

- 33
16. In addition, I chair the Zimbabwe Exiles Forum, which has remained engaged in the political and human rights processes in Zimbabwe. This is testimony to my continued interest in the socio-political and economic developments of my country. I wish to avail myself of my constitutional right to participate in Zimbabwean elections as a citizen of the country, but am barred from participation by the residency requirements set out in the Electoral Act.
 17. As a refugee I am unable to resume residence in Zimbabwe. Nevertheless, I remain a citizen of Zimbabwe and have significant interest in the political and economic developments in the country.
 18. I regularly send remittances to relatives who remain in Zimbabwe. I was heartened to note that in terms of the Zimbabwe Diaspora Policy, the Government acknowledges that the Zimbabwe Diaspora wishes to be engaged as active citizens in national dialogue and affairs as they bring international exposure and lessons to the table. I attach hereto the foreword to the Diaspora Policy written by the Minister of Macro-Economic Planning and Investment Promotion in July 2016 marked **Annexure C**
 19. I also continue to have a vested interest in the electoral processes of my country, and keenly monitor events back home. As such, I am aware that the General, Presidential and Local Authority Elections will be held in 2018 by operation of section 158 of the Constitution of Zimbabwe.
 20. However, under the current legislative framework, I am unable to participate in the 2018 elections due to the restrictive provisions of the Electoral Act [Chapter 2:13] and the regulations made thereunder which place a residence qualification on Zimbabweans who can be included on the electoral voters roll and can thus participate in electoral processes as will be illustrated below.

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21. Section 23 of the Electoral Act sets out the residence qualifications of voters and reads in part as follows:

23 Residency qualification of voters

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

(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 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

(4) The Commission, any voter registration officer 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.

22. The Electoral Act has made provision for some exceptions to the residence requirements outlined above.

23. It is also pertinent to note that there are a limited category of Zimbabweans abroad who can cast their ballots from outside the country by operation of sections 72 and 73 of the Electoral Act that provide for the instances in which postal votes are permissible stating as well, the process through which specific persons can apply for postal votes, thus :

24. 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—

(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 outside Zimbabwe; or

(c) outside Zimbabwe on the orders of a person referred to

in paragraph (b); and so unable to vote at a polling station in the constituency.

25. Section 73 sets out the application process necessary to obtain a postal vote as follows:

73 Application for postal vote

(1) A person who wishes to vote by post may apply to the Chief Elections Officer for a postal ballot paper.

(2) An application for a postal ballot paper shall be –

(a) In the prescribed form; and

(b) Signed by the applicant and accompanied by-

(i) A certified copy of the voter's national registration certificate; and

(ii) Except in the case where the application is submitted (individually or as part of a batch of such applications) by a commanding officer on behalf of a member of a disciplined force, a letter from-

A. The applicant's head of Ministry, head of department or head of station; or

B. The head of Zimbabwe's Embassy or diplomatic or consular mission in the foreign State where the applicant is employed;

Stating the capacity in which the applicant is employed by the government and where the applicant will be employed on polling day or polling days, as the case be in the election and

(c) Sent to the Chief Elections Officer by means of a commercial courier service or by diplomatic courier, or delivered by hand to the Chief Elections Officer (in which event written proof of delivery shall be required) not later than noon on the fourteenth day after nomination day in the election.

(3) Where more than one election is to be held concurrently in any Constituency, a single application form may be used by applications who apply for postal ballot papers in all those elections.

(4) The Commission shall ensure that application forms for postal ballot papers are available at all Embassies and diplomatic or Consular missions of Zimbabwe located in foreign countries.

(5) The chief elections officer shall number in consecutive order of their receipt all applications for postal Ballot papers received by him or her, and shall permit them to be inspected by members of the public, free of charge, until the declaration of the result of the poll, when they shall be dealt with in terms of section 70 (3).

26. Thus there are mechanisms for registration and voting outside of Zimbabwe already in existence and in regular use which are not available to me as I do not fall within any of the categories listed in section 72.

D: BASIS OF CLAIM

POLITICAL RIGHTS

27. Section 67 of the Constitution sets out the political rights of citizens. Section 67(3) particularly provides that 'every Zimbabwean citizen who is of or over eighteen years of age has the right to vote in all elections and referendums ... and to do so in secret.'
28. Similarly, Section 155 sets out the principles of Zimbabwean electoral system, stating that
- (1) Elections which must be held regularly, and referendums, to which this Constitution applies must be*
- (c) based on universal adult suffrage and equality of votes "*
- (2) 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 and special needs"*
29. It is evident from these Constitutional provisions 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.

30. I call the attention of the court to paragraph 2 of the 4th schedule to the Constitution concerning qualifications for voter registration for Presidential and National Assembly elections, which provides that :

(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.

31. I have been duly advised by my Legal Practitioners of record, whose advice I believe is true, that the implication of subparagraph 2 above is that any residential requirements that may be imposed by the Legislature may not prohibit any person from exercising their right to vote as enshrined in section 67 of the Constitution.
32. Thus, any residential requirements imposed in terms of the Electoral Act cannot negate the right to vote for any Zimbabweans above the age of 18.
33. Thus, to the extent that the Electoral Act does not facilitate the registration and voting of Zimbabweans based abroad it is a negation of section 67(3) of the Constitution as read with paragraph 2 of the 4th schedule to the Constitution.
34. I draw this court's attention to the Supremacy of the Constitution and the fact that any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
35. In addition to the principle of Constitutional Supremacy, section 44 of the Bill of Rights imposes a duty on the State and every person, including Government agencies, to respect, protect, promote and fulfil the rights set out therein.
36. Respondents are therefore not spared from ensuring that the fundamental right to vote is observed for all citizens of Zimbabwe of 18 or more years of age, with no limitations.

37. I further contend that sections 23, 72 and 73 of the Electoral Act are discriminatory. By restricting the classes of absent voters, those voters who do not fall within the prescribed classes are deprived of the right, effectively discriminating against them. Section 56(1) of the Constitution clearly states that all people are equal before the law and have the right to equal protection under the law. Section 56(3) of the Constitution provides that every person has the right not to be treated in an unfairly discriminatory manner on any grounds including their class.
38. Section 56(4) of the Constitution outlines the circumstances under which one is treated in a discriminatory manner. Such circumstances include being subjected "directly or indirectly to a condition, restriction or disability to which other people are not subjected"; or not being accorded a privilege or advantage which other people are accorded.
39. I aver that sections 72 and 73 of the Electoral Act have bestowed the privilege of voting outside the boundaries of Zimbabwe to a certain class of people, which is highly discriminatory.
40. I am unjustifiably discriminated against simply because I am not on duty in the service of the government, or because I am not a spouse of such a civil servant.
41. I humbly submit that if the legislature has made it possible for those in the diaspora on government duty to vote, then this right should be accorded to all citizens of Zimbabwe in the Diaspora.
42. The discrimination promoted by the Electoral Act is an insult to the founding principles of equality of all human beings and the provision for universal adult suffrage and equality of votes enshrined in the Constitution of Zimbabwe.
43. There is no doubt that sections 23, 72 and 73 of the Act breach sections 56 and 67 of the Constitution. I therefore seek a declaration that these sections of the Electoral Act are unconstitutional, and seek an order compelling Respondents to honour their duty

THE ELECTORAL ACT PREACHES ESSENTIAL PRINCIPLES OF ELECTORAL SYSTEMS AND PROCESSES UNDER CHAPTER 7 OF THE CONSTITUTION.

40. Chapter 7 of the Constitution outlines guiding principles for electoral Systems and processes. In particular Section 155 (2) states:
- (2) *The state must take all appropriate measures (emphasis added), including legislative measures, to ensure that effect is given to the principles set out in subsection (1) and in particular, must*
- (a) *ensure that all eligible citizens, that is to say the citizens qualified under the fourth schedule, are registered as voters;*
- (b) *ensure that every citizen who is eligible to vote in an election or referendum has an opportunity to cast a vote...*
44. It is my averment that the statement, “*must take all appropriate measures*”, in section 155(2) of the Constitution is peremptory and does not give room for any denial or refusal by the respondents to create voting mechanisms for people in the diaspora.
45. I contend that all appropriate measures must be taken by Respondents to refer the infrastructure and the technical, financial and human resources required to ensure that people in the Diaspora may exercise their right to vote, thereby giving full effect to section 67(3) of the Constitution.
46. In taking “all appropriate measures” to give effect to Section 155(2) (a)-(b), Respondents must adapt the system for attaching citizens to constituencies, as necessary.
47. Thus, it is my fervent belief that Zimbabwean citizens resident outside Zimbabwe may be registered as voters for their Zimbabwean constituencies of origin. Respondents may consider extending the application of registration and voting mechanisms that are already in place, as is laid out in sections 72 and 73 of the Electoral Act, to all Zimbabwean citizens of the requisite age who reside outside of Zimbabwe.

DENIAL OF DIASPORA VOTING RIGHTS BREACHES REGIONAL AND INTERNATIONAL LAW

48. The African Charter on Human and Peoples' Rights, ratified by Zimbabwe in 1986, provides as follows in Article 13: *"Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."*
49. The African Charter seeks to ensure that all citizens may enjoy equal political rights, and does not allow for the prohibition on voting prescribed by the Electoral Act.
50. To that end, the African Commission on Human and People's Rights issued provisional measures on the eve of the constitutional referendum in 2013 directing the Government of Zimbabwe to provide all eligible voters the same voting facilities it affords to Zimbabweans working abroad in the service of the Government. I attach hereto a copy of the provisional measures as **Annexure C**.
51. The Southern African Development Community (SADC) Principles and Guidelines Governing Democratic Elections emphasize that states must ensure full participation of all citizens in the political process (Section 4.1.1), and all citizens must be given an equal opportunity to exercise the right to vote (Section 5.1.8). Further, the SADC Principles and Guidelines consider the participation of Diaspora populations in elections as a key component of free elections, and encourages regular reviews of the participation of diaspora citizens in national elections by states (Section 4.1.8). Zimbabwe is a member-state of SADC.
52. The Constitution also requires that in any interpretation of Chapter 4 of the Constitution, take into account "international law and all treaties and conventions to which Zimbabwe is a party. The International Covenant on Civil and Political Rights provides as follows:

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

53. Thus, the Respondents have international law obligations to ensure that I am able to exercise my right to vote without restriction.

COMPARATIVE PRACTICE FROM OTHER JURISDICTIONS

54. Other countries in the world, including African countries with progressive Constitutions have created a framework for their citizens based abroad to participate in electoral processes. These include Botswana, Namibia, South Africa, Mozambique, Senegal, Chad and Guinea.
55. Recently, the Supreme Court of Kenya, ordered the Kenyan Electoral Commission to effect voter registration and put in place infrastructure for the comprehensive registration of Kenyan citizens in the Diaspora to enable them to vote. Thus, there is increasing recognition of the right of citizens living and working abroad to participate in their countries' electoral processes.

THE INCREASING ROLE OF THE DIASPORA IN ZIMBABWE

56. I further ask this Honourable Court to take judicial notice of the fact that in July 2016, the Government of Zimbabwe published a Zimbabwe Diaspora Policy whose main objective is to formally mainstream the Diaspora into the national development agenda by creating an enabling environment in which the Diaspora is effectively integrated. A copy of the Zimbabwe Diaspora Policy is attached hereto as **Annexure D**.

57. The Zimbabwe Diaspora Policy acknowledges the significant rôle played by Diaspora remittances in Zimbabwe's development. Indeed, I am duly informed that in 2016 Zimbabwe's Diaspora formal and informal remittances were estimated at \$1 billion. The policy articulates the importance of the Diaspora to Zimbabwe in the following passage:

The key benefits of migration for countries of origin if properly managed, include the investments by the diaspora communities into their homeland and the positive impact of remittances on foreign currency inflows, knowledge and skills-transfer when migrants return home on a temporary or permanent basis, increased levels of indigenous entrepreneurship through new opportunities in the private sector by those in the diaspora, improvement in human development through philanthropic work and ultimately poverty reduction as the diaspora communities invest into their motherland.

58. The specific objectives of the Zimbabwe Diaspora Policy include: (i) "[to] [d]evelop measures that enhance the protection of Zimbabweans in the Diaspora in order to safeguard their basic rights, working conditions and living standards through engagement with host governments to follow up agencies which are working on employment and labour affairs to ensure safety of employees"; and (ii) "[e]stablish the necessary inclusive institutions for the co-ordination and proper administration of Diaspora issues."
59. The policy is meant to boost financial investment in Zimbabwe through the active participation of the diaspora in local investments and financial remittances to Zimbabwe.
60. If the Diaspora can participate in the development of the economy they must be given an opportunity to also exercise their political rights in a country towards which they contribute for development. Indeed, the full extent of the Zimbabwe Diaspora Policy goals *cannot* be realized if channels for the Diaspora's engagement in politics and elections in Zimbabwe continue to be denied.

61. Section 13 of the Constitution requires that any measures taken to encourage national development must "*involve the people in the formulation and implementation of development plans and programmes that affect them.*" Without the ability to participate in elections, citizens of Zimbabwe in the Diaspora are not adequately 'involved' in the development of policies that affect them and their families.

CONCLUSION

62. From the aforementioned facts, I humbly submit that this court must declare the provisions of section 23, 72 and 73 as unconstitutional and order the respondents to comply with sections 56, 67 (3), of the Constitution.

In the circumstances, I pray for an order in terms of the draft.

Thus done and signed at..... thisday of2017

.....

GABRIEL SHUMBA

BEFORE ME

.....

NOTARY PUBLIC

CASE NO CCZ.....

IN THE CONSTITUTIONAL COURT OF ZIMBABWE
HELD AT HARARE

In the matter between
GABRIEL SHUMBA

1ST APPLICANT

AND

SIBONILE MFUMISI

2ND APPLICANT

AND

DARLINGTON NYAMBIWA

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

SUPPORTING AFFIDAVIT

I, the undersigned, SIBONILE MFUMISI, do hereby make oath and say:

1. I am a Zimbabwean citizen living and working in South Africa. I am employed as an office administrator in a South African business. I reside in South Africa for economic reasons. I have attached here my Zimbabwean Identity Card marked **Annexure GS5**.
2. I confirm that I want to participate in the 2018 Zimbabwean elections and would like to be able to exercise my right to vote from South Africa.
3. I have family members who reside in Zimbabwe. This includes my mother and my children who are residing in Mberengwa. I support my family financially and regularly send remittances home to my family to pay for their upkeep and care

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4. I do not enjoy being away from my family for extended periods and it causes both myself and my children great hardship having to live so far away from each other. However, I would have great financial difficulty if I was to return to Zimbabwe permanently as it is difficult to find employment and I would struggle to care for my family financially if I could not find suitable employment.
 5. I would experience financial difficulty to travel to Zimbabwe in order to vote in country during the 2018 elections. I would also require to take several days off from work for this purpose which my employer may not be willing to approve. This may mean that I would not be able to exercise my vote as a citizen.
 6. I pray for an order in terms of the draft.

THUS SWORN TO AND SIGNED AT ON THIS.....DAY OF2017.

SIBONILE MFUMISI

Signed before me:

NOTARY PUBLIC / COMMISSIONER OF
OATHS

CASE NO CCZ.....

IN THE CONSTITUTIONAL COURT OF ZIMBABWE
HELD AT HARARE

In the matter between
GABRIEL SHUMBA
AND

1ST APPLICANT

SIBONILE MFUMISI

2ND APPLICANT

AND

DARLINGTON NYAMBIWA

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

SUPPORTING AFFIDAVIT

I, the undersigned, DARLINGTON NYAMBIWA do hereby make oath and say:

1. I am a Zimbabwean citizen living and working in the United Kingdom. I am employed as an office administrator in a South African business. I reside in South Africa for economic reasons. I have attached here my Zimbabwean Identity Card marked **Annexure GS6**.
2. I confirm that I want to participate in the 2018 Zimbabwean elections and would like to be able to exercise my right to vote from South Africa.
3. I have family members who reside in Zimbabwe whom I support.
4. I do not enjoy being away from my family for extended periods and it causes both myself and my children great hardship having to live so far away from each other.

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permanently as it is difficult to find employment and I would struggle to care for my family financially if I could not find suitable employment.

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6. I pray for an order in terms of the draft.

THUS SWORN TO AND SIGNED AT ON THIS.....DAY OF2017.

DARLINGTON NYAMBIWA

Signed before me:

NOTARY PUBLIC / COMMISSIONER OF
OATHS

Full names:

Business address:

Capacity:

Area

IN THE CONSTITUTIONAL COURT OF ZIMBABWE
HELD AT HARARE

In the matter between

GABRIEL SHUMBA	1 ST APPLICANT
AND	
SIBONILE MFUMISI	2 ND APPLICANT
AND	
DARLINGTON NYAMBIYA	3 RD APPLICANT
AND	
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS	1 ST RESPONDENT
AND	
THE CHAIRPERSON OF THE ZIMBABWE ELECTORAL COMMISSION	2 ND RESPONDENT
AND	
ZIMBABWE ELECTORAL COMMISSION	3 RD RESPONDENT
AND	
THE MINISTER OF FOREIGN AFFAIRS	4 TH RESPONDENT
AND	
THE MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT	5 TH RESPONDENT
AND	
THE ATTORNEY GENERAL OF ZIMBABWE	6 TH RESPONDENT

DRAFT ORDER

HARARE the day of 2017

BEFORE the Honourable Justices

Mr(s).....For the Applicants

Mr(s).....For the Respondents

WHEREUPON after reading papers filed of record and hearing Counsel,

IT IS DECLARED THAT:

Zimbabweans based abroad be and is hereby declared unconstitutional in that it violates Applicants' rights as enshrined in sections 67 and 56 of the Constitution.

ACCORDINGLY IT IS ORDERED THAT:

1. Section 23 of the Electoral Act [Chapter 2:13] is hereby declared constitutionally invalid as far as it excludes citizens not resident in Zimbabwe from registering as voters in contravention of sections 67(3) as read with paragraph 2 of the 4th schedule to the Constitution of Zimbabwe.
2. Section 72 of the Electoral Act Chapter 2:13 is hereby declared constitutionally invalid as far as it excludes citizens of Zimbabwe who are not in Government service from exercising their right to vote in contravention of sections 56(1), 56(3) and 56(4) of the 67(3) of the Constitution of Zimbabwe.
3. The Respondents are hereby ordered to 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.
4. Each party to bear its own costs.

BY THE JUDGE

CASE NO CCZ.....

IN THE CONSTITUTIONAL COURT OF ZIMBABWE
HELD AT HARARE

In the matter between

GABRIEL SHUMBA
AND

1ST APPLICANT

SIBONILE MFUMISI

2ND APPLICANT

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4TH RESPONDENT

AND

THE MINISTER OF FINANCE AND
ECONOMIC DEVELOPMENT

5TH RESPONDENT

AND

THE ATTORNEY GENERAL OF ZIMBABWE

6TH RESPONDENT

DRAFT ORDER

HARARE, the.....day of.....2017

Before the Honorable Justices.....

For Applicant

For the Respondents

WHEREUPON after reading the documents filed of record and hearing counsel for the parties,

IT IS ORDERED THAT:

1. The Application for direct access to this Court is hereby granted.

THE JUDGE

REGISTRAR