

REPORTABLE ZLR (89)

Judgment No. SC 100/05

Constitutional Application No. 22/05

**(1) Jefta Madzingo (2) Farayi Maruzani (3) Emily Tsunai
Madamombe (4) Matthew Nyashanu (5) Makusha Mugabe (6)
Brian Makuzva (7) Lincoln Makotore**

V

**(1) The Minister Of Justice, Legal And Parliamentary Affairs
(2) The Registrar General (3) The Electoral Supervisory
Commission (4) The Attorney-General**

SUPREME COURT OF ZIMBABWE

CHIDYAUSIKU CJ, SANDURA JA, ZIYAMBI JA, MALABA JA & GWAUNZA JA

HARARE, FEBRUARY 23, 2005

H Zhou, for the applicants

E Jena, for the respondents

MALABA JA: At the conclusion of hearing full argument in this case from counsel for the applicants and counsel for the respondents we dismissed the application with no order as to costs and indicated that reasons for the decision would follow in due course. These are they –

The application for redress was made by the applicants in terms of s 24(1) of the Constitution of Zimbabwe (“the Constitution”) which gives any person who alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to himself the right to apply to the Supreme Court for redress. The proceedings arose out of concern by the applicants that no mechanism had been established in the United Kingdom where they resided for taking their votes in the forthcoming election of Members of Parliament (“the election”) fixed for 31 March 2005.

The applicants are citizens of Zimbabwe living in the United Kingdom where they are employed. They left the country of their own accord. They have not stated in their affidavits for how long they have been living in the United Kingdom. It is not in dispute that before leaving Zimbabwe each applicant had registered on the voters' roll for the constituency in which he or she resided. The names of the respective constituencies for which the applicants were enrolled are not given. On the basis of the fact that their names were on the voters roll for their respective constituencies the applicants alleged that they were entitled to cast their ballots in the election whilst in the United Kingdom. They alleged that they will be unable to attend personally on polling day at polling stations in the constituencies for which they enrolled to cast their votes.

It is common cause that no machinery has been established in the United Kingdom to take votes of persons in the applicants' position. Assuming that the respondents are responsible for the conduct of the election, the applicants alleged that failure by the respondents to put up facilities in the United Kingdom or provide some mechanism to take their votes in the election constitutes a hindrance to them from participating in the election and is likely to violate freedom of expression, guaranteed to them under s 20(1) of the Constitution. They also alleged that failure by the respondents to put up mechanisms to record their votes in the foreign country is likely to violate their right to freedom of assembly and association (s 21) and the right to freedom of movement (s 22). They therefore claim an order directing the respondents to make the ballot in the election available to them in the foreign country where they reside. This they call the "diaspora vote".

The relief sought by the applicants is in the form of an order to the effect that -

1. The hindrance of the applicants from participating in Parliamentary and Presidential elections is inconsistent with the provisions of ss 20, 21 and 22 of the Constitution of Zimbabwe and is accordingly declared null, void and of no effect.
2. The respondents be and are hereby directed to set up all the necessary structures to allow and enable the applicants to vote in the forthcoming Parliamentary elections and all future general elections thereafter in the United Kingdom.
3. The respondents pay the costs of this application.

Mr *Zhou*, for the applicants, did not advance in Court the contention that the alleged conduct of the respondents in failing to establish mechanisms to take the applicants' votes in the United Kingdom is likely to violate their rights guaranteed under ss 21 and 22 of the Constitution. He nonetheless pressed on with the argument that the alleged conduct of the respondents is likely to violate the applicants' freedom of expression. The basis of the contention is that freedom of expression includes the right to vote. It is said that the casting of a ballot is an expression of a preference of a candidate by a voter.

The respondents opposed the application. The first respondent is responsible for the administration of the Electoral Act [*Cap 2:13*] ("the Act") in terms of which the election is to be conducted. His position is that the Government is not under any legal duty to establish mechanisms in foreign countries to take votes of its citizens who left Zimbabwe of their own accord and

are unable on the polling day to attend personally to cast their ballots at polling stations in the constituencies for which they are enrolled.

