



**A brief report on the outstanding legal issues
that affect the fairness of the General Elections
to be held on 31st March 2005**

Harare 22nd March 2005

The following tables set out the outstanding issues that in themselves indicate that the judicial system in Zimbabwe has failed in addressing issues that could materially contribute to the Fairness of elections.

The salient points are

- Election petitions filed by MDC candidates which were successful in the high court (7 cases) and have been appealed in the Supreme Court.

The fact that 7 cases have been won by the MDC are now subject to Supreme Court appeals indicates that there are potentially 7 (seven) ZANU PF members of parliament who should not be there and are effecting the balance of power in the legalization of law.

- Election petitions filed by MDC candidates in the high court but not yet completed (5 cases)
- Election petitions filed by MDC candidates in the high court but not proceeded with (16 cases)
- Election petition filed by a ZUD candidate in the high court but not proceeded with (1 case)

One may ask how these cases affect the General Elections – The fact is that had these cases been finalized timeously then the balance in Parliament could have been significantly different and that legislation such as AIPPIA etc would not necessarily have been passed. It can be said that the slowness of the legal system has delayed justice to the advantage of the ruling party.

- The fact that Joseph Mwale has not been investigated by the police for the Burning to Death of Talent Mabhika and Tachiona Chiminya even after Justice Devittie had ordered the investigation is testament of the bias within the Police.

One may ask what affect has the non investigation of Joseph Mwale on the Free and Fair climate for the general elections.

The answer lies in the fact that everyone knows what Joseph Mwale is capable of and the fact that he roams freely and is still a senior CIO agent puts fear into the electorate and endorses the ZANU PF concept of intimidation.

OUTSTANDING CASES RELATING TO THE PRESIDENTIAL ELECTION

The fact that the Presidential Election Court Case has still to be addressed in court blatantly hides significant facts that prove beyond all doubt that the election was rigged.

Without this knowledge being made public because of court rules the likelihood of the SAME rigging practices being carried out in the forthcoming elections is a very strong possibility.

If the Registrar General refuses to allow the voting residue from the Presidential Elections to be scrutinised and the Judiciary condone the refusal then it can ONLY be assumed that there is a lot to hide and that the elections were massively rigged. Why else would anyone deny access to what is a legal obligation?

2.1 ELECTION PETITION

Phase One of the Election Petition, which dealt with numerous legal arguments, was eventually heard on 2 – 3 November 2003. At the conclusion of the argument the presiding judge, Mr Justice Hlatshwayo reserved his judgment.

After a considerable delay, on 10 June 2004, Mr Justice Hlatshwayo handed down an Order in chambers dismissing the Applicant's application. However, to date, and despite various representations, the Judge has still not given his reasons for judgment.

2.2 BRINGING TO HARARE THE BALLOT PAPERS AND VOTERS' ROLLS USED IN THE PRESIDENTIAL ELECTION

From September 2002, we brought a series of applications to force the Registrar-General to comply with his obligation in terms of the Electoral Act to bring to his office in Harare the ballot papers and voters' rolls used in the Presidential Election. However, the Registrar-General has persistently refused to comply with various Court Orders ordering him to bring the ballot papers and voters' rolls used in the Presidential Election to Harare. We have therefore instituted Contempt of Court proceedings against him.

2.3 APPLICATION FOR INSPECTION OF DOCUMENTS

This application is for inspection of documents once they have been brought to Harare. This case is related to the Contempt of Court proceedings.

Both the Contempt of Court case and the Inspection case are before Mr Justice Omerjee and we are now awaiting a date for the hearing of both matters.

3. MURDER OF TALENT MABHIKA AND RICHARD (Tachiona) CHIMINYA

Talent Mabhika and Richard Chiminya were campaigners for the MDC before the 2000 Parliamentary General Election. Richard Chiminya, in particular, was a very effective campaigner and was highly valued by the MDC. He was subsequently described in media reports as Mr Morgan Tsvangirai's driver but he was far more than that. Prior to arriving in Buhera North to assist in Mr Morgan Tsvangirai's campaign, Mr Richard Chiminya had been campaigning in the Makoni District and by all accounts had been very effective there.

