

IN THE HIGH COURT OF ZIMBABWE

CASE NO HC /18

HELD AT HARARE

In the matter between: -

ABRAHAM MATETA

APPLICANT

And

ZIMBABWE ELECTORAL COMMISSION

1ST RESPONDENT

And

MINISTER OF JUSTICE,

LEGAL AND PARLIAMENTARY AFFAIRS

2ND RESPONDENT

And

ATTORNEY GENERAL

3RD RESPONDENT

APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

1. Applicant is seeking this Court to issue an order compelling:
 - a) 1st Respondent to urgently put in place measures to print ballot papers in braille or to print the template ballot or to provide tactile voting devices, and make them available for use by him and other visually impaired voters who wish to vote by secret ballot in the impending 2018 general election and;
 - b) 2nd and 3rd Respondents to ensure that the necessary amendments to the Electoral Law are made in order to give effect to the right of visually impaired persons to vote in secret/by secret ballot in all elections that will be held in Zimbabwe in terms of the Constitution. The legislative amendments must be effected not later than 31 December 2018.
2. 1st Respondent has not filed its notice of opposition while 2nd Respondent is being represented by 3rd Respondent.

ISSUES TO BE DECIDED UPON BY THIS COURT

3. It is important to state from the outset that the Respondents have raised no issues regarding Applicant's *locus standi* and the approach taken by Applicant to file an urgent court application. Notwithstanding this, it may be important to state that:
 - i. The procedure used by Applicant to approach this Court is based on the ruling by this Court recently in *Andrew John Pascoe v Ministry of Lands and Rural Resettlement* HH 391-17 where at page 3-5, Foroma J emphasized that applications of this nature are to be filed as urgent court applications rather than urgent chamber applications.
 - ii. The requirements for a matter to be treated as urgent have been enumerated by Chigumba J in *Constable Jani 985403P v ZRP Officer in Charge Mamina*.¹ As argued by Applicant is his founding Affidavit², he meets all those requirements. The only aspect to emphasise is that the attitude demonstrated by 2nd Respondent warrants this Court to put its foot down and protect Applicant's right to vote by secret ballot in the impending general election and in all subsequent elections.
4. No issue has also been raised against Applicant's claim that as an interim measure, the Zimbabwe Electoral Commission must be ordered to print ballot papers in braille or to print the template ballot or to provide tactile voting devices and make them available for use by Applicant and other visually impaired voters who wish to vote by secret ballot in the impending 2018 general election. However it may be important to state that 1st Respondent is bound to respect, protect and fulfil the rights enshrined in the Declaration of Rights.³ Therefore there is a clear constitutional duty on 1st Respondent to protect and fulfil Applicant's right to vote by secret ballot.
5. Even though there is no legislation in place which expressly empowers ZEC to print ballots in braille or to provide tactile voting devices, 1st Respondent is empowered by section 239 (a) (i) of the Constitution to:

¹ HC 4289/15) [2015] ZWHHC 550 at page 6 as follows: ""A matter will be deemed urgent if (a) the matter cannot wait at the time when the need to act arises; (b) Irreparable prejudice will result, if the matter is not dealt with straight away without delay; (c) There is *prima facie* evidence that the applicant treated the matter as urgent; (d) Applicant gives a sensible, rational and realistic explanation for any delay in taking action; (e) there is no satisfactory alternative remedy."

² See paragraph 13 (a)-(d) of Applicant's founding affidavit

³ See section 44 of the Constitution of Zimbabwe, 2013

prepare for, conduct and supervise-- i. elections to the office of President and to Parliament;...and to ensure that those elections and referendums are conducted efficiently, freely, fairly, transparently and in accordance with the law;[My own emphasis]

6. As part of discharging this function, ZEC is mandated by section 239 (g) of the Constitution to:

design, print and distribute ballot papers, approve the form of and procure ballot boxes, and establish and operate polling centres;[My own emphasis]

7. Applicant submits that the import of section 239 (a) when read together with (g) above is as follows:

- i. ZEC is required to ensure that elections are conducted in accordance with the Constitution. The term “law” in section 239 (a) means “*any provision of [the] Constitution or of an Act of Parliament*” (See section 332 of the Constitution). There is no legislation which says ballot papers can be printed in braille but there is also no legislation which prohibits ZEC from printing ballot papers in braille.
- ii. The Constitution (which is supreme to legislation anyway⁴) gives ZEC general and broad power “*to design and print ballot papers.*”⁵ In the present circumstances where legislation is silent on whether ballot papers can be printed in braille or not, this Court must interpret the power “to design and print ballot papers” to include designing those ballots in a manner that is readable to every voter, including the visually impaired/blind. Thus, although legislation is silent, section 239 (g) of the Constitution gives ZEC the mandate to print some of the ballots in braille.
- iii. The interpretation advanced above is also supported by section 46 of the Constitution which is not only applicable to interpretation of the Declaration of Rights but is also applicable when interpreting the rest of the Constitution.⁶ Per the various judgments of the Constitutional Court,⁷ provisions of law should be

⁴ See section 2 (1) of the Constitution of Zimbabwe, 2013

⁵ See section 239 (g) of the Constitution of Zimbabwe, 2013

⁶ See section 331 of the Constitution of Zimbabwe.