The second respondent is the Registrar General of Voters. His stance is that he has no power under the Act to do what the applicants ask the Court to order him to do. The Act entrusted the Zimbabwe Electoral Commission with the responsibility for the conduct of the election. He said that body is not a party to the proceedings.

The third respondent's position is also that it has no power under the Act to do what the applicants want the Court to order it to do. It said that its duties in an election are under the Act limited to the accreditation of election monitors and observers, the making of a report after every election on the conduct of that election stating whether or not the result of the election represented the will of the electorate and giving advice upon request to the Electoral Commission on any matters relating to the registration of voters and the conduct of elections.

The third respondent was cited as an intervenor in terms of s 24(6) of the Constitution. It appears to me that the Attorney-General should not have been cited as a party to these proceedings. The question raised by the applicants for determination is not whether any law is in contravention of the Declaration of Rights. Section 24(6) of the Constitution gives the Attorney-General the right to be heard by the Court and therefore be cited if in any proceedings it falls to be determined whether any law is in contravention of the Declaration of Rights. The question arising for determination in these proceedings is whether the alleged failure by the respondents to set up mechanisms to take the applicants' votes in the election in the United Kingdom where they reside is likely to violate their freedom of expression enshrined in s

20(1) of the Constitution. The allegation is not that any provision of the statute contravenes s 20(1) of the Constitution. The application proceeds on the assumption that there is a constitutionally valid law requiring the respondents to do what the applicants claim as relief in terms of s 24(1) of the Constitution.

The Attorney-General, nonetheless, went into the merits of the application. He denies that the applicants have been excluded from participating in the election. He said they are free to come back to Zimbabwe on polling day and cast their ballots at the polling stations in the constituencies for which they enrolled. The Attorney-General cited the case of *Registrar General of Elections & Ors v Morgan Tsvangirai* SC 12/02 as authority for the proposition that the 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 to cast their ballots except in respect of the category of persons specified under s 71 of the Act.

The question for determination is whether the applicants have established the allegation that the respondents are under a legal duty to establish machinery in the United Kingdom to take their ballots in the election. In other words does freedom of expression entrenched under s 20(1) of the Constitution impose a positive duty on the State to take measures to ensure that a registered voter casts his or her vote in a foreign country where he or she is resident on the polling day if he or she is unable to attend personally at a polling station in the constituency for which he or she is enrolled? It is necessary to set out the provisions of the Constitution and the Act which are relevant to the determination of the question.

Section 20(1) of the Constitution guarantees freedom of expression in these words:

“(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.”

Section 58 of the Constitution provides that:

“(1)

(2)

(3) The qualifications and disqualification for registration, as a voter and for voting at elections shall be as prescribed in Schedule 3 and subject thereto, by the Electoral Law.

(4) An Act of Parliament shall make provision for the election of members of Parliament, including elections for the purpose of filling casual vacancies.” (the underlining is mine for emphasis).

Section 3 of Schedule 3 of the Constitution provides that:

“(1) Subject to the provisions of this paragraph and to such residence qualifications as may be prescribed in the Electoral Law for inclusion on the electoral roll of a particular Constituency, any person who has attained the age of eighteen years and who –

(a) is a citizen of Zimbabwe; or

(b) since the 31st December 1985, has been regarded by virtue of a written law as permanently resident in Zimbabwe; shall be qualified for registration as a voter on the common roll.

(2) ...

(3) Any person who is registered on the electoral roll of a Constituency shall be entitled to vote at an election which is held for the Constituency.” (the underlining is mine for emphasis)

Section 60(2) of the Constitution provides that Zimbabwe shall be divided into one hundred and twenty common roll constituencies. Under s

113(1) of the Constitution the "Electoral Law" is defined to mean the Act of Parliament having effect for the purposes of s 58(4) which is for the time being in force. It is common cause that the Act of Parliament in force for the purposes of making provision for the election is the Electoral Act [*Cap 2:13*] which came into force on 1 February 2005. An examination of the law shows that whilst the applicants have a genuine complaint as registered voters there is no provision in the Constitution and the Act on the basis of which their application can be granted.