Talent Mabhika and Richard Chiminya were murdered on the night of 15 April 2000 at Murambinda Business Centre which is in the centre of Buhera North constituency. At the subsequent election petition brought by Mr Morgan Tsvangirai, the losing MDC candidate for Buhera North constituency, several witnesses testified as to the events surrounding the murder of these two people. In his judgment, Mr Justice Devittie, summarised the evidence of the various witnesses. One of these was Itai Mudzingwa who was an eye-witness. In relation to the murders, the Judge summarised this witness' evidence as follows:

"A short while later the ZANU (PF) twin-cab stopped with its hazard lights on. This was about 10:00 pm at night. Mwale and Katsiatota came out of the vehicle and pointed firearms at the MDC vehicle signalling it to stop. Mwale then went to the driver of the MDC vehicle and Katsiatota went to the passenger's side and they began to assault the driver of the red truck. Katsiatota was assaulting the person who was on the passenger's side using the barrel of the gun. The other persons in the red truck jumped out of the vehicle and fled from the scene in a westerly direction. Mudzamiri the war veteran went to the vehicle and asked the girls in the ZANU PF truck to pursue the persons who had fled being the MDC members. They jumped off the ZANU PF twin-cab and ran towards the MDC members who were fleeing. At that stage they saw a vehicle in the middle of the road with flashing lights and coming from Murambinda. They stopped on the tarmac and this vehicle stopped behind the red MDC truck. When the vehicle stopped Mwale said that he would shoot any person who came out of the vehicle. The occupants switched off the lights and it turned out to

be a police vehicle. At this time, Mwale continued assaulting the driver in the red MDC vehicle, and the driver was shouting and saying "Why are you assaulting me". It was the lady who was saying these words. He said the assault continued on these two persons until they became silent. He said it appeared to him that the assault was in the form of being prodded by the barrel of the guns.

The next thing that happened was that Katsiatota took a five litre container which he handed to Mwale. Mwale took the container and started to sprinkle it inside the vehicle where the two persons were. Katsiatota then took a matchbox and it appeared that the match could not light. Katsiatota then rushed to the ZANU PF twin-cab and took a piece of paper which he lit and threw inside the vehicle. The vehicle immediately ignited and at that stage the twin-cab was facing the direction of Murambinda where it had come from. The two occupants of the vehicle came out of the truck in flames. They were running. Mwale shouted "Go away to your home area." After that they said that Mwale said that they should leave and they got into the ZANU PF twin-cab and proceeded to Murambinda."

In his judgment Mr Justice Devittie stated that:

- "(c) On the 15th of April 2000 the smouldering bodies of Talent Mabhika and Richard Chiminya were conveyed to Murambinda hospital after, as the evidence suggests, it seems they had been burnt alive. Richard Chiminya died instantly but Talent Mabhika died in hospital. Talent Mabhika was an MDC supporter and a member of the youth drama group. Richard Chiminya was a campaign manager for the petitioner in Buhera North constituency. The death of these two occurred at Murambinda Growth Point which is in the centre of Buhera North constituency. This evidence was given by several witnesses and is not in dispute."

Mr Justice Devittie found in his judgment that the election of the Zanu (PF) in Buhera North was null and void. One of the main reasons for this was the murder of Talent Mabhika and Richard Chiminya and the adverse effect this had on the voters in the constituency.

At the conclusion of his judgment, Mr Justice Devittie stated as follows:

"In terms of s. 137 of the Act the record of evidence must be transmitted by the Registrar to the Attorney-General "with a view to the institution of any prosecution proper to be instituted in the circumstances" and the attention of the Attorney-General is drawn to the evidence on the killing of Chiminya and Mabhika."

Despite the referral to the Attorney-General of the murders of Talent Mabhika and Richard Chiminya, there were no arrests until June 2004 when the police arrested two of those allegedly involved in the murders. They were Morris

Cainos Zimunya alias Katsiatota and Webster Gama. These two were initially held in custody but were later granted bail. To date, they have not been brought to trial.

On the evidence of various eye-witnesses it is apparent that Joseph Mwale, who was and still is a member of the Central Intelligence Organisation, was actively involved in the murders. However, despite this, he has not to date been arrested. In fact, for some time after 2000, he was very active in the Chimanimani area against MDC supporters.

A ELECTION PETITIONS FILED BY MDC CANDIDATES WHICH WERE SUCCESSFUL IN THE HIGH COURT.

CUM TOT-ALS	IND TOT-ALS	CONSTITUENCY	PARTIES	HIGH COURT JUDGE	LAWYER	STAGE REACHED	MATTERS OUTSTANDING
1	1	Buhera North	Tsvangirai v Manyonda	Devittie J.	S Jarvis (A & C)	Trial commenced on 2/3/01. Judgment given in favour of MDC candidate on 26/4/2001. Reported in 2001(1) ZLR 295. Appeal lodged by Zanu (PF) candidate. Several tapes of the record were stolen from a locked office at the High Court. Some of the remaining tapes are inaudible. The Judge's notebooks are missing. Consequently, appeal has not yet been heard.	Preparation of the record, if this is possible. Thereafter, hearing of the appeal.
2	2	Hurungwe East	Chadya v Marumahoko	Devittie J.	S Hwacha (D M H)	Trial commenced on 16/2/01. Judgment given in favour of MDC candidate on 26/4/2001. Reported in 2001 (1) ZLR 285. Appeal lodged by Zanu (PF) candidate. A whole section of the appeal record is missing. However, the Judge summarized the evidence in his notes. The parties have agreed to proceed with the record as it is. Appeal has not yet been heard.	Preparation of the record, if this is possible. Thereafter, hearing of the appeal.
3	3	Mutoko South	Muzira v Muchena	Devittie J.	T Biti (H & B)	Trial commenced on 15/3/2001. Judgment given in favour of MDC candidate on 27/4/2001. Reported in 2001 (1) ZLR 308. Appeal lodged by ZANU (PF) candidate in January 2001. Record has been transcribed. Petitioner's and Respondent's Heads of	Awaiting judgment of appeal from Supreme Court.

4	4	Chiredzi North	Mare v Chauke	Ziyambi J.	B Mtetwa (K & I)	Argument filed. Appeal was set down for hearing in Supreme Court on 20/9/2004. However, it was postponed on that date at the instance of the Chief Justice. Appeal heard on 4/11/2004. Judgment reserved. Judgment given in favour of M D C on 20/6/2001. Appeal lodged by ZANU (PF) candidate on 4/7/2001. Record recently transcribed. Appeal heard in Supreme Court on 14/6/2004. Judgment reserved.	Awaiting judgment of appeal from Supreme Court.
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CUM TOTALS	IND TOTALS	CONSTITUENCY	PARTIES	HIGH COURT JUDGE	LAWYER	STAGE REACHED	MATTERS OUTSTANDING
5	5	Gokwe North	Mlandu v Mkandhla	Makarau J	L Uriri (H & B)	Judgment given in favour of MDC candidate on 15/1/2003. Appeal lodged by Zanu (PF) candidate on 31/1/03. Appeal record has been transcribed. Heads of Argument called for in June 2004 but not received. Consequently, i.t.o. R44 SC Rules, Registrar of Supreme Court has confirmed that appeal deemed to have been dismissed.	The Registrar of High Court should formally inform the Speaker of Parliament that the seat is vacant. Thereafter, by-election should be held. However, recently, the lawyer for the ZANU (PF) candidate has applied to reinstate the appeal. No date yet set for that application.
6	6	Gokwe South	Muyambi v Machaya	Makarau J.	L Uriri (H & B)	Judgment given in favour of MDC candidate on 15/1/2003. Appeal lodged by Zanu (PF) candidate on 31/1/03. Appeal record has been transcribed. Heads of Argument called for in June 2004 but not received. Consequently, i.t.o. R44 SC Rules, Registrar of Supreme Court has confirmed that appeal deemed to have been dismissed.	The Registrar of High Court should formally inform the Speaker of Parliament that the seat is vacant. Thereafter, by-election should be held. However, recently, the lawyer for the ZANU (PF) candidate has applied to reinstate the

7	7	Makoni East	Mudzenge-tere v Chipanga	Garwe J.P.	S Jarvis (A & C)	Trial before Garwe JP concluded on 11/10/2001. Judgment in favour of the MDC candidate was only granted two years later on 22 October 2003. Even later, the reasons for judgment were provided. An appeal has been lodged by the Zanu (PF) candidate. The record has not yet been transcribed.	appeal. No date yet set for that application. Transcription of record. Thereafter, hearing of the appeal.
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B ELECTION PETITIONS FILED BY MDC CANDIDATES WHICH HAVE BEEN DISMISSED IN THE HIGH COURT.

CUM TOT-ALS	IND TOT-ALS	CONSTITUENCY	PARTIES	HIGH COURT JUDGE	LAWYER	STAGE REACHED	MATTERS OUTSTANDING
8	1	Chinhoyi	Matamisa v Chiyangwa	Garwe J.P	I Chagonda (A & C)	Judgment given in favour of ZANU (PF) candidate on 9/5/2001. Appeal lodged by MDC candidate. Appeal record transcribed. Lawyers presently awaiting instructions whether to proceed. Next stage is to inspect record of appeal.	If so instructed, proceed to appeal.

CUM TOT-ALS	IND TOT-ALS	CONSTITUENCY	PARTIES	HIGH COURT JUDGE	LAWYER	STAGE REACHED	MATTERS OUTSTANDING
9	2	Chiredzi South	Tsumele v Baloyi	Ziyambi J	B. Mtetwa (K & I)	Judgment given in favour of ZANU (PF) candidate on 20/6/2001. Appeal lodged by MDC candidate on 10 July 2001. Appeal record not yet transcribed.	Transcription of record. Thereafter, hearing of appeal.
10	3	Chivi North	Chionde-ngwa v Mumbenge-gwi	Makarau J	A Tsoka (Wintertons)	MDC candidate did not appear on the initial day of the hearing and, because of this, the Judge dismissed the petition. Matter closed.	Nil. Matter closed.
11	4	Goromonzi	Mapuranga v Murerwa	Hlatshwayo J.	S Jarvis (A & C)	Trial held in September 2001. Judgment reserved. Election petition by MDC candidate dismissed on 6 March 2002. However, since then, despite repeated requests, no Reasons for Judgment given. Consequently, MDC candidate unable, as yet, to lodge appeal.	Awaiting Reasons for Judgment from the Judge in the High Court. Thereafter, proceed to appeal.
12	5	Mberengwa West	M. Hove v Joram M.Gumbo	Hlatshwayo J.	B Mtetwa (K & I)	Trial commenced on 3/7/2001. Evidence completed on 26/7/2001. Petition dismissed on 6/3/2002. Reasons for Judgment only given on 9/4/2003. Appeal lodged by MDC candidate. Appeal record transcribed. Appeal heard in Supreme Court on 5/2/04. Argued by Mr S Hwacha of D M H. Judgment reserved.	Awaiting Judgment from appeal in Supreme Court.
13	6	Mt Darwin South	Mumbama-rwo v Kasukuwere	Makarau J.	I Zindi (K & I)	Judgment given in favour of ZANU (PF) candidate in January 2002. Appeal lodged by MDC candidate on 29/1/2002. The record has been transcribed but appeal not yet heard.	Hearing of appeal. No date yet set.

14	7	Murehwa North	Mudzi- ngwa v Chitongo	Hlatshwayo J.	I Zindi (K & I)	Judgment given in favour of ZANU (PF) candidate in June 2002. Appeal lodged by MDC candidate on 24/6/2002. Record not yet transcribed.	Transcription of record. Thereafter, hearing of appeal.
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