⁷ See **Madzimbamuto v Registrar General** [2014] ZWCC 5 at page 5 where Ziyambi JCC said: “*This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and*

interpreted in a manner which gives full effect to the rights enshrined in the Constitution. The Constitution guarantees Applicant the right to vote by secret ballot and therefore the power of ZEC to “design and print ballot papers” should be interpreted to include the power to print some of the ballots in braille in order to allow visually impaired voters to exercise their freedom to vote by secret ballot. If the legislature wanted to prohibit ZEC from printing the ballots in braille, the Electoral Act would have precisely stated so. In these circumstances, it is appropriate that this Court can compel ZEC to print some of the ballot papers in braille.

8. It is also critical to state that, even though there is no legislative provisions which expressly empower ZEC to print ballots in braille and or provide tactile voting devices, this Court is mandated by section 85 (1) of the Constitution to fashion and issue any relief that is appropriate for the protection of constitutional rights. On this point, a Zimbabwean constitutional law scholar Justice Mavedzenge said at page 60 of his book⁸:

Appropriate relief therefore constitutes any suitable remedy that is just and equitable. Where a breach of any right has taken place or is imminent, a court is under duty to ensure that an effective relief is granted.... In some cases, more innovative remedies may have to be developed to vindicate the constitution.

9. Mavedzenge’s views above are in synch with the position taken by this Court in previous cases.⁹ In particular, they are consistent with Mathonsi J’s decision in *Peter Makani v Epworth Local Board*¹⁰ (at page 5) where he said this Court will not fail to enforce fundamental rights simply because there is no legislation to give effect to the right. The Court will enforce the Constitution directly, said the learned judge and jurist.¹¹ Courts in comparative jurisdictions have taken a similar position to the effect

pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits, should be narrowly or strictly construed.” Also see Garwe JCC’s decision in **Mutumwa Mawere v Registrar General** [2015] ZWCC 04 at paragraph 20

⁸ A *Constitutional Law Guide Towards Understanding Zimbabwe’s Fundamental Socio-economic and Cultural Human Rights* (2014)

⁹ See for instance *Farai Mushoriwa v City of Harare* HC 4266/13 at pages 5-6

¹⁰ HH 550-14

¹¹ *Ibid*

that they will fashion remedies to protect rights when they are in danger.¹² Applicant therefore submits that this Court has power to protect his rights and should issue the requested order.

10. Having now addressed issues pertaining to the 1st Respondent, Applicant now turns to addressing issues pertaining to 2nd and 3rd Respondents, who in any case are the only respondents who have filed notice of opposition to this Application.

11. Upon reading 2nd and 3rd Respondents' notice of opposition, it is apparent that they have conceded to most of the claims made by Applicant, and they raise only three questions for consideration by this Court and these are:

- a) Whether the Electoral Act (as it is currently) has adequate measures to give effect to the right of visually impaired and blind voters to vote by secret ballot?
- b) Whether Applicant should have petitioned Parliament with his grievances instead of approaching this Honourable Court?
- c) Whether the relief sought by Applicant is appropriate?

12. Applicant addresses these questions separately in the paragraphs below.

Whether the Electoral Act has adequate measures to give effect to the right of visually impaired and blind voters to vote by secret ballot?

13. Both 2nd and 3rd Respondents aver that the Electoral Act has adequate measures to give effect to the right of visually impaired and blind voters to vote by secret ballot.¹³ Applicant disputes this claim. The only provision which seems to cater for the needs of visually impaired/blind voters is section 59 of the Electoral Act. It reads as follows:

Voting by illiterate or physically handicapped voters

(1) Upon request by a voter who is illiterate or physically handicapped and cannot vote in the way set out in section 57, a presiding officer shall—

(a) permit another person, selected by the voter, to assist the voter in exercising his or her vote; or

¹² See for instance the decision of the Constitutional Court of South Africa in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at paragraph 19.

¹³ See paragraph 3 and 5.1 of the Notice of Opposition

(b) in the absence of a person selected by the voter, assist the voter in exercising his or her vote in the presence of two other electoral officers or employees of the Commission and a police officer on duty.

14. The import of the above is that a visually impaired or blind voter is entitled to bring a person of their choice, who will assist them to mark and cast the ballot paper. This is to be done in the presence of the presiding officer.
15. Essentially, the measures provided for under the Electoral Act allow visually impaired/blind voters to be assisted to mark and cast the ballot paper. These measures do not in any way give the blind or visually impaired voters the option to exercise their constitutional freedom to mark and cast the ballot paper on their own, without being assisted by another person.
16. Applicant submit with respect that, 2nd and 3rd Respondents are conflating the right to be assisted to vote and the right to exercise the freedom to vote by secret ballot. Currently, the Electoral Act gives effect to the right to be assisted to vote and says nothing about the right of visually impaired/blind voters to vote by secret ballot.
17. The freedom to vote by secret ballot is constitutionally guaranteed and it implies that if a visually impaired/blind voter wants to vote by secret ballot, he or she must be allowed to do so and the Electoral Law must provide for measures to allow and enable voters to exercise that freedom.¹⁴

Whether Applicant should have petitioned Parliament with his grievances instead of approaching this Honourable Court?

18. 2nd and 3rd Respondents argue that Applicant should not have approached this Court but should have petitioned Parliament in terms of section 149 (1) of the Constitution of Zimbabwe.
19. Applicant acknowledges that he has the right to petition Parliament in terms of the said provision. But he also has the right to petition this Court if he believes that any of his constitutionally guaranteed rights is being or is likely to be violated. The right to petition this Court is given to Applicant by section 85 (1) of the same Constitution. Applicant's constitutional freedom to vote by secret ballot is likely to be violated and that is why he is petitioning this Court.

¹⁴ This is apparent from the reading of section 67 (3) (a) of the Constitution of Zimbabwe, 2013. Also see section 155 (1) (b) of the same Constitution.

20. 2nd and 3rd Respondents also argue that there is nothing before this Court which shows that Applicant has sought but failed to petition Parliament to enact the necessary amendments to the Electoral Act.¹⁵ In response, Applicant submits to this Court that whilst it is true that he has the right to petition Parliament, he does not have a duty to do so before he can approach this Court for vindication of his rights when they are in danger. The position regarding Applicant's right to approach courts for the protection of constitutional rights has been made very clear by the Constitutional Court in *Jealousy Mawarire v Robert Mugabe*¹⁶ and *Loveness Mudzuru v Minister of Justice, Legal and Parliamentary Affairs*.¹⁷

Whether the relief sought by Applicant is appropriate?

21. 2nd and 3rd Respondents raise issues against *Paragraphs 1 and 4* of the Draft order.¹⁸

They argue that this Court cannot issue the declaratory order requested by Applicant, and they also argue that this Court cannot issue an order compelling the Executive to enact legislative amendments.

22. Applicant has already demonstrated to this Court that the Electoral Act does not provide for any measures to give effect to his freedom to vote by secret ballot. The legislation is silent on how this right is to be implemented. Therefore it is appropriate for this Court to issue a *declaratur* to the effect that the absence of such measures in the Electoral law is a violation of Applicant's section 67 (3) (a) constitutional freedom to vote by secret ballot.

23. The only concern to be dealt with is Respondents' counter-claim that this Court cannot compel the executive to enact laws. With respect, Applicant submits that the Respondents have missed the point. Paragraph 4 of the Draft Order reads as follows:

2nd Respondent is ordered to ensure that the necessary legislative and administrative measures are put in place by no later than 31 December 2018, to give effect to the right of the blind or visually impaired voters to vote by secret

¹⁵ See paragraph 5.2 of the Notice of Opposition.

¹⁶ [2013] ZWCC 1 at page 5 where Chidyausiku CJ said: "*Certainly, this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat...*" [My own emphasis]

¹⁷ [2015] ZWCC 12 at page 8 where Malaba DCJ (as he then was) said: "*The right to approach a court directly seeking appropriate relief in cases arising from alleged infringement of a fundamental human right or freedom enshrined in Chapter 4 of the Constitution is given to the persons specified under s 85(1) of the Constitution*"

¹⁸ See paragraph 5.1 of the Notice of Opposition

ballot in all elections to be held in terms of the Constitution of Zimbabwe. [My own emphasis]

24. Applicant is aware of the separation of powers between the Executive and the Legislature. Applicant is seeking an order compelling 2nd Respondent to play its role to “ensure” that amendments are made by 31 December 2018.
25. Applicant refers this Court to the 5th Schedule of the Constitution of Zimbabwe. Section 3 (c) of the 5th Schedule provides that a Minister may introduce a Bill in Parliament. 2nd Respondent is the cabinet minister responsible for the administration of the Electoral Act. It is his responsibility to initiate and introduce a bill to Parliament, which seeks to provide for the measures necessary to give effect to Applicant’s constitutional right.
26. Further, it is critical to note that 2nd Respondent is the chair of the Inter Ministerial Task Team (IMT), which is a committee of cabinet ministers who are charged with the responsibility to initiate legislative amendments in order to realign legislation with the Constitution. 3rd Respondent (as chief legal advisor to Government) is a member of the IMT. The establishment of the IMT is testament to the fact that Government’s preferred route of realigning legislation with the Constitution is by way of cabinet ministers initiating and introducing bills to Parliament. This means that Parliament can only debate and enact into law bills which are introduced to it by the cabinet ministers. This is very much in line with section 3 (c) of the 5th Schedule of the Constitution. If this is the route/policy which the Executive and Government has chosen, then 2nd and 3rd Respondents must accept to be held accountable on the basis of their policy. 2nd and 3rd Respondents can therefore not enjoy the pleasure of choosing a policy while at the same time they refuse to take responsibility.
27. For quite some time and on many occasions, 2nd Respondent made public pronouncements promising to bring to Parliament a bill to amend the Electoral Act, before the 2018 elections. Pursuant to this promise, 2nd respondent initiated a Bill which seeks to introduce wholesale amendments to the Electoral Act. This Bill has since been passed by Parliament and awaits the President to assent. Applicant was anticipating that as part of this Bill, 2nd Respondent would include measures to give effect to his right to vote by secret ballot. 2nd Respondent has not done that and this Bill does not suggest any such measures.
28. Applicant is aware that 2nd Respondent does not enact amendments. This is the province of the Legislature. Applicant is simply arguing that 2nd Respondent has an obligation to initiate and introduce a bill to Parliament which suggests measures to give effect to

Applicant's constitutional right. For the avoidance of doubt, 2nd Respondent's obligation to do this arises from:

- i. The fact that he is the minister responsible for the administration of the Electoral Act and is therefore charged with the responsibility of initiating bills to realign the Act with the Constitution, in terms of section 3 (c) of the 5th Schedule to the Constitution. It is critical to state that both 2nd and 3rd Respondents concede to this claim in its notice of opposition.¹⁹
- ii. Government policy on the realignment of legislation, as signified by the establishment of the IMT requires 2nd Respondent to initiate and introduce the said bill.

29. In any event, the answer to the question whether this Court can grant Applicant's request depends on whether Applicant has presented a case which meets the requirements of a mandatory interdict. According to a series of judgments handed down by this Court²⁰, these requirements are:

- i. Applicant must have a clear right
- ii. There must be a reasonable apprehension of irreparable harm on Applicant's right if the interdict is not granted.
- iii. There must be no other remedy which can adequately vindicate Applicant's right
- iv. The balance of convenience must be in favour of granting the interdict

30. In his founding Affidavit, Applicant has explained how his case meets all the above stated requirements.²¹ The only aspect to emphasise on is that 2nd Respondent has a clear duty to initiate a bill which seeks to introduce legislative measures that give effect to Applicant's right and therefore must be compelled to fulfil its duties without delay and not later than 31 December 2018.

31. It is therefore appropriate that this Court should make a finding to the effect that:

- i. The absence of legislative and other measures to allow the blind or visually impaired voters to exercise their freedom to vote by secret ballot is a violation of sections 67 (3) and 56 of the Constitution of Zimbabwe of 2013

¹⁹ See paragraph 5.2 of the Notice of Opposition

²⁰ See decision handed down by Chigumba J in *Constable Jani 985403P v ZRP Officer in Charge Mamina* (HC 4289/15) [2015] ZWHHC 550 at pages 6-7. Also see Mafusire J's decision in *Masango v Minister of Primary & Secondary Education* (HMA 07-17 HC 51/17) [2017] ZWMSVH 07 at page 3.

²¹ See paragraphs 25 (a) to (d) of Applicant's Founding Affidavit

- ii. 1st Respondent must immediately put in place administrative measures to ensure that ballot papers printed in braille or template ballots or tactile voting devices are made available for use by the blind or visually impaired voters who wish to vote by secret ballot in the 2018 general election.
- iii. 2nd Respondent must without delay and no later than 31 December 2018, bring to Parliament a bill which seeks to provide for measures to ensure that visually impaired/blind voters can exercise their freedom to vote by secret ballot.

Dr. Justice A Mavedzenge & Dr. Innocent Maja

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