The effect of subs (3) and (4) of s 58 of the Constitution is that what is prescribed in Schedule 3 of the Constitution and the provisions of the Act constitutes a self-contained code on the rights and duties arising from the election. One does not have to look outside these provisions for law governing matters relating to elections in Zimbabwe.

Section 56(1) of the Act also provides that at an election for a member of Parliament every voter registered on the voters roll for the constituency concerned shall be entitled to vote. Does this provision mean that every registered voter has a right to cast his or her ballot wherever he or she is on the polling day and that the State is obliged to provide mechanisms to take the ballot?

It is important to appreciate the fact that there is no express provision in the Constitution and the Act requiring electoral authorities to establish machinery in foreign countries to record votes of Zimbabwean citizens registered as voters on voters rolls for constituencies who live in those countries. The provisions that are there require a registered voter to attend personally on polling day to cast his or her ballot at a polling station in the constituency for which he or she is enrolled. The requirement applies to every registered voter

and its object is to give effect to the entitlement to vote provided under s 3 of Schedule 3 of the Constitution. The only exception to this general rule is created in s 71 of the Act.

For the purposes of enabling registered voters to cast their ballots, s 51 of the Act requires the constituency elections officer to establish the polling stations at places convenient to the voters but within the boundaries of the constituencies. Section 56(3) of the Act requires that a ballot paper be handed to a person who has proved to the satisfaction of the presiding officer at a polling station that he or she is registered as a voter on the voters roll for the constituency concerned by producing a voter's certificate. The presiding officer is required under s 56(2) of the Act to put such questions to an applicant for a ballot paper as he considers necessary to ascertain whether or not the applicant is registered as a voter on the voter's roll for the constituency concerned. It is clear from the provisions of the Act that the overriding object of the law of elections was to make the ballot available to registered voters who attended personally at polling stations to cast their votes.

Under s 71 of the Act a person who on application to the Chief Elections Officer can show that he or she has good reason to believe that he or she will be absent from the constituency or unable to attend at the polling station personally by reason of being -

- (a) on duty as a member of a disciplined force or as an electoral officer or monitor;
- (b) absent from Zimbabwe in the service of the Government of Zimbabwe; or
- (c) a spouse of a person referred to in para (a) or (b),

may vote by post.

A person entitled to postal voting is deemed to be resident in the constituency for which he or she enrolled as a voter. If the Chief Elections Officer is not satisfied that the applicant is entitled to receive a postal ballot paper he is required under s 73 of the Act to send the person a notice to the effect that he is not so satisfied and that the applicant must attend personally at a polling station on the polling day to cast the ballot. The statute makes it clear that absentee voting is available to the few specific categories of registered voters living in foreign countries. These are of persons who are absent from Zimbabwe in the service of the Government of Zimbabwe or members of the disciplined forces who are on duty and their spouses.

There is no provision in the Constitution and the Act to the effect that a registered voter in the applicants' position who is unable because of the nature of his or her occupation, service or employment to attend personally on the polling day to cast the ballot at a polling station in the constituency for which he or she is enrolled can vote through some mechanism of absentee voting.

Parliament has power under s 58(3) of the Constitution to prescribe conditions for the exercise of the right to vote. The right to vote includes the right to cast the ballot and have it counted at the election. Parliament has power under s 58(4) of the Constitution to enact a law governing the election of members of Parliament. It has a duty therefore to ensure that the law it enacts is operative and effective. The assumption is that in creating absentee voting by post as an exception to the general rule for the categories of the registered voters specified under s 71, the legislature was aware of the classes of registered voters in the applicants' position but decided that extending the exception to them would

not be for the common good. Parliament did not find it necessary in the exercise of its powers to treat the applicants as a special class of persons for the purposes of the exercise of the right to vote.

