

The LEGAL MONITOR

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Diaspora vote war intensifies

Potential voters turn heat on Zuma...

PRETORIA-An exiled Zimbabwean who won his case to vote using the postal ballot at the African Commission on Human and Peoples' Rights (ACHPR) has taken matters up in a bid to force Zimbabwe to comply with the continental tribunal's ruling.

Pretoria-based Gabriel Shumba is pushing South Africa to tie any funding for Zimbabwe polls to a condition that people in the Diaspora are allowed to vote as per the ACHPR ruling. Cash-strapped Zimbabwe is seeking poll funding from regional countries and South Africa – being the continent's biggest economy – is likely to be a major financier.

Shumba, who fled Zimbabwe in 2003 after being tortured by State security agents, was unable to vote in the March referendum despite winning the case he had brought before the ACHPR.

The human rights advocate had taken the Zimbabwe government to the ACHPR, an organ of the African Union, to force Harare to allow Zimbabweans living outside the country to vote using postal ballots.

Zimbabwe has so far defied the ruling from the continent's body, leaving Shumba and millions other exiled Zimbabweans in the cold.

With a watershed general election fast approaching, Shumba has now taken the matter up with South African President Jacob Zuma, the SADC appointed facilitator to the Zimbabwean political crisis.

In a letter to Zuma, Shumba states that South Africa should use its leverage as a potential funder of Zimbabwe's elections to push President Robert Mugabe and Prime Minister Morgan Tsvangirai's administration to allow postal voting for ordinary Zimbabweans living outside the country.

"The purpose of this letter, therefore is to request the Presidency to –

- Confirm whether there is any truth in reports that South Africa will fund the elections; and if so
- Confirm the exact amount of the intended funding; and
- Indicate whether the Presidency is aware of the Government of Zimbabwe's defiance of the provisional measures laid down by the ACHPR; and
- Indicate whether any conditions - such as compliance with internationally acceptable principles regarding the holding of elections and compliance with continental human rights instruments and rulings of the ACHPR in

particular - will be imposed on the transfer of South African funds towards the holding of an election in Zimbabwe," reads the letter recently dispatched to Zuma's offices by Shumba's lawyer Willie Spies of Hurter Spies Incorporated of South Africa.

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Shumba (second from left) and other exiled Zimbabweans in chains symbolising how they are prevented from participating in events back home

Free at last

HARARE-State prosecutors were last week left with egg on their faces after Harare Magistrate Don Ndirowei acquitted two human rights campaigners charged with forgery and conspiracy to commit fraud or publishing false statements prejudicial to the State.

Magistrate Ndirowei on Friday acquitted ZimRights Director Okay Machisa, his workmate Leo Chamahwinya and ZimRights as an organisation after their lawyers from Zimbabwe Lawyers for Human Rights (ZLHR) applied for discharge at the close of the State case.

Human rights lawyer and ZLHR board member Trust Maanda, who represented ZimRights together with Selby Hwacha and Beatrice Mtetwa, told *The Legal Monitor* that Magistrate Ndirowei freed the human rights activists after ruling that there was no evidence linking them to the commission of the alleged offence. Chamahwinya was represented by Admire Rubaya.

The trial of Dorcas Shereni, a ZimRights official and two others Farai Bhani and Tatenda Chinaka - who are accused of contravening Sections 31, 136 and 137 of the Criminal Law (Codification and Reform) Act for allegedly attempting to defraud the Registrar General's Office by forging and manufacturing counterfeit copies of certificates of voter registration - continues next month after they were all put to their defence.

State prosecutors had alleged that Machisa, Chamahwinya and ZimRights created fake copies of voter registration certificates between May 2012 and January 2013 in a bid to defraud the Registrar General's office.

The State claimed that there was a possibility that the misrepresentation by Machisa and his fellow activists could cause "bloodshed or a chaotic situation in Zimbabwe" if the fake documents were only detected during the general election planned for later this year.

ACHPR ruling

As Zimbabwe pays blind eye

AFRICAN UNION الاتحاد الإفريقي African Commission on Human & Peoples' Rights		UNION AFRICAINE UNIÃO AFRICANA Commission Africaine des Droits de l'Homme & des Peuples
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COMMUNICATION 430/2012:

GABRIEL SHUMBA AND OTHERS (REPRESENTED BY ZIMBABWE LAWYERS FOR HUMAN RIGHTS)
v
REPUBLIC OF ZIMBABWE

*Adopted by the
African Commission on Human and Peoples' Rights
during the 13th Extra-Ordinary Session, from the 19 to 25 February 2013
Banjul, The Gambia.*

  

Hon. Commissioner Catherine Dupe Aton
Chairperson of the African Commission
on Human and Peoples' Rights

Dr. Mary Maboreke
Secretary to the African Commission on
Human and Peoples' Rights

Communication 430/12 - Gabriel Shumba and Others (represented by Zimbabwe Lawyers for Human Rights) v Republic of Zimbabwe

Summary of the Complaint:

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat), received a complaint on 27 December 2012 from Zimbabwe Lawyers for Human Rights (the Complainant), acting on behalf of Gabriel Shumba, Kumbirai Tasuwa Muchemwa, Gilbert Chamunorwa, Diana Zimbudzana and Solomon Sairos Chikohwero (the Victims).
2. The Complaint is submitted against the Republic of Zimbabwe, State Party to the African Charter on Human and Peoples' Rights (the African Charter).¹
3. The Victims are all Zimbabwean citizens working in the Republic of South Africa, who are unable to travel to Zimbabwe on polling day for the referendum on the Draft Constitution and general elections thereafter. The Victims claim to have participated in the constitution drafting process, through participation in public consultations and attendances of diaspora meetings held by the Select Committee of Parliament in Johannesburg in 2010, but are unable to participate in the referendum.

¹ Zimbabwe ratified the African Charter on 30 May 1986.

13th Extra-Ordinary Session 19 to 25 February 2013



4. It is alleged that the Victims' right to vote in referendum and elections is restricted by Section 3 of Schedule 3 of the Constitution of the Republic of Zimbabwe read together with Section 72 of the Electoral Act². These sections prevent Zimbabweans based abroad from participating in any electoral process, unless the individuals are on duty in the service of the Government.
5. The Complaint provides a factual background dealing with the Victims' vested interest in the electoral processes of their country and the details leading to the upcoming referendum on the Draft Constitution. It further describes how certain provisions of the Constitution of the Republic of Zimbabwe and the Electoral Act restrict the right to vote of Zimbabweans living abroad.
6. The referendum on the Draft Constitution is scheduled to be held on 16 March 2013 and the general elections are expected to be held later in the year.

Articles alleged to have been violated:

7. The Complainant alleges violation of Articles 2, 3(1) and (2), 9 and 13(1) of the African Charter.

² Section 72 of the Electoral Act provides that "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 in the service of the Government; or

(b) As the spouse of a person referred to in paragraph (a); and so unable to vote at a polling station in the constituency."

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1. The Commission further issues the following Provisional Measures in its own initiative in accordance with Rule 98(1) of its Rules of Procedure:
 - i. That the Respondent State 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;
 - ii. That the Respondent State provides all eligible voters, including the Victims in this Communication, the same voting facilities it affords to Zimbabweans working abroad in the service of the Government; and
 - iii. That the Respondent State takes measures 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.
2. The Commission requests the Respondent State to report back on the implementation of the Provisional Measures requested within fifteen (15) days of receipt of this decision in accordance with Rule 98(4) of its Rules of Procedure.



Diaspora vote war intensifies

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Spies said Shumba is a representative of "a specific class of persons, namely Zimbabwean citizens residing in South Africa and elsewhere in the world due to the circumstances prevailing in Zimbabwe since the violent oppression of the opposition by government agencies re-emerged in 2000".

Shumba, Kumbirai Tasuwa Muchemwa, Gilbert Chamunorwa, Diana Zimbudzana and Solomon Sairos Chikohwero, represented by Zimbabwe Lawyers for Human Rights, approached the ACHPR in February this year on the Zimbabwean government's failure to make provision for exiles to cast their votes in national elections.

ACHPR directed Zimbabwe to provide all eligible voters the same voting facilities it affords to Zimbabweans working abroad in the service of the government. The ACHPR ordered Zimbabwe to take measures to give effect to its obligations under the ACHPR in accordance with Article 1 of the African Charter, including in areas of free participation in government.

Zimbabwe, which was ordered to report back to the ACHPR within 15 days from the date of the communication, has failed to adhere to the ruling of the tribunal.

"Notwithstanding the fact that no effort has been made to provide for my client and hundreds of thousands of Zimbabwean voters in Diaspora to cast their vote, the President of Zimbabwe has been pressing ahead with elections in defiance of, amongst others, the rulings of a respected African human rights institution such as the ACHPR," said Spies. Being a party to the African Charter, Zimbabwe is bound by the ACHPR's decisions although the organ lacks the force to implement its decisions, a situation exploited by countries such as Zimbabwe to disregard rulings.

Zimbabweans living outside the country have been fighting to be allowed to vote but have faced massive resistance from government.

The Constitutional Court is currently seized with a case brought by a South African-based bus driver who wants to be allowed to vote in the upcoming elections.

Tavengwa Bukaibenyu wants the Constitutional Court to declare that sections of the Electoral Act which bar postal voting for ordinary Zimbabweans infringe on his rights to have a voice on who governs Zimbabwe.

But Justice Minister Hon. Patrick Chinamasa and Registrar-General of Voters Tobaiwa Mudede, who are cited as respondents, are opposing the application. They both argue that postal voting for all Zimbabweans living outside the country would present a logistical and financial nightmare.

In his Notice of Opposition, Hon. Chinamasa says postal voting would prejudice his ZANU PF party, citing targeted travel and financial sanctions imposed on President Mugabe and a few of his close government, military and party officials by Western countries in 2002.

"The granting of visas at the discretion of countries that have imposed sanctions against Zimbabwe means that a number of Western countries are only accessible to members of the MDC formations. That fact militates against a conducive level playing field obtaining in those countries," argues Hon. Chinamasa.

The matter was recently postponed by the court while it monitors proposed amendments to the Electoral Act.

in full

Prayers:

8. The Complainant requests the Commission to:

- Find the Respondent State in violation of the aforementioned Articles of the African Charter; and
- Urge the Respondent State to amend the Constitution of the Republic of Zimbabwe, the Referendums Act and the Electoral Act to enable the Victims vote abroad.

Procedure:

9. The Secretariat received the Complaint on 27 December 2012 and acknowledged receipt of the same on 15 January 2013.

Analysis of the Commission on Seizure:

- 10. The Commission is of the view that the Complaint contains all the information required under Rule 93(2) of its Rules of Procedure.
- 11. The Commission also finds that the Complaint reveals prima facie violation of the African Charter.

Decision of the Commission on Seizure:

12. The Commission has decided to be seized of this Complaint.



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13. The Commission further issues the following Provisional Measures in its own initiative in accordance with Rule 98(1) of its Rules of Procedure:

- i. That the Respondent State 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;
- ii. That the Respondent State provides all eligible voters, including the Victims in this Communication, the same voting facilities it affords to Zimbabweans working abroad in the service of the Government; and
- iii. That the Respondent State takes measures 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.

14. The Commission requests the Respondent State to report back on the implementation of the Provisional Measures requested within fifteen (15) days of receipt of this decision in accordance with Rule 98(4) of its Rules of Procedure.

15. The Commission calls on the Complainant to present evidence and arguments on Admissibility within two (2) months in accordance with Rule 105(1) of its Rules of Procedure.

Done in Banjul, The Gambia this 13th Extra-Ordinary Session held from 19 to 25 February 2013

13th Extra-Ordinary Session 19 to 25 February 2013



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COMMUNICATION 430/2012:

GABRIEL SHUMBA AND OTHERS (REPRESENTED BY ZIMBABWE LAWYERS FOR HUMAN RIGHTS)
v
REPUBLIC OF ZIMBABWE

Provisional Measures

Adopted by the
African Commission on Human and Peoples' Rights
during the 13th Extra-Ordinary Session, from the 19 to 25 February 2013
Banjul, The Gambia.

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M. M. M.

Hon. Commissioner Catherine Dupe Atoka
Chairperson of the African Commission
on Human and Peoples' Rights

Dr. Mary Maboreke
Secretary to the African Commission on
Human and Peoples' Rights



Canada's St. Francis Xavier University recently bestowed honorary degrees on five distinguished individuals including Beatrice Mtetwa, one of the world's leading human rights activists during Spring Convocation ceremonies held on 5 May. Outstanding volunteer and retired educator James (Jim) Mulcahy, Indigo Books & Music Inc. CEO Heather Reisman; Chicken Soup for the Soul publisher and StFX alumnus Peter Vegso, and business leader, philanthropist and StFX alumnus Terrance (Terry) Wolff were also honoured



Canadian Prime Minister Stephen Harper meets with Beatrice Mtetwa in Ottawa, Ontario May 2, 2013

Villager in 'Mugabe dog insult' trouble

CHIPINGE-A 30 year-old villager who allegedly shredded President Robert Mugabe's campaign poster and insulted the 89-year-old has successfully applied to have the matter referred to the Constitutional Court to determine the possible violation of his rights.

Benny Gaza was arrested for the alleged offence back in March 2008. Zimbabwe Lawyers for Human Rights (ZLHR), which is representing him, says the State infringed his rights by taking too long to bring the case to court. He was summoned to stand trial on charges of contravening Section 33 of the Criminal Law (Codification and Reform) Act for allegedly undermining the authority of or insulting the Zanu PF party leader only recently. Gaza was also charged with contravening Section 152 of the Electoral Act after he allegedly tore a Zanu PF political campaign poster at Tanganda Business Centre.

According to the State, Gaza publicly, unlawfully and intentionally made abusive, indecent or obscene statements about President Mugabe when he uttered the following words, "Mugabe chii, munoda kutiuraya nenzara, imbwa yemunhu, hatidi kunzwa nezvake (Who is Mugabe, you want to starve us to death, he is a dog, we don't want to hear anything about him.)"

Gaza is alleged to have uttered the "abusive" words while at Tanganda Business Centre in Chipinge in Manicaland Province on 4 March 2008.

ZLHR member lawyer Langton Mhangu, who is representing Gaza, had applied for permanent stay of proceedings or referral to the Constitutional Court on the grounds that his constitutional right to be tried within a reasonable time was infringed by the State. Since 2010, ZLHR has recorded a dramatic increase in the arbitrary application of Section 33 of the Criminal Law (Codification and Reform) Act, where individuals have been charged with allegedly "insulting or undermining the authority of the President".

ZLHR has attended to more than 65 cases where clients have fallen foul of this law. Due to continued delays in the justice delivery system, most of the cases are pending although three have since been finalised, with the accused being acquitted. In other instances, clients have been removed from remand due to failure by the State to prosecute timeously.

The constitutionality of this provision has been challenged on several occasions, on the basis that it infringes on freedom of expression and that it protects the President from public scrutiny when he is an elected official. The Constitutional Court, is yet to make a determination on these cases.



Several people have been arrested for allegedly defacing President Robert Mugabe's campaign posters

Referendum leaflets man off the hook

KAROI-The State's case against a Hurungwe man accused of distributing campaign leaflets at a polling station during the March constitution referendum has spectacularly collapsed, with a court noting that there was insufficient evidence to nail Lloyd Chibanya.

Chibanya, the MDC-T district secretary for information and publicity in Hurungwe, had endured a tough three months of jail hanging over his head.

He had been accused of breaching Section 147 (1) (d) of the Electoral Act [Chapter 2:13] as read with Section 10 of the Referendum Act [Chapter 2:10].

But on 13 June, a Karoi Magistrate discharged and acquitted Chibanya citing lack of incriminating evidence.

"The Magistrate in passing his ruling highlighted that the State witnesses' testimonies were unreliable that no reasonable court could properly convict," Chibanya's lawyer, Kennedy Masiye of Zimbabwe Lawyers for Human Rights told *The Legal Monitor* at the end of the case.

"He noted that the evidence of the witnesses collaborated in the direction of exonerating Chibanya of any wrongdoing as they all testified that they did not see him placing a poster on a tree," added Masiye.

The State had accused Chibanya of distributing a leaflet campaigning for a "Yes" vote during the March 16 constitution referendum within 300 metres of the polling station at Chikova Primary School in Hurungwe.

Before the acquittal, Chibanya had to endure several court appearances.



Kennedy Masiye

He first appeared in court on 18 March and was granted \$100 bail.

On 3 April, the court remanded the case to 23 April for trial. However, the trial failed to kick off on 23 April after the court stated that it was overwhelmed.

Remanding the case to 9 May, the Magistrate noted that the matter would receive first priority. On 9 May, the 40-year-old was a relieved man after he was removed from remand.

Masiye applied for refusal of the continued placement of his client on remand after expressing concern at the continued failure by State witnesses to attend trial.

The court ordered the removal of Chibanya from remand and ruled that the State could proceed by way of summons once it put its house in order.

About three weeks later, Chibanya's case was back in court after he was served with summons on 21 May to appear in

court on 4 June when trial commenced.

After leading its three witnesses, a returning officer at Chikova Primary School Polling Station and two police officers, the State closed its case prompting Masiye to apply for discharge.

Chibanya's case comes soon after the acquittal of Nhau Jamba, another Hurungwe resident who was facing a charge of contravening the Electoral Act and the Referendum Act.

The State was accusing Jamba of obstructing people intending to vote in the March 16 referendum.

He was acquitted after the State, which had led one witness at trial, withdrew charges after plea.

The prosecution said it had withdrawn the case because the witness, who was also the complainant in the matter, failed to produce evidence of a commission of the offence of obstructing voters.

Mao's long march

HARARE-The Constitutional Court will on Thursday hear an urgent application in which a human rights campaigner Nixon Nyikadzino is seeking a revision of the proclamation of July 31 as the election date.

President Robert Mugabe recently unilaterally declared July 31 as the date for presidential, parliamentary and local government elections. This followed the Constitutional Court's decision in which seven judges ruled that President Mugabe must set elections by the end of July.

But Nyikadzino popularly known as "Mao" says the court's decision and Mugabe's proclamation violate his rights. He argues that the court's July 31 election deadline would result in restrictive time frames within which the impending elections must now be held and that these timeframes significantly threaten or compromise his right to vote as a citizen and to participate in free and fair elections.

Nyikadzino's request recently received support from leaders of the 15-nation Southern African Development Community, who forced President Mugabe to climb down from a unilateral decision to hold elections on July 31 following a meeting of the southern African regional bloc in Mozambique.

In an urgent application filed in the country's highest court, Nyikadzino argues that: "There has not been progress in key and mandatory processes necessary for the holding of free and fair elections. Some of the processes have not yet commenced and some are about to commence. None have been finalised."

He argues that constitutionally, it is impossible for relevant processes needed for free and fair elections to be completed on July 31 without violating his rights.



"My fear is that given the short time that is left, the respondents cannot fulfill their obligations without infringing on my rights," he said in an application in which Zimbabwe Electoral Commission (ZEC) is one of the respondents.

"In particular the respondents have to fulfill their obligation of aligning electoral laws to the Constitution and the fifth respondent (ZEC) has to carry out a voter registration and inspection exercise.

"Further the fifth respondent has to carry out voter education and conduct and supervise preparations for the holding of elections."

Nyikadzino cites President Mugabe as first respondent, Prime Minister Morgan Tsvangirai and second respondent and Constitutional and Parliamentary Affairs Minister Eric Matinenga as third respondent.

Justice and Legal Affairs Minister Patrick Chinamasa is cited as the fourth respondent while Registrar-General of Voters Tobaiwa Mudede is the sixth respondent. Nyikadzino mentions that other issues the respondents are grappling with include preparation of a code of conduct for political party candidates, voter education and registration, voters' roll inspection and nomination processes and the enactment and publication of a compliant Electoral Act.