AMANI TRUST

Neither Free nor Fair: High Court decisions on the petitions on the June 2000 General Election.

A report prepared by the Mashonaland Programme of the AMANI Trust.

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1. Introduction

This monograph focuses on the electoral irregularities, including gross human rights abuses, during the period preceding the June 2000 Parliamentary elections. This election marked the first time a strong opposition party, the Movement for Democratic Change (MDC), had challenged the ruling Zimbabwe African National Union – Patriotic Front (Zanu (PF)) in the political arena. In the General Election the MDC won 57 out of 120 contested seats but the price paid for these democratic gains was high. This was perhaps the most violent election in Zimbabwe's history, with killings, wide scale torture, threats and intimidation and property damage around the country. The organised violence and torture continued through the various bye-elections held in 2000 and 2001.

Following the General Election, the MDC brought legal challenges to the High Court of Zimbabwe in 38 constituencies in an effort to contest the election results in those areas. They alleged that the violence perpetrated by Zanu (PF) agents, with the knowledge or active participation of the Zanu (PF) candidate at the time, unfairly affected the outcome of the vote in these constituencies, and thereby violated the Electoral Act of Zimbabwe. The MDC asked in their petitions that the results be overturned, and that elections be held again in these 38 constituencies. The MDC additionally requested that, if any member of parliament was found guilty of election misconduct, that member be rendered ineligible to run for public office for five years.

The trial of 39 cases (Zanu (PF) submitted one case as the petitioner) began in February 2001, and, by December 2001, 15 petitions had been heard by a High Court Judge, and eight cases cancelled or withdrawn. First hand testimony was documented from all the election petition cases that were heard in the High Court of Zimbabwe from February to October 2001. A majority of data included in this chapter is based on the testimony from the 15 completed election petitions. Certain testimonies might additionally include excerpts from medical assessments that were performed by medical staff that had expertise with trauma victims.

This monograph concentrates upon the court hearings and the court decisions. It outlines the pleadings of the plaintiff-petitioners - the Movement for Democratic Change (MDC), the defence offered by the respondents – Zanu(PF), and the decisions of the High Court judges.

The fact that the election petitions were heard in the High Court is historic. Testimony about gross human rights violations is uncommon in the Zimbabwean courts, and even less common are testimonies about gross human rights violations in respect of election irregularities. For this reason, the AMANI Trust, together with the Legal Resources Foundation, felt obliged to use this opportunity to support the victims in their attempts to make public their experiences, as well as to use the opportunity to validate the many allegations of torture in the legal arena. This position was also supported by the Zimbabwe Human Rights NGO Forum.

For the MDC, the election petitions had three main goals. Firstly, to ensure that the stories of the victims were heard by the nation; the intention here was to ensure that the historical record was made complete. Secondly, the court hearings would combat the prevailing climate of impunity in Zimbabwe. That the Government was discomforted by the possible implications of the election petitions and the supporting testimonies was evident from both the passing of a Presidential Pardon in October 2000, as well as the attempt to vitiate the petitions by an amendment to the Electoral Act by the President using Presidential Powers in December 2000. This latter effort was thrown out by the Supreme Court, but the amnesty stayed and prevented the prosecution of many perpetrators under the criminal law. Such prosecutions would have had a very important consequence for the election petitions. Thirdly, there was the hope that the results might be overturned by the Courts, and, since such verdicts would justify the claims of an unfair election, to allow the voters the opportunity to elect the member of Parliament of their choice free from fear or irregularity.

This monograph is based on detailed observation of the election petitions held in the High Court of Zimbabwe, as well as testimonies available from victims seen during the General Election and the subsequent bye-elections. A team of researchers attended all the court hearings, making notes of all proceedings, as well as studying the case notes held by the AMANI Trust and the Zimbabwe Human Rights NGO Forum. There is a companion monograph on the violence[i], and both monographs, together with additional material, will shortly be consolidated into a book. As will be seen, the report corroborates many of the earlier reports of the Zimbabwe Human Rights NGO Forum[ii], as well as the reports of international human rights organisations[iii].

[i] **See** AMANI TRUST (2002), Organised Violence and Torture in the June 2000 General Election in Zimbabwe, HARARE: AMANI TRUST.

[ii] **See** ZIMBABWE HUMAN RIGHTS NGO FORUM (2000), Who is Responsible? A Preliminary Analysis of Pre-election Violence in Zimbabwe, HARARE: ZIMABWE HUMAN RIGHTS NGO FORUM; ZIMBABWE HUMAN RIGHTS NGO FORUM (2000), Report on Pre-election Violence in Mberengwa, HARARE: ZIMABWE HUMAN RIGHTS NGO FORUM.

[iii] **See** AMNESTY INTERNATIONAL (2000),Zimbabwe: Terror tactics in the run-up to the parliamentary elections, June 2000, LONDON: AMNESTY INTERNATIONAL. **See also** IRCT (2000), Organised Violence and Torture in Zimbabwe, Harare and Copenhagen, 6th June 2000, COPENHAGEN: IRCT.

2. The constitution

The constitution of Zimbabwe, including a Declaration of Rights (Articles 11-12), was inherited in 1980 from the former white-minority regime that had lost the 1970's civil war. The end of white-minority rule was supposed to have heralded the establishment of multi-racial democracy and the realization of political, social and economic self-determination for all Zimbabweans, regardless of race or ethnic origin.

During colonial and white-minority rule, a justiciable set of individual rights did not exist for all the country's inhabitants. Indeed, the white settler regime of Rhodesia had constructed their political system around the entrenchment of political power in the hands of the white population. To ensure this, laws were put into place that valued the rights, liberties and aspirations of the white minority over those of the black majority. In effect, a hierarchy of rights was created where one set of rights (for whites) insidiously undercut a secondary set of rights (for blacks.)

Independence should have provided the opportunity to strengthen individual rights that had been lacking during the Rhodesian era. However, the constitution still retained its colonial inheritance. Indeed, for the first ten years of independence, a state of emergency made it impossible for the courts to enforce certain rights- such as liberty, movement, speech, assembly and association. Furthermore, until 1985, section 26(3) exempted all existing law from court scrutiny in regard to the Declaration of Rights. Existing Rhodesian legislation exempt under this clause extensively derogated individual freedoms.

Even after the state of emergency lapsed in the 1990's, the State still maintained laws that were offensive to the principle of civil and political liberties. The worst of these was the Law and Order (Maintenance) Act, promulgated by the white minority government in the 1960s to suppress black nationalist dissent against their racialized system of laws. This law has today been effectively and cynically used against the ruling party's opposition, much in the same way the Smith regime had used it against its own opponents. Rather than amend the constitution to remove such offensive and anomalous legislation to increase or ensure individual entitlements, the government has made many amendments since independence that have taken away or encroached on entitlements that are supposedly guaranteed in the Declaration of Rights. However, the power of the Law and Order (Maintenance) Act has been substantially eroded over the years by a number of Supreme Court decisions. These decisions have been corrected by the widespread use of Constitutional amendments, and the most recent passing of the Public Order and Security Act, an act that has been condemned both by local civil society and the international community.

The Declaration of Rights

The Declaration of Rights is a set of basic individual rights that are by law entitled to all Zimbabweans. Many of these rights were adopted from the universally accepted individual rights derived from international covenants as well as the Universal Declaration of Human Rights. The rights guaranteed are: the right to life, and personal liberty; the protection of the law, including right to fair trial and to be presumed innocent; freedom of movement, conscience, expression, association and assembly; protection from arbitrary search and entry, inhumane treatment, slavery or forced labour, deprivation of property, and protection from discrimination on grounds of colour, creed, tribe, gender, place or origin or political opinion.

Although, no law or action may be made which will derogate from these rights, these rights are qualified by a general claw-back clause. This claw-back clause, or limitation, states, "limitations [are] designed to ensure that the enjoyment of…rights and freedoms by any person <u>does not prejudice the public interest</u> or the rights and freedoms of other persons." (Preamble) This allows the government some room for interpretive discretion, especially when defining what is in the public interest. This perhaps opens the door for the deprivation of rights.

Recently, the protection of property rights has been severely infringed upon in the government's pursual of its controversial land-reform policies.

The Electoral Act

The legal framework for elections is provided in the constitution, mainly from the Electoral Act, though it is also guided by the principles behind the Declaration of Rights. For the purpose of this work, the portion of the Electoral Act that will concern us is how the Act defines the grounds under which an election may be nullified.

The Act defines corrupt practices; that is, acts committed by candidates or their agents that would result in the forfeiture of an election outcome. These include treating, undue influence, bribery, impersonation and illegal transportation of voters. Undue influence is the most important of these. It defines someone who is guilty of undue influence as:

> Any person who, directly or indirectly, by himself or with any other person-
> - Makes use of or threatens to make use of any force, violence or restraint or any unnatural means whatsoever upon or against any person; or
> - Inflicts or threatens to inflict by himself or by any other person any temporal or spiritual injury, damage, harm, or loss upon or against any person; or
> - Does or threatens to do anything to the disadvantage of any person;
> - In order to induce or compel that person…to vote or refrain from voting…
> - Any person who by abduction, duress, threats to invoke any unnatural means whatsoever or references to such unnatural means or by fraudulent device or contrivance-
> - Impedes or prevents the exercise of his vote by a voter; or
> - Compels, induces or prevails upon a voter either to vote or to refrain from voting at an election

The June 2000 parliamentary elections witnessed a massive campaign of violence and intimidation. In effect, the government hoped to apply as much "undue influence" on the electorate necessary to ensure their own victory at the polls[iv].

[iv] **See** AMANI TRUST (2002), Organised Violence and Torture in the June 2000 General Election in Zimbabwe, HARARE: AMANI TRUST.

3. The petitions and the judiciary

The National Democratic Institute states that "the exercise of the right to democratic elections cannot be realized without the exercise of related fundamental human rights, including the right to freedoms of opinion, expression (including to seek, receive and impart information), association, assembly, movement, equality before the law and due process of law (including equal protection of the law and to an effective remedy for violations of rights), as well as to life, liberty and security of the person (UDHR Article 19). These rights are not only applicable in Zimbabwe through international obligations; they are applicable directly through the constitution of Zimbabwe (Articles 11-26, The Declaration of Rights.)[v]

The Harare Declaration of 1991, adopted by Commonwealth heads, equally supports this view. It states:

We believe in the liberty of the individual under law, in equal rights for all citizens…and in the individual's inalienable right to participate by means of free and democratic political processes…[we believe in] democracy, democratic processes…the rule of law and the independence of the judiciary, [and] just and honest government.[vi]

Furthermore, the Southern African Development Community (SADC) committed itself in its founding declaration to the promotion and strengthening of "democracy and good governance, respect of the rule of law and the guarantee of human rights."[vii]

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[v] Statement of the National Democratic Institute (NDI) Pre-Election Delegation to Zimbabwe, p.3-4
[vi] Harare Declaration, Commonwealth Heads of Government Meeting (CHOGM), Harare, 1991
[vii] Towards the Southern African Development Community, A Declaration by the Heads of State or Government of Southern African States, Windhoek, 1992
[viii] Statement of the National Democratic Institute (NDI) Pre-Election Delegation to Zimbabwe, p.3-4
[ix] Harare Declaration, Commonwealth Heads of Government Meeting (CHOGM), Harare, 1991
[x] Towards the Southern African Development Community, A Declaration by the Heads of State or Government of Southern African States, Windhoek, 1992

The High Court Judges

Initially at the commencement of the election petition cases, three High Court judges were assigned to preside over them: Judges James Devittie, Paddington Garwe, and Vernanda Ziyambi.

Justice Ziyambi was the first to hand down a judgment, in favor of Zanu (PF) in the Zvishavane case. Justice Devittie announced four decisions at once: Buhera North, Hurungwe East, and Mutoko South in favor of the MDC, and Shurugwi in favor of Zanu (PF). However, shortly after announcing theses decisions Judge Devittie resigned from the bench, amidst speculation that he had been threatened by the government and by the war veterans' association. Justice Ziyambi later released judgments on Chiredzi North and South, in favor of MDC and Zanu (PF) respectively. She was then appointed to the Supreme Court later in the year, and discontinued hearing the election petition cases. However, she had been promoted in the midst of presiding over the Seke case, and returned to the High Court late in October 2001 to release her judgment, in favor of Zanu (PF).

Justice Garwe was appointed Judge President of the High Court in August, but did not officially discontinue hearing election petition cases. Garwe J. had presided over three cases: Chinhoyi, in which he decided in favor of Zanu (PF); Makoni West, in which Minister Mahachi died so that the case, though complete, was not decided upon; and Makoni East, in which he still has reserved judgment.

Due to the promotions of Ziyambi and Garwe, Judges Benjamin Hlatshwayo and Rita Makarau were assigned to the election petitions, and split Ziyambi's caseload. As of January 2002, Justice Hlatshwayo had not released judgments in any of his cases.

Witnesses

Many witnesses who testified in the election petitions were residents from rural communities, and were unfamiliar with the legal system. Those who had experienced torture and other crimes could be seen to be still traumatized by their victimization, as evidence by their testimony and the tenor of it. Some were MDC supporters who were only card-carrying members who attended membership meetings and only had membership cards. Others were officeholders or held other leadership positions in the MDC. Other witnesses were unaffiliated with MDC, or just related to MDC members. Testimony is also related in which children were violently attacked.

Though witnesses were not sophisticated regarding their court experiences, many were strong though the officers of the court and the surroundings were intimidating. Witnesses were sometimes thoroughly badgered, harassed, and yelled at on the stand by the respondent's attorneys. This would occur unchecked by the judges and it is to the credit of the witnesses that they were able to handle the pressure of testifying[xi].

Witness Intimidation

However, the victimization did not cease after the election period. Some witnesses were intimidated, threatened, and assaulted before and after they testified in the election petition cases.

The intimidation of witnesses has not ended. In Murehwa North, the witness testified in the election petition that she had been intimidated before she was to appear in court. Two witnesses in Mount Darwin South and Makoni West were threatened after their election petition cases had begun, and reported it to medical staff when they were assessed.

[xi] The effects of testifying will be covered in a subsequent publication. The AMANI Trust has undertaken a study of the effects of testifying on victims of organised violence and torture.

4. Status of Cases

The full status of the petitions is given in Appendix A.

Completed Election Petitions

Fifteen election petitions were completed by January 2002; there were verdicts in 10 petitions. Five election petitions were still waiting for a verdict: **Goromonzi, Makoni East, Mberengwa West, Mount Darwin South, and Murehwa North**. The **Makoni West** election petition was completed but did not yield a verdict due to the death of the Zanu (PF) Minister of Defence, Moven Mahachi, in an auto accident in May. A by-election was conducted in Makoni East in 2001.

Postponed Election Petitions

Following an order handed down by Judge Vernanda Ziyambi, the verification of all voting materials in **Marondera East**, including a recount of all ballots, began in May. Despite this order, the Registrar-General failed to deliver all twelve ballot boxes on time, forcing officials to rush back to Marondera to fetch the seven boxes that had been left behind. Upon examination, postal ballots from Chikomba had been discovered with the Marondera East ballots. ZANU (PF) blamed human error. The case was postponed.

Withdrawn Election Petitions

Judge Rita Makarau dismissed the **Chivi North** case because MDC candidate and petitioner Bernard Chiondengwa, did not appear in court on the opening day of the case. Judge Makarau had ruled that, if within three weeks the petition was taken on by a voter in the constituency or another person representing Chiondengwa, then the petition could move forward; however no one came forward. MDC candidate in **Zaka West** Charles Musimiki withdrew his petition against ZANU (PF) MP Jefta Chindanya. Newspaper reports stated that Musimiki has left the MDC and rejoined ZANU (PF). He was quoted as saying that he was frustrated with the MDC's lack of commitment to individual constituencies and its land policy. However, MDC Information Secretary Learnmore Jongwe stated that Musimiki told him he was offered Z$800,000 (US$14,545) and a job by ZANU (PF) to rejoin the party. Musimiki denied the allegations. The **Chegutu, Gokwe East**, **Gutu North** and **Masvingo South** petitions were withdrawn without explanation.

Cancelled Election Petitions

Bindura and Chikomba were cancelled because of the death of the respondent in both cases. Chenjerai Hunzvi, Zanu (PF) candidate in **Chikomba**, and the leader of the war veterans' association who supported the use of violence died in May after a bout of malaria. Border Gezi, the Zanu (PF) candidate for **Bindura**, a member of the Zanu (PF) politburo and the Minister for Gender, Youth Employment, Education, perished in a car accident in May. By-elections were held in both of these constituencies in September 2001.

Constituency Descriptions

All nine provinces in Zimbabwe experienced violence during the pre-election period to varying degrees. The following is a breakdown of constituencies by province of the election petition cases that the MDC brought to the High Court. (For a detailed listing for each of these constituencies, including voter turnout and results, please see Appendix B.)

Harare	0
Manicaland	3
Mashonaland Central	7
Mashonaland East	8
Mashonaland West	4
Masvingo	7
Matabeleland North	0
Matebeleland South	0
Midlands	9

Of the cases that were brought to the High Court, a majority of 19 were from the Mashonaland provinces of Zimbabwe, in the north-eastern part of the country. This part of the country has historically been a Zanu (PF) stronghold and violence was concentrated there during the Liberation War. Eleven of the murders that took place during the pre-election period were in the Mashonaland provinces, with nine in Mashonaland Central. This province on the whole experienced the most violence in the pre-election period. One of the cases from **Mashonaland Central** was **Mount Darwin South**, in which there were several horrifically brutal cases of torture and kidnapping, with rapes being perpetrated at all-night Zanu (PF) meetings, called pungwes.

The province of **Mashonaland East** included the election petition cases from the constituencies of Goromonzi, Murehwa North, Mutoko South, and Seke. The case of Murehwa North featured widespread destruction of property and abductions of MDC supporters who were kept at a business used as a base by war veterans and Zanu (PF) supporters. Testimony in Mutoko South pointed the finger at the Zanu (PF) candidate providing money to Zanu (PF) supporters and war veterans. Seke, the only case that was brought by Zanu (PF) as the petitioner, alleged widespread disarray in the voters' rolls. Goromonzi featured assaults of MDC supporters at Atlanta Farm, used as a base for war veterans and Zanu (PF) supporters.

The constituencies of Makoni East and West, and Buhera North election petitions were heard from the **Manicaland** province. Buhera North was a high profile case since the petitioner was Morgan Tsvangirai, the President of the MDC. Buhera North also featured the grisly murders of Tichaona Chiminya, a prominent MDC campaigner, and Talent Mabika, an MDC supporter. The effect of the murders was not only felt in Buhera North; witnesses testified about the murders in the Makoni West case. Chiminya had also campaigned heavily in Makoni West for the MDC candidate there and was well known in that constituency. The murders and the manner in which these two victims died had a powerful effect on citizens in both constituencies.

The election petition cases in the Zvishavane, Shurugwi, and Mberengwa West constituencies in the **Midlands** province were varied. The petitioner in Zvishavane, Farai Maruzani, received death threats and an attempt was made on his life. In Mberengwa East, Mberengwa West, and Shurugwi, most witnssess reported threats and intimidation.

5. The Election Petitions

The petitions were historic, both because such petitions were unusual in Zimbabwe and because of the sheer number of petitions brought. Prima facie, the petitions were a source of discredit for the freedom and fairness of the General Election, and were additionally a severe threat to the credibility of the Zanu(PF) Government. The President and the ruling party seemed determined to derail any legal challenge to the election results; partly because such a challenge would provide a convenient forum in which the human rights abuses condoned and conducted by the government would be disclosed; and partly because the ruling party's parliamentary majority would be threatened by any overturning of the results and subsequent bye-elections. Understandably, the President, by using his Presidential Powers, sought to nullify the MDC's attempt to petition the High Court. The amendment to the Electoral Act sought to make legal all the results of the General Election by preventing any decision of the High Court from overturning the result.

But in early January 2001, the full bench of the Supreme Court declared unconstitutional this presidential decree[xii], and the High Court was forced to begin hearing the cases. The three judges initially assigned to hear the petitions were Justices James Devittie, Vernanda Ziyambi and Paddington Garwe. Although circumstances later forced the re-assignment of the petitions to two new High Court judges, for the purposes of this work, we will only look into the cases where judgments have been already handed down. The two new judges, Justices Rita Makarau and Ben Hlatswayo have both reserved judgment on the cases they have overseen. At the time of writing, Justice Devittie had handed down four judgments, Justice Ziyambi three, and Justice Garwe, only one.

In the sections that follow, we will examine the judicial opinion from 8 of the decided cases to see how each judge treated the evidence before the High Court, and how the judge ultimately interpreted the law. Attention was given to a number of questions. How did each judge treat the concept of free and fair elections? What was the judges' demeanour in court? How did they treat the witnesses? What overall picture did the judge glean from the evidence and what picture emerges in each constituency challenged?

5.1 J. Devittie: Hurungwe East

Despite the array of charges laid out by the petitioner in the Hurungwe East petition, Judge Devittie decided to limit the court's inquiry to the charge that general violence was of such a scale, as to render the election result void. Accepting general violence and intimidation as a sufficient ground to vitiate an election is not specifically expressed in the Electoral Act. Rather, section 124 of the Electoral Act specifically states that an election may be nullified if:

Any corrupt practice or illegal practice has been committed with reference to the election…by or with the knowledge and consent or approval of the candidate…or by or with the knowledge and consent or approval of any of his agents.[xiii]

Furthermore, Section 105 of the Electoral Act defines "Undue Influence" as a corrupt practice. It defines someone who is guilty of undue influence as:

Any person who, directly or indirectly, by himself or with any other person-
Makes use of or threatens to make use of any force, violence or restraint or any unnatural means whatsoever upon or against any person; or
Inflicts or threatens to inflict by himself or by any other person any temporal or spiritual injury, damage, harm, or loss upon or against any person; or
Does or threatens to do anything to the disadvantage of any person;

[xii] The Herald, 31/1/01, p.1
[xiii] See Electoral Act, Part XX, Section 124

In order to induce or compel that person…to vote or refrain from voting…
Any person who by abduction, duress, threats to invoke any unnatural means whatsoever or references to such unnatural means or by fraudulent device or contrivance-
Impedes or prevents the exercise of his vote by a voter; or
Compels, induces or prevails upon a voter either to vote or to refrain from voting at an election[xiv]

Devittie's interpretation of the Electoral Act's guidelines above goes beyond the onus of personal liability. He believes that violence and intimidation even if committed by other parties, yet proven to permeate an entire community, could still reasonably affect constituents' ability to exercise their vote freely. Should pervasive violence and intimidation be proven to have prevailed in a constituency, the issue of a respondent's liability becomes irrelevant. Because fundamental to the Electoral Act is "the principle of freedom of election," [xv] Judge Devittie believes that although not expressed specifically in the Act, his more expansive interpretation has sound foundation in the law.

Although claimed in all four of the petitions before him, Devittie rejects the idea that "constitutional violations" serve as a sufficient ground to overturn an election. Such a charge would rely on the "same grounds upon which an election may be set aside in terms of the express provisions of the [Electoral] Act", which embraces the very values of the Constitution itself.[xvi] Constitutional violations as a charge would therefore be redundant.

Other claims asked the court to inquire about the conduct of the election in other constituencies and potentially invited the Judge to make a finding on the election as it occurred in the nation as a whole. However, Devittie chose to interpret his own role in this legal inquest as one limited to the events and circumstances of the election within the specific constituency in question. In his view, dealing with issues about the entire electoral process in general would be beyond the purview of the inquiry. Should either party believe that the election was neither free nor fair in its entirety, then *all* results in contested seats should be challenged and, if proven, set aside.

The main instances of violence and intimidation in Hurungwe East that Judge Devittie took particular note of were as follows:

At Mulichi Farm, war veteran militias assaulted and harangued Langton Ndlovu, the MDC coordinator for Hurungwe East, and Maposa, an MDC member, with bottles and iron bars. Both men sustained injuries, some serious. The petitioner, Richard Chadya, on this occasion escaped injury by hiding behind a counter in a nearby shop. Thereafter, Zanu (PF) supporters began hunting around for him and his campaign team. Ndlovu recounted how over the space of two days at Chiedza Township, he and the campaign team had to flee a pursuing mob of Zanu (PF) supporters three times. When the police advised them to make a report at the station, the police arrested Ndlovu and Maposa for assault. It's interesting to note that Assistant Inspector Mwale, a Karoi policeman who disarmed Zanu (PF) supporters as they harassed MDC members on their way to a rally at Magunge Growth Point, was transferred to Bulawayo when angry war veterans demanded his removal for "supporting" the MDC.

At Blockely Farm, on 13 May 2000, Kabalami, a farm worker, testified that war veteran militias extorted money from all the workers, threatened them with death if they did not hand over money, and demanded their presence at a meeting on Mawunga Farm. At Mawunga Farm two farm workers, one named Charles Taruvinga, were accused of being MDC members and were paraded in front of the other workers and assaulted. When Kabalami tried to intervene on their behalf, he too was assaulted with logs. He was beaten, blind folded and threatened with death. Kabalami's clothes were removed and he was beaten on the soles of his feet. He testified that on Election Day, although he decided to vote, the majority of farm workers on both Blockely and

[xiv] See Electoral Act, Part XX, Section 105
[xv] Devittie, J., *Hurungwe East Election Petition*.
[xvi] Devittie, J., *Hurungwe East Election Petition.*

Muwunga Farms did not exercise their vote. Taruvinga recounted a similar story at Mawunga Farm where he was forced to sit facing the gathering as he was made an example of and beaten.

Two witnesses, Dzingayi Chitera and Never Masauka testified that they were abducted whilst walking in Karoi town and taken to Zanu (PF) offices where they were interrogated and assaulted. Another witness, Julia Sixpence, was attacked by Zanu (PF) youth in Hurungwe West after being chased out of Hurungwe East.

There were five unopposed affidavits submitted to the court. One, made by Delux Butay recounted how Zanu (PF) youth came to his home where he, his wife and two children were rudely awakened in the middle of the night and forcefully taken to Zanu (PF) offices where he and his wife were assaulted in front of his children. The Zanu (PF) youth beat the soles of his feet with a wooden plank. Another affidavit, made by Persuade Chinyati claimed that she was taken to the Zanu (PF) office in Chikangwe where Zanu (PF) supporters made her lie down so they could beat the soles of her feet with a wooden plank and fists. Following the assault her assailants made her walk home shirtless. Francis Madimbu, who was abducted and taken to Karoi Zanu (PF) offices along with witness Dzingai Chitera, made the final affidavit. Madimbu was assaulted with axe handles and iron bars and consequently sustained multiple injuries.

The Response

The respondent did not seriously challenge the acts of intimidation alleged by the Petitioner's witnesses. In fact, the respondent never suggested that these allegations were fabricated. Rather, the respondent's main line of defence was that he was not personally, nor through his election agents, liable for the acts of intimidation.

Though he shared offices with war veterans in Karoi, the respondent dismissed the allegation that the war veterans were campaigning on his behalf as approved agents. He asserted that the war veterans were a different organization and that he was neither liable nor specifically aware of their actions. He also denied witnessing the assault of Dzingayi Chitera and Never Masauka at the Zanu (PF) office in Karoi.

The Result

Having considered the petitioner's evidence and the respondent's answer, Judge Devittie outlined the evidentiary standard that underscored his decision-making process:

Intimidation was of a general nature, so that it permeated the society and was not restricted to a small locality.

If general intimidation is proved, the court is not required to inquire whether such intimidation had affected the election result in consequence. All the court needs to decide is whether the result may have been affected and whether the nature and extent of intimidation may have affected men of ordinary nerve and courage.

If general intimidation is proved, the burden of proof is cast upon the respondent to show that the amount of intimidation could not possibly have affected the election outcome, and unless he shows that, the election should be declared null and void.

Devittie rejects the respondent's assertion that allegations of violence and intimidation were irrelevant where he had obtained an absolute majority. Devittie rejects the further claim that the petitioner had to show that pre-election violence had swayed the will of a sufficient number of persons that could upset this majority.

Instead, Justice Devittie found that Hurungwe East was "a community where high levels of intimidation occurred, "and that this intimidation caused undue influence over the election

process. In his remarks, Devittie denounces the ruling party's decision and inclination to use violent means in campaigning for both the parliamentary elections and its policy of fast-track land-reform- which was one the central issues surrounding the election. He states:

I have tried to reach out, as I believe I must, and without success, to considerations that arise from what men of my generation may perceive, rightly or wrongly, to be in the national interest; such as, that the achievement of economic and social justice is a process and not an event; and that the causes that gave rise to the question for economic freedom may not have been entirely removed. These laudable objectives must nonetheless be pursued within the framework of the laws of this country. I must therefore uphold the truth even though I sit as a judge of this new nation state that has emerged from the smoulders of war: violence and intimidation upon citizens of this country must be condemned without reservation and are deserving of criminal sanction.[xvii]

5.3 J. Devittie: Buhera North

The main vein of the petitioner's case in the Buhera North petition was that the respondent, Mr. Kenneth Manyonda, was part of a conspiracy hatched by the government and ruling party at the national level to subvert the people's will and coerce the election. The instrument of this coercion was war veteran militias and Zanu (PF) supporters whose objective was to terrorize the population into voting for the ruling party. Therefore, by the petitioner's submission, these militias were in fact, agents of Mr. Manyonda.

One thing new in this petition was the production by the petitioner's counsel of several reports of international observers to the June 2000 election. Although accepted into evidence, Devittie decided that the inquiry before him was solely concerned with the election in Buhera North and that findings of fact must be drawn from oral evidence from persons affected by the allegations of violence and intimidation, rather than second or third hand from an international election monitor. Moreover, these reports contained countrywide allegations of corrupt practices and threatened to expand the inquiry beyond the borders of Buhera North constituency. Devittie rejected this invitation to conduct a separate inquiry into the role of the state media, state president, and other allegations pertaining to the conduct of the election in other parts of the country.

The main instances of violence and intimidation which Justice Devittie took note of were as follows:

At the Paradise Motel, Betty Machingauta and Daniel Machinga were assaulted, one severely. An MDC supporter and war veteran, David Mukose, at New Gift Shop, was being harassed and manhandled by war veterans who were trying to drag Mukose to a Zanu (PF) vehicle which had an inscription, "Zanu (PF) Manicaland Province."

The bodies of Talent Mabika and Tichaona Chiminya, burnt beyond recognition, were conveyed to Murambinda Hospital. Evidence suggests they were burnt alive after a petrol bomb was thrown into the vehicle they were driving in near the Murambinda Growth Point. Chiminya was the MDC campaign manager for Buhera North, while Mabika was an MDC supporter and member of a youth drama group.

At least two teachers, one at St Georges School in Mashiri and the other at Bika were intimidated. One teacher was severely assaulted, forced to walk 40kms blindfolded all because of his association with the MDC.

Witness, Edward Muzambare, told the court how war veterans and a Zanu (PF) official would threaten and harass MDC supporters and potential MDC supporters and how Chief Chitsunge would shout Zanu (PF) slogans at polling stations.

[xvii] ibid,

Witness, Mavangira recounted how Zanu (PF) supporters told people that the ruling party had installed mechanical devices to detect how individuals voted and would therefore find out who voted for the MDC. Anyone found to have voted against the ruling party would have to deal with dire consequences, perhaps, even death. Mavangira said that most elderly people believed this claim.

Virginia Mabika, Mavangira's wife, was forced to attend a Zanu (PF) rally where she was isolated from the crowd and threatened with assault. Zanu (PF) supporters ransacked her house, confiscating $3000 and an MDC manifesto.

Chiremba, the co-coordinator for the MDC campaign in Buhera North, received several death threats after the deaths of Chiminya and Mabika. HE recounted how Zanu (PF) supporters told people that computers can and will be used to learn how individuals voted.

The Response

Again, as in the Hurungwe East Petition, the respondent in his testimony did not controvert the essential details of events recounted by the Petitioner's witnesses. He simply denied any personal wrongdoing, and dismissed any alleged connection with the perpetrators of violence or intimidation in Buhera North constituency.

The Result

In the end, Devittie, decided to try and answer two questions from the evidence brought before him: 1) Was the respondent personally, or through his agents, guilty of corrupt practices? And 2) was there general violence and intimidation in the constituency?

An important determination central to the decision making process was who, in fact, were or were not agents of the respondent. Were the perpetrators of the violence and intimidation recounted in the above evidence "agents" of the respondent? If the perpetrators of violence were proven to have acted on behalf of the respondent, but not proven to have been instructed by him, would the issue of agency fall away? Judge Devittie sought to inform his interpretation of the concept of agency by looking at the evidence, particularly, of the deaths of Chiminya and Mabika.

He found that:

The persons who killed Chiminya and Mabika drove a cream colored Nissan with the inscription "Zanu (PF) Manicaland Province." The registration number was provided.

Persons who were in possession of this vehicle earlier that day threatened and manhandled war veteran and MDC supporter Mukose at New Gift Shop.

At all times, this vehicle was under the control of the respondent, to whom the vehicle was assigned to for the purposes of the campaign. The respondent's campaign manager was responsible for allocating the vehicle to various persons for the purpose of the Zanu (PF) campaign in the constituency.

The respondent obtained the keys to this vehicle after the incident, he claimed, from his personal driver. The vehicle was parked in front of Kitsiatota's shop in Gaza for the duration of the investigation. Kitsiatota was seen on the day of the killing in the same vehicle with the perpetrators of Chiminya and Mabika's deaths.

Three days after his arrest, Kitsiatota returned to Gaza using the same vehicle. He used the vehicle throughout the duration of the pre-election period, for the purposes of assisting the respondent in his campaign.

Justice Devittie viewed the events of 15 April 2000 as a sequence of events put into play by persons actively engaged in the respondent's election campaign, and whose participation the respondent "recognized and accepted." Though these agents were not officially nor formally appointed deputies, they nevertheless acted on behalf of the respondent in relation to the election.

Justice Devittie did however accept the respondent's assertion that neither he nor his election agent committed corrupt practices personally. He also accepted that the killing of Mabika and Chiminya was not committed at the sanction of either the respondent or his election agent. However, though the Judge grudgingly gave the benefit of the doubt in terms of whether the respondent took all preventative measures to thwart or discourage the commission of corrupt practices, a whiff of culpability remains hanging over the respondent. Willful ignorance, in Devittie's opinion, is a weak argument for innocence, and, rather, carries a strong suggestion of liability and collusion on the respondent's part. Indeed, Devittie acknowledged the suspicion surrounding Manyonda's role in the killings even though, from the evidence led, he could not come to definitive conclusion on what that role entailed.

Accordingly, Justice Devittie found that the respondent's agents guilty of undue influence. He declared the killing of Chiminya and Mabika a "wicked act." Having already found the election void through the first charge, Judge Devittie found it unnecessary to consider the second challenge to the election on the grounds of general violence and intimidation.

5.4 J Devittie: Shurugwi

This petition, like the previous ones Judge Devittie presided over, centred on three questions: 1) did the respondent, Mr. Francis Nhema commit corrupt practices in the election campaign? 2) Is the respondent, through his agents, guilty of committing corrupt practices? And finally, 3) was there general violence and intimidation in the constituency to the degree that the election was unduly affected?

According to the petitioner, the respondent, Mr. Nhema, was not only cognizant of the violence and intimidation in Shurugwi, but that he had consciously set into motion a campaign of terror aimed at ensuring a Zanu (PF) victory in the constituency. His instruments in implementing this campaign were his election agents, the surrogate campaign team, and the "war veteran" militias.

As in the previous petitions, an expanded definition of agency was put forward. It was argued that since Zanu (PF) party structures had provided the financial wherewithal to the respondent to carry out campaign activities in the constituency, he must have therefore allocated some of these funds to the operations of the war veterans, their base camp near the Shurugwi Police Station and their violent campaign of intimidation, particularly in the town of Shurugwi itself. Through the alleged allocation of such funds, the respondent implicitly recognized the agency of the war veteran militias who campaigned on his behalf, and thus had to be held, by law, responsible for their actions.

Indeed, from the testimony presented before Judge Devittie, a grim picture does emerge. The petitioner, Ms. Lucien Gladys Mativenga, and her witnesses, testified that war veteran militias had set up a base camp next to the police station in Shurugwi Town Centre from which campaigns of violence and intimidation were planned and executed. Various MDC officials, campaigners, and supporters, including the MDC District Chairman, Cotton Ndlovu, and MDC supporter Eliphas Ndiwani, were terrorized and made to leave the constituency for safety. It was common for these militias to demand their victims to name other MDC supporters, or provide lists of MDC officials. These names were sought, presumably, so that these militias could go out and terrify these people to refrain from exercising their legitimate right to vote.

Although most of the violence was concentrated in the urban area of Shurugwi, incidents of violence and intimidation did occur in the communal areas, which make up 90% of the

constituency. Peasants were forced to attend rallies, shopkeepers and their businesses were threatened, MDC supporters and MDC officials, such as Solomon Zapu and Mr. And Mrs. Mavunga, were brutally assaulted. Furthermore, Zanu (PF) officials threatened villagers with retribution should they vote for the MDC. These officials asserted that government could use gadgets to detect who voted for the opposition. This seemed to be an effective threat in a population with modest educational background, as well as among the elderly.

In his opinion, Justice Devittie uttered harsh words about the militia- young men and Zanu (PF) supporters- that went on 15 April 2000 to Railway Block- a housing complex where mining employees reside. Rather than legitimately promote and convey to the inhabitants of Railway Block the policies of the political party that they supported, they conducted a "military style" campaign, in which they "physically abused women old enough to be their mothers and left permanently etched in these persons memories of pain and humiliation."[xviii]

The incident at Railway Block was exceptionally brutal. The judge seemed moved by the particular testimony given by Margaret Tavengerwai, aged 45, and in fact relies on her testimony in his opinion. Tavengerwai explained:

One morning in May 2000, I was at a women's club named Tashinga where the women at Railway Block operate a Tuck Shop to earn some income for our club. I was approached by a group of armed youths who demanded that I take them to my house to show them the MDC T shirt and membership card that they said I had in my possession. When we arrived at my house, they kicked my daughter out of the house, stating that they wanted to kill me. Six people entered my house and asked me to open my wardrobe. They failed to get any material even though I had some of the MDC material which I had hidden under a flowerpot. I had hidden it because we had been warned that if MDC material was recovered we would be killed. They then began to assault me in the bedroom and they did so at random. I was struck on the head with an axe. Another stabbed my buttocks. These persons had small axes. The assault continued to the extent that I was so weary that I didn't know what was happening. The assault commenced at about 4 p.m. I cannot recall what happened thereafter. I regained consciousness at 6 p.m. and I was taken to the hospital where I was detained for three days suffering from stab wounds and multiple bruises. I believe that the injuries I suffered were very serious and think I may have permanent damage. I am unable to pass urine during the day and I can only pass urine when I feel acute stomach pain. I have extreme difficulty in carrying heavy objects on my head. I suffered so much that I was determined to go and vote. I still have nightmares about my experience. I do not know the names of my assailants but I know their first names and that they stay in a Council location. It is clear to me that when these persons attacked me, they knew my name and had come to target me as one of the MDC supporters. They had a list with them of persons to be attacked. I was unable to make an immediate report because the war veterans were camped right next to the police station and it was there where they planned their campaigns of violence. At times we were even afraid to go into town to buy bread in case we encountered the war veterans. I have not been harassed by the war veterans after the June elections.[xix]

Emily Rice and Tawanda Moffat, both residents at Railway Block also gave evidence to this affect: they were severely assaulted with axes, catapults and sticks and were consequently hospitalized. Rice's parents were beaten up after they visited her at the hospital. Moffat was unable to walk for five days.[xx]

The response

The response from Mr. Nhema, in light of the previous petitions, was predictably thin. The respondent in cross-examination challenged none of the evidence put forward in the petitioner's

[xviii] Devittie, J., *Shurugwi Election Petition* p. 1-2
[xix] ibid, p.2-3
[xx] ibid, p.4

case. Specifically, Mr. Nhema called no witness to controvert the testimony that Railway Block had sustained an organized attack by Zanu (PF) supporters.

On the issue of liability, the respondent insisted that because he was often in Harare on business, the respondent depended mainly on his election agent, Ruzivhe, and area Chiefs to carry out pre-election activities. Therefore, he concluded that he couldn't possibly be guilty of corrupt practices during the campaign.

As in the three previous election petitions Devittie presided over, the respondent relied on personal ignorance of corrupt practices committed by "war veteran militias" and Zanu (PF) supporters. Far from denying the instances of violence at the hands of the "war veteran" militias, the respondent did all he could to separate himself and his campaign from the machinations of the militia. Mr. Nhema insisted that these "war veterans" were neither funded nor encouraged to engage in violent activities by himself or anybody on his campaign team.

In any case, Devittie refused to accept the respondent's claim that he was unaware of the violent campaign being waged by war veterans in Shurugwi, though he was unprepared to make a conclusion on the issue of agency- whether Nhema and the war veterans were manifestly linked. Indeed, the judge is dismissive of the respondent's use of ignorance as a defense when he states:

I do think that merely standing by and doing nothing in the face of organized violence and intimidation designed to benefit a candidate constitutes strong evidence of agency.

No doubt, Devittie discerned common cause between the respondent and the war veterans. However, he found that the evidence presented by the petitioner in this regard was lacking and therefore the allegation was not proven beyond a reasonable doubt.

In fact, Devittie believed that the petitioner's counsel had failed to follow procedure in presenting its case properly. Most importantly, the petitioner failed to call upon persons whose conduct during the election campaign, as argued at trial, was relied upon to void the election. Why weren't the respondent's election agents called to explain their actions, to respond to the allegations levied against them?

More troubling was the fact that the petition as initially pleaded never relied on conduct that was eventually testified to in oral evidence. Because the respondent's agents were neither called to testify at trial, nor implicated in the petition itself, a notice of trial was not served within the prescribed time on either of the respondent's express agents, David Ruzivhe, the election agent, or Gunpowder, the polling agent. As a result of the many procedural lapses, Devittie dismissed the argument to nullify the election on the grounds of corrupt practices committed by Nhema's formally appointed election agents.

The Result

This petition ultimately failed. But not because Justice Devittie did not make a finding that violence and intimidation did, in fact prevail in Shurugwi constituency. On the contrary, a pattern of violence did emerge, though concentrated mainly in Shurugwi's urban areas. Indeed, it was found by the Judge that "war veteran" militias and other Zanu (PF) supporters had perpetrated acts of violence and intimidation in order to deprive or deter opposition supporters the free exercise of their legitimate franchise in Shurugwi.

The fact that the urban areas only make up 10% of the constituency did not automatically persuade Devittie that the violence and intimidation perpetrated was too localized to meet the legally proscribed standard of being general or pervasive. In fact, Devittie stated:

The commission of organized acts of violence with immunity granted by the law enforcing agencies will normally operate to void an election, even in circumstances where organized violence has not permeated the entire constituency.

But in Shurugwi, law enforcement agencies did not stand idly by as they had in other constituencies. The petitioner's witnesses testified that the police, when called upon, had acted with prompt regard. When Cotton Ndlovu and Eliphas Ndiwani made reports to the police, the police immediately went to arrest and disarm the militias. The militias' spears and axes were confiscated and placed under police custody.

The police action had effectively conveyed a message to the inhabitants of Shurugwi that these acts of violence and intimidation were unlawful, and would therefore be stopped. By doing so, the police in Shurugwi, succeeded in muzzling the effect that the violent campaign had hoped to have- that is, to prevent "persons of ordinary nerve and courage" from exercising their vote freely.

Having found that the evidence against both the respondent and his agents on whether they committed corrupt practices lacking, the petition failed to meet the standards required in voiding an election on these counts.

5.5 J. Ziyambi: Zvishavane

The petitioner, Mr. Farayi Maruzani, sought to nullify the results of the election in Zvishavane constituency on the grounds that the respondent, Mr., Meeting Mbalekwa, was guilty of a breach of the electoral act. Namely that Mr. Mbalekwa, his election agents and supporters:

perpetrated violence, property destruction, assaults and intimidation in an effort to instill fear throughout the electorate so as to subvert the free will of the people
was guilty of vote-buying
attempted to procure votes in a corrupt manner, namely by approving the disbursement of funds to such persons who would mount a roadblock at which they could harass and intimidate MDC supporters.

There were two main incidents of violence: 1) on 9 April 200, at Mushaya Business Centre, a lorry carrying Zanu (PF) supporters armed with slashes, bricks, sjamboks, stones and sticks assaulted fifteen people 2) on 17 June 2000, at Maglas Township, two witnesses were assaulted with logs and knobkerries.

There were three main instances of corrupt practices: 1) on 6 May 2000,at a Zanu (PF) rally in Mutambi, the respondent produced firearms in an effort to intimidate potential opposition support and steam any gains made by the opposition among the populace. He also allegedly approved the disbursement of $2000 to individuals ready to mount a roadblock where opposition supporters could be harangued and intimidated. 2) On 20 June 2000, at a rally in the Mafuwe area, the respondent and a war veteran named Hogwe offered $2000 to any individual who would deal with an MDC vehicle which was "giving them problems." 3) On 15 February 2001, near the Harare High Court, the respondent allegedly tried to bribe one of the petitioner's witnesses to not testify against him in court.

Justice Ziyambi had little regard for the petitioner or his witnesses. Her demeanour in court was that of ambivalence towards their position and standing. Most were poor, with limited education, and had experienced victimisation at the hands of the person they were facing off in court: the respondent.

Throughout her opinion, she described the petitioner's witnesses as arrogant, unpersuasive, evasive, visibly uncomfortable, vague and embarrassing; their testimony delivered in an angry manner, or uncorroborated. She seemingly put an uneven amount of weight on the witnesses' demeanor without taking into account their modest social and educational backgrounds. In this

regard, perhaps her expectation of them was misplaced. It certainly must have been a harrowingly intimidating experience going to the High Court having not been schooled in proper court protocol or procedure and with little knowledge of their own legal rights.

Ziyambi's assessment of the evidence put forth by these witnesses, already seemingly tainted by her ambivalence towards them, was as follows:

Because the petition had not been served on any of the specific individuals named by witnesses to be involved in violence, corrupt practices or intimidation, no finding could be made against them. These alleged perpetrators were not given the opportunity to answer these accusations.

If the respondent was not directly implicated in acts of violence, corrupt practices or intimidation, then these instances were not sufficient to unseat an elected official.

Some of the violent incidents, namely the two assaults in Maglas Township, were crimes not of a political nature. This assessment is bolstered by the fact that the assaults desisted with the appearance of either a Zanu (PF), or CIO official.

Witnesses' testimony about the incident at Mushaya Business Centre was riddled with contradicting evidence.

The contradictions centred on where the lorry carrying Zanu (PF) supporters stopped before these people disembarked. The respondent was allegedly in the lorry watching the assault, but the questions around where the lorry stopped undermines witness testimony that they had seen him.

Some evidence lead in court by the petitioner was missing in the written affidavit that was submitted shortly after the parliamentary elections in mid-2000. Ziyambi's contention was that such evidence, being fresh in the petitioner's mind, should have not gone unnoticed when the petition was drafted.

Evidence given by Godfrey Sithole that he was bribed in front of the High Court was dismissed. Ziyambi could not understand why the respondent would choose to bribe a witness whose testimony never directly implicated the respondent. Furthermore, the alleged $500 given to Sithole had already been spent.

Alleged electoral irregularities were dismissed, since there were no complaints initially reported to the constituency registrar's office.

The Response

The respondent's main line of defence was that the Zanu (PF) leadership in Zvishavane had never accepted him as the rightful parliamentary candidate for the area. In fact, there were three primary elections that pitted Mbalekwa against the leadership's favored candidate, Cephas Msipa, the local patron for ex-combatants. In these primary elections, "war veterans" threatened and intimidate Mbalewkwa and his supporters. For this reason, having already borne the brunt of the "war veterans" tactics of intimidation, he could and would never encourage similar activities against his political opposition. Rather, he had preached non-violence and co-existence.

He dismissed his participation on the attacks at Mushaya Business Centre, mainly because ex-combatants did not campaign for him. The bribe in front of the High Court was dismissed as well. Mbalekwa asserted that Sithole had asked him for lunch money which he gladly obliged. This was corroborated by Lovemore Shoko.

The respondent put forward eight witnesses, four of which described an incident on 22 June 2000, in which MDC supporters assaulted them. However, none of the particulars were detailed in Ziyambi's opinion.

The Result

Ziyambi finds that violence and intimidation did in fact occur in Zvishavane constituency in the run up to the June 2000 parliamentary election. Particularly Ziyambi acknowledges that violence occurred against MDC supporters at Mushaya Business Centre, and at three various localities where MDC supporters assaulted Zanu (PF) members.[xxi] However, the judge chose to narrowly interpret the Electoral Act. Because she finds that none of these acts of intimidation, violence or corrupt practices satisfactorily implicate the respondent or his express agent, such instances of violence and intimidation could not legally unseat an elected official.

Furthermore, Ziyambi is not fully convinced that the violence had permeated the constituency to the degree that unduly influenced the election. In her opinion, she relies on case law that states,

"Not all riotous behaviour will render an election void….sporadic assaults and acts of intimidation will not justify the setting aside of an election."[xxii]

In any event, Justice Ziyambi found the petitioner's witnesses unreliable, giving evidence that in her view was uncorroborated or vague. Individuals accused of perpetrating violence were not served with the petition, and were never given an opportunity to controvert the allegations levied against them. Ziyambi consequently makes no finding against them.

5.6 J. Ziyambi: Chiredzi North

Mr. Moses Mare, the petitioner in this case, sought to set aside the election of the respondent, Mr. Elliot Chauke, on the grounds that the respondent and his campaign manager, war veteran Boniface Mutemachani, conducted a pre-election campaign using violence, intimidation, harassment and threats aimed at dissuading and coercing, the Chiredzi North electorate from voting for the opposition in the parliamentary elections of June 2000.

Members of the Mujaji, Mavheneka and Chauke families recounted how they or their family members were severely assaulted with sjamboks, knobkerries, whips and sticks. The Chauke homestead was razed to the ground, while Mavheneka's home was damaged. Both the Chauke and the Mujaji family were forced to flee the constituency. Boniface Mutemachani was implicated in two of these attacks[xxiii].

There were other acts of violence including: 1) the brutal attack on Richard Nyekwani. Again, Mutemachani was implicated. 2) The attack on Kenneth Mwenga by Mutemachani in May 2000. Mwenga, who appeared in court on crutches, was also attacked on 22 February 2001, prior to his testifying in the petition. Mutemachani, in an attempt to dissuade Mwenga from testifying in court, broke Mwenga's leg with a pick handle and left him for dead.

Property damage and acts of intimidation also occurred. Chademana Sungano and the petitioner had their homes surrounded and defaced, and were consequently unable to remain in their

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[xxi] See Ziyambi, J., *Zvishavane Election Petition*, Justice Ziyambi does not include one iota of detail on the attacks by MDC supporters on Zanu (PF) members. Despite this, in her findings, she accepts that these attacks had been proven beyond a reasonable doubt.

[xxii] ibid, p.30

[xxiii] It is noteworthy that Mutemachani has been implicated in the perpetration of gross human rights violations subsequent to the General Election. **Here see** ZIMBABWE HUMAN RIGHTS NGO FORUM (2000), Who was responsible? Alleged perpetrators and their crimes during the 2000 Parliamentary Election period, HARARE: ZIMABWE HUMAN RIGHTS NGO FORUM.

homes. Kudzayi Chisirimunhu's business was regularly visited by war veterans who damaged the store and frightened away patrons. Proud Zava, an MDC supporter, was assaulted in the presence of Sungano.

There were also attempts to coerce and threaten area chiefs and village headmen. Chief Tshovani and village headman, James Jekero, testified that Mutemachani intimidated them into advising their constituents to vote for Zanu (PF) or risk death or war.

The Response

The war veteran

Because of the mounting evidence against him and other ex-combatants, the court called on war veteran Boniface Mutemachani and others to answer the array of allegations levied against them. Although the petition was served on all the individuals implicated in the petitioner's case, only Mutemachani appeared before the court.

Mutemachani proved to be a poor witness. On two occasions he made assertions that later in his testimony, he boldly contradicted. For example, he alleged that he met Chief Tshovani for the first time in February of 2001. A few minutes later, he explained to the court that in May 2000 he brought the Chief to an occupied farm, not to intimidate him, but to show the general progress of fast-track land reform.

Also, he denied being the respondent's campaign manger despite the fact that such an admission was recorded before a Masvingo magistrate in a previous case. The record in that case was produced before Ziyambi as evidence.

Justice Ziyambi found Mutemachani intransigent and unmoved by his own contradictory statements. His defence was dismissed as unreliable and unconvincing.

The candidate

The respondent's main defence was that because he was confined to a hospital bed for a large duration of the pre-election period, it would have been impossible for him to personally commit corrupt practices in conducting his campaign.

He testified that in fact, he was attacked by MDC supporters at Croco Motors on 7 May 2000 and sustained injuries. Directly after being discharged from hospital where he was treated for these injuries, he had, in anger, made inflammatory statements at a rally at an occupied farm where Mutemachani had brought Chief Tshovani. Ziyambi accepts that these statements where made in a moment of passion and is disinclined to infer that underneath these statements lay a more sinister, pre-meditated plan of action.

The Result

Justice Ziyambi found that Chiredzi North constituency suffered widespread violence and intimidation during the pre-election period. War veterans and Zanu (PF) supporters were found to be the main perpetrators of this violent campaign, but opposition supporters were also found to have committed violent acts, particularly at Croco Motors where the respondent himself was injured.

Ziyambi believed that, in order to set aside the election, *"the degree of violence and intimidation must be such as is liable to induce persons of ordinary courage from exercising their votes*." Indeed, Ziyambi conceded that, although only two families that came before the court were made to flee the area, she believed that the far-reaching character of the violence perpetrated in

Chiredzi North would have likely intimidated others "into fleeing or refraining from casting their vote for fear of reprisals." Therefore, it was reasonable to infer that the violence and intimidation was of such a nature and extent to suppose that the election had been affected, and thus, the election in Chiredzi North not valid.

Whether the respondent, by himself or through his agents, was responsible for the violent nature of the campaign, or whether he or his agents had committed corrupt practices as defined in the Electoral Act remained unresolved. Although it was the petitioner's assertion that the war veterans, namely Boniface Mutemachani, were linked to the respondent, Ziyambi never made a determination on whether individuals not appointed at an official capacity, could qualify as an agent as set out in the Electoral Act. This would have been important because, had Ziyambi made a decision that Mutemachani and others were in fact the respondent's agents, Mr. Chauke would have been personally held responsible for these war veterans' illegal actions. Ziyambi did however dismiss any allegation that the respondent himself was guilty of performing corrupt acts in his campaign. She insisted that there was not enough sufficient evidence to prove this charge beyond a reasonable doubt.

5.7 J. Ziyambi: Chiredzi South

The MDC candidate and petitioner Mr. Patrick Tsumele's main contention in this case was that the respondent, Mr. Aaron Baloyi, and supporters unleashed a reign of terror in Chiredzi South in an effort to intimidate MDC supporters, real or potential, from exercising their vote freely.

Central to this case were various events that occurred between 4 and 16 June 2000. These included:

On 4 June, war veterans physically assaulted the petitioner, causing him injuries that required hospitilisation.

On 8 June, war veterans threatened the petitioner, and assaulted his campaign manager, Shadreck Mbizi, with an empty bottle and whips. Mbiza consequently required medical attention to treat the injuries he sustained in the attack.

On 10 June, Zanu (PF) members set alight the church of Hasani Mukaha, an MDC supporter and choirmaster. Mukaha was pursued by 14 Zanu (PF) supporters the following Monday from his home to his mother's home where he was taken into custody and detained in the cells at Chikombedzi Police Station.

On 12 June, Zanu (PF) supporters stoned a motorcycle carrying MDC supporter Jabulani Gumbo and Mbizi. The assailants allegedly sought refuge in the respondent's home. Again, Gumbo was waylaid by people hiding in the trees a week later while he was driving his vehicle

On 14 June, war veterans stoned the petitioner's home.

On 15 June, respondent's supporters cordoned off the gates of the hospital where the petitioner lived and worked. The petitioner was threatened with assault.

On 16 June, outside the shops, Zanu (PF) supporters attacked MDC branch chairman, Paul Chauke and 14 other MDC supporters with stones. The attackers were pursued until the melee reached the respondent's home where the fighting continued. It was alleged that some of the Zanu (PF) assailants were residing at the respondent's home.

On an unspecified date, Sgt. Verenga detained, interrogated and threatened MDC organizing secretary, John Mazhata.

Justice Ziyambi found some of the evidence led by the petitioner's witnesses as somewhat unbelievable. Specifically, in Mbizi's testimony about the two incidents where he and his vehicle were waylaid and attacked, rather than driving off to avoid confrontation, Mbizi actually pursued his assailants on both occasions. Ziyambi believed that Mbizi was not the victim he made himself out to be, and was rather, "looking for trouble."

In testimony described by Mr. Gumbo, Ziyambi found it difficult to believe his assertions that he was actually a CIO operative whose initial aim was to infiltrate the MDC and procure information for a CIO employed friend. His testimony about the disturbance at the hospital gates on 15 June, and of the motorcycle incident on the 12 June was not forthcoming. Why was the CIO pursuing him on the 15th, and why was he avoiding them, especially when he was alleged to be a CIO operative?

No clear evidence established for a fact that Zanu (PF) supporters implicated in violent activities were residing at the respondent's home. Since this was the only evidence led in court that directly linked the respondent with the violence in Chiredzi South, Ziyambi was not sufficiently convinced that the respondent was personally responsible for encouraging or engaging in violent or corrupt activities and therefore not liable as outlined in the Electoral Act.

The response

Indeed, the respondent, Mr. Baloyi, denied engaging in or encouraging acts of violence against opposition supporters. Rather, Baloyi claimed that he and his supporters were the victims of MDC sponsored violence. He and his witnesses recounted two incidents:

On 15 June, the hall in which a Zanu (PF) rally was stoned by MDC supporters. According to ex-combatant, Morris Chishonge, after the rally, MDC supporters were seen refusing Zanu (PF) supporters, some seeking medical treatment, from entering the hospital where the petitioner lived and worked.

On 16 June, a crowd of about 60 men surrounded the respondent's home, hurled threats at him and stoned his house. Baloyi's home, outhouse, bicycle and car were all damaged. His maid sustained injuries in the attack. After seeing a list of the perpetrators who were later apprehended by the police, Baloyi found that many of the assailants were not from the area, and alleged that they must have been brought into the constituency to create trouble. Also, the mob of people stoned Chishonge near Baloyi's home as he cycled to work.

The result

In Justice Ziyambi's opinion, the petitioner presented his case poorly. The allegations made in Tsumele's written petition bore little resemblance to the actual oral evidence testified to in court. Ziyambi stated*, "The respondent could not have been adequately prepared for the cases he was to meet by reading the petition."*[xxiv] The petitioner's witnesses never mentioned in court some of the allegations against the respondent put forth in the written petition. Furthermore, the petition was not served on Sgt. Verenga, a police officer implicated in a number of incidents and whose actions the petitioner relied upon in justifying the nullification of the election.

Although Ziyambi concluded that there were certainly incidences of violence and intimidation in Chiredzi South, these incidences were sporadic and not of a general nature. Moreover, it was established from the testimony of both sides, that the violence and intimidation spanned a short time period between 4 and 16 June 2000, and that the constituency was peaceful for the greater part of the pre-election period. Because Ziyambi found that the violence was not of the sufficient degree or extent capable of negating the principle and exercise of free election, she dismissed

[xxiv] Ziyambi, J., *Chiredzi South Election Petition*, p.15

the petition and upholds the election of Aaron Baloyi as Member of Parliament for Chiredzi South.[xxv]

5.8 J. Garwe: Chinhoyi

The main allegation in this petition was that the first respondent, Zanu (PF) candidate Philip Chiyangwa, during the pre-election period, had attempted to procure votes by lending individuals money with the condition that the recipients vote him into parliament. Chiyangwa was also alleged to have promised food to destitute squatters at Shackleton Mine in an effort to influence how the mine's inhabitants voted in the parliamentary elections. He allegedly fulfilled this promise sometime after the election, in a gesture "thanking" the residents for voting for Zanu (PF).

The charge of bribery centred on loan applications issued by Chiyangwa and his campaign team in February and March 2000, during Zanu (PF) primary elections. These loan applications were apparently distributed across the constituency and offered loans only to Zanu (PF) members in possession of party cards. A former Zanu (PF) member, Willard Chimbiravora, testified that the office of Chiyangwa's campaign manager had advised him that the loans would be disbursed sometime after the election.

An additional, yet peripheral charge asserted that pre-election violence and intimidation caused undue influence over the electorate's ability to freely exercise their vote. The main thrust of this charge alleged that commercial farming areas were inaccessible to the MDC because of the defensive and hostile stance of war veteran squatters. Indeed, white farm owners, fearful of retribution from these squatters, often prohibited all MDC activity in general.

Also, electoral irregularities were sited. Poll monitors were allegedly ordered out of the polling stations, and two witnesses, both poll officers at Murerekwa Poll Station, testified that two individuals, Timothy Zuze and an unidentified woman, entered the station asking for the numbers of ballot papers.

The Response

Although Philip Chiyangwa admitted that the loan applications central to the bribery charge had been drawn up and distributed, he asserted that they were not drawn up for the purpose of illegally and corruptly, soliciting votes. Rather, the respondent had initially offered a sum of money to the ruling party for the disbursement to Zanu (PF) card-carrying members back in February 1999, when he had no political ambitions for himself. The loans were mainly intended to assist individuals who operated market stalls, and benefited persons in other provinces other than Mashonaland West, including Manicaland, Harare, Matabeleland North and South.

When he was finally persuaded to contest the candidacy in Zanu (PF) primary elections, it came to light that none of the money he had provided to the party had been ever made available to applicants, mainly because none of the submitted applications had been processed. Consequently, Chiyangwa's campaign manager drew up a new application form and gave the new forms to district chairpersons for general distribution. But, as a result of complaints from other Zanu (PF) nominees, Chiyangwa eventually ordered the termination of its distribution. For that reason, the forms were not distributed in the run-up to the June Parliamentary elections, and incidentally, had an application deadline of March 29, 2000.

Chiyangwa also denied "thanking" the residents of Shackleton Mine for voting for him by distributing foodstuffs among that community. His motive underlying this gesture was purely

[xxv] According to a Daily News article (5 December 2001, p.17), Aaron Baloyi was found guilty of public violence and sentenced by a Masvingo magistrate to 36 months in jail. On 15 December 1999, Baloyi incited a group of 400 Shangani-speaking people from Jeka village to assault all Karanga-speaking people in the area claiming that they were settled on foreign land. The villagers, acting on his instructions, attacked people, destroyed crops, and assaulted livestock.

philanthropic, and was in response to pleas for help from the Deputy Mayor of Chinhoyi. The situation of these squatters had been of some concern since December 1999.

The respondent denied any collusion with war veterans who were occupying commercial farms and who had allegedly prevented the MDC from campaigning in the area.

The Result

In arguing the two sides, two interpretations emerged on the issue of onus. The petitioner's counsel argued that the charges against the respondent were of a civil nature and, therefore, the evidence needed to be proven simply on a balance of probabilities that the respondent had engaged in corrupt practices. The respondent's counsel however, argued that the charges before the court if proven, could incur serious penalty, including possible criminal prosecution and therefore, as in all criminal proceedings, must be proven, beyond a reasonable doubt.

Justice Garwe made his determination on this matter by turning to the relevant sections of the Electoral Act. Sections 104 and 106 provided the Judge with a guiding definition of the offences of Treating and Bribery respectively. If these offences were to be proven, the act would require the Judge to take certain concrete steps, namely to:

Void the election of the respondent (section 124 (a))
Notify the Speaker of Parliament that corrupt practices had been committed (section 136 (4))
Send a statement with evidence taken at trial to the Attorney -General in case it is decided that separate criminal prosecution should be pursued. (section 137)
Bar the respondent and/or his agent from holding office or voting for a period of five years (section 124 (b))

In his assessment of the possible consequences to the respondent, Garwe stated, *"to find on the preponderance of probabilities that someone committed a corrupt practice, in itself a criminal offence, would be grossly unfair and a contradiction."* Therefore, the petitioner's assertion that the charges before the respondent constituted civil offences emerged unsustainable.

On the bribery charge, Garwe ultimately found the petitioner's case circumstantial, relying on inference and second-hand evidence. Two witnesses that had allegedly observed the respondent distribute bribes at a rally failed to come forward to testify. Only one witness was brought forward who claimed that the loan application forms were in circulation around the parliamentary election and therefore intended to influence voters. Moreover, it was established that the application's closing date was 29 March 2000, and that loans to Zanu (PF) members were on offer from the respondent as early as February 1999. According to Garwe, nothing in the evidence contravened the respondent's testimony that the loan forms were withdrawn during the Zanu (PF) primary elections as a result of complaints from other nominees. Because the loan forms were not proven to have been intended specifically for the general election, Garwe dismisses the charge of bribery.

Garwe also dismissed the charge of treating, where the respondent allegedly "thanked" constituents by fulfilling a pre-election promise to feed them. There was no evidence led that such a pre-election promise had been made. In any event, when the petitioner was pressed under cross-examination, he made no objection to the principle of handing out charity to the needy.

While Garwe listened with gravity to the allegations of electoral irregularities, he found that there were no "fundamental breaches of the principles of the [Electoral] Act" and that non-compliance had not affected the election as a result. Indeed, Garwe attributed the alleged irregularities as administrative lapses, insufficient in degree, or extent, to void an election.

The final charge of pre-election violence and intimidation was also dismissed. What little evidence that was led by the petitioner to this effect, did not personally implicate the respondent or his agent. Testimony that the respondent's vehicle was involved in acts of intimidation was unsubstantiated. The petitioner claimed to have noted the registration number of this vehicle, but never brought this information to the attention of the court, even when it was requested.

The petitioner relied on the fact that he and his campaign team were excluded from commercial farming areas, where war veterans or farmers had refused them entry. Neither potential voters on these farms, nor farm owners, were brought to court to testify that there was violence or intimidation on commercial farms, or to verify that farms were no-go areas for MDC supporters. Furthermore, because Chinhoyi is largely an urban constituency and no evidence showed that violence and intimidation occurred in urban areas, Garwe concluded that violence did not permeate the community to the degree that could reasonably affect the result of the election in Chinhoyi constituency.

6. Conclusions

The judges and the electoral act

The judges' treatment of the electoral act spanned a full spectrum of varying interpretations. The judges diverge mainly on two specific points:

- the issue of agency;
- the definition of general violence.

The Electoral Act makes no specific mention of persons who simply act on behalf of the respondent but who are not formally appointed as actual election agents of the respondent per se. It only states that an election may be void if:

Any corrupt…or illegal practice has been committed with reference to the election…by or with the knowledge and consent or approval of the respondent…or any of his agents…[xxvi]

This leaves judges a certain amount of discretionary power in interpreting agency and determining liability in the commission of corrupt practices during an election. In his Buhera North opinion, Judge Devittie accepted that there was a link between the respondent and the murderers of Tichaona Chiminya and Talent Mabika, even though the murderers were not express agents of the respondent, Mr. Manyonda. However, Justice Ziyambi clung to a more narrow reading. In her Zvishavane opinion, she concerned her inquiry almost exclusively to determining whether the respondent or his agent had been personally involved in the commission of corrupt practices. She gave cursory regard to any testimony that did not directly implicate the respondent or his agent.

Although in the Chiredzi North case, testimonial evidence convinced Ziyambi that violence and intimidation prevailed in the constituency on a large scale, she refused to make a determination on the issue of agency. Were the war veterans implicated in the Chiredzi North terror campaign recognized and accepted by the respondent?

Justice Devittie, in his Shurugwi opinion, went further than adopting the expansive interpretation of agency that he had upheld in his Buhera North opinion. He suggested that the common defence that was led by all the respondents in the cases before him- namely ignorance of violence and intimidation- cast further doubt on the respondents' proclaimed innocence, rather than the opposite. Wilful ignorance of violent acts, especially when they are intended for the benefit of the respondent, is a deficient line of defence.

Among the judges, defining general violence and intimidation was less varied. All three understood that "general" meant that violence and intimidation should need to have permeated a community to a degree and extent as to reasonably affect individuals' ability to freely exercise their vote. Where they diverge is in their interpretation of evidence in regard to this definition. In her Chiredzi South opinion, Justice Ziyambi found that the violence and intimidation spanned about two weeks, and therefore believes that it did not meet the standard of being "general." Justice Garwe agrees with Ziyambi's assessment. Since Chinhoyi was largely an urban constituency, and most of the alleged violence and intimidation occurred on farms, the charge itself could not possibly meet the standard for inquiry. Justice Devittie on the other hand, in his Shurugwi opinion, finds that even localized violence and intimidation could potentially void an election especially if it is found that law enforcement agencies either encouraged violence or intimidation or stood by helpless to prevent such acts.

[xxvi] Electoral Act, Part XX, Section 124

All agreed that evidence of violence perpetrated by both political parties may serve to strengthen the inference that the freedom of election was violated.

The judges and the witnesses

Judge Devittie's view of the witnesses was unique among the three judges in that he was explicitly cognizant of the witnesses' modest social and educational status. He recognized their courage and steadfast demeanour, and seemed generally impressed by their inability from straying from the truth, even in the face of intimidating cross-examination tactics.

Judge Ziyambi's demeanour and attitude towards the witnesses however, was dismissive and apathetic. At no time, either in court or in her opinion, did she take into account their social status, nor their limited access to education. She never considered that it could be intimidating for them to testify at the High Court in front of one or more of their alleged tormentors. At many moments when the respondent's counsel was cross-examining some of the petitioner's witnesses, the judge allowed the respondent's counsel to badger and intimidate the witness. On a few occasions, she even laughed at some of the witnesses' testimony.

Attitudes on procedural aspects of the petitions

The most common fault in all of the petitions was the failure to serve and call upon individuals implicated in corrupt practices, violence or intimidation. When these individuals were not properly called upon, each judge was not able to make a finding against that person, or any determination on the event or act testified to. Justice Devittie, in his Shurugwi opinion, admitted that had the petition been properly served on the alleged perpetrators, the outcome of his decision could have been different.

Additionally, Justice Devittie suggested that future petitions should include maps noting the localities where violence or intimidation occurred. This may help illustrate to the Court the extensiveness and general nature of the violence and intimidation that is alleged. He also suggested that police evidence could help corroborate allegations of violence and intimidation by police officers testifying to reports made of incidents, whether they were acted upon (or not), localities affected, or incidents witnessed.[xxvii] Here, of course, the amnesty promulgated by President Mugabe was of crucial importance, since this amnesty allowed very large numbers of persons to escape criminal prosecution[xxviii], and the evidence from criminal prosecutions would have undoubtedly been central to all the allegations by the petitioners that large-scale violence had been perpetrated during the election. The knowledge that an amnesty had been given perhaps should have influenced the judges more, and the understanding that government's only pass amnesties to excuse their own actions led to a greater interest in the testimony of the victims.

Attacks on the Judiciary

In November 2000, Patrick Chinamasa, the Minister of Justice, Legal and Parliamentary Affairs stated, "Few fundamental and revolutionary changes have been brought through the legal process. Secondly, I belong to a generation which brought fundamental revolutionary change not through the law or a legal process, but through the barrel of a gun."[xxix] Chinamasa said this in his denunciation of non-black judges who had made judgments or statements criticizing the government's fast-track land redistribution program.

[xxvii] Devittie, J. *Shurugwi Election Petition*, p.8-9

[xxviii] **See** ZIMBABWE HUMAN RIGHTS NGO FORUM (2000), Report on Pre-election Violence in Mberengwa, HARARE: ZIMABWE HUMAN RIGHTS NGO FORUM.

[xxix] *The Herald*, Wednesday November 29, 2000, p.9

The independence of the judiciary since the June parliamentary elections has been under sustained attack from the government. This has been accomplished by the government's defiance of High Court and Supreme Court orders, the attack upon the integrity of individual judges, and the actual threat of assault and occupation of judges' homes. Judges who have shown any sign of judicial independence have also been threatened with investigation and disciplinary action for supposed misconduct.[xxx]

The repercussions for handing down an independent judicial decision were certainly highlighted when the Supreme Court finally decided the constitutionality of a presidential decree that banned the MDC election challenges. Five days after the Supreme Court struck down the presidential decree that aimed to thwart the MDC from bringing forth the election petitions, Chief Justice Anthony Gubbay was forced into early retirement.[xxxi] Amid the public dispute that arose at that time between the judiciary and the government, "war veterans" threatened to assault all judges hostile to the government's policies.[xxxii] Chinamasa and other Zanu (PF) officials vowed to overhaul the judiciary, specifically targeting the remaining Supreme Court judges as well as four non-black High Court judges. Black judges, who had made judgments against the state in the past, would also be eliminated.[xxxiii] Chinamasa stated, "If they [judges] behave like unguided missiles, I wish to emphatically state that we will push them out."[xxxiv]

Shortly after Justice Devittie nullified the election of three Zanu (PF) parliamentarians and, amid threats to him as a result, the judge tendered his resignation. Just before Devittie's resignation, a "war veteran leader", Joseph Chinotimba stated, "Devittie is a judge for opposition parties. The way Gubbay went is the same way Devittie is gong to go."[xxxv]

Since then High Court judges, Justice Esmael Chatikobo, Justice Michael Gillespie, and Justice David Bartlett and Supreme Court judge, Justice Nicholas McNally have either resigned or retired. Four new judges with Zanu (PF) links were appointed.[xxxvi]

Since the Judge President, Justice Godfrey Chidyausiku, was promoted to the position of Acting Chief Justice in the wake of Gubbay's departure[xxxvii], the government decided to promote Justice Paddington Garwe ahead of more senior High Court judges, such as Justice George Smith and Justice Mohamed Adam both who have been targeted by the government in their moves to purge the judiciary.[xxxviii] Additionally, Justice Vernanda Ziyambi was elevated to the Supreme Court in August 2001.

Still, judges have remained resilient in the face of enormous adverse pressure. On political violence, Justice Moses Chinhengo stated, "Violence as a means to an end has entered and lodged itself in the national psyche. It must be exorcised…we need peace and tranquility when we elect our leaders during national elections."[xxxix] On attacks on the judiciary, Justice Chatikobo stated, "Judges and magistrates cannot discharge their duties properly if they are subject to direction or control from …the government of the day…the courts [need] to administer the laws of the country without fear, favour or prejudice, independently of the consequences which might ensue."[xl]

[xxx] Gillespie, J. *The State v. Tapfuma Humbarume and Ask Ndoro* p.4
[xxxi] *Zimbabwe Human Rights Bulletin*, p.24
[xxxii] *The Standard*, 18-24 February 2001, p.1
[xxxiii] *The Standard*, 11-17, p.1; *The Standard*, 18-24, p.1; The four non-black judges that were targeted were, Justice George Smith, Justice Michael Gillespie, Justice Fergus Blackie and Justice James Devittie. Two black judges that condemned the government's interference and intimidation of the judiciary were Justice Esmael Chatikobo and Justice Moses Chinhengo.
[xxxiv] *The Daily News*, February 6, 2001, p.2
[xxxv] *The Eastern Star,* May 4, 2001
[xxxvi] *The Daily News*, December 22, 2000, p.1-2: Ben Hlatswayo, Rita Makarau, Anne Gowora, and Charles Hungwe
[xxxvii] *The Standard*, 24-30 June p.1
[xxxviii] *The Standard*, February 25-March 3, 2001 p.1
[xxxix] *The Daily News,* February 7, 2001, p.1
[xl] *The Daily News*, February 27, 2001, p.3

In his final opinion before resigning the bench in September 2001, Justice Michael Gillespie condemns the government's disregard for the rule of law. He states:

The executive has contrived to politicize the bench….manipulation of court rolls; selective prosecution; and packing of the Bench of the superior courts are techniques which provide a government determined to do so with the opportunity to subvert the law while at the same time appearing to respect its institutions.[xli]

It is difficult to imagine that the judges hearing these petitions can have remained indifferent to all of these goings-on, nor can they have been indifferent to the threats made against them when they came to their decisions. It is axiomatic that justice requires that judges are free from political influence and manipulation, but, in Zimbabwe, we have seen direct threats against individual judges and generalised threats against the judiciary as a whole. What effects this has had upon the petitions can only be speculation, but it remains an important speculation. It will be interesting to see the outcome of the Supreme Court appeals for these cases, for all of the cases have been referred to the Supreme Court on appeal.

Although the results of all of these petitions remain to be decided, it is clear that the results to a large extent validate the claims that the June 2000 General Election was violent. It is also clear that the courts in most cases accepted that the organised violence and torture was a significant problem for accepting that the elections were wholly free and fair, but there were decided differences in the interpretations of the Electoral Act.

The goals behind the Petitions
As indicated earlier, there were several goals behind these petitions (see page 3 above), and, to a large extent, these appear to have been met.

One of the major goals, that the stories of the victims were heard by the nation, was mostly met, despite rather uneven and uninformed press coverage. This goal accords to the "***right to know***" in the principles outlined by the Economic and Social Council of the United Nations[xlii]. In order to combat the effects of impunity, a number of rights must be affirmed according to the UN, and these include the following:

(a) *The victims' right to know;*
(b) *The victims' right to justice;*
(c) *The victims' right to reparations;*
(d) *The right to non-recurrence.*

The right to know is not simply the right of any individual victim or closely related persons to know what happened, but is also a collective right, ensuring that history accurately records the violations to prevent them from recurring in the future. Its corollary is a "duty to remember", which the State must assume in order to guard against the perversions of; the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved.

The right to justice implies that all victims shall have the opportunity to assert their rights and receive a fair and effective remedy, ensuring that the perpetrators stand trial and that the victims obtain reparations. The right to justice entails obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them. Lastly, international

[xli] Gillespie, J., *The State v Tapfuma Humbarume and Ask Ndoro*, p.5
[xlii] **See** UN [1997], The Administration of Justice and the Human Rights of Detainees: Question of the impunity of perpetrators of humanrights violations (civil and political), Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, United Nations. Economic and Social Council. Commission on Human Rights. Sub-Commission on Prevention of Discrimination and Protection of Minorities. E/CN.4/Sub.2/1997/20/Rev.1

human rights treaties should include a “universal jurisdiction” clause requiring every State party either to try or to extradite perpetrators of violations. The necessary political will is still essential, of course, to enforce such clauses. For example, humanitarian provisions in the 1949 Geneva Conventions or the United Nations Convention against Torture have scarcely ever been applied.

Restrictions justified by the desire to combat impunity may be applied to certain rules of law in order to support efforts to counter impunity. The aim is to prevent the rules concerned from being used to benefit impunity, thus obstructing the course of justice. The main restrictions are as follows.

- *No Prescription for offences;*
- *No Amnesty for offences;*
- *No Right to asylum for perpetrators;*
- *Extradition of all perpetrators;*
- *Trial in absentia;*
- *Due obedience is no defence;*
- *Legislation on repentance should not avoid either amnesty or prescription;*
- *Military courts should not be used;*
- *The principle of the irremovability of judges.*

The right to reparation entails both individual measures and general, collective measures. On an individual basis, victims - including relatives and dependants - must have an effective remedy. The procedures applicable must be publicized as widely as possible. The right to reparation should cover all injuries suffered by victims, and this right embraces three kinds of action:

- *Restitution (seeking to restore victims to their previous state);*
- *Compensation (for physical or mental injury, including lost opportunities, physical damage, defamation and legal aid costs);*
- *Rehabilitation (medical care, including psychological and psychiatric treatment).*

The right to non-recurrence is also crucial according to the Sub-Commission, and three measures need to be taken in order to avoid victims having to endure new violations affecting their dignity:

- *Disbandment of parastatal armed groups;*
- *Repeal of all emergency laws, abolition of emergency courts and recognition of the inviolability and non-derogability of habeas corpus;*
- *Removal from office of senior officials implicated in serious violations.*

Perhaps we have established the *right to know* during these petitions, but it is clear that the other rights are far from being accepted or implemented in Zimbabwe. The rights to justice and non-recurrence are wholly vitiated by the Amnesty of October 2000 and the general climate of impunity within which the perpetrators have continued to operate. There is no evidence that groups implicated in gross human rights violations have been disbanded, rather that they have been increased under the National Youth Training Scheme.

However, it can be claimed that these petitions, and the extremely brave testimony of the victims, have contested the general tendency in Zimbabwe to use impunity rather than the law to deal with gross human rights violations. We can only hope that this small step will be met in the future with a commitment to implement the kinds of principles developed by the United Nations.

Appendix A.
Status of the Election Petitions.

Constituency	Case	Judge	Decision	Province
Complete				
Buhera North	Tsvangirai/Manyonda	Devittie	MDC	Manicaland
Chinhoyi	Matamisa/Chiyangwa	Garwe	Zanu (PF)	
Chiredzi North	Mare/Chauke	Ziyambi	MDC	Masvingo
Chiredzi South	Tsumele/Baloyi	Ziyambi	Zanu (PF)	Masvingo
Goromonzi	Mapuranga/Murerwa	Hlatshwayo	TBA	Mashonaland East
Makoni East	Showala/Chipanga	Garwe	TBA	Manicaland
Makoni West*	Makuwaza/Mahachi	Garwe	TBA	Manicaland
Hurungwe East	Chadya/Marumahoko	Devittie	MDC	Mashonaland West
Mberengwa West	Hove/Gumbo	Hlatshwayo	TBA	Midlands
Mount Darwin South	Mumbamarwo/Kusukuwere	Makarau	TBA	Mashonaland Central
Murehwa North	Mudzingwa/Chitongo	Hlatshwayo	TBA	Mashonaland East
Mutoko South	Muzira/Muchena	Devittie	MDC	Mashonaland East
Seke#	Chiota/Mutasa	Ziyambi	Zanu (PF)	Mashonaland East
Shurugwi	Matibenga/Nhema	Devittie	Zanu (PF)	Midlands
Zvishavane	Maruzani/Mbalekwa	Ziyambi	Zanu (PF)	Midlands
In session				
Gokwe North	Mlandu/Mkandhla	Makarau		Midlands
Mazowe West	Chigonero/Kuruneri	Hlatshwayo		Mashonaland Central
To proceed				
Gokwe Central	Nyathi/Mupukuta	Hlatshwayo		Midlands
Gokwe South	Muyambi/Machaya	Makarau		Midlands
Kariba	Sigobole/Mackenzie	Garwe		Mashonaland West
Mberengwa East	Holland/Gumbo	Garwe		Midlands
Murehwa South	Nezi/Matiza	Hlatshwayo		Mashonaland East
Postponed				
Mwenezi	Masekesa/Shumba	Makarau		Masvingo
Marondera East	Muhenzva/Sekeremayi	Ziyambi		Mashonaland East
Undecided on whether to proceed				
Gokwe West	Sithole/Nyauchi	Makarau		Midlands
Guruve North	McCormick/Mazikana	Garwe		Mashonaland Central
Guruve South	Chamanikire/Chininga	Hlatshwayo		Mashonaland Central
Hurungwe West	Kanhena/Madiro	Garwe		Mashonaland West
Hwedza	Tachiveyi/Chigwedere	Garwe		Mashonaland East
Mazowe East	Mashonga/Chimutengwende	Hlatshwayo		Mashonaland Central
Zvimba North	Gomba/Chombo	Garwe		Mashonaland West
Withdrawn				
Chegutu	Matibe/Ndhlovu			Mashonaland Central
Chivi North	Chiongengwa/Mumbengwegwi			Masvingo
Gokwe East	Mudzori/Bhika			Midlands
Gutu North	Musoni/Muzenda			Masvingo
Masvingo South	Rioga/Zvobgo			Masvingo
Zaka West	Musimiki/Chinhanya			Masvingo
Cancelled				
Bindura*	Pfebe/Gezi			Mashonaland Central
Chikomba*	Kaunda/Hunzvi			Mashonaland East

Appendix B.
(Election Results: courtesy Zimbabwe Election Support Network 'Report on the 2000 Parliamentary Elections: Zimbabwe')

Buhera North
Mr Morgan Tsvangirai, MDC MP candidate and head of the MDC
Vs.
Mr Kenneth Manyonda, ZANU (PF) MP

Results:

Voter Population	48356
Votes Cast	23969
Spoilt Ballots	803
Manyonda	12850
Tsvangirai	10316

(Manicaland)

Bindura
Mr Elliot Pfebve, MDC candidate
Vs.
Mr Border Gezi, Zanu (PF) MP and Minister of Gender and Employment Creation

Results:

Voter Population	53191
Votes Cast	25589
Spoilt Ballots	669
Gezi	13328
Pfebve	11257

(Mashonaland Central)

Chegutu
Mr Philemon Thambatshira Matibe, MDC Candidate
Vs.
Mr Charles Ndlovu, ZANU (PF) MP

Results:

Voter Population	51832
Votes Cast	23447
Spoilt Ballots	381
Ndlovu	12169
Matibe	10412

(Mashonaland West)

Chikomba
Mr Peter Kaunda, MDC Candidate
Vs.
Mr Chenjerayi Hitler Hunzvi, ZANU (PF) MP

Results:

Voter Population	49850
Votes Cast	21914
Spoilt Ballots	625
Hunzvi	13417
Kaunda	6776

(Mashonaland East)

Chinhoyi
Mr S. Matamisa, MDC MP candidate
Vs.
Mr Phillip Chiyangwa, Zanu (PF) MP

Results:

Voter Population	35850
Votes Cast	16082
Spoilt Ballots	205
Chiyangwa	8176
Matamisa	7602
(Mashonaland West)	

Chiredzi North
Mr Moses Mare, MDC candidate
vs.
Mr Elliot Marilele Chauke, ZANU (PF) MP

Results:

Voter Population	46852
Votes Cast	19891
Spoilt Ballots	532
Chauke	10154
Mare	8675
(Masvingo)	

Chiredzi South
Mr Patrick Tsumele, MDC Candidate
Vs.
Mr Aaron Baloyi, ZANU (PF) MP

Results:

Voter Population	46879
Votes Cast	18819
Spoilt Ballots	0
Baloyi	11611
Tsumele	6414
(Masvingo)	

Chivi North
Mr Bernard Chiondengwa, MDC Candidate
Vs.
Mr Samuel Creighton Mumbengegwi, ZANU (PF) MP

Results:

Voter Population	39188
Votes Cast	18957
Spoilt Ballots	310
Mumbengegwi	10947
Chiondengwa	3938
(Masvingo)	

Gokwe Central
Mr Edson John Nyathi, MDC Candidate
Vs.
Mr Lovemore Mupukuta, ZANU (PF) MP

Results:

Voter Population	39656
Votes Cast	19990
Spoilt Ballots	615
Mupukuta	11802
Nyathi (Midlands)	5987

Gokwe East
Mr Tinos Mudzori, MDC Candidate
Vs.
Ms Flora Buka, ZANU (PF) MP

Results:

Voter Population	42448
Votes Cast	24057
Spoilt Ballots	736
Buka	17088
Mudzori (Midlands)	3674

Gokwe North
Mr Sibangani Mlandu, MDC Candidate
Vs.
Mr Eleck Mklandla, ZANU (PF) MP

Results:

Voter Population	39866
Votes Cast	22509
Spoilt Ballots	1102
Mklandla	15923
Mlandu (Midlands)	3967

Gokwe South
Mr Lameck Nkiwane Muyambi, MDC Candidate
Vs.
Mr Jaison Max Kokerai Machaya, ZANU (PF) MP

Results:

Voter Population	37807
Votes Cast	18571
Spoilt Ballots	822
Machaya	12644
Muyambi (Midlands)	3615

Gokwe West
Mr Edgar Sithole, MDC Candidate
Vs.
Ms Esther Nyauchi, ZANU (PF) MP

Results:

Voter Population	41821
Votes Cast	22115
Spoilt Ballots	738
Nyauchi	14956
Sithole	3240

(Midlands)

Goromonzi
Mr Leonard Mapuranga, MDC Candidate
Vs.
Mr Herbert Muchemwa Murerwa, ZANU (PF) MP

Results:

Voter Population	53394
Votes Cast	25933
Spoilt Ballots	654
Murerwa	14459
Mapuranga	9489

(Mashonaland East)

Guruve South
Mr Gift Chimanikire, MDC Candidate
Vs.
Mr Edward Takaruza Chindori Chininga, ZANU (PF) MP

Results:

Voter Population	41317
Votes Cast	23642
Spoilt Ballots	415
Chininga	19988
Chimanikire	3239

(Mashonaland Central)

Guruve North
Mr Cordner Ivor McCormack, MDC Candidate
Vs.
Mr Paul Herbert Mazikana, ZANU (PF) MP

Results:

Voter Population	42271
Votes Cast	24131
Spoilt Ballots	580
Mazikana	20513
Ivor	2370

(Mashonaland Central)

Gutu North
Mr Crispa Zvovuno Musoni, MDC Candidate
Vs.
Mr Simon Vengesai Murefu Muzenda, ZANU (PF) MP

Results:

Voter Population	50185
Votes Cast	24530
Spoilt Ballots	806
Muzenda	14867
Musoni	8179

(Masvingo)

Hurungwe East
Mr Richard Chadya
Vs.
Mr Marumahoko

Results:

Voter Population	38200
Votes Cast	19846
Spoilt Ballots	
Marumahoko	14814
Chadya	4315

(Mashonaland West)

Hurungwe West
Mr Tsvangiwa Kanhema, MDC Candidate
Vs.
Mr Marko Madiro, ZANU (PF) MP

Results:

Voter Population	48413
Votes Cast	25279
Spoilt Ballots	827
Madiro	18991
Kanhema	4532

(Mashonaland West)

Hwedza
Mr Pearson Tachiveyi, MDC Candidate
Vs.
Mr Aeneas Soko Chigwedere, ZANU (PF) MP

Results:

Voter Population	50865
Votes Cast	25216
Spoilt Ballots	611
Chigwedere	18044
Tachiveyi	6049

(Mashonaland East)

Kariba
Mr Luka Sigobole, MDC Candidate
Vs.
Mr Isaac Mackenzie, ZANU (PF) MP

Results:

Voter Population	51300
Votes Cast	23660
Spoilt Ballots	720
Mackenzie	15048
Sigobole	7332

(Mashonaland West)

Makoni East
Mr Nicholas Mudzengerere , MDC Candidate
Vs.
Mr Tongesai Shadreck Chipanga, ZANU (PF) MP

Results:

Voter Population	35762
Votes Cast	15518
Spoilt Ballots	406
Chipanga	7509
Mudzengerere	7391

(Manicaland)

Makoni West
Mr Elisha Remus Makuwaza, MDC candidate
vs.
Mr Moven Enock Mahachi, ZANU (PF) MP and Minister of Defense

Results:

Voter population	42625
Votes Cast	20641
Spoilt Ballots	362
Mahachi	11138
Makuwaza	7356

(Manicaland)

Marondera East
Mr Didimas Tadzingaira Munenzva, MDC Candidate
Vs.
Mr Sydney Tigere Sekeramayi, ZANU (PF) MP

Results:

Voter Population	46171
Votes Cast	22121
Spoilt Ballots	347
Sekeramayi	10692
Munenzva	10629

(Mashonaland East)

Masvingo South
Mr Zacharia Isaac Rioga, MDC Candidate
Vs.
Mr Edson Jonasi Mudadirwa Zvobgo, ZANU (PF) MP

Results:

Voter Population	37071
Votes Cast	21054
Spoilt Ballots	656
Zvobgo	14954
Rioga	5444
(Masvingo)	

Mazowe East
Mr Shepherd Lenard Mushonga, MDC Candidate
Vs.
Mr Chakezha Chenamo Chen Chimutengwende, ZANU (PF) MP

Results:

Voter Population	49497
Votes Cast	27482
Spoilt Ballots	652
Chimutnegwende	18824
Mushonga	7473
(Mashonaland Central)	

Mazowe West
Mr Biggie Township Chigonero, MDC Candidate
Vs.
Mr Tichaona Christopher(Kuruneri??), ZANU (PF) MP

Results:

Voter Population	45975
Votes Cast	22561
Spoilt Ballots	1038
Christopher	14024
Chigonero	7085
(Mashonaland Central)	

Mberengwa East
Ms Sekai Hove, MDC Candidate
Vs.
Mr Rugare Eleck Ngidi Gumbo, ZANU (PF) MP

Results:

Voter Population	48608
Votes Cast	27974
Spoilt Ballots	1262
Gumbo	23595
Holland	3117
(Midlands)	

Mberengwa West
Mr Mufandaedza Hove, MDC Candidate
vs.
Mr Joram Macdonald Gumbo, ZANU (PF) MP

Results:

Voter Population	43949
Votes Cast	24691
Spoilt Ballots	852
Gumbo	18315
Mufandaedza	3889
(Midlands)	

Mount Darwin South
Mr Don Godfrey Mumbamarwo, MDC Candidate
Vs.
Mr Savior Kasukuwere, ZANU (PF) MP

Results:

Voter Population	41522
Votes Cast	26236
Spoilt Ballots	802
Kasukuwere	22733
Mumbarmarwo	2295
(Mashonaland Central)	

Murewa North
Mr Musarurwa Alouis Mudzingwa, MDC Candidate
vs.
Mr Osward Chitongo, ZANU (PF) MP

Results:

Voter Population	35806
Votes Cast	18696
Spoilt Ballots	437
Chitongo	13694
Mudzingwa	4104
(Mashonaland East)	

Murewa South
Mr Ward Nezi, MDC Candidate
Vs.
Mr Biggie Joel Matiza, ZANU (PF) MP

Results:

Voter Population	35620
Votes Cast	19275
Spoilt Ballots	449
Matiza	13895
Nezi	4426
(Mashonaland East)	

Mutoko South
Mr Derek Muzira, MDC candidate
Vs.
Ms Olivia Nyembezi Muchena, ZANU (PF) MP

Results:

Voter Population	36352
Votes Cast	21662
Spoilt Ballots	501
Muchena	19228
Muzira	1177

(Mashonaland East)

Mwenezi
Ms Lucia Masekesa, MDC Candidate
Vs.
Mr Isaiah Shumba, ZANU (PF) MP

Results:

Voter Population	51811
Votes Cast	29219
Spoilt Ballots	1102
Shumba	22676
Masekesa	1881

(Masvingo)

Seke (Note- Zanu petitioner vs. MDC respondent)
Mr Phineas Chivazve Chiota, ZANU (PF) MP
Vs.
Mr Bennie Mutasa, MDC Candidate

Results:

Voter Population	48541
Votes Cast	22639
Spoilt Ballots	409
Mutasa-Tumbare	10821
Chiota	9236

(Mashonaland East)

Shurugwi
Ms Lucia Gladys Matibenga, MDC Candidate
Vs.
Mr Dunstan Francis Nhema, ZANU (PF) MP

Results:

Voter Population	48342
Votes Cast	22440
Spoilt Ballots	512
Nhema	14891
Matibenga	6524

(Midlands)

Zaka West
Mr Charles Musimiki, MDC Candidate
Vs.
Mr Jefta Johnson Chindanya, ZANU (PF) MP

Results:

Voter Population	49561
Votes Cast	24146
Spoilt Ballots	1884
Chindanya	10928
Musimiki	7444

(Masvingo)

Zvimba North
Mr Hamilton Gomba, MDC Candidate
Vs.
Mr Ignatious Morgan Chiminya Chombo, ZANU (PF) MP

Results:

Voter Population	46804
Votes Cast	22756
Spoilt Ballots	709
Chombo	16175
Gomba	5872

(Mashonaland West)

Zvishavane
Mr Farai Maruzani, MDC MP candidate
Vs.
Mr Pearson Mbalekwa, ZANU (PF) MP

Results:

Voter Population	48498
Votes Cast	26230
Spoilt Ballots	602
Mbalekwa	13971
Maruzani	10373

(Midlands)