The applicants did not challenge the constitutional validity of the provisions of the Act requiring registered voters to attend personally at polling stations in their constituencies to cast their ballots. That attitude is not surprising in the light of the power given to Parliament in s 58(4) of the Constitution. They also did not allege that failure by the legislature to create an exception in their case in the form of absentee voting was unconstitutional. It is not the applicants' case that failure by the respondents to establish a mechanism to take their votes in the United Kingdom deprives them of the right to vote as prescribed under s 3 of Schedule 3 of the Constitution.

In *McDonald v Board of Election Commissioners of Chicago* 394 US 802 plaintiffs who were awaiting trial as inmates of the jail of Cook County Illinois and were unable to attend personally at the polls to cast their ballots challenged the constitutionality of a statute which made absentee balloting available to certain persons absent from their county of residence for any reason but did not make the same mechanism available to take their votes. They alleged that the statutory scheme violated the equal protection clause of the Fourteenth Amendment of the Constitution of the United States of America.

The Supreme Court of the United States held that the statute did not disenfranchise the plaintiffs. It said that what was at stake was a claimed right to receive absentee ballots rather than the right to vote. The court noted the fact that the absentee voting provisions of the statute were designed to make voting more available to some groups who could not get to the polls but did not in themselves deny the appellants the exercise of the franchise.

CHIEF JUSTICE WARREN, delivering the opinion of the court, said at pp 807, 809, 810,

“States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised

Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent ...

With this much discretion, a legislature traditionally has been allowed to take reform ‘one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind’; and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.

Illinois could, of course, make voting easier for all concerned by extending absentee voting privileges to those in appellants’ class. Its failure to do so, however, hardly seems arbitrary, particularly in view of the many other classes of Illinois citizens not covered by the absentee provisions, for whom voting may be extremely difficult, if not practically impossible.”

In *Registrar General of Elections* case (*supra*) the respondent sought to have the Registrar General compelled to set up all the necessary mechanisms to enable registered voters who would be outside their constituencies on the polling day in the Presidential election to vote. Although the correct interpretation of s 28(2) of the Constitution was at issue in that case the substance of the relief sought was the same as the one sought by the applicants.

The Court held that the failure by the Registrar General of Elections to put up mechanisms to take votes of registered voters who would not be in their constituencies on the polling day did not constitute a denial to those voters of their right to vote nor was it unconstitutional.

CHIDYAUSIKU CJ said:

"It is common cause that the first appellant, in his capacity as Registrar General of Elections, has directed that each voter on the common roll shall vote in his or her constituency in the forthcoming Presidential election. The respondent is not in any way challenging this decision. It is the failure of the first appellant to make adequate and reasonable arrangements for all voters registered on the common roll who would not be in their constituencies on the polling days which he alleges is unconstitutional. Providing for as many people to vote as possible is highly commendable. Failure to provide in the manner alleged is, however, not unconstitutional. The contention that the failure to provide the above facility amounts to the disenfranchisement of a voter is simply untenable. The voter does not lose his right to vote. He is disabled from exercising the right by being in a wrong constituency at the time he is expected to vote. The disability would not, in the circumstances, have resulted from any action by the Registrar General."

I note the fact that the applicants have alleged that failure by the respondents to put up mechanisms to record their votes was likely to contravene their freedom of expression guaranteed under s 20(1) of the Constitution. The contention is that freedom of expression includes the right to vote. Underlying the applicants' argument is the assertion that the casting of a ballot is an expressive activity, the content of which conveys a meaning to the effect that the candidate chosen is the suitable person to represent the voter in Government.

The first step to be taken is to determine whether the casting of a ballot may properly be characterised as conduct falling within "freedom of expression". In *Irwin Toy Limited v Quebec (AG)* (1989) 39 CRR 193 McINTYRE JA writing for the majority in the Supreme Court of Canada at p 228 said that:

"'Expression' has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content."

