REPORTABLE (4)

(1) GABRIEL SHUMBA (2) SIBONILE MFUMISI (3) DARLINGTON NYAMBIYA
v
(1) MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS (2) THE CHAIRPERSON OF THE ZIMBABWE ELECTORAL COMMISSION (3) ZIMBABWE ELECTORAL COMMISSION (4) THE MINISTER OF FOREIGN AFFAIRS (5) THE MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT (6) THE ATTORNEY GENERAL OF ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, PATEL JCC, GUVAVA JCC,
MAVANGIRA JCC, BHUNU JCC & UCHENA JCC
HARARE, MARCH 14, 2018 & MAY 30, 2018

T. Mpofu, for the applicants

V. Munyoro, for the first, fourth, fifth, and sixth respondents

T. M. Kanengoni, for the second and third respondents

GWAUNZA JCC: This is an application in terms of s 85(1)(a) of the Constitution and the background to the matter is as follows: -

The applicants are all citizens of, but are not resident in, Zimbabwe. They give different reasons for their absence, with the first applicant citing political reasons. The second applicant cites economic reasons while the third applicant alleges his absence is premised on economic and political reasons. The applicants state that they wish to participate in the

country's harmonized general elections due later this year, 2018, but are precluded from doing so by certain sections of the relevant law. They accordingly seek the following relief: -

IT IS DECLARED THAT:

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

ACCORDINGLY, IT IS ORDERED THAT:

1. Section 23 of the Electoral Act [*Chapter 2:13*] be and is hereby declared constitutionally invalid as far as it excludes citizens not resident in Zimbabwe from registering as voters in contravention of s 67 (3) as read with para 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 s 56 (1), 56 (3), 56 (4) and 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.

As is evident from the draft relief sought that, it is the applicants' case that ss 23 and 72 of the Electoral Act [*Chapter 2:13*] infringe their right to vote as enshrined in s 67 (3) as read with para 1 (2) of the 4th Schedule to the Constitution. It is also their argument that s 72 of the Electoral Act violates their rights in terms of s 56 (1), (3) and (4) of the Constitution. Section 67 deals with 'Political Rights' and its subs (3) confers the right to vote on every Zimbabwean citizen of 18 years and above. Section 56 and the subsections cited relate to equality and non-discrimination.

The applicants argue that in terms of s 67 (3) of the Constitution, every citizen over the age of 18 years is entitled to vote regardless of where they reside or resident. In their opinion, the residency requirements set out in s 23 (3) of the Electoral Act ("the Act") should not and cannot negate the right of any Zimbabwean above the age of 18 years to vote. Because

the Act does not facilitate the registration and voting of Zimbabweans based abroad, the applicants contend that the result is a negation of s 67 (3) as read with para 1 (2) of the 4th Schedule to the Constitution. They further aver that subs 23 (3) and 72 of the Act are discriminatory for the reason that they restrict the right to vote only to persons physically in Zimbabwe, to the prejudice of absent voters. They contend that the benefit extended to a certain class of people under s 72 of the Act unjustly discriminates against them because they are not in government service nor are they spouses of such civil servants. The applicants in addition allege that denial of the diaspora vote is contrary to international law, that is, Article 13 of the African Charter on Human and Peoples' Rights, ss 4.1.1, 4.1.8 and 5.1.8 of the SADC Principles and Guidelines Governing Democratic Elections, and Article 25 of the International Covenant on Civil and Political Rights.

Mr *Mpofu* for the applicants further argues that the right to vote given under s 67 (3) of the Constitution does not depend on anything other than citizenship and age. He also relied on s 155 (1)(c) of the Constitution which he described as an 'executionary provision'. The contention in this regard is that all voters are equal, regardless of where a person is residing for a particular period. Mr *Mpofu* further contends that the right accorded in the Constitution cannot be attenuated by legislation and that, in terms of s 35 (3)(a) of the Constitution, the State is obliged to 'follow' its citizens wherever they are, this obligation not being informed by the location of the citizen but by the citizenship of the person. In terms of s 67 (3) as read with the 4th Schedule to the Constitution, it is further argued, everyone not disqualified from voting is entitled to vote. Citizens in the diaspora are not disqualified from voting. The 4th Schedule is different from its equivalent under the erstwhile Constitution, and does not detract from ss 67, 35 and 155 of the Constitution. He postulates that the according of a right to vote can only have meaning if it is given to a person who would otherwise not have voted. Once a citizen remains

outside the constituency for the relevant period, there is no provision for the equitable use of discretion by the Zimbabwe Electoral Commission. Reference was made to the fact that South Africa, Mozambique, Senegal, Rwanda, Ghana, Kenya, Botswana, Namibia, India, United States of America and Australia all grant their citizens in the diaspora the right to vote. Finally, Mr *Mpofu* argues that there was no need to amend the Constitution but that the government needed to amend its attitude.

The second and third respondents filed papers indicating that they would abide by the order of the Court. The first, fourth, fifth and sixth respondents opposed the application and did so, generally, on the basis that anyone who wishes to exercise their right to vote can bring themselves into the confines of the law as currently worded and exercise the right to vote. They also allege that the impugned provisions are not restrictive. As regards s 72 of the Act, the first, fourth, fifth and sixth respondents allege that it is a justified differentiation between government employees outside the country and those pursuing their own interests abroad because government employees are required to be outside Zimbabwe on the polling day. They also allege that there is no obligation on the State to establish polling stations outside Zimbabwe. The first, fourth, fifth and sixth respondents also contend that the impugned sections are administrative in nature and are consistent with the Constitution.

Mrs *Munyoro* for the first, fourth, fifth and sixth respondents argues in addition that the arguments by Mr *Mpofu* have already been dealt with in *Bukaibenyu v The Chairman of the Zimbabwe Electoral Commission and Others* CCZ 12/17. Her position is that the provisions under the erstwhile Constitution and the provisions in the current Constitution are similar. Section 67 (3) is subject to the rest of the Constitution. A person has the right to be retained only on the 'most appropriate roll'. The 4th Schedule provides for an additional

requirement, of residency. The Constitution does not provide for external constituencies. There is a presumption of coherence of the Constitution and the provisions of the Constitution should not be read in isolation. Further, that the residency requirements have constitutional 'parentage' and are not unreasonable requirements. A person can only lose their right to vote in terms of s 23 (3) as read with s 33 of the Act. Section 33 provides for the procedural steps to be taken before a person is disentitled to vote. In order to be entitled to vote in a constituency, a person has to have an interest in the relevant constituency and this is only safeguarded by the residency requirement. Mrs *Munyoro* contends that s 72 of the Act is justified for the reason that it relates to persons reassigned by the government. Persons abroad on government service cannot vote in the hosting nations but applicants may be able to vote in their countries of residence depending on their circumstances. Notwithstanding that there are other countries which permit the diaspora vote, it is her contention that Zimbabwe has to be guided by the wording of its Constitution, which clearly did not anticipate the diaspora vote. Thus, if the applicants feel strongly about the diaspora vote, they should petition Parliament to amend the Constitution.

Before I consider the real dispute between the parties, I consider it pertinent to comment on a part of the relief sought by the applicants, that is, para 1 of the draft order. The applicants purport to seek relief on their own behalf and that of 'other Zimbabweans living and working abroad ….' This application has been filed in terms of s 85 (1)(a) of the Constitution, not under s 85 (1)(c) or (d), which permit an applicant to seek relief on behalf of other persons besides him or herself. During the hearing, Mr *Mpofu* for the applicants properly conceded that the applicants could not validly seek this relief.

In resolving this matter, it is apparent that four questions arise for determination, that is: -

1. Whether the Constitution of Zimbabwe, directly or indirectly, allows for the 'diaspora vote.'
2. Whether s 23 of the Act violates s 67 (3) of the Constitution.
3. Whether s 72 of the Act violates subs 56 (1), (3) and (4) of the Constitution.
4. Whether international conventions and electoral laws have any influence in the interpretation of our electoral laws as currently phrased.

Whether the Constitution of Zimbabwe directly or indirectly, allows for the 'diaspora vote'

The papers before the court point to one major point of dissent between the parties, and that is whether or not the Constitution, in the way it is worded in relevant parts, or in the import of such wording, envisages or anticipates a situation where Zimbabweans based abroad by dint of their own volition, can vote during the country's harmonized general elections. In other words, does the Constitution allow or not allow the so-called diaspora vote? The applicants' view is in the affirmative while the respondents firmly subscribe to the opposite view.

My view is that this is the issue that must be determined first before one can consider the question of whether or not the impugned provisions of the Electoral Act violate the relevant provisions of the Constitution. This is particularly so where it is alleged, as *in casu*, that certain statutory provisions violate a particular constitutional provision, and where the meaning of such provision is the subject of dispute between the parties.

Section 67 deals with 'Political Rights' and in its subs (3) reads as follows:

"67 Political rights
(1) ….

(2) ...
(3) **Subject to this Constitution**, every Zimbabwean citizen who is of or over eighteen years of age has the right—
(a) to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret; and
(b) to stand for election for public office and, if elected, to hold such office." (*my emphasis*)

Paragraph 1(2) of the 4th Schedule to the Constitution provides as follows:

"(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 s 67."

As is apparent from the above, subs (3) confers the right to vote in all elections, on '**every Zimbabwean who is of or over eighteen years of age'**. This right however is not absolute, since the same provision is prefixed with the words **'Subject to this Constitution',** whose effect is to limit this very right. The clear meaning of this provision is that it must not be read in isolation but must 'subject' itself to other provisions of the Constitution that have a bearing, no matter how tangential, on the issue of electoral voting. The provision must in other words, cohere or be consonant with all such other constitutional provisions. Of these other provisions, the applicants specifically mention para 1 (2) of the 4th Schedule to the Constitution. This provision, as already indicated, provides leeway for 'the Electoral Law' to prescribe additional residential requirements to ensure that voters are registered on the most appropriate voters roll. However, any such requirements must be consistent with the Constitution, in particular with s 67. (It hardly needs mention that whether or not such residential requirements violate s 67 will depend on how that section itself is interpreted.)

Paragraph (2) follows directly after para 1 (1) and must, logically, not be read independently from it, as the appellants seek to do. Doing so is to interpret para 1 (2) out of context[1], with the possible result of giving it an unintended, if not erroneous, import.

The whole of para 1 therefore reads as follows:

1. Qualifications for registration as voter

> "(1) Subject **to subparagraph** (2) and to para 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 s 67." (*my emphasis*)

If this whole provision is read together with s 67 (3), as it should since it addresses the same issue, the simple meaning is that while para 1 (1) gives the right to vote to every Zimbabwean citizen of or over 18 years of age, that right alone is not enough. It merely qualifies the citizen for registration as a voter, something that he is then required to do. The registration must be effected on a voter's roll, and that voters' roll must relate or 'belong' to, a given constituency. However, by virtue of para 1 (2) additional residential qualifications may be prescribed, and these would, as it were, complete the package of voting requirements to be met before a citizen is allowed to vote. This point was in my view correctly made in the *Bukaibenyu case* (*supra*) where MALABA DCJ (as he then was) had this to say in relation to Zimbabwe's electoral system:

[1] This would run counter to basic principles of Statutory Interpretation, which require that all relevant provisions in a statute, that deal with the subject for interpretation, must be considered together (see Tsvangirai V Mugabe & Others, CCZ 24\17)

> "Under the Zimbabwean electoral system, a voter votes not only as a citizen of this country but also to protect his or her rights and interests as a resident of the constituency in which he or she is registered[2]."

It should be noted that para 1 (1) is made 'subject to' para 1 (2). The import of this prefix in my view is simply to restate the fact that the requirements for eligibility to vote as outlined in para 1 (1) must take on board any additional residential requirements that may be prescribed in terms of para 1 (2). The caution contained in para 1 (2) against these additional requirements violating the political rights guaranteed in s 67, especially subs (3) thereof, is not to be interpreted narrowly, since this subsection is made 'subject to' other provisions of the Constitution that deal with voting rights.

The clearest suggestion as to what 'constituency' for purposes of voting in general elections refers to, is given in s 160(1) of the Constitution. The section falls under the heading 'DECLARATION OF ELECTORAL BOUNDARIES', and the subtitle '**Number of constituencies and wards'.** It reads as follows: -

> "(1) For the purpose of electing Members of Parliament, the Zimbabwe Electoral Commission must **divide Zimbabwe** into 210 constituencies." (*my emphasis*)

It is not in dispute that Harmonised General Elections are held in order for the electorate to vote among others, for Members of Parliament, a President and local Government representatives of their choice. There can, in my view, therefore, be no doubt that the reference to 'constituency' in para 1 (1) of the 4th Schedule relates to any one of the 210 constituencies which ZEC is constitutionally mandated to divide Zimbabwe into.

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[2] . In that judgment, the Court dealt with a challenge to the restriction of postal voting to government officials and the residency requirements in the Electoral Act*, albeit* under the old Constitution. The issues are however the same as the ones in this case. The applicants have not challenged the correctness of this judgment nor established that it was distinguishable.

To facilitate the registration of a voter on the most appropriate voters' roll of a constituency, para 1 (2) of the 4th Schedule gives the discretion to prescribe additional residential requirements to the Electoral Law. Clearly in my view, the 'most appropriate voter's roll' envisaged in this paragraph must be related to, and not exist outside, the specific constituency applicable to the voter in question. The respondents argue effectively that one measure of this appropriateness is the voter's physical or 'deemed' residency in the constituency concerned. The 'deemed' residency applies, with respect, to postal votes provided for under s 72 of the Electoral Act, discussed later in this judgment. Such residency must be related to a constituency and the postal voter must be registered on its voters' roll before he can vote from wherever, in or outside Zimbabwe, he might be located.

The constituency-based residential requirements for voting, I find, extend to the election of the President and Vice Presidents. Mr *Mpofu* argued that if the residential requirements are constitutional, they would only relate to parliamentary and local government elections. He contended that with regard to presidential elections, the residential requirements are of no consequence because there is only one constituency in presidential elections. I am not persuaded by this argument in view of the provisions of s 92 of the Constitution which reads as follows: -

"92 Election of President and Vice Presidents

(1) The election of a President and two Vice-Presidents must take place within the period specified in s 158.
(2) Every candidate for election as President must nominate two persons to stand for election jointly with him or her as Vice-Presidents, and must designate one of those persons as his or her candidate for first Vice-President and the other as his or her candidate for second Vice-President.
(3) The President and the Vice-Presidents are **directly elected jointly by registered voters <u>throughout Zimbabwe</u>,** and the procedure for their election is as prescribed in the Electoral Law**.**
(4) The qualifications for registration as a voter and for voting at an election of a President and Vice-Presidents are set out in the 4th Schedule.

(5) The election of a President and Vice-Presidents must take place concurrently with every general election of members of Parliament, provincial councils and local authorities." (*my emphasis*)

In terms of s 92 (4), the qualifications for registration as a voter and voting are prescribed in the 4th Schedule to the Constitution. This is the very same Schedule that speaks to a constituency-based election and directs one to s 23 of the Electoral Act. One significant provision of s 92 is para (3) which makes reference to registered voters 'throughout Zimbabwe'. This phrase delineates geographical parameters for the Presidential election and since the election is held concurrently with the rest of the harmonised elections, it (the phrase) is in perfect harmony with s 160 of the Constitution which relates to electoral boundaries. The clear meaning is that the Presidential election is to be conducted in Zimbabwe and in order for a person to participate in it, he has to be in Zimbabwe or deemed so, and, also, must be registered as a voter in terms of the 4th Schedule to the Constitution.

When the foregoing is considered, it becomes evident that the contention made for the applicants that the right to vote given under s 67 (3) of the Constitution does not depend on anything other than citizenship and age, is not legally sustainable. While it is in some cases correct, as contended for the applicants, that a right accorded in the Constitution cannot be attenuated by legislation, *in casu*, it is the Constitution itself which appears to attenuate in a later provision, a right that it accords in an earlier one. Further, the argument by Mr *Mpofu* that in terms of s 35(3) of the Constitution, the state is 'obliged' to follow its citizens wherever they are in the world to enable them to vote, and that its obligation to do so is not informed by the location of the citizen but his being a citizen, finds no support in the Constitution. It is important to note that while a right granted by the Constitution may not always be limited through

legislation, legislation itself cannot confer rights which the Constitution, in related provisions, specifically excludes.

Other provisions of the Constitution touch directly or indirectly on the issue of elections and the right of Zimbabwean citizens to participate in them. Section 124 relates to the composition of the National assembly and mentions 210 members elected from the same number of constituencies 'into which Zimbabwe is divided'. Section 161 refers to delineation of electoral boundaries 'into which Zimbabwe is divided'. With regards to s 155 the applicants argue that the provision entitles them to cast their votes from abroad. The section provides as follows:

155 Principles of electoral system

(1) Elections, which must be held regularly, and referendums, to which this Constitution applies must be—
(*a*) peaceful, free and fair;
(*b*) conducted by secret ballot;
(*c*) based on universal adult suffrage and equality of votes; and
(*d*) free from violence and other electoral malpractices.

(2) The State must take all appropriate measures, including legislative measures, to ensure that effect is given to the principles set out in subs (1) and, in particular, must—
(*a*) ensure that all eligible citizens, that is to say the citizens **qualified under the 4th 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, and must facilitate voting by persons with disabilities or special needs;
(*c*) ensure that all political parties and candidates contesting an election or participating in a referendum have reasonable access to all material and information necessary for them to participate effectively;
(*d*) provide all political parties and candidates contesting an election or participating in a referendum with fair and equal access to electronic and print media, both public and private; and
(*e*) ensure the timely resolution of electoral disputes.

Section 155 (1)(c) relates to 'universal adult suffrage and equality of votes'. The question is whether the provision necessarily means that every person without further

requirements for qualification is entitled to vote. It appears to me that the answer, in the negative, lies in subs 2 (a) of the same provision. It restates the requirement for every voter to be qualified to vote in terms of the 4th Schedule to the Constitution. Equality of votes, in my view, simply relates to the fact that no vote is more important or weightier than the other. Section 155 is still subject to the rest of the Constitution and in particular, the 4th Schedule and therefore, the constituency-based residential requirements are still applicable. Section 155 (2)(b) clearly provides that every citizen eligible to vote must be availed the chance to vote. The key is in the eligibility to vote. The section itself is a secondary provision. It only applies after a person has brought himself within the strictures of s 67 and the 4th Schedule. I find in the result that, since it cannot stand alone, s 155 does not assist the applicants' case.

It is trite that the Constitution is a legal instrument which falls to be interpreted, generally, according to the same principles that govern the interpretation of any other legislation. In this respect it is important to note, as stated in the case of *Rushesha and Others v Dera and Others* CCZ 24/17, that the Constitution evinces one singular document, one singular law which is consistent within itself. This principle is aptly explained as follows in *Tsvangirayi v Mugabe and Others* CCZ 24/17:

> "The preferred rule of interpretation is that all relevant provisions having a bearing on the subject for interpretation must be considered together as the whole in order to give effect to the objective of the Constitution, taking into account the nature and scope of the rights, interests and duties forming the subject matter of the provisions."

In the South African case of *State v Zuma and Others*, 1995 (2) SA 642 (CC), cited in the respondents' heads of argument, it was stated as follows:

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

When these principles are applied to the circumstances of this case, it becomes evident that an interpretation of all the provisions of the Constitution as discussed above, that deal with the question of who may vote, where and how, makes it abundantly clear that the Zimbabwean electoral system is constituency-based. The constituencies, in terms of s 160 of the Constitution are 210 in number and are located within the boundaries of the country. The Constitution does not mandate the setting up of constituencies outside the borders of Zimbabwe. This in my view directs attention to what the true intention of the Legislature was in this respect. It appears to be clear that the exclusion of the diaspora vote, as can be evinced from the constitutional provisions referred to, was consciously contrived and therefore intended. As stated in *Zuma's case* (*supra)* the language used by the Legislature in effecting this result is not one that this Court can ignore in favour of values, no matter how meritorious, pertaining to the desirability or otherwise of permitting the diaspora vote. This is because the language is clear in its meaning and does not admit of any ambiguity. In its wisdom and for reasons that are not apparent, the Legislature chose to expressly exclude Zimbabwean citizens not in government service but based abroad, from voting in the country's harmonised elections. Had the intention been not to so exclude this group of citizens from voting, the Legislature would have clearly stated so.

This Court, dealing with constitutional interpretation in *Rushesha and Others v Dera and Others(supra),* made the point that even what is not said has its own implications. The court remarked:

> "The interpretation of a statute and indeed a Constitution is based not only on what the provision says but also on what the provision does not say…."

That the exclusion of the diaspora vote might have been intended is further demonstrated by the fact that this is not the first time that the issue of the diaspora vote has

been brought before this Court. There is a presumption that Parliament is aware of court judgments, (*Dodson v. Potomac Mack Sales & Serv.,* 241 Va. 89, 94, 400 S.E.2d 178, 180 (1991); *Waterman v. Halverson,* 261 Va. 203, 207, 540 S.E.2d 867, 869 (2001). When enacting laws that might impact on a certain area, the Legislature is presumed to be aware of the judgments of the courts on those issues. As far back as 2002 and 2005, in the cases of Registrar *General of Elections & Ors v Morgan Tsvangirai* 2002 (1) ZLR (S) *and Madzingo and Others v Minister of Justice and Others* 2005 (1) ZLR 171 (S) respectively, this Court held that the diaspora vote is not provided for in the law and that the impugned sections were not unconstitutional. The current Constitution was enacted in 2013, by which time the Legislature already knew that the law did not provide for a diaspora vote. However, no provision was inserted into the Constitution to expressly reverse this *status quo*.

Against this background, the only interpretation that accords with the Constitutional structure is that there is no legislative framework set out therein, for the diaspora vote.

Bearing the foregoing in mind I now turn to consider the other questions raised by this application.

Whether ss 23 and 72 of the Act violate s 67 (3) of the Constitution

Section 23 of the Electoral Act, which is one of the impugned provisions provides:

> **"23 Residence qualifications of voters**
>
> 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:
>
> Provided that if a claimant satisfies the Registrar-General of Voters that he or she is or intends to be a candidate for election as a member of Parliament for a particular

constituency in which he or she is not resident, the claimant may be registered as a voter in that constituency.
[Subsection amended by Act 17 of 2007]

(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 subs (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.

(5) For the purposes of subsection (4), the Commission may prescribe documents that shall constitute proof of identity and additionally, or alternatively, proof of residence:

Provided that the prescribing of such documents shall not preclude a person from proving his or her identity or residence by other means" (*my emphasis*)

Section 23 of the Act deals with residency requirements for eligibility to participate in elections as a voter. It is an additional requirement to the contents of para 1(1) of the 4th Schedule to the Constitution. The power to make residency requirements is derived from the Constitution itself. It is apparent that the concept of additional residential requirements is lawful and constitutional. What has to be determined is whether the residency requirements under s 23 of the Act contravene s 67 (3) in their extent. In view of my determination that the import of constitutional provisions dealing with national elections (s 67(3) included) is to create a constituency-based electoral system, I do not find that the provision in any way violates s 67(3). As argued for the respondents, the provision is administrative in nature and serves to facilitate implementation of the constituency-based electoral process. An 'appropriate roll' for the purposes of para 1(2) of the 4th Schedule relates, therefore, to a roll of the constituency in which the voter actually resides. Since the Constitution does not envisage constituencies

beyond the borders of Zimbabwe, it follows that no voter's roll can exist outside the 210 constituencies into which Zimbabwe is divided for voting purposes.

It should be noted that the residency requirement does not affect only the diaspora vote, since it also affects those who live in Zimbabwe. For example, a person who has ceased to live in Mount Pleasant for the relevant period will not be allowed to vote in Harare North elections notwithstanding that they still live in Zimbabwe, *albeit* in a different constituency, eg. Harare West. In this regard, the residency requirements are not directed only at the diaspora vote.

In any event, the applicant's case was premised on an interpretation of the constitutional provisions in question that allowed for the diaspora vote and made them eligible to vote. Their case is not based on a challenge to the constituency-based nature of our electoral system. Such a challenge can, in my view, only be mounted in the context of lobbying the Legislature to amend the Constitution so as to allow the diaspora vote. This is in fact what the respondents *in casu* urge the applicants to do. However, given that a determination contrary to their interpretation of the Constitution has been made, I find that the proverbial rug has, so to speak, been pulled from under the applicants' feet.

This point is accordingly decided against the applicants.

Whether s 72 of the Electoral Act violates s 56 (1), (3) and (4) of the Constitution

The constituency-based nature of the electoral system is maintained in relation to the postal vote.

Section 72 provides as follows:

"72 Persons who may vote by post

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

(a) on duty as a member of a disciplined force or as an electoral officer; or
(b) on duty in the service of the Government; or
(c) as the spouse of a person referred to in para (b);
and so unable to vote at a polling station in the constituency.
[Section substituted by Act 6 of 2014]" *(my emphasis)*

In terms of this provision, the starting point is an election due to be held in a given constituency. Next is the person who is registered on the voters' roll of that constituency. Then follows the question of whether or not, on the day of voting, such voter is physically present not only in Zimbabwe, but within the constituency in order to cast his vote. Only if he is absent from the country will he be able to cast his vote by post. However, such person's absence must be attributable to the call of duty in the service of the State or to being the spouse of such a person. This in my view points to an attitude on the part of the Legislature that this type of person would be interested in the affairs of his constituency and would have voted but for his absence due to the State posting abroad. Accordingly, the person is deemed to be resident in his constituency for purposes of voting in the general elections. Given the constituency based nature of the electoral system as set out in the Constitution, there can be no doubt that this person would not be able to cast his vote by post if he is not registered on the voters' roll of his constituency.

The applicants do not assert that they are registered on the voters' roll of any constituency in Zimbabwe, a constitutionally mandated pre-requisite for casting the vote through the post, and indeed through any other means. They allege a violation of their rights

under s 56 of the Constitution, on the basis that s 72 of the Electoral Act bestows the privilege of voting outside the boundaries of Zimbabwe to a certain class of people –State employees – in a manner that excludes them from voting and is also 'highly discriminatory' against those based in the diaspora who are not State employees or their spouses. The applicants allege this also violates their right to protection of the law.

Section 56 of the Constitution provides, in part: -

"56 Equality and non-discrimination

(1) All persons are equal before the law and have the right to equal protection and benefit of the law.
(2) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
(3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.
(4) A person is treated in a discriminatory manner for the purpose of subsection (3) if—
    (*a*) they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or
    (*b*) other people are accorded directly or indirectly a privilege or advantage which they are not accorded."

The right to equal protection of the law was discussed by ZIYAMBI JCC in *Nkomo v Minister of Local Government, Rural & Urban Development & Ors* 2016 (1) ZLR 113 (CC) when the learned judge, at 118H-119B found:

> "The right guaranteed under s 56 (1) is that of equality of all persons before the law and the right to receive the same protection and benefit afforded by the law to persons in a similar position. It envisages a law which provides equal protection and benefit for the persons affected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected. In order to found his reliance on this provision the applicant must show that by virtue of the application of a law he has been the recipient of unequal treatment or protection that is to say that certain persons have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been

> treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons." (*my emphasis*)

The applicants have shown that there are other citizens, that is, State officials, who are allowed to use postal voting, which they are denied by law. What they have not shown is that they are in the same position as those State officials. In this respect I find to be persuasive the following argument by the respondents, found in their heads of argument:

> "… s 72 applies to persons who are ordinarily resident in Zimbabwe and are registered voters who are actually on the voters' roll. They are however outside the country because their duties require that they be outside Zimbabwe on polling day (and) are permitted in terms of s 72 to vote by post. This is a class of people who have themselves not made a conscious decision to leave the country but do (*sic*) so on national duty. They are a different class of persons from applicants who have **voluntarily left the country, are not ordinarily resident in Zimbabwe, are not registered and have no constituency**. The two are not in similar positions and cannot be compared." (*my emphasis*)

As already determined, in terms of the Constitution, no person may vote without being registered on the voter's roll of a constituency. The applicants would be automatically excluded from voting if they are not so registered, and if they are not resident (or deemed to be so) in such constituency for the time periods specified in s 23 of the Act. A person entitled to postal voting is deemed to be resident in the constituency for which he or she is enrolled as a voter, see *Madzingo and Others v Minister of Justice and Others* 2005 (1) ZLR 171 (S). This is in terms of s 23 (2) of the Electoral Act. It is that deeming which entitles them to utilise postal voting. They are so deemed because, while they are on national assignments, their stay outside their constituency is regarded as temporary. The situation is different as regards people who have left their constituencies on their own accord. If they do not stay in their constituency as is required by s 23 of the Electoral Act, they are taken to have left their constituency for a duration which is not temporary. They are not deemed resident in that constituency and for that reason, cannot vote in the constituency.

Once it is found, as I have done, that the residency requirements under s 23 are not unconstitutional in that they do not interfere with the constituency-based nature of our electoral system, it must follow that there is no obligation on the part of the Zimbabwe Electoral Commission to set up polling stations outside the country. The same point has been stressed before, by this Court. In *Registrar General of Elections & Ors v Morgan Tsvangirai* 2002 (1) ZLR (S) the court found that electoral authorities are not under a legal duty to provide machinery in foreign countries to record votes of Zimbabwean citizens registered as voters who live there and are unable to attend personally at polling stations in their constituencies on polling day. The exception was the category of persons specified under s 72 of the Act. The applicants have not challenged the correctness of that judgment.

In the *Bukaibenyu* judgment at page 9, MALABA DCJ (as he then was) said in part:

> "The Constitution did not place an obligation upon the State to make arrangements for voters who for personal reasons were unable to attend at the polling stations to vote."

I find that the applicants have not established, as correctly argued for the respondents, that they are in a similar position as the persons referred to in ss 72 and 73 of the Act. They have not argued that they remain ordinarily resident in their constituencies in Zimbabwe. As already determined, residency in a constituency located in Zimbabwe (*actual or deemed*) is a *sine qua non* for eligibility to vote in national elections.

It may be observed in this respect that residency requirements are not peculiar to Zimbabwe, as other jurisdictions have had occasion to address the same issue. The Court of Appeal for Ontario (Canada) dealt with the rationale for and the constitutionality of, residency

requirements in the Canada Elections Act in *Frank v Canada (Attorney General)* 2015 ONCA 536. Strathy C.J.O., with whom BROWN JA concurred, found in part:

> "… [5] Canada's political system is based on geographically defined electoral districts. The citizens living in each residency elect a Member of Parliament to represent them. Their representative serves the interests of the community, speaks for the community and participates in making laws that affect the daily activities of all residents of the community. The electorate submits to the laws because it has had a voice in making them. This is the social contract that gives the laws their legitimacy.
> [6] Permitting all non-resident citizens to vote would allow them to participate in making laws that affect Canadian residents on a daily basis, but have little to no practical consequence for their own daily lives. This would erode the social contract and undermine the legitimacy of the laws. The legislation is aimed at strengthening Canada's system of government and is demonstrably justified in a free and democratic society. While the impugned legislation violates s. 3 of the Charter, it is saved by s. 1. Denying the right to vote to non-resident citizens whose absence exceeds five years is a reasonable limit on the Charter right….
> [123] Residence is a determinant of voter eligibility in all provinces and territories, with most requiring a minimum period of residence. The Saskatchewan Court of Appeal, the Yukon Territory Court of Appeal and the Nunavut Court of Justice have found a rational connection between these residence requirements and the fairness and integrity of the electoral process: *Storey v. Zazelenchuk* (1984), 1984 CanLII 2426 (SK CA), 36 Sask.R. 103 (C.A.); Anawak v. Nunavut (Chief Electoral Officer), 2008 NUCJ 26 (CanLII), 172 A.C.W.S. (3d) 391; Re Yukon Election Residency Requirements (1986), 1 Y.R. 23 (C.A.) …."

It is not in dispute that the provisions challenged effectively hamstring citizens who are resident in the diaspora. Not only these, but also those who have ceased to reside in their registered constituencies but continue to live elsewhere in Zimbabwe. There is no doubt therefore that the provisions effectively make voting for those resident in the diaspora, who are not State employees, harder. Regardless, in interpreting the Constitution, the court must uphold the overall principles upon which the Constitution, in relevant parts, is founded. The right to vote is not more important than the need to safeguard the legitimacy of elections in the case where only those who are relevant to a certain constituency are given the opportunity to vote in a particular election. The electoral system is constituency based and the constitutionally mandated residence requirement is the safeguard that is in place to ensure that the electoral system maintains this character. This objective is one that furthers compliance, and therefore

resonates, with the Constitution. The contrary interpretation favoured by the applicants would in my view result in undermining the principle that Zimbabwean elections are constituency based. As already determined, this principle emerges from a consideration of the relevant provisions of the Constitution as a whole, especially s 67, s 93, s 155, s 161 and the 4th Schedule.

Even if it were to be assumed that the applicants were in a similar situation with the State employees mentioned in s 72 of the Act, based solely on the fact that they are all Zimbabwean citizens over 18 years of age and resident abroad, it is evident that the Legislature chose to treat these two categories differently. It has been held that this type of differentiation does not always amount to discrimination. MALABA CJ, in *Greatermans Stores (1979) (Private) Limited t/a Thomas Meikles Stores and Another v Minister of Public Service, Labour and Social Welfare and Another* CCZ 2/18 dealt with the difference between discrimination and differentiation in the following terms:

> "In *V.M. Syed Mohammad and Company (supra)* a complaint was made to the effect that an impugned Act singled out for taxation purchasers of certain specified commodities only but left out purchasers of all other commodities. In interpreting the right to equal protection of the law, the court stated as follows:
>
> > "It is well settled that the guarantee of equal protection of laws does not require that the same law should be made applicable to all persons. Article 14, it has been said, does not forbid classification for legislative purposes, provided that such classification is based on some *differentia* having a reasonable relation to the object and purpose of the law in question. As pointed out by the majority of the Bench which decided Chiranjitlal Chowdhury's case ([1950] S.C.R. 869), there is a strong presumption in favour of the validity of legislative classification and it is for those who challenge it as unconstitutional to allege and prove beyond all doubt that the legislation arbitrarily discriminates between different persons similarly circumstanced. There is no material on the record before us to suggest that the purchasers of other commodities are similarly situated as the purchasers of hides and skins.""

The differentiation in this case is based on the fact that the categories of persons given a privilege in terms of s 72 of the Act are persons who have been posted to stations

outside the country by the State to conduct State business. The applicants are people who have left Zimbabwe of their own accord. The rationale for the differentiation is that State servants cannot be disadvantaged on the basis of where they have been posted. They have been assigned by the State to take up positions at stations outside Zimbabwe in order to conduct the business of the State. The latter is accordingly under an obligation to ensure that they are not prejudiced of their right to vote. The differentiation in my view meets the constitutionality test.

Accordingly, this point is determined against the applicants.

The influence, if any, of International Conventions and electoral laws

The first applicant approached the African Commission on Human and Peoples' Rights in 2012 arguing that Zimbabwe was in violation of Articles 2, 3 (1), (2), 9 and 13 (1) of the African Charter on Human and Peoples' Rights for the reason that the erstwhile Constitution as read with s 72 of the Electoral Act restricted his right to vote. The African Commission gave the following order:

1. That Zimbabwe allows Zimbabweans living abroad to vote in the referendum of 16 March 2013 and the general elections thereafter, whether or not they are in the service of the Government;
2. That Zimbabwe provides all eligible voters, including Gabriel Shumba the same voting facilities it affords to Zimbabweans working abroad in the service of the Government; and
3. That Zimbabwe takes measure to give effect to its obligations under the African Charter in accordance with Article 1 of the African Charter, including in areas of free participation in government.

Section 327 (2) of the Constitution provides as follows:

"(2) An international treaty which has been concluded or executed by the President or under the President's authority—
(*a*) does not bind Zimbabwe until it has been approved by Parliament; and
(*b*) does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament."

The applicants argue that Zimbabwe is bound to implement the findings of the African Commission. However, the country has not domesticated the African Charter on Human and Peoples' Rights in the manner outlined in s 327(2). This section has to be read in light of s 46 of the Constitution which provides[3]:-

"46 Interpretation of Chapter 4

(1) When interpreting this Chapter, a court, tribunal, forum or body—
   (*a*) must give full effect to the rights and freedoms enshrined in this Chapter;
   (*b*) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in s 3;
   (*c*) must take into account international law and all treaties and conventions to which Zimbabwe is a party;
   (*d*) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and
   (*e*) may consider relevant foreign law; in addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.

(2) When interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter."

Zimbabwe is a dualist state as evidenced by ss 327 (2) and 34 of the Constitution which exhorts the State to ensure incorporation into our domestic law of all international conventions and treaties to which Zimbabwe is a party. The African Charter is not a self-executing treaty and as such, it has to be specifically incorporated into Zimbabwean law, that is, the Constitution of Zimbabwe. This, I find, reinforces the respondents' argument that the solution to the applicants' problem *in casu* lies in them lobbying the Government to amend the Constitution, including domestication of relevant treaties and conventions, so that it allows the diaspora vote. The relevance of this course of action is highlighted in the case of *Foster & Elam v. Neilson* 27 U.S. (2 Pet.) 253, (1829) at 314 where MARSHAL CJ had this to say:

[3] Although, the African Chapter has not been incorporated into our law through an Act of Parliament, many of its substantive provisions accord with the righty and freedom guaranteed in our Constitution. These however, do not include any provision addressing the issue of the diaspora vote.

> "Our constitution declares a treaty to be law of the land. It is, consequently, to be regarded in Courts of Justice as equivalent to an act of legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract – when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule of law for the Court."

The Constitutional Court remains guided by the wording of the Constitution, and has interpreted its provisions as expressly excluding the diaspora vote. Amendments to the Constitution are the prerogative of the Legislature. In other words, the court does not dictate to the law maker what the content of the law should be. It can only declare what such content should not be.

The parties in their heads of argument made reference to the state of electoral laws in a number of countries. It is evident that different countries impose different laws to regulate the right of their citizens, based locally or abroad, to vote in their general elections. While there are some countries that do not admit of, or even address, the diaspora vote in their law, (eg. Uganda, Zambia, Nigeria) there are many others that allow it, to differing degrees and on different pre-conditions (eg. South Africa, Germany, Mozambique, New Zealand and others).

What is clear, however, in respect of the international electoral systems cited, is the fact that the right to vote is regulated by law. Different countries have different methods employed to allow or not allow the diaspora vote depending on the provisions of their Constitutions. The determination has already been made that Zimbabwean law does not provide for the diaspora vote. This should be a basis for agitating for the amendment of the Constitution at the request of any aggrieved party. The fact that other countries have the diaspora vote provided for in terms of their laws would be an effective lobbying tool in that respect. Such laws however do not entitle this Court to interpret legislation in a manner that confers on the

applicants a right which does not arise from the Constitution. The only benefit to this Court, of these laws, might lie in their persuasive effect in the interpretation of any similar or related law that may be passed by our Legislature to regulate the right of those based abroad to vote.

In the result, I find that the international treaty cited by the applicants, not having been appropriately incorporated into our domestic legislation, has no binding effect in the determination of the dispute in this matter. I find too that the international electoral laws which the applicants have made reference to offer little if any assistance in the interpretation of the constitutional provisions, as currently phrased, that pertain to our national elections.

DISPOSITION

When all is considered, and on the basis of the foregoing, I find that the application cannot succeed.

It is accordingly ordered as follows:

'The application be and is hereby dismissed with no order as to costs.'

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA JCC: I agree

BHUNU JCC: I agree

UCHENA JCC: I agree

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