let alone credible response to the application exists. The position of the respondents as one understands it is that the issue was dealt with in terms of certain judgments which deal with the old constitution. It is clear that the response tendered is not worthy of the time of this court. The breach being accepted and no constitutional justification having been advanced, it is submitted the application ought to be afforded.

b. The applicants

- 1.2 There are three direct applicants before the court. It is important to relate to their circumstances because the point must be made from the outset that they were driven out of the country by the very state that now seeks to disenfranchise them.
  - i. The first applicant is Gabriel Shumba who is a qualified legal practitioner. In the course of his representation of an opposition politician he was abducted by members of the secret service. He was charged with a very serious offence, and was tortured mercilessly including being electrocuted on his genitalia. The unfounded charges raised against him were subsequently withdrawn and he was as a result forced to flee the country. His decision to take up residence outside the country is involuntary. He however, regularly sends remittances back to his people in Zimbabwe.
  - ii. The second applicant is Sibonile Mfumisi and has taken up residence in South Africa for economic reasons. She was forced to do so after she failed to secure employment in the republic. She regularly sends remittances to the country and wishes she were in the land of her nativity. She is however, not responsible for the bad economic environment in the country.
  - iii. The third applicant is Darlington Nyambiya and is a citizen who has taken up residence in the United Kingdom. He lives in exile as a result of political and economic reasons. The economic constraints make it unviable for him to travel to Zimbabwe for purposes of casting his vote.
  - iv. The fourth applicant is in reality not an applicant at all but is so circumstanced as to lend support to the application brought by the three identified applicants. She is called the "Government employee" who is required to be outside the country by virtue of her employment. This type of employee was, just like the other three applicants, forced by the government to take up residence outside the country for both political and



economic reasons. In recognition of the fact that it forced this employee to take up residence outside the country, government makes facilities available for her to vote in any election. From that we learn the following:

- a. That government accepts that there are legitimate reasons which may make people take up residence outside the country.
- b. That it is possible to make facilities available for those people to vote whilst outside the country.
- c. That there are people who are as of this date entitled to make use of the voting facility and have actually been making use of it.
- d. That the relief sought by the applicants is therefore capable of implementation. It is also relief which government has afforded to some citizens in the absence of a coercive process.

c. The diaspora vote discourse

- 1.3 The diaspora vote discourse is not peculiar to Zimbabwe. It is proposed that a comparative review be undertaken. That review shows that many African countries have made facilities available to their subjects to cast their votes from their respective bases outside the country.

South Africa

- 1.4 In South Africa external voting was introduced after the case of **Richter v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)** 2009 (3) SA 615 (CC). The legislature amended the Electoral Act to include the diaspora vote.
- 1.5 In terms of the process followed, voters register to vote and cast their votes in person at their respective embassies and consulates. No problems are created by this system. It is important to point out that our constitution is in many respects a carbon copy replica of the South African Constitution.

Mozambique

- 1.6 The 1990 Constitution, revised in 2004, provides for external voting. The Constitution further provides for two (2) Members of Parliament out of 250 to represent the

diaspora constituency. One parliamentary is for citizens resident in Africa and the other for the rest of the world.

- 1.7 Registration for diaspora voters is done both within Mozambique and at the respective consulates and embassies of Mozambique across the world. In the 2014 polls, Mozambique established 11 polling stations in Zimbabwe alone.

#### Senegal

- 1.8 Senegal introduced external voting in 1994 as part of electoral reforms. This applies to both presidential and parliamentary elections.
- 1.9 External voting is only for those countries where there is official diplomatic representation of Senegal. The host country must give permission that voting be conducted in its territory. Voting in a country will only be done if there are more than 500 registered voters in that country.

#### Rwanda

- 2.1 Rwanda instituted a diaspora vote for the first time in 2017. The country established 98 polling stations across the world for Rwandan citizens to vote.
- 2.2 Voting material is shipped to the diaspora polling stations, but the Electoral Commission facilitates the purchase by embassies of the bulky ballot boxes from their respective locations to ease the process.

#### Ghana

- 2.3 The Representation of the People Amendment Act 2006 (Act 699) allowed for the diaspora vote, but has not been implemented by the Electoral Commission since. In December 2017, the Human Rights High Court in Accra ordered the Electoral Commission to take all necessary steps to enable Ghanaians living abroad to vote in the 2020 elections.

#### Kenya

- 2.4 In the 2010 Constitution, Kenya made an unprecedented provision, which politically was seen to be a way of denying or indefinitely delaying the diaspora vote. The provision in Chapter 7, Part 82 (1e) is as follows:



*"Parliament shall enact legislation to provide for the progressive registration of citizens residing outside Kenya, and the progressive realisation of their right to vote."*

- 2.5 During the 2013 General Elections, the Electoral Commission allowed for diaspora Kenyans living in Uganda, Tanzania, Rwanda and Burundi to vote, but only at the presidential level. In June 2014 however, the Court of Appeal directed the electoral commission to register Kenyans abroad as voters and allow them to vote in all elective positions. The court ruled that the citizens' rights to vote in an open democratic society can only be limited when there are justifiable reasons based on human dignity, equality and freedom- **Independent Electoral and Boundaries Commission (IEBC) v. New Vision Kenya (NVK Mageuzi), Kenya Diaspora Alliance & 3 Others**, Petition No. 25 of 2014. In the August 2017 elections, the Kenyan Electoral Commission set up polling stations in 5 African countries (Uganda, Rwanda, South Africa, Tanzania and Burundi) for Kenyans resident in those countries to vote.
- 2.6 Electoral material is transported to the foreign countries, and voting is done through the Kenyan Integrated Electoral Management System at embassies and consulates in the foreign countries, after which the results are transmitted electronically to Kenya.

#### Botswana

- 2.7 Botswana introduced external voting in 1997 as part of its constitutional reforms, through an amendment to the Electoral Act.
- 2.8 Since Presidential elections in the country are indirect (President is voted for by Parliamentarians), all citizens in the diaspora over 18 years of age are permitted to vote every 5 years for their Member of Parliament. Voting procedures mirror those at home. Eligible voters register at their respective embassies and high commissions, and the registration is normally conducted by embassy staff under the supervision and guidance of the Electoral Commission. The head of each country's embassy or high commission is responsible for keeping the register of external voters and updating it. External voting takes place two weeks before the general election at home. Ballots are transported back home, and are then counted in the presence of political parties. Votes are transferred to the relevant constituency based on the voter's choice.

#### Namibia

- 2.9 All registered voters in Namibia are allowed to vote, whether they find themselves within or without the borders of Namibia on designated polling days. This is in terms of section 98 of the Electoral Act.
- 3.1 Voters voting outside their constituencies are allowed to cast their ballot as a tendered ballot at any polling station in the country or outside. Both those who register to vote in Namibia and outside Namibia will be allowed to cast their ballots outside Namibia if they find themselves outside the country's borders on polling day. Usually people vote at temporary polling points or embassies and consulates.

### India

- 3.2 India has by legislative intervention made provisions for the right to vote for those who are in the diaspora. It is however, not just a matter of legislation. In **Lily Thomas vs. Speaker of Lok Sabha** the Supreme Court said;

*"Free and fair elections alone are a guarantee to the growth of a healthy democracy in the country. The "fair" denotes equal opportunity to all people. Universal adult suffrage conferred on the citizens of India by the Constitution has made it possible for millions of individual voters to go to the polls and participate in the governance of India. For democracy to survive, it is essential that the best available men should be chosen as the people's representatives for proper governance of the country."*

### United States of America

- 3.4 In the United States of America the right to vote is made to solely depend on citizenship. All citizens wherever they maybe and for whatever reasons they may be in those places are entitled to vote as of right.

### Australia

- 3.5 In Australia, the people living in the diaspora were given the right to vote as far back as the year 1989. This was a consequence of the **Voting Rights and Residency Case**. In this case the court made a finding to the effect that a prohibition of the Australians who were outside Australia to vote was a violation of the constitution. The ratio of the decision is that of equality of the citizens.
- 3.6 These progressive countries allow their citizens living in the diaspora the right to vote. They recognise that one does not become a lesser citizen simply because their passport



has been stamped at a designated departure point. It is of much significance that even the poor African countries have put in place measures which ensure that the right to vote is respected. The fact that Mozambique is one such country must shame the respondents. In most countries, these developments have been spearheaded by the judiciary. It is submitted that courts of law play a critical role in overcoming the reluctance of the state in this regard.

d. The right to vote

- 3.7 The right to vote is a well-established norm of international law. Significant international treaties, including the International Covenant on Civil and Political Rights (ICCPR) and regional agreements enshrine citizens' claims to universal and equal suffrage. The enshrinement of the right in a Constitution to vote not only puts a bulwark against any Government action that infringes on that right but also necessarily places a positive obligation on the State to ensure that its citizens vote voluntarily. As the South African Constitutional Court observed in the case of **Richter v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)** [2009] ZACC 3,

*"Unlike many other civil and political guarantees, as this Court has remarked on previous occasions, the right to vote imposes an obligation upon the state not merely to refrain from interfering with the exercise of the right, but to take positive steps to ensure that it can be exercised."*

- 3.8 The Constitution of Zimbabwe recognizes the aspirations of all Zimbabweans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law, and the right to vote is necessarily embedded in that rallying call. As was held in the **Ritcher Case** (supra) at para 55,

*"In designing and establishing an electoral system, one of the crucial considerations is the need to foster enfranchisement. The electoral system should recognise that the right to vote has both symbolic and democratic value and that wherever possible the participation of citizens should be encouraged. There are of course other important constitutional considerations relevant to the design of an electoral system. Amongst them is the need to ensure that the election process will be free and fair and that the results will be both credible and accurate. "*

- 3.9 In the South African case of **August v Electoral Commission** 1999 (3) SA 1 (CC) at para 17, the Constitutional Court (per Sachs J) underlined the importance of the right to vote in the following terms:

*"[u]niversal adult suffrage on a common voter roll is one of the foundational values of our entire constitutional order...The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement."*

- 4.1 The South African Constitutional Court in that case rejected the argument that allowing prisoners to vote posed special hardships on the electoral commission. The Commission's intention to make no effort to allow prisoners to vote was thus found to have amounted to an unconstitutional deprivation of their right to vote.
- 4.2 In **Sauve v. Canada** 158 C.C.C. (3d) 449; 2002 the Supreme Court of Canada expressed the same principle in the following terms:

*"[t]he right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features underpins the legitimacy of Canadian democracy and Parliament's claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizen, jeopardizes its claim to representative democracy, and erodes the basis of its right to convict and punish lawbreakers."*

- 4.3 Further, in the case of **Richter v Minister for Home Affairs & 2 others** (supra) [2009] ZACC 3, in holding that some sections of the Electoral Act that did not allow for all South African citizens who were registered voters and living and working abroad to vote in elections, were inconsistent with the Constitution and therefore invalid, the Constitutional Court of South Africa observed in part as follows:

*"The right to vote, and the exercise of it, is a crucial working part of our democracy. Without voters who want to vote, who will take the trouble to register,*



*and to stand in queues, ...democracy itself will be imperilled. Each vote strengthens and invigorates our democracy. In marking their ballots, citizens remind those elected that their position is based on the will of the people and will remain subject to that will. The moment of voting reminds us that both electors and the elected bear civic responsibilities arising out of our democratic Constitution and its values. We should accordingly approach any case concerning the right to vote mindful of the bright, symbolic value of the right to vote as well as the deep, democratic value that lies in a citizenry conscious of its civic responsibilities and willing to take the trouble that exercising the right to vote entails."*

4.4 In the same matter Justice O'Regan rightly remarked as follows;

*"I am influenced by the fact that, as several of the parties noted, we now live in a global economy which provides opportunities to South African citizens and citizens from other countries to study and work in countries other than their own. The experience that they gain will enrich our society when they return, and will no doubt enrich, too, a sense of a shared global citizenship. The evidence before us, too, shows that many South African citizens abroad make remittances to family members in South Africa while they are abroad, or save money to buy a house. To the extent that citizens engaged in such pursuits want to take the trouble to participate in elections while abroad, it is an expression both of their continued commitment to our country and their civic-mindedness from which our democracy will benefit."*

4.5 It is submitted that these expressions must apply solidly to the Zimbabwean diaspora and to the issues raised in the present application. The right to vote is also symbolic of our citizenship. It is an active and express consummation of the social contract that exists between the governors and the governed. Without the right to vote, the contract is not consummated and the system of governance remains as an idea, an ideal, bereft of the participation of the citizenry.

e. Constitutional Interpretation

4.6 Mohamed J in *State v Acheson* 1991 (2) SA 805 stated as follows:

*"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a "mirror reflecting the national soul", the identification of the ideals*

*and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion".*

- 4.7 Sachs J in *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer, Port Elizabeth Prison* 1995(4) SA 631 (CC) para 46 articulated himself as follows:

*"The values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality, several times referred to in the Constitution. The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we make.....we should not engage in purely formal or academic analysis, nor simply restrict ourselves to ad hoc technisim but rather focus on what has been called the synergetic relation between the values underlying the guarantees of fundamental rights ..".*

- 4.8 The same judge in *Sidumo v Rusternberg Platinum Mines Ltd* 2008(2) SA 24(CC) para 149 described the significance of underlying values in a constitutional democracy as follows:

*"The values of the constitution are strong, explicit, and clearly intended to be considered part of the very texture of the constitutional project.... The role of the constitutional values is not simply to provide a patina of virtue to otherwise bald, neutral and discrete legal propositions. Text and values work together in integral fashion to provide protections promised by the Constitution".*

- 4.9 When interpreting constitutional provisions therefore, the court ought to be guided by the founding values of the constitution. To that end, a value coherent approach is indispensable. The approach must give life to the constitution, give life to its values and allow the court to assist the state in charting the democratic path envisaged by the constitution. It is only that kind of approach that will allow the court to ensure that the law becomes an instrument of progress and development and that it plays its part in serving the people and meeting their legitimate aspirations. Anything less than this takes us to our collectively reviled past in which might was more important than right.



- 5.1 When dealing with an allegation that a piece of legislation is unconstitutional, two general interpretational principles are to be applied. The first was set out in **Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd** 1983 (2) ZLR 376 (S) at 382B-D; 1984 (2) SA 778 (ZS) at 783A-D, to this effect:

*"Clearly a litigant who asserts that an Act of Parliament or a Regulation is unconstitutional must show that it is. In such a case the judicial body charged with deciding that issue must interpret the Constitution and determine its meaning and thereafter interpret the challenged piece of legislation to arrive at a conclusion as to whether it falls within that meaning or it does not. The challenged piece of legislation may, however, be capable of more than one meaning. If that is the position then if one possible interpretation falls within the meaning of the Constitution and others do not, then the judicial body will presume that the law makers intended to act constitutionally and uphold the piece of legislation so interpreted. This is one of the senses in which a presumption of constitutionality can be said to arise. One does not interpret the Constitution in a restricted manner in order to accommodate the challenged legislation. The Constitution must be properly interpreted, adopting the approach accepted above. Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit into the framework of the Constitution."*

See also **Minister of Home Affairs v Bickle & Ors** 1983 (2) ZLR 431 (S) at 441E-H, 1984 (2) SA 39 (ZS) at 448F-G; **S v A Juvenile** 1989 (2) ZLR 61 (S) at 89C, 1990 (4) SA 151 (ZS) at 167G-H.

- 5.2 The second principle relates to the adoption of a broad approach. All provisions bearing upon a particular subject are to be considered together and construed as a whole in order to effect the true objective. Derogations from rights and freedoms which have been conferred should be given a strict and narrow, rather than a wide construction. Rights and freedoms are not to be diluted or diminished unless necessity or intractability of language dictates otherwise. See **Minister of Home Affairs & Ors v Dabengwa & Anor** 1982 (1) ZLR 236 (S) at 244B-C, 1982 (4) SA 301 (ZS) at 306H; **S v Ncube & Ors** 1987 (2) ZLR 246 (S) at 264F, 1988 (2) SA 702 (ZS) at 715C; **African**

- 5.3 The test is no more crystallized than in **Munhumeso** where the court notes,

*"The test in determining whether an enactment infringes a fundamental freedom is to examine its effect and not its object or subject matter. If the effect of the impugned*

*law is to abridge a fundamental freedom, its object or subject matter will be irrelevant".*

5.4 Thus after going through the two part process, the matter comes down to whether the legislation involved has the effect of abridging fundamental rights. That effect is not only found in the interpretation of the law but in how the state has used the same. In other words, we cannot try and divine as to the possible effect of the legislation, we see same in practice, in how the state uses the law in question. We see for instance, that a person who has been literally hounded out of the country has their right to express themselves on their country taken away. That with respect is completely unacceptable.

5.5 In **Retrofit**, the court also came to the same conclusion. A similar line of reasoning is also to be found in **TS Masiyiwa Holdings (Pvt) Ltd and Anor v Minister of Information, Posts and Telecommunications 1997 (2) BCLR 275 (ZS)** where the court held that certain Telecommunication Regulations were unconstitutional in their effect, although ostensibly designed to facilitate compliance with the law. The court, @ 283 said,

*"If the control mechanism under the regulations, while not interfering with the (PTC'S) entitlement to commence to operate a cellular telecommunications service, is designed to prolong the entry of another into the field, or if it has that effect, it would be violative of the Constitution"*

5.6 The effect of the impugned provisions is most diabolic. Not only does it reward wrong, it also takes away the very little that connects subjects to their country. It deprives them of the right to decide who is to govern them. Doubtless, the impugned provisions strike at the heart of the constitutionally enshrined right to vote.

f. **The constitutional provisions relevant to the determination of the matter in issue**

5.7 Before dealing with the provisions of the constitution in issue, it is important that certain preliminary observations be made. The Declaration of Rights "is a cornerstone" of our democracy; "it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom." See **Barkhuizen v Napier 2007 (5) SA 323 (CC)**. Any appraisal of the rights must accordingly locate their place in the democratic discourse. That after all is the meaning of the position that ours is a constitutional democracy.



5.8 Section 67(3) of the Constitution provides as follows:

*"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".*

5.9 The right is accorded to citizens of a particular age. The right is not accorded to location. It is the connection that exists between a person and the house of stones that entitles them to vote. It is with respect that straightforward. Anything else is an unnecessary subversion.

6.1 Section 155 of the Constitution gives effect to the constitutionally protected right to vote enshrined in section 67(3) of the Constitution. Section 155(2) states:

*"The State must take all appropriate measures, including legislative measures, to ensure that effect is given to the principles set out in subsection (1) and, in particular, must--*

*(b) ensure that every citizen who is eligible to vote in an election or referendum has an opportunity to cast a vote, and must facilitate voting by persons with disabilities or special needs;"*

6.2 Section 3(2)(b)(i) of the Constitution of Zimbabwe also provides that:

*"The principles of good governance, which bind the State and all institutions and agencies of government at every level, include –*

*(a).....*

*(b) an electoral system based on –*

*(i) universal adult suffrage and equality of votes".*

6.3 Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all Zimbabweans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood

and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic Zimbabwean nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement. See **August v Electoral Commission** 1999 (3) SA 1 (CC).

6.4 Section 56(1) deals with both equality and protection of the law. Section 56(3) admonishes against discrimination. Section 56(4) carries on the discrimination gospel and explains how discrimination arises. It is submitted that the differential treatment of the applicants and other citizens based on who the employer is, is unconstitutional—compare **Makoni v Commissioner of Prisons & Others** CCZ 8–16.

6.5 According to the seminal authors Iain Curie & John de Waal, **The Bill of Rights Handbook** 5<sup>th</sup> edition at page 230, equality is defined as follows:

*"equality is a difficult and deeply controversial social idea. At its most basic and abstract, the formal idea of equality is that people who are similarly situated in relevant ways should be treated similarly. Its logical correlative is the idea that people who are not similarly situated should not be treated alike".*

6.6 There is indeed similarity between the applicants and those who work for the government outside the country. They are both citizens and they are above the age of eighteen years. They should be treated in the same way. There cannot be distinction in voting based on the type of the employer. See **President of the Republic of South Africa v Hugo** 1997(4) SA 1 (CC) , **Minister of Finance v Van Heerden** 2004(6) SA (CC) and **National Coalition for Gay & Lesbian Equality v Minister of Justice** 1999(1) SA (6) (CC).

6.7 There is yet another provision which has never been considered in this context. It is section 35 of the Constitution. That provision enacts as follows;

*"(2) All Zimbabwean citizens are equally entitled to the rights, privileges and benefits of citizenship and are equally subject to the duties and obligations of citizenship.*



*(3) All Zimbabwean citizens are entitled to the following rights and benefits, in addition to any others granted to them by law—*

*(a) to the protection of the State wherever they may be"*

6.8 The state is obliged to treat all citizens equally. The rights accorded to citizens living in Zimbabwe must similarly be accorded to those living in the diaspora. Critically, the constitution places an obligation upon the state to follow citizens wherever they may be and afford them protection in whatever place they may be found. Doubtless, such issues as the diaspora vote exercised the minds of the framers of the constitution otherwise there would have been no need for this kind of provision. Indeed, the right to vote was recognised as a symbol of citizenship, a badge of personhood—**August v Electoral Commission 1999 (3) SA 1 (CC)** at para 17.

6.9 That the constitution entitles all citizens to the right to vote is accordingly a subject not worth wasting time over. When all the provisions bearing on the subject are considered, it is clear that the constitution means to chart a break from a restrictive past. As held in **Shabalala & Ors v Attorney-General of the Transvaal & Anor 1996 (1) SA 725; 1995 (12) BCLR 1593 (CC)** at page 1605:

*"What is perfectly clear from these provisions of the Constitution and the tenor and spirit of the Constitution viewed historically and teleologically, is that the Constitution is not simply some kind of statutory codification of an acceptable or a legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and oppression. The aspiration of the future is based on what is justifiable in an open and democratic society based on freedom and equality. It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment."*

7.1 It is submitted that the court ought to be ready to depart from the past. A past which punished citizens for deciding to accept the state's decision to force them out of the

country. A past which took away rights on the basis of geographical location. A past which allowed Zimbabweans in the diaspora to vote simply because they were employed by the state but barred other citizens who could equally use those facilities from voting simply because they had no EC number. Indeed a past which was based on authoritarianism and no other consideration. There must with respect be a decisive break from this ignobly despotic past. After all, we are in a new dispensation.

8. The provisions impugned

7.2 Section 23(3) and (4) of the Electoral Act provides as follows;

*"A voter who is registered on the voters roll for 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 twelve months, he or she has ceased to reside in that constituency.*

*Provided that nothing in this subsection shall prevent his or her name from being struck off such voters roll—*

*(a) on his or her being registered in another constituency; or*

*(b) if he or she becomes disqualified for registration as a voter.*

*(4) The Chief Elections Officer, Registrar-General of Voters, any constituency registrar or any officer of the Commission may demand from any voter who is registered on the voters roll for a constituency proof of identity or proof of residence in that constituency or both of the foregoing."*

7.3 This provision is with respect astounding. It says that if a citizen has not been resident in a particular constituency for a continuous period of more than 12 months, not only is the citizen not entitled to vote in the upcoming election but they also lose their status as a registered voter. Thus, those citizens who go into exile lose both the right to vote at the next election and the right to remain on the voters roll. This indeed is breathtakingly improper.

7.4 Thus in terms of this provision, even if one is able and indeed prepared to fly back into the country on the poll day, they cannot vote if they have resided outside the country for more than 12 months. Coming back to vote is therefore not an answer. Our law says that if you decide to reside outside the country, you can no longer vote even if you want to vote in the country. That the respondents could defend such a law should make all of us afraid, indeed very afraid.



7.5 Subsection 4 then gives effect to subsection 3 by giving the state powers to ensure that the continuous residence requirement is complied with by all. Doubtless the effect of this is that no one in the diaspora can vote.

7.6 Section 72 also provides as follows;

*"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."*

7.7 This provision confirms the restrictions set out in section 23. It says the right to vote from outside the country is limited to the class of persons specified in that provision. The ordinary citizens who are not in the employ of the state are not covered by the provision.

h. The breach

7.8 There can be no doubt that the right to vote set out in section 67(3) is prima facie breached by these provisions. There is no need to explain the breach. There is equally no doubt that section 56(1) is violated to the extent that the protection of the law, being of a constitutional provision, is taken away. There is equally no doubt that the status qua constitutes a violation of the standard against non discrimination. There too is no need to explain that. The only issue is whether there exists a constitutional provision or consideration on the basis upon which these provisions could find justification. To that issue must attention be had.

The fourth schedule

7.9 We must begin with provisions of the fourth schedule to the constitution given that they deal with the issue of elections. The following is set out in the fourth schedule;

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

*(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 voters roll, but any such*

*requirements must be consistent with this Constitution, in particular with section 67.*

*Disqualifications for registration as voter*

*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) if 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."*

8.1 The fourth schedule does the following:

- a. It confirms the constitutional right to vote and confirms that it is exercisable by all those who have attained majority.
- b. It gives leeway to the Electoral Act to deal with certain issues but then limits the remit of the power to be exercised to provisions of section 67. In other words, the exercise by the legislature of lawmaking powers must not result in a situation in which a person of majority status is disqualified from voting merely on the basis of their location on this global and globular village.
- c. Whilst the Electoral Act may provide for the registration of citizens on the appropriate roll, every citizen is entitled to be registered on some roll.
- d. Persons disqualified from voting are set out. The list is exhaustive and does not contain people in the diaspora and neither does the fact that one is in the diaspora constitute a basis upon which they should not be registered.

8.2 Thus the fourth schedule does not set out a basis upon which the breach specified above could be validated.

*Is government not obliged from setting up polling stations?*

8.3 The suggestion that there is no obligation placed upon government to set up polling stations abroad is with respect a false one. That obligation is set out in section 35 of



the constitution which obliges government to follow its citizens wherever they may be and accord them their rights wherever it finds them. It is also fully established in section 155. It also derives directly from section 67. The Constitution does not however, have to spell out this obligation in direct terms.

- 8.4 In reality, the diaspora vote 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). 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. It is after all a Constitution. What the Constitution sets out, as it ought to, are the rights, principles, obligations and duties of the State to ensure that those rights are met.
- 8.5 On the contrary, nothing in the Constitution requires that the State must not ensure that those outside the country are able to register to vote and that they be provided with the means to vote in their respective locations.

#### Section 86

- 8.6 In determining whether the limitation occasioned by section 23 is reasonable and justifiable within the meaning of section 86 of the Constitution, it is necessary to weigh the extent of the limitation of the right, on the one hand, with the purpose, importance and effect of the infringing provision on the other, taking into account the availability of less restrictive means to achieve this purpose. See **S v Manamela and Another** [2000] ZACC 5; 2000 (3) SA 1 (CC).
- 8.7 The **Richter** case turned on the fact that the differentiation in the provisions of the Electoral Act, which allowed for only those on government service abroad to vote by postal ballot and not others, was not justifiable as reasonable in an open and democratic society, in terms of section 36 of the South African Constitution – the equivalent of our section 86.
- 8.8 In **Nyambirai v NSSA & Anor** 1995 (2) ZLR 1 (S) at 13C–F it was held.

*"In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It*

*will ask itself whether: (i) the legislative object is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative object are rationally connected to it; and (iii) the means used impair the right or freedom are no more than is necessary to accomplish the objective"*

See also **Barkhuizen v Ronald Stuart Napier** [2007] ZACC 5.

- 8.9 The right to vote is one that cannot lightly be limited. Limiting the right is now a thing of the past and out of sync with the global trends. In **Apaloo v Electoral Commissioner** [20012002] GLR 372 it was held as follows in Ghana:

*"In the now contemporary world, any limitation on suffrage is rejected, as it is universally accepted that there is no reason, at all for exclusion of the right or any limitation to it considering that all men are created equal and have one vote each. For this reason, it is incumbent on the Electoral Commission to provide by all legitimate means for the free and unlimited exercised of the citizens' franchise to conform with both the letter and the spirit of the constitution, 1992".*

- 9.1 The respondents have not advanced argument on what they consider to be the purpose for the limitation. The erroneous view they take is that the constitution does not make provision for the right. It is submitted at any rate that there could never be a rational purpose particularly in favour of this blanket blackout. What the blackout achieves is to put a permanent blot on our democratic narrative.
- 9.2 The purpose not having been identified, there can be no justification for the limitation. When one considers that the provisions not only take away the right to vote but also the right to remain on the roll, there can be no doubt that it goes a lot further than could ever become permissible. It follows therefore that the respondents have an obligation to put in place mechanisms which ensure that Zimbabwean citizens residing abroad are able to cast their ballot in those countries. See the Kenyan case of **Jeffer Isaak Kanu v Ministry v Ministry of Justice, National Cohesion and Constitutional Affairs & 3 others** [2013] eKL, where the court placed emphasis on the need to make provision for the diaspora vote.

Distinction Between Those On Government Service On Those Pursuing "Personal Interests" – The Discrimination Argument



- 9.3 Those living and working outside Zimbabwe are not necessarily doing so out of their own "personal interests" as the Respondents allege. In the First Applicant's case, had it not been of the persecution and torture, he would have been resident and working in Zimbabwe. A lot more are outside the country for political and economic reasons. It is these same people working abroad that are bringing the much talked about remittances in the country. Government cannot say it wants their money but it does not want to expend its money so that they can vote. It is any rate not true that those employed in the civic service are the only ones who are being of service to the state.
- 9.4 It is however, disappointing that the respondents could ever take this kind of position. For the respondents to accuse the victims of Xenophobia of having voluntarily emigrated to South Africa is an unnecessary outrage. So too is its characterization of those people who ran away from it. It matters not that the new dispensation might not be responsible for the mass migrations but the fact of the matter is that those people ran away from either the government of Zimbabwe or the conditions created by that government. That government was led by so and so at the time is completely irrelevant.

#### Limited resources and administrative convenience

- 9.5 In the words of a judge of the Canadian Supreme Court, fundamental-rights guarantees 'would be illusory if they could be ignored because it was administratively convenient to do so'.<sup>1</sup> The South African Constitutional Court was confronted with this question in **Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & others** 2005 (3) SA 280 (CC). The case concerned the constitutionality of provisions in the Electoral Act which deprived convicted prisoners serving sentences of imprisonment without the option of a fine of the right to vote. The state argued that it would put a strain on the logistical and financial resources of the Electoral Commission if it had to make provision for prisoners to vote. The Court rejected this argument, but stopped short of holding that logistical and cost considerations are irrelevant to an inquiry into the limitation of fundamental rights.

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<sup>1</sup> *Singh v Minister of Employment and Immigration* [1985] 1 SCR 177 at 218-219 (per Wilson J).

9.6 There is however, simply no evidence to back up the alleged difficulties. The point must however, be made that compliance with fundamental rights costs money. Unless the state alleges an impossibility, no attention should be given to its protestations. At any rate, this is a right which can be realised progressively.

9.7 In its **General Comment Number 3**, The Nature of States Parties Obligations (Art. 2, Para. 1 of the Covenant), adopted by the UN Committee on Economic, Social and Cultural Rights at its fifth session, 1990, UN Doc. HRI/Gen/1/Rev.3, 15 August 1997 the UN Committee maintains in that regard;

*"In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations. The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. The Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programs."*

9.8 In the case of **Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another**, Petition No. 102 of 2011, Court opined thus;

*"The Government must ensure that the National and County Governments have laws, policies, programmes and strategies that are adequate to meet its obligation under Article 27. The measures must establish coherent programmes towards the progressive and the immediate realization of all the rights within the State's available means. The programmes and the legislations must be capable of facilitating the realization of the right."*

9.9 The South African Constitutional Court in **New National Party of South Africa v Government of the Republic of South Africa and Others** [1999] ZACC 5; 1999 (3) SA 191 (CC) said;



*"Parliament is obliged to provide for the machinery, mechanism or process that is reasonably capable of achieving the goal of ensuring that all persons who want to vote, and who take reasonable steps in pursuit of that right, are able to do so. I conclude, therefore, that the Act would infringe the right to vote if it is shown that, as at the date of the adoption of the measure, its probable consequence would be that those who want to vote would not have been able to do so, even though they acted reasonably in pursuit of the right."*

- 10.1 It follows as doth day night that the respondents must be ordered to place efficient, concrete and realistic mechanisms to ensure that all Zimbabwean citizens in the position of the applicants are able to register and participate as voters in the 2018 election. All available means to realise these right, must be used and all resources applied towards that end, otherwise the right to universal suffrage will merely become be a "pipe dream". The words of the Attorney General of India as cited in S Rajab-Budlender & N Budlender's *Judges in conversation. Landmark human rights cases of the twentieth century* (2009) are apposite in this regard.

*"Once you have [justiciable] socio-economic rights in the Constitution and the Bill of Rights, I think it is too late to say that these are mere aspirations that cannot be enforced. Otherwise you are saying that the founders of the Constitution played a hoax on the people. Because they are in the Constitution, they are pledges to the people-so you cannot say the difficulties of enforcement or impracticability should mean that judges say that it is too difficult"*

- 10.2 The resources argument does not therefore deserve any consideration.

Should diasporans come home and vote?

- 10.3 It has already been pointed out that the applicants cannot come back to Zimbabwe to vote. They are no longer registered voters by virtue of not having resided in a constituency for more than twelve months. The deprivation of their fundamental rights is absolute under the circumstances and only this court can ameliorate their positions.
- 10.4 Further, while no law should force people to vote, there is a positive duty imposed upon government to effectuate the right to vote. This means that.

- a. Positive action must be taken to ensure all who are eligible to vote are able to vote, and
  - b. Burdens that prevent people from exercising their rights to vote are eliminated.
- 10.5 It is not correct that it is up to the citizen and to the citizen alone to exercise their right to vote. We would otherwise print our own ballot papers. The right to vote imposes a positive obligation upon the State to ensure that every eligible citizen is granted access to be able to register and to vote. The Constitution requires that all reasonable measures, including legislative measures be taken to facilitate the right to vote. In addition, the positive obligation placed upon the State is to ensure that all burdens of whatever form placed on the citizen to exercise the right to vote are removed. The requirement that those living and working abroad must travel back home to vote is one such burden.
- 10.6 These however, are people who are working day and night to send their remittances back home. Why must they, in addition to that, break their backs the more so that they can fly home to vote? Why mustn't that position pertain to their fellows in the civil service?
- 10.7 There is therefore no justification for the prima facie breach of the constitution in this regard. Nothing can save that breach. The breach is a fundamental negation of the constitution and the political superstructure created by that contract. Indeed the right to vote is meaningless if accorded to people in Mbare who would have voted anyway. The protracted and bitter liberation struggle was waged and prosecuted so that those who had difficulties in voting would vote. People in Highlands are not such people. In the current order, people who are confronted by those difficulties are those in South Africa, in Botswana and in England and all those other countries. For the right to make sense, it must, when tested, be able to avail those people otherwise the liberation struggle, so appropriately recognised by the constitution was waged in vain.
- 10.8 The provisions must be held to be wholly void for these reasons.
- i. Bukaibenyu
- 10.9 Reliance on the Bukaibenyu judgment is misplaced for the following reasons:
- a. The judgment deals with the old constitution.



- b. There are significant differences between the old and the new and those have already been related to above.
- c. The Bukaibenyu judgment accordingly no longer correctly reflects the law.

11.1 The findings of this Honourable Court in **Bukaibenyu** were premised on the fact that s3(1) of the Third Schedule to the Constitution (the 1979 Constitution) "authorised" the provisions of section 23(3)(g) of the Electoral Act. Section 3(1) of the Third Schedule provided as follows:

*"Qualifications and disqualifications for voters*

*(1) Subject to the provisions of this paragraph and to 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; ...*

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

11.2 The equivalent of section 3(1) of the Third Schedule of the former Constitution is now Section 2 of the Fourth Schedule to the Constitution, recited above. Two additional qualifications have now been added to this provision vis-à-vis the erstwhile section 3(1):

*"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 section 67.* (my emphasis)

11.3 These two additions are there for a reason. Firstly, they provide the explicit purpose for any residency requirement: *it is only for the purposes of registration on the most appropriate voters roll – nothing more*. Secondly, any such residency requirements cannot limit the right to vote on anyone who is so qualified by virtue of being a citizen and having attained eighteen years of age (i.e. section 67 must not be violated). The implication is clear: residency is no longer to be used to limit the right to vote, if it was meant to be used for such under the old Constitution.

- 11.4 Apart from these differences, there is the question of the proper construction of section 23 of the Electoral Act. In *Bukaibenyu* it was assumed that the provision only negated the right to vote. The effect of the provision on the continued entitlement to vote by virtue of remaining a registered voter was never considered. It has now been considered.
- 11.5 Thus whilst in *Buykaibenyu* and on the construction given, it could have remained open to the state to insist on those in the diaspora coming home to vote, that position is no longer available to the state.
- 11.6 Further, the court ought also to consider that there has been introduced a new voter registration system. The position in *Bukaibenyu* if applied would mean that those living in exile would need to come back home to register and thereafter come back home to vote. That kind of luxury is simply not available. It is not available to those who left the country for economic reasons. It is not available to those who fled from torture. It is in good faith and good conscience not an alternative. This was never considered in *Bukaibenyu*.
- 11.7 Thus the court ought to find that *Bukaibenyu* is on account of the legal developments set out above no longer applicable otherwise it no longer correctly reflects the law. The net effect is that the judgment is of no use to the present matter. The unconstitutionality that afflicts the provisions cannot be got over.

j. The remedy

- 11.8 The question of the remedy available to the applicants has to be dealt with. It is submitted that once the court finds that there is a right which is breached by a piece of legislation, the invalidity of such legislation must be decreed—compare *Catholic Commission for Justice & Peace in Zimbabwe v Attorney General & Ors* 1993 (1) ZLR 242 (S) at 283C.. That is the relief that applicant seeks.
- 11.9 That a right requires an appropriate remedy is a truism. Centlivres CJ in *Minister of the Interior and Another v Harris and Others* 1952 (4) SA 769 (A) at 780 –1 said,

*“As I understand Mr Beyers’ argument the substantive right would, in the event of such an Act having been passed, remain intact but there would be no adjective or procedural law whereby it could be enforced: in other words the individual concerned*



*whose right was guaranteed by the Constitution would be left in the position of possessing a right which would be of no value whatsoever. To call the rights entrenched in the Constitution constitutional guarantees and at the same time to deny to the holders of those rights any remedy in law would be to reduce the safeguards enshrined in sec. 152 to nothing. There can to my mind be no doubt that the authors of the Constitution intended that those rights should be enforceable by the Courts of Law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. Ubi jus, ibi remedium."*

- 12.1 In the words of Madam Justice McLachlin in *R v Zundel* (1992) 10 CRR (2d) 193 (Can SC);

*"Before we put a person beyond the pale of the Constitution, before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection."*

- 12.2 There can be no justification for the refusal of relief otherwise applicants would have been invalidly put beyond the pale of the constitution.

k. The options available to the respondents

Special voter's roll for the diaspora

- 12.3 The Constitution contemplates "voters' rolls" and not a single voters' roll. Sections 155(1) and (2); 157(1)(b) and 1(2) of the Fourth Schedule all contemplate the existence of "voters' rolls". The residency requirements contemplated under section 1(2) of the Fourth Schedule are only to ensure that voters are put *on the most appropriate voters' roll*. There may as well be a specific voters roll for those in the diaspora on which all those in the diaspora can be put. What other meaning could one ascribe to the provision?
- 12.4 It is accordingly open to the respondents to have a diaspora voters' roll. The voting will be in terms thereof.

Diaspora vote for Presidential election only

- 12.5 Section 160 of the Constitution contemplates constituencies only for MPS, and wards for local authorities. For Presidential elections, Zimbabwe is one constituency. Nothing

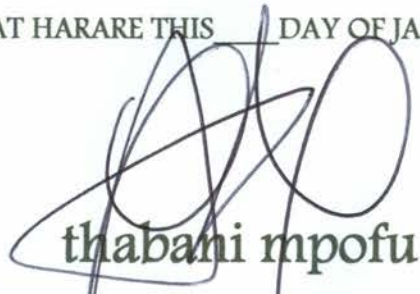
in the Constitution requires that Zimbabwe use only one voters' roll for all elections. Several countries do this. The election of the President in Zimbabwe is not constituency-see s160 of the Constitution. The argument of a constituency-based system thus does not apply to this particular vote. Nothing in the Constitution requires that the President be elected through voters' rolls used for constituency parliamentary elections.

- 12.6 This option is also available to the respondents.
- 12.7 What these options demonstrate is that the order which the court may issue and is indeed asked to issue will never be unduly burdensome on the state. Further, the order will leave the state with many options to pursue and will choose the one that it finds best under the circumstances. What the court is simply asked to pronounce is that those who are outside the country have the right not simply to vote but to be accorded meaningful facilities which conduce to the enjoyment of that right.

1. Conclusion

- 12.8 In all circumstances there can be no doubt with respect that the application is merited. There is equally no doubt that the relief sought is relief which the court can properly afford and ought under the circumstances feel compelled to afford. The alternative is a meaningless right.
- 12.9 In the circumstances, it is prayed that the court may afford the relief sought with costs.

DATED AT HARARE THIS \_\_\_\_\_ DAY OF JANUARY 2018



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