It is not in dispute that the casting of a ballot is an expressive activity. The ballot forms the content of that activity and conveys a meaning. By a ballot a voter makes an expression of his or her preference among the candidates. In *United States v Classic* 313 US 299 MR JUSTICE STONE at p 318 said that:

"From time immemorial an election to public office has been in point of substance no more and no less than the expression by qualified electors of their choice of candidates."

The question is whether the casting of a ballot is part of the conduct falling within the sphere of activities intended by the framers of the Constitution to be constitutionally guaranteed and entrenched against infringement by the State under the "freedom of expression".

In my view the contention that freedom of expression as guaranteed under s 20(1) of the Constitution includes the casting of a ballot is an ill- conceived attempt to elevate an unentrenched right to the status of a fundamental human right. That misconception is due to lack of appreciation of the meaning of freedom of expression and the structure of the Constitution. It is clear for the reasons that follow that there is no legal basis on which the applicants' claim as pleaded can be granted.

Freedom of expression denotes the freedom to communicate orally, in writing, print, by broadcasting or otherwise, statements or views on any matter. In *R v Zundel* (1987) 29 CRR 349 the court, in dealing with the Canadian jurisprudence on the subject of freedom of expression, concluded thus at p 365:

"When determining the limits of freedom of expression, a distinction must be drawn at the outset between 'rights' and 'freedoms'. A 'right' is defined positively as what one can do. A 'freedom', on the other hand, is defined by determining first the area which is regulated. The freedom is then what exists in the unregulated area – a sphere of activity within which all acts are permissible. It is a residual area in which all acts are free of specific legal regulation and the individual is free to choose."

Rights are said to impose a corresponding duty or obligation on another party to ensure the protection of the right in question, whereas “freedoms” involve an absence of interference. Freedom of expression as guaranteed under s 20(1) of the Constitution recognises a claim by any individual against the State to non- interference with the enjoyment of the activities stated therein.

In *Allman v Northwest Territory* 144 DLR (3d) 467 (SC) the appellant challenged the constitutionality of a three year residency requirement contained in a Territorial Plebiscite Ordinance that prevented him from voting in an upcoming referendum. The trial judge stated that the basic difference between a “right” and a “freedom” consisted in the nature of the claims which each of these terms describes in relation to the “State”. He observed at p 479 that:

“The ‘freedom of thought, belief, opinion and expression’ referred to in para 2(b) of the charter on which the applicants rely is therefore to be understood as recognition of a claim which anyone may make against the State ... to non-interference in matters of thought, belief, opinion and expression.

The applicants’ complaint in these proceedings ... falls instead into the class of a ‘demand for State intervention’ to provide access to the means of expression available to those designated as voters by the Ordinance. That sort of demand ... is to be classed as a claim of ‘right’, such as the right to vote in s 3.”

The right to vote as prescribed under s 3 of Schedule 3 of the Constitution was created and conferred upon the citizens and permanent residents who had attained the age of eighteen and were registered on the common voters roll by positive law. The right came into existence at the time the Constitution was enacted. It was prescribed as a distinct or free standing right from freedom of expression which was at the same time protected under s 20(1) of the Constitution as a fundamental human freedom recognised as having been in existence at the time the Constitution was enacted.

As a matter of law, the right to vote was provided as a distinct right different from freedom of expression. The framers of the Constitution clearly placed the casting of a ballot within the regulated sphere of activities, thereby removing it from the sphere of unregulated conduct guaranteed as freedom of expression. The right to vote having been expressly provided for under the Constitution, cannot be sought to be established by implication from freedom of expression.

The right to vote is a creature of legislation and the conditions for its exercise are a result of a State intervention. The casting of a ballot is clearly a regulated activity. The applicants are making claim to a mechanism that would make the casting of the ballot easier and convenient to them. There is not a claim of non-interference by the State but a demand for State assistance to make the exercise of the right to vote easier. The claim has nothing to do with the freedom of expression, the enforcement of which is protected against infringement by the State under s 20(1) of the Constitution.

Even under international human rights instruments the "right to vote" is proclaimed as a distinct and separate right from freedom of expression. In the Universal Declaration of Human Rights (1948) the right to freedom of opinion and expression is recognised under Article 19 whilst the right to vote is proclaimed in Article 21. The International Covenant on Civil and Political Rights (1966) recognises the right to freedom of expression under Article 19, whilst the right to vote is under Article 25. Constitutions of other countries adopt the same framework. The Constitution of the Republic of South Africa (1996), for example, provides for the right to freedom of expression in s 16(1), whilst the right to vote in elections for any legislative body established in terms of the Constitution is proclaimed under s 19(3)(a).

The clear distinction between the right to vote as prescribed under s 3 of Schedule 3 of the Constitution and freedom of expression as guaranteed under s 20(1) of the Constitution should not be blurred, as the two values serve different purposes. The primary purpose of the right to vote is to secure for a voter effective representation in government. The purposes of freedom of expression on the other hand have been stated as being -

1. seeking and attaining the truth;
2. participation in social and political decision-making; and
3. cultivation of diversity in forms of individual self-fulfilment and human flourishing in an essentially tolerant environment not only for the sake of those who convey a meaning but also for the sake of those to whom it is conveyed.

See *Carter v Saskatchewan* (AG) (1992) 5 CRR 1 at p 9; *Irwin Toy supra* at p. 234; *In re Munhumeso & Ors* 1994(1) ZLR 49(S) p 57 A.

As already pointed out, in claiming the right to cast a ballot in the election as freedom of expression the applicants sought to elevate the right to vote to a constitutionally guaranteed and entrenched right. The right to vote is not one of the fundamental human rights in our Constitution. It is true that Zimbabwe is a constitutional democracy and that the right to vote is of the essence of a democratic system of Government. In *Haig v Canada* 16 CRR 193 CORY J was of the view that the right to vote was synonymous with democracy. He said at p 227:

"All forms of democratic government are founded upon the right to vote. Without the right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is a proud badge of freedom."

Notwithstanding its importance to democracy the right to vote is, anomalously, not guaranteed as a fundamental human right. The framers of the Constitution were influenced at the time by legal thinking on the nature of voting rights. In *Hipperson v Electoral Officer* [1985] 2 All ER 456 SIR JOHN DONALDSON MR remarked on the nature of the right to vote at p 458C:

“Voting rights lie at the root of Parliamentary democracy. Indeed many would regard them as a basic human right. Nevertheless they are not like the air we breathe. They do not just happen. They have to be conferred or at least defined and the categories of citizens who enjoy them have also to be defined. Thus no one would expect a new-born baby to have voting rights or that citizens could vote in all constituencies or in that of their unfettered choice.”

In 1982 REDDY J made the observation in the case of *Jyoti Basu v Bebi Ghosa* [1982] 3 SCR 318 that under the Indian Constitution:

“A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right.”

On the other hand freedom of expression has been recognised and guaranteed as one of the fundamental human rights to which every human being is by nature entitled wherever and whenever born. It is a guaranteed birthright. Many countries have since guaranteed the right to vote as a fundamental human right. Examples of such countries are Namibia, South Africa, Canada and the United States, to name but a few.

It was improper for the applicants to seek to invoke a guarantee under s 20(1) of the Constitution to enforce a right not constitutionally protected as a fundamental human right. Theirs was not a claim for freedom or liberty.

The last reason why this application must fail is that the respondents are not under any legal duty to conduct the election. They are not responsible for the conduct of the election. If they were responsible for the conduct of the election they would still be acting lawfully in not providing the applicants with the machinery to record their ballot. This is because there is no law imposing such a duty on any authority responsible for the conduct of elections. In the circumstances the Court would not have power to order the respondents to act unlawfully. The provisions of the law properly construed do not bear out the relief claimed by the applicants.

The application was accordingly dismissed with no order as to costs.

CHIDYAUSIKU CJ: I agree.

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

GWAUNZA JA: I agree.

Kantor & Immerman, applicants' legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners