

SUBVERTING JUSTICE:



**THE ROLE OF THE JUDICIARY
IN DENYING THE WILL
OF THE ZIMBABWEAN ELECTORATE SINCE 2000**

***SOLIDARITY PEACE TRUST
MARCH 2005***

“Manipulation of court rolls; selective prosecution; and the 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 respects its institutions...

... A judge, finally, who finds himself in the position where he is called upon to administer the law only as against political opponents of the government and not against government supporters faces the challenge to his conscience: that is whether he can still consider himself to sit as an independent Judge in an impartial Court.”

[High Court Judge Gillespie ¹]

“Wicked things have been done, and continue to be done. They must be stopped. Common law crimes have been, and are being, committed with impunity. Laws made by Parliament have been flouted by the Government.”

[Supreme Court Chief Justice Anthony Gubbay ²]

“The law must be obeyed for the well-being of us all, and in order that freedom of election may be bequeathed to future generations.”

[High Court Judge Devittie ³]

“If you vote, we will kill you.”

[Shadrek Chipanga, Deputy Minister of Home Affairs ⁴]

¹ Extract from judgment by Judge Gillespie in *State v. Humbarume*, Judgment HH 148-2001, at 5 (*issued on 26 Sept. 2001*).

² *Commercial Farmers Union v. Minister of Lands* 2000 (2) ZLR 469 (S), at 486.

³ *Tsvangirai v. Manyonda*, HC 8139/2000, Buhera North Election Petition Judgment (26 April 2001, at 62-64). Judge Devittie found the ZANU PF candidate not duly elected, and resigned shortly after his judgment in this petition. ZANU PF appealed to the Supreme Court, which has yet to hear the appeal, four years later.

⁴ Statement allegedly made by the Deputy Minister of Home Affairs, Shadreck Chipanga, to a supporter of the opposition MDC in Makoni East on 22 June 2000, two days prior the parliamentary elections. *See Showano v. Mudzengerere*, HC 8120/2000, Makoni East Election Petition, at 15, *filed* 26 July 2000.

TABLE OF CONTENTS

I.	Introduction.....	5
	A. Outcome of electoral petitions.....	5
	B. Suspension from public office.....	6
	C. Implication of the lack of Court outcomes for democratic processes.....	7
II.	Background	9
	A. Political Overview	9
	B. Electoral Overview	13
	C. Judicial Overview	16
III.	Parliamentary Electoral Challenges	18
	A. Allegations of Violence, Intimidation, and Polling Irregularities	18
	B. Undue Delays and Witness Intimidation	22
	C. High Court Findings	23
	D. Outcome of Electoral Challenges	28
IV.	Presidential Electoral Challenge	29
V.	Conclusion	34

APPENDICES

Appendix One: 2000 Parliamentary Electoral Challenges:
 Specific allegations, findings and outcomes

[*Appendix One* is a separate 135-page document that has summaries of all 39 election petitions: see www.solidaritypeacetrust.org.za, or send request to: selvanc@venturenet.co.za]

Appendix Two: Bibliography.....36

Cover photograph: *victim of violence, Presidential election campaign, Mberengwa East. January 2002: this man reported that he was beaten with sjamboks and chains all over his body by youth militia and war veterans, because he supported MDC.*

[*photo originally used by Physicians for Human Rights, Denmark, January 2002*].

LIST OF ACRONYMS AND ABBREVIATIONS

CIO	Central Intelligence Organization
ESC	Electoral Supervisory Commission
EU	European Union
HC	High Court
MDC	Movement for Democratic Change
NCA	National Constitutional Assembly
NGO	Non-Governmental Organization
SADC	Southern African Development Community
SC	Supreme Court
ZANU (PF)	Zimbabwe African National Union, Patriotic Front
ZANLA	Zimbabwe African National Liberation Army
ZIPRA	Zimbabwe People's Revolutionary Army
ZAPU	Zimbabwe African People's Union
ZESN	Zimbabwe Election Support Network

I. INTRODUCTION

Five years ago this June, parliamentary elections were held in Zimbabwe. Both the ruling Zimbabwe African National Union - Patriotic Front (ZANU (PF)) and the opposition Movement for Democratic Change (MDC) fielded candidates in all of the 120 constituencies. When the results were announced, ZANU (PF) was declared the winner of sixty-two of the constituencies, while the MDC won fifty-seven of the constituencies.⁵ The MDC, however, alleged that the elections were marred by, *inter alia*, widespread violence and voter intimidation, and in accordance with Zimbabwe's electoral law, challenged the election results in thirty-nine of the constituencies.

A Presidential Amnesty in October 2000, pardoning all politically motivated crimes except rape and murder, ensured that perpetrators of political violence would not be brought before the Courts and that victims' stories would be officially silenced. The electoral petitions were therefore intended to serve the dual purpose of challenging the outcomes in 39 constituencies and also making an official part of the Zimbabwean Court record, the horrific accounts of murder, torture, assault and property destruction that formed the backdrop to the 2000 election.

Two years later, Zimbabwe's electorate again went to the polls in the 2002 presidential elections. Amid allegations of systematic violence and intimidation, polling irregularities, and vote rigging, Robert Mugabe was re-elected to an additional six-year term in office.⁶ The MDC refused to recognize the outcome of the election and likewise challenged the election results in the High Court of Zimbabwe.

A. Outcome of the electoral petitions

The most striking outcome of the 39 original petitions is that - during an entire parliamentary period of five years, and in spite of the fact that the Electoral Act, for obvious reasons, states that election petitions should be dealt with urgently - not one case was ever fully resolved by the judiciary. On the eve of the next parliamentary election, and with the dissolution of parliament only days away, justice has not been done and electoral fraud, intimidation and violence has gone unpunished.

Furthermore, in spite of the petitions providing evidence of 17 politically motivated murders, mostly with clearly indicated perpetrators, nobody has been prosecuted and sentenced for these murders.⁷

Out of the 39 original election petitions:

- 5 were never set down for hearing by the High Court
- 2 were dismissed by the High Court on procedural grounds

- 11 were withdrawn:

⁵ A third party candidate for ZANU Ndonga, Kumbula Wilson, won one seat in Parliament, Chipinge South. *See* ELECTORAL SUPERVISORY COMMISSION REPORT ON THE MARCH 2002 PRESIDENTIAL, MAYORAL AND COUNCIL ELECTIONS 31 (2002).

⁶ The official results reported by the Electoral Supervisory Commission indicate that Robert Mugabe (ZANU (PF)) received 1,681,212 votes (55.2% of the total votes cast), while Morgan Tsvangirai (MDC) received 1,262,403 votes (41.4% of the total votes cast). *See* ELECTORAL SUPERVISORY COMMISSION REPORT ON THE MARCH 2002 PRESIDENTIAL, MAYORAL AND COUNCIL ELECTIONS, 31 (2002).

⁷ Murder was excluded from the Amnesty. However, the perpetrators of the 1,308 incidents of torture, violence, intimidation and electoral fraud detailed in the petitions all fall under the Amnesty.

- as a result of intimidation of/violations against the complainant⁸
- or because after years of delay MDC candidates claimed prejudice

5 were not proceeded with, as the ZANU (PF) respondent/s died before the hearing

16 were heard by the High Court of Zimbabwe

*Out of the 16 petitions heard by the High Court*⁹

7 were ruled in favour of MDC

9 were ruled in favour of ZANU (PF)

Thirteen out of the 16 High Court rulings were appealed to the Supreme Court, with MDC appealing 6 of the rulings against them, and ZANU appealing all of the rulings against them. MDC could not appeal the Goromonzi petition dismissal because Judge Hlatshwayo has - to date - never presented his written arguments for the dismissal. They decided not to appeal two other petitions.

Out of the 13 petitions presented to the Supreme Court

3 have been heard to date

10 have never been heard

0 judgments have been given on the 3 cases heard

This meant that although in seven constituencies, the High Court had declared the election results null and void, and found the respondents complicit in electoral fraud and/or violence, the ZANU (PF) MPs in these constituencies have seen out five years in office.

B. Suspension from public office

In terms of the Electoral Act, the Court in passing judgment on an electoral petition may suspend a respondent implicated in a corrupt or illegal act from the right to vote or to hold public office for a period of up to five years.

In seven constituencies, ZANU (PF) respondents were found by the High Court to be complicit with illegal acts. Yet the lack of final outcome of these petitions at the Supreme Court level means that these MPs have seen out their terms in office. Furthermore, in four out of these seven constituencies, the respondents disqualified by the High Court for electoral misconduct during 2000, are standing again in the 2005 election

The seven constituencies ruled in favour of MDC because the High Court found corrupt and illegal practices linked to the respondents, are:

Constituency

Respondent

Mutoko South:

Olivia Muchena – Minister of State for Science and Technology*

⁸ MDC petitioners who withdrew their cases after intimidation are: Philemon Matibe, Chegutu; Tswangiwa Kanhema, Hurungwe West; Sibangani Mlandu, Gokwe North; Elliot Pfebve, Bindura; Lucka Sigabole, Kariba;

⁹ See ahead in this report for detailed discussions of all these judgments. For reasonable assumption of biased judgments in some cases, see sections on Judicial Review and High Court Findings in this report.

Makoni East:	Shadrek Chipanga – Dep Minister of Mines and Mining Development*
Gokwe South:	Jaison Max Machaya – Dep Minister of Home Affairs*
Hurungwe East:	Reuben Marumahoko*
Gokwe North:	Eleck Mkandla
Chiredzi North:	Elliot Chauke
Buhera North:	Kenneth Manyonda – former Governor of Manicaland Province

[* indicates respondents standing for election again in 2005]

C. Implication of the lack of Court outcomes for democratic processes

By failing to give final judgments in the electoral petitions set before it, the Supreme Court has exhibited a lack of concern for the rights of the electorate of Zimbabwe, and has implicitly rewarded illegal behaviour by people in senior positions, one of them a Cabinet Minister, and two Deputy Ministers.

It is further noted that Cabinet Minister Muchena and the two Deputy Ministers Machaya and Chipanga who have been found guilty of condoning electoral misconduct and violence by the High Court, have been nominated by ZANU (PF) to stand again in 2005 in the very same constituencies where they abused the electoral process in 2000. Similarly, Reuben Marumahoka stands again in Hurungwe East.

This is a disturbing indictment on the democratic process in Zimbabwe. In all 39 constituencies that were petitioned in 2000, levels of violence and intimidation were widespread,¹⁰ and the lack of concern shown by the judicial process for this reality in the five years since then, has sent a strong message to voters in these constituencies that their rights are of little or no interest to the State. Several election petitions were withdrawn before hearing because of the complainant suffering intimidation and/or property destruction.¹¹ Ruthless attacks on potential witnesses led to other petitions being withdrawn,¹² and even though the perpetrators of witness intimidation were not covered by the Amnesty of October 2000, nobody has ever been prosecuted.

Out of the 39 respondents originally named by MDC, five are deceased and two have fallen from grace within ZANU (PF)'s ranks and have faced charges in the Courts linked not to electoral fraud but monetary fraud and/or espionage.¹³

Of the remaining 32 respondents on the original list, 20 will stand for re-election in 2005. If the electoral challenges had been seen through to completion in all these cases, this would have allowed respondents to have been either vindicated or found guilty by a judicial process, however imperfect.¹⁴ The withdrawal of ten cases for reasons of intimidation/disillusionment with the judicial process, the failure even to hear five further cases in the High Court, and the failure of the Supreme Court to review the few heard by the High Court and appealed, means that 20 candidates go into this election in constituencies where thousands of voters remember the violence and/or fraud at the hands of these very

¹⁰ See accompanying summaries of petitions for details of some of the 1,308 accounts of violations of rights including murder, torture, assault and property destruction in these 39 constituencies.

¹¹ See PLAYING WITH FIRE; ZIMBABWE INSTITUTE, JUNE 2004, which recounts human rights abuses against 28 losing MDC candidates before and after election 2000.

¹² Id.

¹³ Phillip Chiyangwa, Chinoyi has been in and out of jail during 2004 on charges of externalizing foreign currency, and then on espionage charges, which were later dropped; Christopher Kuruneri, Mazowe West, has been in custody without bail since April 2004 on charges of externalizing foreign currency.

¹⁴ See "Judicial Overview" ahead for collapse of the separation of powers between State and judiciary in the last four years.

same individuals, and believe that these individuals are above the law and will not be held accountable no matter what they do or allow to be done in their campaigns.¹⁵

Not only in these 20 constituencies, but across Zimbabwe, voters go the polls believing that the Courts will not offer them any right of redress if they are victimized in the context of a campaign.

The Supreme Court, which has chosen to ignore some brave rulings by High Court judges against ZANU (PF) respondents, has in so doing reinforced the longstanding pattern of violence and impunity in our nation's history; victims continue to be punished, and perpetrators, as long as they are on the side of the incumbent government, are rewarded for their crimes.

Perpetrators of election violence were pardoned by President Mugabe in October 2000, and have therefore never been held accountable for heinous acts.

Respondents in 39 petitions have escaped official judgment - even in the seven instances where the High Court found them guilty of misconduct. In fact, three were rewarded with high office.

In stark contrast to the positive rewards given to ZANU (PF) respondents over the last five years, stands the cruel and inhuman treatment that sitting opposition Members of Parliament have experienced at the hands of ZANU (PF) and State agents: 90% of MDC MPs report having suffered human rights violations at the hands of the State, including assassination attempts, torture, assaults, illegal detention. Not a single perpetrator of these acts against MPs has been prosecuted.¹⁶

The appeal against the outcome of the Presidential election in 2002 has been stalled in the Courts for a full three years since this election took place, once more making a mockery of the concept of justice. In such an instance justice delayed, is justice rendered irrelevant. Epidemic violence was part of the presidential campaign. While no amnesty was declared in 2002, *de facto* impunity has meant that once more, those committing acts of violence against the political opposition have not been prosecuted and victims have had no reparations and no justice.

Against this background, with what level of depression, cynicism and hopelessness might Zimbabwean voters be expected to view the 2005 election, particularly in those constituencies where the very persons who committed or condoned atrocities are standing once more, having escaped final judgment and censure by the Courts?

¹⁵ Those re-contesting are listed by name, constituency, and petition number as they appear in the attached appendix, where summarized details of each case can be found: Aaron Baloyi, Chiredzi South (7); Lovemore Mupukuta, Gokwe Central/ Gokwe (9); Flora Bhuka, Gokwe East/Gokwe Nembudziya (10); Jaison Max Machaya, Gokwe South/Gokwe Kana (12); Ester Nyauchi, Gokwe West/ Gokwe Centre (13); Herbert Murerwa, Minister of Higher Education and Technology, Goromonzi, (14); Edward Chindori-Chininga, Guruve South (16); Reuben Marumahoko, Hurungwe East (18); Aneas Chigwedere, Hwedza (20); Tongesayi Chipanga, former CIO Director, Makoni East (22); Sidney Sekeramayi, Minister of State Security, Marondera East (24); Chenhamo Chimutengwende, Mazowe East (27); Rugare Gumbo, Mberengwa East (29); Joram Gumbo, Mberengwa West (30); Saviour Kusukuvere, Mount Darwin South (31); Joel Matiza, Murehwa South (33); Olivia Muchena, Minister of Science and Technology, Mutoko South (34); Isaiah Shumba, Dep Minister of Education, Mwenezi (35); Dustan Nhema, Shurugwi, (36); Ignatius Chombo, Minister of Local Government and Rural and Urban Development, Zvimba North (38).

¹⁶ See PLAYING WITH FIRE, op cit.

II. BACKGROUND

A. Political Overview:

i. *The 1980s*

On 18 April 1980, following a prolonged guerrilla war, Zimbabwe gained independence from white-minority rule. In Zimbabwe's first general elections, ZANU (PF) won the majority of the seats in Parliament and its leader, Robert Mugabe, was elected Prime Minister. The other principal party in the liberation movement, the Zimbabwe African People's Union (ZAPU), won twenty seats in Parliament.¹⁷ Following the elections, the ZAPU leader, Joshua Nkomo, was given a cabinet post and efforts were made to integrate into one national army, ex-combatants from the Zimbabwe African National Liberation Army (ZANLA – armed wing of ZANU (PF)) and Zimbabwe People's Revolutionary Army (ZIPRA – armed wing of ZAPU). These armies had long standing and deep seated antagonisms, and integration proved a problematic process: sporadic outbreaks of violence and illegal caching of arms occurred throughout Zimbabwe, and in late 1981 there was a major clash between ex-ZIPRA and ex-ZANLA forces in Bulawayo. Rhetoric by the government against ZAPU intensified, large numbers of ex-ZIPRAs defected and by mid 1982 there were sporadic "dissident" attacks on civilians carried out by ex-combatants believed to have ties with the ZAPU party.

Relations between ZANU and ZAPU deteriorated and in early 1983, President Mugabe dispatched the notorious 5 Brigade, a North Korean-trained army unit consisting of ex-ZANLAs, to Midlands and Matabeleland. The ensuing clampdown was severe, and in the early- to mid-1980s an estimated 20,000 civilians were killed by government forces in what is known as the *Gukurahundi* massacres.¹⁸ Hundreds of thousands of others were victims of torture, illegal detentions, beatings and destruction of property.

In December 1987, the Unity Accord was signed by the two political parties, resulting in the effective dissolution of ZAPU into ZANU-PF. Following the 1987 Unity Accord, Zimbabwe became a *de facto* one-party state.

The Unity Accord was followed by a general amnesty in April 1988, which pardoned 122 dissidents – and also pardoned approximately 3,500 members of 5 Brigade, plus hundreds of other State personnel – for all political crimes including murder committed from 1980 to April 1988. Crimes by the State are estimated to account for more than 90% of all atrocities linked to this era.¹⁹ It was therefore government aligned forces that benefited most from the 1988 amnesty, thus reinforcing the pattern of impunity for those who commit crimes

¹⁷ See REPORT OF THE COMMONWEALTH OBSERVER GROUP, THE PARLIAMENTARY ELECTIONS IN ZIMBABWE, 24-25 JUNE 2000, at 8 (2000).

¹⁸ "Gukurahundi," a Shona term used by President Mugabe to describe the mission of the 5 Brigade, literally means "the rain which washes away the chaff before the spring rain." See CATHOLIC COMMISSION FOR JUSTICE AND PEACE & LEGAL RESOURCES FOUNDATION, BREAKING THE SILENCE BUILDING TRUE PEACE: A REPORT ON THE DISTURBANCES IN MATABELELAND AND THE MIDLANDS 1980-1988, SUMMARY REPORT 13 (1999).

¹⁹ Id, see "Results" pages 140 ff.

at the behest of the government of the day - a pattern that began under colonial rule and that continues to date.²⁰

ii. The rise of opposition: issue of a new constitution

Elections in 1990 and 1995 were not entirely peaceful, and any attempts within the nation to form a viable opposition party were quelled. From 1988, until the formation of the Movement for Democratic Change (MDC) ahead of the 2000 election, no political party won more than two seats in a parliamentary election.

In September 1999, following food riots, rising inflation, and economic stagnation, a civil society movement gained momentum under the banner of the National Constitutional Assembly (NCA), campaigning nationwide for a people-driven constitution that would result in more accountable governance. The government tried to hijack the process by putting forward their own revised constitution, which effectively entrenched presidential powers. The MDC was formed in late 1999 under the leadership of labour union leader Morgan Tsvangirai, and absorbed many who had been involved in the unions and civic movements. In the early months of 2000, the MDC and the NCA campaigned against the government-proposed constitution, which was put to a referendum in February 2000. The electorate responded by rejecting the government's draft constitution by a margin of 54.7% to 45.3%²¹ Just five months after the formation of the MDC, ZANU (PF) was handed its first ever national poll defeat.

iii. The farm invasions – and election 2000

ZANU (PF) indicated that they would accept the results. However, within two weeks of the referendum, the first farm invasions began. These escalated in the ensuing months and became acclaimed as part of a violent “land reform” programme, in which over one thousand white commercial farmers were displaced by ZANU (PF) militias and war veterans.²² This was hailed as a third “chimurenga” (revolution), and became the cornerstone of ZANU (PF)'s 2000 campaign. Political violence against supporters of the MDC was brutal and widespread, and was both masked by, and rhetorically justified by, the concurrent “land revolution”.²³

On 24-25 June 2000, Zimbabwe's electorate returned to the polls for the parliamentary elections and the MDC won 57 of the 120 contested seats in Parliament. The elections were widely recognized to have been marred by high levels of violence and voter intimidation. The report of the Commonwealth Observer Group concluded:

The campaign was not peaceful. There was violence, intimidation and coercion in many parts of the country, especially in rural areas, both against ordinary voters and against candidates and party supporters. All parties share responsibility in this. There were incidents where opposition parties carried out acts of violence. But it would appear that most of the violence was

²⁰ General amnesties have been issued in 1979 and 1980, pardoning predominantly Rhodesian armed forces, and in 1988, 1995 and 2000 pardoning predominantly Zimbabwean government forces and ZANU (PF) supporters.

²¹ See REPORT OF THE COMMONWEALTH OBSERVER GROUP, *supra* note 4, at 10.

²² See, e.g., *id.* at 10; see also INTERNATIONAL COUNCIL OF ADVOCATES AND BARRISTERS, THE STATE OF JUSTICE IN ZIMBABWE 38 (2004).

²³ See further ahead in this report for Judge Hlatshwayo's judgment on the Mberengwa West petition where he acknowledges the widespread violence including several murders, but explicitly claims violence in this constituency was driven by land hunger rather than the election process, and therefore finds in favour of ZANU (PF).

directed against the opposition parties, especially the Movement for Democratic Change.

These violent acts included murders, rapes, beatings and the ransacking and burning of houses of opposition party members and supporters. It was reported that thirty-six people had been killed, thousands injured and seven thousand displaced

... As in many elections, there were occasions when violence was the result of unplanned clashes between groups of party supporters. But for the most part it appears to us that the violence which disfigured this campaign was employed systematically as part of a strategy to diminish support for the opposition parties.²⁴

Similarly, the European Union Observation Mission concluded that

The election campaign was marred by high levels of violence and intimidation. Most areas of the country were affected.

An assessment of political violence since February 2000 made by the EU Observer Mission, together with reports from EU Observers deployed across the country since early June, attributed the bulk of political violence to Zanu (PF).

The evidence showed that between February and June Zanu (PF) was engaged in a systematic campaign of intimidation aimed at crushing support for opposition parties...

The level of violence and intimidation varied from one part of the country to another. In some urban centres, relatively normal political campaigning continued. In many rural areas, however, the level of intimidation by Zanu (PF) were so intense as to make it virtually impossible for opposition parties to campaign.²⁵

The findings of the international election observer missions were supported by local civic groups and human rights organizations. After analyzing the cases of approximately 13,000 victims of political violence, the AMANI Trust found that ZANU (PF) supporters and government officials were responsible for approximately 93 per cent of the violence, while violence committed by MDC supporters accounted for only 2 per cent of the violence.²⁶

As a result of the widespread violence that marred the elections, the MDC challenged the election results in thirty-nine of the constituencies. In July 2000, pursuant to Zimbabwe's electoral law, the MDC filed thirty-nine election petitions in the High Court. President

²⁴ THE REPORT OF THE COMMONWEALTH OBSERVER GROUP, *supra* note 4, at 20.

²⁵ REPORT OF THE EU ELECTION OBSERVATION MISSION ON THE PARLIAMENTARY ELECTION IN ZIMBABWE ON 24-25 JUNE 2000 (2000), http://europa.eu.int/comm/external_relations/human_rights/report_zimbabwe/preelection_periode.htm.

²⁶ *See id.*, at http://europa.eu.int/comm/external_relations/human_rights/report_zimbabwe/preelection_periode.htm; *see also* ZIMBABWE HUMAN RIGHTS NGO FORUM, WHO IS RESPONSIBLE? ALLEGED PERPETRATORS AND THEIR CRIMES DURING THE 2000 PARLIAMENTARY ELECTION PERIOD 2 (2001) (concluding after taking statements from approximately 1000 victims that "ZANU (PF) was engaged in a systematic campaign of intimidation aimed at crushing opposition parties").

Mugabe was also aware of the violence that had accompanied the ZANU (PF) victories and responded accordingly. On 6 October 2000, President Mugabe issued a general amnesty for anyone having committed a politically-motivated crime in connection with the parliamentary elections: “A free pardon is hereby granted to every person liable to criminal prosecution for any politically-motivated crime committed during the period 1st January, 2000 to 31st July, 2000.”²⁷ On 8 December 2000, President Mugabe went one step further and attempted by executive order to invalidate the electoral challenges:

Recognizing that the general elections held following the dissolution of Parliament on the 11th April, 2000, were held under peaceful conditions and that the people who voted did so freely . . . the election of a [member of Parliament] shall not be rendered void . . . and the doing of anything in connection with, arising out of or resulting from the general election referred to in section 2 which is or may be such a contravention [of the Electoral Act] is to that extent hereby validated and shall be deemed not to be such a contravention.²⁸

The MDC responded by challenging the constitutionality of the executive order asserting that it represented a blatant usurpation of the judiciary and a violation of their constitutional rights. The Supreme Court agreed. In a unanimous decision handed down on 30 January 2001, the Supreme Court held that:

...the applicants had the civil right to partake in an election that was free and fair and devoid of corrupt or illegal practices, to challenge the result of an election which was claimed to have been tainted by corrupt and illegal practices, and to seek practical and meaningful redress in the form of a High Court order certifying that the results were tainted. The notice effectively deprived them of that right. The right of full and unimpeded access to courts is of cardinal importance for the adjudication of justiciable disputes.²⁹

In 2002, Zimbabwe’s electorate braced for another election—the closely contested presidential race between Robert Mugabe and the leader of the MDC, Morgan Tsvangirai. By the completion of election, the reported number of MDC officials and party supporters that ZANU (PF) militants had “hunted down and slaughtered” had risen to over 100.³⁰ In the end, Robert Mugabe was declared the victor of the 9-11 March 2002 presidential election and re-elected to a six-year term in office with 55.1% of the votes.³¹ On 12 April 2002, Morgan Tsvangirai filed an election petition in the High Court challenging the election results, and international election observers again declared the elections to be neither free nor fair.³² As noted by the Commonwealth Election Observer Mission:

²⁷ General Notice 457A of 2000 - Clemency Order No. 1 of 2000. The general amnesty excluded the “specific offences” of “murder, robbery, rape, indecent assault, theft, possession of arms and any offence involving fraud or dishonesty.”

²⁸ Statutory Instrument 318 of 2000, Electoral Act (Modification) (No. 3) Notice, 2000. *See generally* Electoral Act, Amended to October 28, 2003, § 158 (regulatory powers of the president).

²⁹ *Movement for Democratic Change v. Chinamasa*, 2001 (1) ZLR 69 (S), at 70.

³⁰ Geoff Feltoe, *An Unfair Contest: the Presidential Elections in Zimbabwe*, 6 *Zimbabwe Human Rights Bulletin*, 81 (2002).

³¹ *See supra* text accompanying note 3.

³² *See, e.g.*, REPORT OF THE COMMONWEALTH OBSERVER GROUP, *supra* note 3, at 48-49; *but cf* REPORT OF THE SOUTH AFRICAN OBSERVER MISSION TO THE PRESIDENTIAL ELECTIONS IN ZIMBABWE 09 TO 11 MARCH

[T]he Presidential election in Zimbabwe was marred by a high level of politically motivated violence and intimidation, which preceded the poll. While violent acts were carried out by supporters of both of the main political parties, it is our view that most of these were perpetrated by members/supporters of the ruling party against members/supporters of the opposition. ...

All of the foregoing brings us to the conclusion that the conditions in Zimbabwe did not adequately allow for a free expression of will by the electors.³³

Local civic groups and human rights organization likewise reflected these findings. The Zimbabwe Election Support Network (ZESN) concluded that “the 2002 elections violated the SADC norms and standards and as a result the will of the Zimbabwean electorate was not expressed in a transparent, free and fair environment.”³⁴ Likewise, after taking more than 900 statements from victims of political violence, the Zimbabwe Human Rights NGO Forum found that most of the victims were supporters of the MDC and only 1.4% of the victims were ZANU (PF) supporters.³⁵ The Zimbabwe Human Rights NGO Forum also concluded that “the police have seemingly taken little action to protect persons against the widespread political violence but have enforced the law with partiality.”³⁶ Similarly, after examining hundreds of victims tortured at the hands of state agents and ZANU (PF) supporters, the AMANI Trust concluded:

The AMANI Trust thus supports the conclusion of other observer groups that this Presidential Election was seriously defective, and cannot be seen as meeting minimum standards for holding of elections. When the outcome of both elections is taken together—the 2000 General Election and the Presidential Election—the legitimacy of Zanu (PF) is seriously in doubt, and, until such time as proper legal determinations on the elections through the Zimbabwean courts is complete, the Zanu (PF) government and the executive can only be considered to be *de facto* and not *de jure*.³⁷

B. Electoral Overview

An eyewitness account of the tumultuous 1874 elections held in Wolverhampton, England observed:

Blood flowed freely and they were terribly kicked, one so shockingly about the head and face that his life is in much jeopardy—as soon as the roughs

2002, at 22 (2002) (concluding that “the outcome of the presidential elections in Zimbabwe represented the legitimate voice of the people of Zimbabwe, conditions precedent to the elections notwithstanding”).

³³ REPORT OF THE COMMONWEALTH OBSERVER GROUP, *supra* note 3, at 48-49.

³⁴ ZIMBABWE ELECTION SUPPORT NETWORK, 2002 PRESIDENTIAL ELECTIONS REPORT 83 (2002).

³⁵ See ZIMBABWE HUMAN RIGHTS NGO FORUM, ARE THEY ACCOUNTABLE? EXAMINING ALLEGED VIOLATORS AND THEIR VIOLATIONS PRE AND POST THE PRESIDENTIAL ELECTION MARCH 2002, at 4 (2002).

³⁶ *Id.* at 82.

³⁷ AMANI TRUST, THE PRESIDENTIAL ELECTIONS AND THE POST-ELECTION PERIOD IN ZIMBABWE 2 (2002). See generally AMANI TRUST, BEATING YOUR OPPOSITION: TORTURE DURING THE 2002 PRESIDENTIAL CAMPAIGN IN ZIMBABWE (2002).

were able they got back to the railway station, where the profuse flow of blood has left painful evidence of the extent of the injuries the most injured have sustained.³⁸

In response to the electoral violence that marred English elections of the late nineteenth century, the British Parliament took prompt action and passed a series of electoral laws that created an effective inquisitorial mechanism for dealing with electoral malpractices and imposed a strict code of conduct upon the electorate. Such measures enabled England in a few short years to turn the tide of violence that had long plagued its electoral process.³⁹ It is significant to note that the same statutory provisions that England successfully used to quash electoral violence have been incorporated into Zimbabwe's electoral law. As Judge James Devittie noted, "there is no significant omission."⁴⁰

Specifically, Zimbabwe's Electoral Act contains three provisions by which an election can be set aside. First, section 124 stipulates that an election can be set aside for "corrupt"⁴¹ or "illegal"⁴² practices:

[I]f . . . any corrupt practice or illegal practice has been committed . . . 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, the election of that candidate shall be void, and a fresh election shall thereupon be held.⁴³

This "one strike and you're out" provision stipulates that if a single corrupt or illegal act—including imposing "undue influence" on a voter⁴⁴—is committed with the knowledge and

³⁸ The eyewitness account of the 1874 Wolverhampton elections was quoted by Judge James Devittie in *Makamure v. Mutongwizo* 1998 (2) ZLR 154 (H), at 155 (Zimb.).

³⁹ *See id.* at 162-70.

⁴⁰ *Id.* at 165.

⁴¹ "Corrupt practices" are defined in Part XX of the Electoral Act as: (1) treating, (2) undue influence, (3) bribery, (4) personation, or (5) the illegal transportation of voters. *See* Electoral Act, amended to 28 Oct. 2003, §§ 104-08.

⁴² "Illegal practices" are defined in Part XXI of the Electoral Act as: (1) prohibited or unauthorized expenditures, (2) prohibited employment, (3) corrupt procurement of a candidate, (4) betting, (5) improper use of bills and placards, (6) use of prohibited symbols, (7) prohibited activities within the vicinity of a polling station, (8) prohibited use of premises licensed for the sale of liquor, (9) procurement of prohibited persons to vote, (10) false statement regarding the withdrawal of a candidate, (11) obstruction of voters, or (12) use of philanthropic funds for political purposes. *See id.* §§ 110-22.

⁴³ *Id.* § 124(a).

⁴⁴ *Undue influence* is defined by § 105 of the Electoral Act as:

- (1) Any person who, directly or indirectly, by himself or by any other person –
 - (a) 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
 - (b) 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
 - (c) does or threatens to do anything to the disadvantage of any person;in order to induce or compel that person –
 - (i) to sign a nomination paper or refrain from signing a nomination paper; or
 - (ii) to vote or refrain from voting.shall be guilty of the offense of undue influence.
- (2) Any person who, directly or indirectly, by himself or by any other person –
 - (a) makes use of or threatens to make use of any force, violence or restraint or against any person; or
 - (b) 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
 - (c) does or threatens to do anything to the disadvantage of any person;

consent of any of the candidate's agents, the election is necessarily void, regardless of whether the actual outcome of the election were affected.⁴⁵ Furthermore, the person who committed the corrupt or illegal act shall then be declared by the High Court to be incapable of voting or holding a public office for a period not exceeding five years⁴⁶ and a statement with the evidence taken at the trial "shall be transmitted by the registrar of the High Court to the Attorney-General with a view to the institution of any prosecution proper to be instituted in the circumstances."⁴⁷

Secondly, section 149 of the Electoral Act provides that an election can be set aside due to a contravention of the Electoral Act:

An election shall be set aside by the High Court by reason of any mistake or non-compliance with the provisions of this Act, if, and only if, it appears to the High Court that –

- (a) the election was not conducted in accordance with the principles laid down in this Act; and
- (b) such mistake or non-compliance did affect the result of the election.⁴⁸

Finally, sections 132 & 136 of the Electoral Act stipulate that an election can be set aside for *any cause whatsoever*:

A petition complaining of an undue return or an undue election of a member of Parliament by reason of want of qualification, disqualification, corrupt practice, illegal practice, irregularity, or any other cause whatsoever may be presented to the High Court...

on account of that person –

- (i) having signed a nomination paper or refrained from signing a nomination paper; or
 - (ii) having voted or refrained from voting at any election;
- shall be guilty of the offense of undue influence.
- (3) Any person who by abduction, duress, threat[en]s to invoke any unnatural means whatsoever or references to such unnatural means or by fraudulent device or contrivance –
- (a) impedes or prevents the exercise of his vote by a voter; or
 - (b) compels, induces or prevails upon a voter either to vote or to refrain from voting at an election;
- shall be guilty of an offense of undue influence.

Id. § 105.

⁴⁵ See, e.g., *Muzira v. Muchena*, HC 8231/2000, Mutoko South Election Petition Judgment (HH 68/2001), at 6, issued on 27 April 2001; but see § 125 of the Electoral Act:

[If] the candidate has proved to the satisfaction of the High Court that –

- (a) no corrupt practice or illegal practice was committed at that election by the candidate himself or by his election agent and that the offenses mentioned in the said finding were committed without the sanction or connivance of the candidate or his election agent; and
- (b) the candidate and his election agent took all reasonable precautions for preventing the commission of corrupt practices and illegal practices at that election; and
- (c) the offences mentioned in the finding were of a trivial, unimportant and limited character;

then the election of that candidate shall not, by reason of the offences mentioned in the finding, be void, nor shall the candidate or the election agent be subjected to any incapacity under this Act.

Id. § 125.

⁴⁶ See Electoral Act, *supra* note 25, § 124.

⁴⁷ *Id.* § 137.

⁴⁸ *Id.* § 149.

At the conclusion of the trial of the election petition the High Court shall determine whether the respondent was duly elected⁴⁹

In addition to the specific provisions for setting aside elections, Zimbabwe's electoral law clearly mandates that electoral petitions must be dealt with in an urgent manner: "The Registrar and all parties to any stated case, petition, appeal or application referred to in these rules shall take all steps necessary to ensure that the matter is dealt with as quickly as possible."⁵⁰

In all, Zimbabwe's electoral law provides ample grounds for the enforcement of electoral morality. As Judge James Devittie duly noted: "We thus have at our disposal as effective an instrument as in any English-speaking jurisdiction to deal with electoral malpractices."⁵¹

C. Judicial Overview

On 21 December 2000, writing for a unanimous Supreme Court, Chief Justice Anthony Gubbay issued a stinging indictment of the government's increasing lawlessness: "Wicked things have been done, and continue to be done. They must be stopped. Common law crimes have been, and are being, committed with impunity. Laws made by Parliament have been flouted by the Government."⁵² One month later, on 30 January 2001, the Chief Justice again acted against the executive, and ruled that President Mugabe's attempt to invalidate the electoral challenges was an unconstitutional violation of the petitioners' civil rights.⁵³

Three days after ruling against the President, Chief Justice Gubbay was visited by the Justice Minister and forced into early retirement.⁵⁴ The Justice Minister then met with the other justices on the Supreme Court and recommended that they too resign, noting that "the President does not want you to come to any harm."⁵⁵ Over the ensuing three years, three of the four remaining Supreme Court justices and nine of the eighteen High Court judges, resigned, were suspended, or otherwise left the bench.⁵⁶ Some of the judges could bear to serve no longer.⁵⁷ As High Court Judge Michael Gillespie noted in his final judgment before resigning and leaving the country: "Manipulation of court rolls; selective prosecution; and the packing of the Bench of the superior courts are techniques which provide a government determine to do so with the opportunity to subvert the law while at the same time appearing to respects its institutions."⁵⁸ Judge Gillespie then concluded:

A judge, finally, who finds himself in the position where he is called upon to administer the law only as against political opponents of the government and

⁴⁹ *Id.* § § 132, 236.

⁵⁰ Statutory Instrument 74A of 1995, Electoral (Application, Appeals and Petitions) Rules 1995, § 31.

⁵¹ *Makamure v. Mutongwizo* 1998 (2) ZLR 154 (H), at 168.

⁵² *Commercial Farmers Union v. Minister of Lands* 2000 (2) ZLR 469 (S), at 486.

⁵³ *See Movement for Democratic Change v. Chinamasa*, 2001 (1) ZLR 69 (S).

⁵⁴ *See* INTERNATIONAL BAR ASSOCIATION, REPORT OF ZIMBABWE MISSION 2001, §§ 10.2, 10.6 (2001). The International Bar Association concluded:

The Delegation is satisfied that . . . Chief Justice Gubbay was forced into early retirement by relentless pressure from the Government and state controlled Government supporting media that he should resign, coupled with unfair and untrue allegations about him and threats of violence which the Government appear at the least to have condoned.

⁵⁵ INTERNATIONAL COUNCIL OF ADVOCATES AND BARRISTERS, THE STATE OF JUSTICE IN ZIMBABWE 49 (2004).

⁵⁶ *See, e.g., Id.* at 51.

⁵⁷ *See* Jeremy Gauntlett, *Mugabe's Broken Bench* (on file with author).

⁵⁸ *State v. Humbarume*, Judgment HH 148-2001, at 5 (*issued* on 26 Sept. 2001).

not against government supporters faces the challenge to his conscience: that is whether he can still consider himself to sit as an independent Judge in an impartial Court.⁵⁹

With the departure of over half the members of the superior courts in the past four years, the composition of the superior courts has dramatically changed. The outgoing judges have been replaced with individuals perceived by many to be sympathetic to the ZANU (PF) government.⁶⁰ The independence of the judiciary has been further compromised through the allocation by the ZANU (PF) government of commercial farms to the judges. The new Chief Justice of the Supreme Court Godfrey Chidyaisiku,⁶¹ the Judge President of the High Court Paddington Garwe,⁶² High Court Judge Ben Hlatshwayo⁶³—the judge hearing the presidential electoral challenge—and at least ten of the other seventeen High Court judges have taken prime agricultural estates seized from commercial farmers through the government’s controversial land reform program.⁶⁴ It cannot be reasonably denied that, at the least, the possession of commercial farms by members of the judiciary creates an “apprehension of bias” on the part of the judiciary,⁶⁵ particularly given that (1) these judges are called upon to rule on the legality of the very program in which they themselves are beneficiaries, and (2) the government can, at its pleasure, withdraw the allocation of the farms and has no duty to pay compensation to the judges.⁶⁶

Due to the growing concern over the deteriorating state of the Zimbabwe’s judiciary, both the International Bar Association and the International Council of Advocates and Barristers sent delegations to the country. After having met with government officials, lawyers, and members of the judiciary, the International Bar Association concluded that the government’s actions vis-à-vis the judiciary put the “rule of law in Zimbabwe at the gravest of peril”⁶⁷ and the “very fabric of democracy at risk.”⁶⁸ Likewise, the delegation from the International Council of Advocates and Barristers concluded that Zimbabwe’s judiciary has been “distorted and subverted for the illegitimate maintenance of political power”⁶⁹ to such an extent that it can no longer be characterized as “independent and impartial.”⁷⁰

⁵⁹ *Id.* at 6.

⁶⁰ *See, e.g.*, INTERNATIONAL COUNCIL OF ADVOCATES AND BARRISTERS, *supra* note 39, at 4; *see also, e.g.*, LEGAL RESOURCES FOUNDATION, JUSTICE IN ZIMBABWE 12 (2002).

⁶¹ *See* INTERNATIONAL COUNCIL OF ADVOCATES AND BARRISTERS, *supra* note 39, at 27-28.

⁶² *See* Peta Thornycroft, *Lay Assessors Block Judge’s Guilty Verdict on Tsvangirai*, DAILY TELEGRAPH (U.K.), 30 July 2004, at 14.

⁶³ *See e.g.*, Offer of Land Under the Land Reform and Resettlement Programme (*accepted* by Judge Hlatshwayo 30 June 2002); *see also* Nicole v. Hlatshwayo HC 232/2003, Judgment (HH 34-2003), at 4 (*issued* on 7 March 2003) (suit brought by dispossessed farm owner requesting the eviction of Judge Hlatshwayo from the farm); *see also* Peta Thornycroft, *Zimbabwe Judge Takes Over White Homestead*, DAILY TELEGRAPH (U.K.), 17 June 2003, at 11 (reporting that Judge Hlatshwayo broke into his allocated homestead while the owner was out of the country).

⁶⁴ *See* Thornycroft, *supra* note 46, at 14.

⁶⁵ *See, e.g.*, Associated Newspapers of Zimbabwe v. Diamond Ins. Co., 2001 (1) ZLR 226 (HC), at 238 (holding that the test for “apprehension of bias” is whether a litigant would “reasonably apprehend a probability of bias on the part of the judge”).

⁶⁶ *See e.g.*, INTERNATIONAL COUNCIL OF ADVOCATES AND BARRISTERS, *supra* note 39, at 4 (“Some Supreme Court and High Court Judges have been allocated land under the Government’s commercial farms allocation scheme and hold that land at nominal rents and at the Government’s pleasure. The deleterious effect this has for judiciary independence is too obvious to require stating.”).

⁶⁷ INTERNATIONAL BAR ASSOCIATION, *supra* note 38, § 12.1.

⁶⁸ *Id.* at 12.1.

⁶⁹ INTERNATIONAL COUNCIL OF ADVOCATES AND BARRISTERS, *supra* note 39, at 70.

⁷⁰ *Id.* at 5.

In the end, though, perhaps the truest test of the judiciary's independence came in how it would handle what were likely the most highly politicized group of cases to ever come before Zimbabwe's judiciary—the presidential electoral challenge and the thirty-nine parliamentary electoral challenges.

II. PARLIAMENTARY ELECTORAL CHALLENGES

A. Allegations of Violence, Intimidation, and Polling Irregularities

In July 2000, thirty-nine MDC parliamentary candidates, represented by sixteen lawyers from six separate law firms, filed election petitions in the High Court challenging the election results in their respective constituencies. The election petitions and witness affidavits documented some 1308 incidents of alleged violence, intimidation, polling irregularities, and contraventions of the Electoral Act.⁷¹ When taken in their totality, the alleged acts of violence portray a systematic campaign of terror perpetrated on the part of the ruling ZANU-PF party. Seventeen members of the MDC were alleged to have been shot, stoned, bludgeoned, or burned to death by ZANU-PF supporters—including two members of Morgan Tsvangirai's campaign team who were burned alive at gunpoint by ZANU-PF agents and CIO operative Joseph Mwale.⁷² ZANU (PF) members with the support of war veterans

⁷¹ See *2000 Parliamentary Electoral Challenges - Summary of Allegations, Findings and Outcomes* (on file with author).

⁷² See *Tsvangirai v. Manyonda*, HC 8139/2000, Buhera North Election Petition, at 5 (*filed* on 25 July 2000); see also, e.g., *Tsvangirai v. Manyonda*, HC 8139/2000, Buhera North Election Petition, Judgment & Summary of Evidence (HH 67/2001), at 62-64 (*issued* on 26 April 2001) (On 15 April 2000, Morgan Tsvangirai's campaign manager—Tichoana Chiminya—and a member of the MDC drama group—Talent Mabika—were burned to death when their vehicle was stopped at gunpoint and petrol bombed by ZANU (PF) agents and CIO operative Joseph Mwale.).

See also *Pfebve v. Gezi*, HC 8106/2000, Bindura Election Petition, at 6-7, 20 (*filed* on 25 July 2000) (On 30 April 2000, ZANU (PF) supporters killed Mathew Pfebve—the brother of the MDC candidate. The cause of death was “massive brain injury from trauma, laceration of the right lung, and assault.” The hit squad, formed at a meeting chaired by the ZANU (PF) candidate—Border Gezi—included John Karikoga, Shepherd Kararira, M. Mapundu, W. Mapundu, C. Kavranje, and P. Pfdzwa. It is believed that the target of the hit squad had been the MDC candidate, but his brother was mistakenly killed instead.).

See also *Mudzori v. Bhuka*, HC 8228/2000, Gokwe North Election Petition, at 3 (*filed* on 26 July 2000) (On 21 June 2000, people chanting ZANU (PF) slogans fatally assaulted Zeke Chigagura—an MDC activist—at the Kahobo Business Centre and dumped his dead body in front of the house of the MDC candidate's campaign manager.).

See also *Mlandu v. Mkandhla*, HC 8229/2000, Gokwe East Election Petition, at 7 (*filed* on 26 July 2000) (On 18 June 2000, Wonder Manhango—a member of the MDC candidate's campaign team—was abducted and tortured by ZANU (PF) supporters. His assailants included Felix Dube, Levy Calias, Mufundisi Siyakofu, and Tobias Magwatu. The ZANU (PF) supporters castrated Wonder Manhango, broke his legs, “bashed in” his head with a hoe handle, and then dumped him in a ditch. Wonder Manhango died on 26 June 2000 from injuries sustained during the assault.).

See also *McCormick v. Mazikana*, HC 8114/2000, Guruve North Election Petition, at 7 (*filed* on 25 July 2000) (On 2 April 2000, a bus transporting MDC supporters was ambushed at a ZANU (PF) roadblock at Chiweshe Business Centre. The roadblock was manned by approximately 200 ZANU (PF) supporters armed with axes, knives, sticks, and stones. Non-MDC supporters were ordered off the bus and the ZANU (PF) candidate's campaign manager—Tailor Dakwa—then instructed the crowd to kill the MDC supporters. The ZANU (PF) supporters proceeded to stone and beat the MDC supporters on the bus. Doreen Marufu, who was pregnant at the time, was stoned to death by the crowd.).

See also *Sigobole v. Mackenzie*, HC 8224/2000, Kariba Election Petition, at 8 (*filed* on 26 July 2000) (Luckson Kanurira—the MDC district secretary—was dragged out of his office by ZANU (PF) militia and severely assaulted. The abduction was reported to the police but no action was taken. On 25 April 2000, the

were alleged to have set up bases throughout the constituencies that ostensibly served as torture centres—such as the Gokwe District Council Offices,⁷³ the Texas Ranch base in

ZANU (PF) candidate, along with Rex Chikwana (a.k.a. “Black Jesus”) and the ZANU (PF) militia took eight of the abducted MDC members—including Luckson Kanurira—to Charara Estate. The ZANU (PF) militia proceeded to severely assault the farm workers including Bobo Chatima with “batons, sjamboks, booted feet and other weapons” for their real and perceived support of the MDC. Bobo Chatima died from the injuries sustained during the assault. “Black Jesus” and the ZANU (PF) militia then dumped five of the abducted and severely beaten MDC members at the side of a road in Nyamhunga Township. Luckson Kanurira died at the side of the road from injuries sustained during the assault.).

See also Chipangura v. Gwanzura, HC 8190/2000, Marondera West Election Petition, at Annexure A (*filed* on 26 July 2000) (On 29 April 2000, war veterans and ZANU (PF) agents killed Allan Dunn—an MDC branch coordinator.).

See also Hove v. Gumbo, HC 7752/2000, Mberengwa West Election Petition, ¶¶ 8.2-8.3 (*filed* on 17 July 2000) (On 4 June 2000, MDC supporter Fainos Zhou was abducted by ZANU (PF) supporters and war veterans and taken to the Texas Ranch base. Fainos Zhou was handcuffed, his MDC T-shirt was burned, he was accused of supporting the MDC, and over a period of several days, tortured, severely assaulted, and subjected to various humiliating acts by, among others, Wilson “Biggie” Chitoro—a member of the ZANU (PF) candidate’s campaign team. On 7 June 2000, Fainos Zhou died from injuries sustained during the torture.).

See also Nezi v. Matiza, HC 8189/2000, Murehwa South Election Petition, at Annexure A (*filed* on 26 July 2000); *see also* John Osborne Affidavit (*signed* on 22 May 2000) (1. On 15 April 2000, MDC activist David Stevens was abducted from his farm by war veterans and ZANU (PF) supporters. Three of his colleagues—John Osborne, Stephanus Krynauw and Gary Luke—reported his abduction to the police at the Murehwa police station. The police, however, refused to intervene. While they were at the police station, the group of ZANU (PF) supporters and war veterans arrived and dragged Osborne, Krynauw and Luke out of the police station and into the vehicle in which Stevens was being held. They were then handcuffed, interrogated about their involvement in the MDC, severely assaulted, and driven in the vehicle out of town. Stevens then shook hands with Osborne, told him that he had been a good friend and that it had been a good life. One of the ZANU (PF) supporters then pulled out a shotgun and proceeded to shoot Stevens twice at close range, killing Stevens. 2. In addition, Nhamo Gwaze—the MDC youth chairman for Tayengwa—died at Parirenyatwa Hospital on 27 May 2000 from injuries sustained during a fatal assault by ZANU (PF) supporters.).

See also Muzira v. Muchena, HC 8231/2000, Mutoko South Election Petition, ¶ 8.1.8 (*filed* on 26 July 2000) (On 16 May 2000, Mationa Mushaya—an MDC branch chairman—and his son Onias Mushaya were dragged from their homes and beaten to death by a group of war veterans and ZANU (PF) supporters, including Enock Kuchiva, Nyepanayi Chipuriro, Rise Chifondya, Garikai Gumbedze, Andrew Chipamando, Taurayi Nhri, Macheke Chingwena, and Lazarus Chifodya.).

⁷³ *See, e.g.,* Nyathi v. Mupukuta, HC 8090/2000, Gokwe Central Election Petition, at 4, 6, 8 (*filed* on 25 July 2000; *see also* Lazarus Chacha Affidavit (*signed* on 29 March 2001); *see also* Aaron Chinhara Affidavit (*signed* on 6 April 2001) (1. On 26 April 2000, the MDC youth chairman for the constituency—Lazarus Chacha—was abducted from his house by five ZANU (PF) members, including Bernard Siziba and Cephas Bindiko—the constituency chairman of ZANU (PF) youth. Chacha was taken to ZANU (PF)’s Gokwe base where he was stripped naked, beaten, and interrogated throughout the night. Those present during the torture of Chacha included the ZANU (PF) candidate’s campaign manager—Tedious Mapondera—and the ZANU (PF) candidate for Gokwe West—Esther Nyauchi. 2. On 26 April 2000, a suspected MDC supporter—Aaron Chinhara—was abducted and assaulted by a group of ZANU (PF) supporters; the police were present during this attack but did nothing to intervene. Mr. Chinhara was taken to the Gokwe base, stripped naked, severely assaulted on multiple occasions, and interrogated by a CIO operative. 3. On 19 May 2000, Witness “B”—an MDC supporter and neighbour of the MDC candidate—was abducted by ZANU-PF youth and war veterans and taken to the Gokwe base where he was tortured and held overnight. 4. On 10 June 2000, the independent candidate for the constituency—Christopher Sibindi—was tortured along with his father and sister by members of ZANU (PF)—including Cephas Bindiko and the ZANU (PF) candidate’s campaign manager—Tedious Mapondera. The three of them were handcuffed, made to lie down, told that ZANU (PF) would “rule forever,” and beaten with chains, boots, and whips for “a number of hours.”). *See also* Muyambi v. Machaya, HC 8226/2000, Gokwe South Election Petition, at Annexures D & E (*filed* on 26 July 2000) (5. On 7 May 2000, Reward Khumalo—an MDC supporter—was abducted and assaulted by ZANU-PF supporters and war veterans. Khumalo was taken to ZANU (PF)’s Gokwe base, stripped naked, beaten, and warned that if he voted for the MDC he would be killed. 6. On 14 June 2000, Charles Shava—the MDC district chairman—was abducted and taken to the Gokwe base. The ZANU (PF) members demanded to know the names of MDC supporters, threatened to kill him, harm his family, and burn down his house. When he refused to reveal the names of MDC supporters, he was beaten severely with reinforced wire, sticks and wood until he was unable to stand on his

Mberengwa,⁷⁴ the Zexcom Centre in Murehwa North,⁷⁵ and the Mutoko Base in Mutoko South.⁷⁶ ZANU (PF) supporters, youth militia, and war veterans allegedly abducted MDC supporters and took them to these bases where they were interrogated, tortured and subjected to various forms of cruel, inhuman and degrading treatment. In all, eighty-four specific incidents of torture were documented.⁷⁷

In addition to torture, 425 specific incidents of assault were alleged.⁷⁸ Eight of the MDC candidates were personally assaulted by ZANU (PF) supporters, and in some cases so severely that they remained hospitalized until after the elections.⁷⁹ It didn't take much to

own; those involved in the torture of Khumalo included Darlington Dobiwa, Kenia Chiunda, Godfrey Maketo, and Thompson Toindepi.).

⁷⁴ See e.g., *Holland v. Gumbo*, HC 7886/2000, Mberengwa East Election Petition, Petitioner's Summary of Evidence, at 3-4 (filed on 19 Feb 2000) (1. On 28 March 2000, approximately 80 ZANU-PF supporters, led by Wilson "Biggie" Chitoro—a member of the ZANU (PF) candidate's campaign team—abducted MDC member Trynos Shava from his home. Shava's hands were tied together with wire, he was accused of being a "sell out," and severely assaulted on various occasions. "Biggie" Chitoro threatened to castrate Shava, he then cut Shava across his back and throat with his knife, and assaulted him until Shava lost consciousness. Shava was taken in a wheelbarrow to the hospital the next day. 2. Three MDC supporters—Masimba Jeremani, Tatenda Muchemwa, and Erasmus Matika—were abducted by ZANU (PF) members and taken to the Texas Ranch base where they were tortured, severely assaulted, burned with various instruments, and tortured by, among others, "Biggie" Chitoro. The abducted MDC supporters were eventually released on 23 June 2000, and warned that if they voted, they would be killed.). See also *Hove v. Gumbo*, HC 7752/2000, Mberengwa West Election Petition, ¶¶ 8.2-8.3 (filed on 17 July 2000); see also *Hove v. Gumbo*, HC 7752/2000, Mberengwa West Election Petition, Judgment (HH 43-2002), at 13-14 (issued on 6 March 2002); (1. On 30 April 2000, MDC member Robson Gamiza was abducted by ZANU (PF) youth militia and taken to the Texas Ranch base; Gamiza was accused of "selling out the country," tortured, and subjected to various forms of humiliating treatment; the following day he was released after being threatened that if he continued to campaign for the MDC he would be killed; as a result, Gamiza surrendered his MDC party card to "Biggie" Chitoro and fled the constituency. 2. On 4 June 2000, suspected MDC supporter James Zhou was abducted and taken to the Texas Ranch base where he was tortured over a period of several days by ZANU (PF) supporters and war veterans, including "Biggie" Chitoro.).

⁷⁵ See, e.g., *Mudzingwa v. Chitongo*, HC 7950/2000, Murehwa North Election Petition, Petitioner's Summary of Evidence, at 7-8, 10 (filed on 14 Sept. 2001) (1. On 12 April 2000, MDC supporter Samuel Kadzinga was abducted by ZANU (PF) members and taken to the Zexcom base where he, along with other MDC supporters, was interrogated and tortured throughout the night with "sticks and sjamboks." The ZANU (PF) perpetrators included Trust Mupaneshure, Temba Chaponda, "Jisi," Chitekuteku, "Matanda," "Charles," Gilbert Chingosha, Kudzanai Manyange, and "Chanyoroya." 2. On 13 April 2000, MDC supporter Sekai Manezhu was abducted by ZANU (PF) supporters and taken to the Zexcom base. Manezhu was held at the base for 13 days, forced to wear a ZANU (PF) T-shirt, chant ZANU (PF) slogans, and repeatedly assaulted. On 13 April 2000, ZANU (PF) supporters—including "Charles," Temba Chaponda, and Tafi Madymahuru—abducted MDC supporter Charles Gwasira and took him to the Zexcom base where he was forced to surrender his MDC T-shirt and membership card and assaulted all over his body for approximately two hours.).

⁷⁶ See, e.g., *Muzira v. Muchena*, HC 8231/2000, Mutoko South Election Petition, at Annexure G (filed on 26 July 2000) (On 24 April 2000, Matthew Rukwata, who the MDC candidate at the time, was kidnapped by war veterans and ZANU (PF) supporters and taken to the Mutoko base where he was held captive for three weeks. As a result of Rukwata's kidnapping, Derick Muzira had to take over as the MDC candidate for the constituency. Over the next three weeks, Rukwata was handcuffed to a bench at night, repeatedly tortured by, among others, "Hodzi," "Ndemera," and "Marimo," and forced to denounce the MDC. During this time the police were aware of where Rukwata was being held but did nothing to intervene.).

⁷⁷ See *2000 Parliamentary Electoral Challenges - Summary of Allegations, Findings and Outcomes* (on file with author).

⁷⁸ *Id.*

⁷⁹ See, e.g., *Muyambi v. Machaya*, HC 8226/2000, Gokwe South Election Petition, at 4 (filed on 26 July 2000) (On 19 June 2000, while attempting to register a list of polling agents in Gokwe Central, Lameck Muyambo—the MDC candidate for Gokwe South—was severely assaulted by ZANU (PF) members, including Cephas Bindiko, Godfrey Mazhara, and Bernard Siziba, with iron bars leaving blood "splattered all over the books in the corridor" of the district registrar's office. Muyambo remained hospitalized until after the elections.). See also *Rioga v. Zvobgo*, HC 8129, Masvingo South Election Petition, at 2-3 (filed on 25 July 2000) (On 21 June 2000 at the Nyikavanhu Business Centre, a group of ZANU (PF) supporters brutally

warrant a brutal beating as a supporter of the MDC. In Gokwe Central, for example, Clyton Chivende was twice assaulted for “wearing an MDC shirt.”⁸⁰ Three mechanics were severely assaulted for allegedly “servicing the MDC candidate’s vehicle.”⁸¹ One of the mechanics, Lucky Dazi, was helped to the hospital by Esther Mabvira. When Ester Mabvira returned from the hospital, she was likewise severely assaulted and hospitalized for “aiding an MDC supporter.”⁸² Nicholas Nyoka was assaulted and hospitalized for “selling MDC membership cards.”⁸³ Lemeck Muyambo was severely assaulted leaving blood “splattered all over the books of the corridor” of the local government offices for “attempting to register a list of a polling agents.”⁸⁴ And Vusumuzi Mkwelie was brutally assaulted by the ZANU (PF) candidate’s campaign manager, sustaining a “depressed skull” and a “fractured frontal bone,” simply because she supported the wrong political party.⁸⁵

In Chiredzi North, the Mujaji family were supporters of the MDC in the run up to the 2000 elections. On 8 May 2000, Boniface Mutemachani—the ZANU (PF) candidate’s self proclaimed campaign manager—allegedly led a group of approximately 30 ZANU (PF) supporters to the Mujaji’s house where he proceeded to severely assault the Mujaji’s two children. The crowd of ZANU (PF) supporters then made the two children sit in front of the house and watch as Boniface Mutemachani set the house on fire burning it to the ground. The intimidation was effective. The Mujajis fled their home and did not return to the constituency until after the election.⁸⁶ In all, 51 homes of MDC supporters were alleged to have been burned down by ZANU (PF). Four of the MDC’s campaign vehicles were allegedly burned to their shell by ZANU (PF) supporters, and 122 separate allegations of property damage were made.

ZANU (PF) was alleged to have supplemented these acts of violence with over 255 alleged incidents of threats and intimidation. Throughout the contested constituencies ZANU (PF) members were alleged to have threatened to kill, beat, or burn down the homes of potential voters if they voted for the MDC. Most strikingly is the allegations found in nearly half of the constituencies in which ZANU (PF) members warned voters that machines or cameras have been placed in polling stations and that if they vote for the MDC, ZANU (PF) will know and dire consequences will follow. These threats came from members of Parliament, the Defence Minister, the former head of the CIO, etc. Given the fact that the police would often fail to intervene in the violence, and the fact that the treats often came from high ranking officials in the government, bolsters the threat.⁸⁷ Finally, the election petitions allege some 267 incidents of irregularities at the polling stations and 37 incidents of irregularities in the verification and counting of ballots. These include campaigning within 100 meters of the polling station, etc. etc.⁸⁸

assaulted the MDC candidate—Zacharia Rioga—and his election agent—Green Gwantinyanya—leaving them lying unconscious on the ground. The MDC candidate remained hospitalized in intensive care until after the elections.).

⁸⁰ See Clyton Chivende Affidavit (*signed* on 29 March 2001).

⁸¹ See Esther Mabvira Affidavit (*signed* on 29 March 2001).

⁸² *Id.*

⁸³ See Nicholas Nyoka Affidavit (*signed* on 26 April 2001).

⁸⁴ See Ernest Nkomazana Affidavit (*signed* on 19 March 2001).

⁸⁵ See Vusumzi Mkwelie Affidavit (*signed* on 29 March 2001).

⁸⁶ See *Mare v. Chauke*, HC 8068/2000, Chiredzi North Election Petition, Judgment (HH 110-2001) (*issued* on 20 June 2001), at 3-4.

⁸⁷ See *Showano v. Mudzengerere*, HC 8120/2000, Makoni East Election Petition, at 15, *filed* 26 July 2000.

⁸⁸ See *eg.*, petitions for Bindura, Buhera, Chiredzi North and South - and most other petitions.

B. Undue Delays and Witness Intimidation

Of the thirty-nine electoral challenges, five of the petitions were either never set down for hearing or their hearings were never completed by the High Court,⁸⁹ two of the petitions were dismissed by the High Court on procedural grounds,⁹⁰ and sixteen of the petitions were either withdrawn or not proceeded with. The reasons for not proceeding with the electoral challenges varied including: the MDC candidates claimed to have been prejudiced by the continued delays in the hearings, the elected ZANU (PF) candidates for the contested constituencies died and bi-elections were held to fill the vacated seats,⁹¹ and the MDC candidates were threatened and either disappeared or left the country.⁹² In Chegutu, for example, the MDC candidate—Philemon Matibe—was a successful commercial farmer. After filing the election petition, war veterans and ZANU (PF) militia invaded his farm, demanded that he withdraw the election petition, and forcibly evicted him from his farm. Having lost all of his property, Mr. Matibe left the country.⁹³ Likewise, after filing the election petition in Kariba, the MDC candidate—Luka Sigobole—was threatened by ZANU (PF) supporters who burned his home to the ground. He has since disappeared.⁹⁴

The parliamentary electoral challenges served the purpose of not only having the election set aside but, given the presidential amnesty and the failure of the government to prosecute the perpetrators of the violence, the only forum for bringing to light the violence that had permeated the general elections. The effects of the amnesty though were felt on the witnesses called to testify—witness intimidation. Those who had allegedly perpetrated the violence had done so with impunity and the culture of impunity continued to the electoral challenges. Once such case was in Chiredzi North where Boniface Mutemachani, the self-proclaimed campaign manager for the ZANU (PF) candidate.⁹⁵ Witnesses allege that during the run up to the elections, Mr. Mutemachani had severely assaulted seven supporters of the MDC, burned down or destroyed two homes, and threatened to kill at least four people. One of the witnesses, prior to testifying, was confronted by Mr. Mutemachani, who told the witness that he would not testify and proceeded to bludgeon the witness unconscious with a pickaxe. Despite no criminal proceedings being brought against Mr. Mutemachani, the witness still bravely came to court in crutches and testified in the election petition.

Similarly, in Gokwe North, a witness broke down on the stand while testifying and told the court that he had been threatened that the day he was testified in court would be the day his family was killed.

And in Mt. Darwin South, three weeks before he was scheduled to give evidence, a witness was abducted by ZANU (PF) members, stripped naked, tortured, interrogated about his intended testimony, and then left for dead on the side of a road. Likewise, the witness chose to give evidence but the affects were unmistakable and while on the stand was afraid to make eye contact and hung his head down through most of his testimony. Although many

⁸⁹ Five of the election petitions were either never heard or their hearings never completed by the High Court: Gokwe West, Marondera East, Mazowe East, Mazowe West, and Mberengwa East.

⁹⁰ In Chivi North and Murehwa South the election petitions were dismissed because the petitioners failed to appear on the first day of the hearing.

⁹¹ In five of the contested constituencies bi-elections were held after the seats in Parliament were vacated as a result of the death of the elected ZANU (PF) candidate: Bindura, Chikomba, Hurungwe West, Makoni West, and Marondera West

⁹² Elliot Pfebve, Bindura; Lucka Sigobole, Kariba; Philemon Matibe, Chegutu are in exile after threats; see *PLAYING WITH FIRE*, op cit, pages 62, 66.

⁹³ *Id.*, page 62

⁹⁴ *Id.*, 66-67

⁹⁵ See Judgment at 15.

witnesses refused to testify for fear of their safety, many others withstood beating and braved death threats to give their evidence before the High Court.

In the end, due in a large part to the continued delays by the court and the intimidation of the petitioners and witnesses, only sixteen of the thirty-nine electoral challenges were heard by the High Court.

C. Findings of the High Court

Hurungwe East:

On 26 April 2001, nine months after the thirty-nine election petitions were filed, Judge James Devittie handed down the first of his four judgments. In the Hurungwe East election petition Judge Devittie reaffirmed the principle that “at the heart of the spirit of the [Electoral] Act, lies the principle of freedom of election.”⁹⁶ The court restated the common law rule that freedom of election ceases to exist where (1) the intimidation “permeates the entire community and is not restricted to a small locality” and (2) the “nature and extent of the intimidation may have affected ‘men of ordinary courage.’”⁹⁷ The court noted that the petitioner is not required to show that the outcome of the elections was actually affected as a result of the intimidation, rather the burden shifts to the respondent to prove that the intimidation “could not possibly have affected the result of the election.”⁹⁸ The court concluded that the uncontroverted evidence⁹⁹ of the torture, assault, and intimidation of MDC supporters in the Hurungwe East constituency, established that “general intimidation permeated the entire community” and that “men of ordinary nerve and courage may have been unduly influenced from exercising their democratic right to vote.”¹⁰⁰

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 the citizens of this country must be condemned without reservation and are deserving of criminal sanction. I must uphold the oath of my office and therefore the idea of a nation governed by law; I must apply the law as it is, and not how I may wish it to be and that shall be my duty for so long as I shall sit as a Judge of this Court. In terms of section 136 (c) of the Act it is my duty to pronounce that the respondent was not duly elected.

Mutoko South:

Similarly, in the Mutoko South Election Petition, Judge Devittie concluded that the ZANU (PF) candidate was “responsible in law” for the kidnapping and torture of MDC supporters at the Mutoko base.¹⁰¹ The court concluded that “corrupt practices” prevailed extensively in the Mutoko South elections and as a result the ZANU (PF) candidate was not duly elected.¹⁰²

There was no need for violence and intimidation which did occur at an alarming level and which caused much suffering, pain and misery amongst

⁹⁶ Chadya v. Marumahoko, HC 8277/2000, Hurungwe East Election Petition Judgment, 21 April 2001, at 4.

⁹⁷ *Id.*, at 17.

⁹⁸ *Id.*

⁹⁹ *Id.* at 12. The respondent did not dispute the evidence of violence and intimidation led by the petitioner’s witnesses. Rather, the respondent submitted that neither he nor his agents should be held personally liable for these acts and, as such, there were no grounds to justify setting aside the election.

¹⁰⁰ *Id.* at 18.

¹⁰¹ Muzira v. Muchena, HC 8231/2000, Mutoko South Election Petition Judgment, 27 April 2001, at 17.

¹⁰² *Id.* at 18.

citizens in this country. As matters did turn out, the election results for the constituency show that [the ZANU (PF) candidate] had a resounding majority. But the laws of this country under which I sit and which I have a duty to obey do not permit me to take into consideration that the violence and intimidation may not have affected the result and there are very good reasons why the law adopts this approach. Violence and intimidation have no place in a democratic society.¹⁰³

The court concluded by ordering that the evidence led regarding the killing of an MDC branch chairman and his son—Mationa Mushaya and Onias Mushaya—be sent to the Attorney General with “a view to the institution of any prosecution to be instituted in the circumstances.”¹⁰⁴

Buhera North:

In Buhera North election petition, Judge Devittie heard evidence led by the petitioner that Morgan Tsvangirai’s campaign manager—Tichoana Chiminya—and a member of his campaign team—Talent Mabika—were burned alive at gunpoint by ZANU (PF) agents and a CIO operative—Joseph Mwale.¹⁰⁵ Judge Devittie concluded that “the election in Buhera North was null and void, by reason that the ZANU (PF) candidate, not personally, or willingly, or knowingly, but through his agents, for whom the law makes him answerable has been guilty of undue influence.”¹⁰⁶ The court concluded by ordering that the evidence led regarding the killing of the two MDC members be sent to the Attorney General with “a view to the institution of any prosecution to be instituted in the circumstances.”¹⁰⁷ In reaching its decision to invalidate the election results, the court emphasized the important principle underlying the Electoral Act that “the law must be obeyed for the well-being of us all, and in order that freedom of election may be bequeathed to future generations.”¹⁰⁸

Similar to Judge Devittie, each of the other High Court judges to hear the election petitions—with the exception of Judge Ben Hlatshwayo—invalidated at least one of the election results in the petitions that came before them.

Chiredzi North:

In Chiredzi North, Judge Ziyambi declared that the ZANU (PF) candidate was not duly elected.¹⁰⁹ Ms. Ziyambi concluded that widespread violence and intimidation was perpetrated to such an extent by ZANU (PF) supporters that “the people of Chiredzi North constituency were not free, by reason of the gross intimidation prevailing in the constituency, to exercise their right to vote for the candidate of their choice.”¹¹⁰

Gokwe North:

In Gokwe North, Judge Makarau concluded that the uncontroverted evidence established that ZANU (PF) candidate’s agents,¹¹¹ subjected MDC supporters to violence and

¹⁰³ *Id.* at 17.

¹⁰⁴ *Id.* at 18.

¹⁰⁵ *See e.g.,* Tsvangirai v. Manyonda, HC 8139/2000, Buhera North Election Petition Judgment, 26 April 2001, at 62-64.

¹⁰⁶ *Id.* at 18.

¹⁰⁷ *Id.* at 19.

¹⁰⁸ *Id.* at 18.

¹⁰⁹ *See* Mare v. Chauke, HC 8068/2000, Chiredzi North Election Petition Judgment, 20 June 2001, at 23.

¹¹⁰ *Id.* at 23.

¹¹¹ *See* Mlandu v. Mkandhla, HC 8228/2000, Gokwe North Election Petition Judgment, 15 January 2003, at 17-18.

intimidation, burned down their homes on account of their membership with the MDC, and killed a member of the MDC candidate's campaign team—Wonder Manhango.¹¹² As a result, Ms. Makarau held that “the evidence before me can only lead to the conclusion that free franchise was affected in the constituency”¹¹³ and consequently “I set aside the election of the ZANU (PF) candidate”¹¹⁴

Gokwe South:

Similarly, in Gokwe South, Judge Makarau found that the MDC candidate was brutally attacked by the ZANU (PF) candidate's agents.¹¹⁵ The MDC candidate sustained serious injuries and a rumor that he had been killed was spread throughout the constituency to such an extent as to “negative conditions for a free franchise.”¹¹⁶

Makoni East:

In Makoni East, the petitioner led evidence that “Chimombe”—the ZANU (PF) candidate's campaign manager—disemboweled Francis Chingonzo for reading an MDC pamphlet.¹¹⁷ On 22 October 2003—two years after the completion of the trial—Judge Paddington Garwe characterized this incident as a “vicious and gratuitous attack” that “cannot be condoned.”¹¹⁸ Judge Garwe concluded that “in terms of the law I am obliged to void the election following my determination that Chimombe, an agent of the respondent, was involved in the attack on Chingonzo.”¹¹⁹

In all, these four High Court judges invalidated the election results in seven of the constituencies. These judges also affirmed the election results of the ZANU (PF) candidate's in six of the contested constituencies.

Zvishavane and Chiredzi south:

In Zvishavane, Judge Ziyambi concluded that although there were politically motivated assaults and threats of violence perpetrated by ZANU (PF) supporters, they had not been proved to have been committed with the “knowledge, approval, or consent” of the ZANU (PF) candidate or his election agent,¹²⁰ and were “insufficient to justify setting aside of the election.”¹²¹ Similarly, in Chiredzi South, Judge Ziyambi concluded that no “breach of the Electoral Act” had been proved to have been committed by the ZANU (PF) candidate or his election agent,¹²² and that from the proved facts the “incidents of violence were not of a general nature nor were they of such a degree as to negative the freedom of the electorate to vote for the candidate of their choice.”¹²³

¹¹² See *id.* at 16-17.

¹¹³ *Id.* at 17.

¹¹⁴ *Id.* at 18.

¹¹⁵ See *Muyambi v. Machaya*, HC 8226/2000, Gokwe South Election Petition Judgment, 15 January 2003, at 12.

¹¹⁶ *Id.*

¹¹⁷ See *Showano v. Mudzengerere*, HC 8120/2000, Makoni East Election Petition Judgment, 23 October 2003, at 18-21.

¹¹⁸ *Id.* at 27.

¹¹⁹ *Id.*

¹²⁰ *Maruzani v. Mbalekwa*, HC 7943/2000, Zvishavane Election Petition Judgment, 23 March 2001, at 30.

¹²¹ *Id.*

¹²² *Tsumele v. Baloyi*, HC 8072/2000, Chiredzi South Election Petition Judgment, 20 June 2001, at 9.

¹²³ *Id.*

Chinoyi and Mount Darwin South:

Likewise, in the Chinoyi election petition, Judge Garwe concluded that the evidence led by the MDC candidate failed to prove that the alleged corrupt practices were committed.¹²⁴

In holding that the ZANU (PF) candidate was duly elected, Judge Makarau based her decision on a narrow reading of the Electoral Act. Unlike judges Devittie and Ziyambi, who held that widespread violence and intimidation can be a grounds for setting aside an election under the Electoral Act when it results in freedom of election ceasing to exist,¹²⁵ Judge Makarau that for an election to be set aside due to allegations of violence, the “undue influence” must have been targeted at a specific person aimed to compel that person to sign or refrain from signing a nomination paper, or to vote or to refrain from voting.¹²⁶ For example, in the Mount Darwin South election petition, Ms. Makarau found that (1) the acts of violence were “unlawful assaults and conduct that is not acceptable in a democratic society,”¹²⁷ (2) it was “generally dangerous for one to be a member of the MDC in the constituency,”¹²⁸ (3) “the majority of the victims of the violence were members of the MDC,”¹²⁹ and (4) “the violence was aimed at stopping the targeted victims from campaigning for their party.”¹³⁰ Despite making these findings, Ms. Makarau concluded that evidence of widespread violence and intimidation was insufficient for setting aside the election:

[S]enseless political violence that seeks to punish the victim for belonging to a different political party is not undue influence under the [Electoral] Act. It remains unpunishable under the Act for as long as it is not intended to induce or compel the victim to do or to refrain from doing the act specified in the section.¹³¹

Mwenezi:

Similarly, in the Mwenezi election petition, Judge Makarau found that the evidence established that (1) the ZANU (PF) roadblocks that prevented the MDC from campaigning in the constituency were “illegal acts,”¹³² (2) the MDC candidate was assaulted by “members of ZANU (PF),”¹³³ (3) the brutal assault of an MDC youth leader was a “cowardly act,”¹³⁴ and (4) the assault of a citizen on account of MDC material being found in his possession was “unlawful.”¹³⁵ However, Ms. Makarau concluded that although these acts of violence were unlawful and cowardly, they do not “fall within the four squares” of the “undue influence” provision of the Electoral Act.¹³⁶

¹²⁴ See *Matamisa v. Chiyangwa*, HC 7751/2000, Chinoyi Election Petition Judgment, 9 May 2001, at 18-21.

¹²⁵ See *e.g.*, *Hurungwe East Judgment* at 4, see also *Chiredzi North Judgment*, at 22-23.

¹²⁶ See, *e.g.*, *Mumbamarwo v. Kasukuwere*, HC 7868/2000, Mt. Darwin South Election Petition Judgment, 17 January 2002 at 8-12; see also *Masekesa v. Shumba*, HC 8070/2000, Mwenezi Election Petition Judgment, 19 October 2001, at 11-13.

¹²⁷ *Mumbamarwo v. Kasukuwere*, HC 7868/2000, Mt. Darwin South Election Petition Judgment, 17 January 2002 at 10.

¹²⁸ *Id.* at 5.

¹²⁹ *Id.*

¹³⁰ *Id.* at 10.

¹³¹ *Id.* at 9.

¹³² *Masekesa v. Shumba*, HC 8070/2000, Mwenezi Election Petition Judgment, 19 October 2001, at 14.

¹³³ *Id.*

¹³⁴ *Id.* at 15.

¹³⁵ *Id.*

¹³⁶ *Id.*

Shurugwi:

In Shurugwi constituency election petition, Judge Devittie dismissed the election petition.¹³⁷ However, the election petition did not fail because violence and intimidation did not exist.¹³⁸ On the contrary, Judge Devittie expressly concluded that evidence establishes that “violence and intimidation did prevail in the Shurugwi Constituency.”¹³⁹ Judge Devittie dismissed the election petition because unlike the other election petitions where the police “did not respond to the reports of violence” and “perform their expected normal duties and arrest those who broke the law,”¹⁴⁰ the police in Shurugwi actually took steps to “quell the tide of intimidation and terror” that was “unleashed” by ZANU (PF) on the residents of Shurugwi.¹⁴¹ “Thereafter,” Judge Devittie concluded, “men and women of ordinary nerve and courage were not affected in a way that prevented them from exercising their right to vote.”¹⁴² After issuing his fourth judgment on the electoral challenges, Judge Devittie noted in his final judgment that “[s]adly, a pattern of organized violence and intimidation is beginning to surface”¹⁴³ and “[i]t is unfortunate that the law was not allowed to take its course against the perpetrators of the violence because of the Presidential pardon.”¹⁴⁴ After ruling against ZANU (PF) in three of the election petitions, Mr. Justice Devittie resigned and left the country.

Mberengwa West, Goromonzi and Murhewa North:

Finally, Judge Hlatshwayo heard three electoral challenges. Twenty months after the election petitions had been filed, Mr. Justice Hlatshwayo chose to issue his judgments dismissing the three election petitions on 6 March 2002—just three days before the 2002 Presidential Elections. The reason why is unknown. In the Mberengwa West and Goromonzi election petitions, he hadn’t prepared a written judgement. He failed to even notify the counsel for the MDC candidate in the Goromonzi that the petition had been denied.¹⁴⁵ The lawyer for the MDC candidate found out that their petition had been summarily demised sometime later in a news report in the government-controlled newspaper, *The Herald*.¹⁴⁶ As time would tell, Judge Hlatshwayo would never provide an explanation or written judgment for dismissing the Goromonzi election petition, thus effectively ensuring that his decision could not be appealed.

The other two judgements, for the Mberengwa West and Murhewa North constituencies represented allegations of some of the worst violence against MDC supporters. Evidence was presented to the court that the Texas Ranch Base and the Zexcom Centre were set up by war veterans and ZANU (PF) supporters where members of the MDC were abducted, tortured, raped, and in one case murdered.¹⁴⁷ Judge Hlatshwayo, however, dismissed much of the evidence as unreliable, and found that the abduction and torture of MDC supporters at the Texas Ranch base was “linked more to land occupations than the election campaign itself.”¹⁴⁸ Similarly, Mr. Hlatshwayo characterized the torture of abducted members of the MDC at the Zexcom Centre as the result of the “the war veterans’ reaction to the rejection of the draft

¹³⁷ See *Matibenga v. Nhema*, HC 8227/2000, Shurugwi Election Petition Judgment, 27 April 2001, at 1.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 18.

¹⁴¹ *Id.* at 1. Judge Devittie also noted that the petition was dismissed, in part, because of a procedural lapse.

¹⁴² *Id.* at 19.

¹⁴³ *Id.* at 1.

¹⁴⁴ *Id.* at 19.

¹⁴⁵ See Atherstone & Cook letter

¹⁴⁶ *Id.*

¹⁴⁷ See generally Mberengwa West judgment; see also Murehwa North judgment

¹⁴⁸ See Mberengwa West judgment at 43

constitution and its implications to the land question, a matter that went beyond the issue of elections.”¹⁴⁹ However, in Murehwa North, Mr. Hlatshwayo could not get around the overwhelming evidence of election violence. He therefore concluded that that the violence could not be “attributed solely on one political party”¹⁵⁰ and that “[b]oth parties must shoulder the full responsibility of human suffering and loss of property inflicted in the constituency.”¹⁵¹ However, instead of invalidating the election on the principle behind the Electoral Act, Judge Hlatshwayo concluded the opposite and upheld the election results, noting that the “remedies of nullification of a seat or banning a candidate from contesting future elections as set out in the [Electoral] Act do not address the harm suffered by the voters at the personal and community levels.”¹⁵² Although Hlatshwayo may be right, the judiciary’s failure to uphold electoral morality means that freedom of election will not be “bequeathed to future generations.”¹⁵³

D. Outcome of Electoral Challenges

In the end, though, the decision of the High Court proved to be of little consequence to the election results. Of the sixteen High Court judgments, thirteen of the decisions were appealed to the Supreme Court. The three judgments that were not appealed were the Goromonzi, Mwenezi, and Shurugwi election petitions. In Goromonzi, as noted previously, Mr. Justice Hlatshwayo summarily dismissed the election petition and failed to ever provide any reasons or written judgment for his decision—thus preventing the MDC from ever appealing his decision. In the Mwenezi and Shurugwi election petitions, the High Court dismissed the elections petitions and the MDC decided not to appeal the decisions.

Of the thirteen appeals that were filed with the Supreme Court, ten were never heard by the Supreme Court. Despite the fact that the electoral laws mandate that election petitions should be dealt with in an urgent manner, the Supreme Court never heard these appeals. In Buhera North, for example, the High Court declared that the ZANU (PF) candidate had not been duly elected. The stakes in this case were high, given that the petitioner was the leader of the MDC, Morgan Tsvangirai. As a result, ZANU (PF) filed an appeal with the Supreme Court on May 7, 2001. However, after the appeal was filed, the tapes of the court record were stolen from a locked office at the High Court, and the judge’s notebooks mysteriously went missing. Despite the repeated attempts on the part of Mr. Tsvangirai’s lawyers to resolve the matter, the case remained in abeyance and the appeal was never heard by the Supreme Court.

Even for the three appeals that the Supreme Court did hear, the Supreme Court’s decisions remained reserved and no decision was ever issued. Despite the fact that in seven of the electoral challenges the High Court declared that the elections were null and void, the ZANU (PF) candidates retained their seats in Parliament throughout the entire five-year term. *All in all, in over five years not even one of the MDC’s electoral challenges was ever resolved by the judiciary.* The Supreme Court’s landmark decision in January 2001 held that an individual has a civil right to partake in an election that is free and fair.¹⁵⁴ However, in seven of the sixteen electoral challenges, the High Court determined that the elections were not free and fair. The Supreme Court also ruled that where results were claimed to have been

¹⁴⁹ Murehwa North Judgment, at 13.

¹⁵⁰ *Id.* at 11

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *See* Note 3.

¹⁵⁴ *Movement for Democratic Change v. Chinamasa*, 2001 (1) ZLR 69 (S), at 70.

tainted by corrupt and illegal practices an individual is entitled to seek “meaningful redress.”¹⁵⁵ However, in not one case was meaningful redress ever provided.¹⁵⁶

IV. PRESIDENTIAL ELECTORAL CHALLENGE

On 12 April 2002, the leader of the MDC, Morgan Tsvangirai, filed an election petition in the High Court challenging the results of the 2002 presidential election. The grounds for requesting that the election be set aside included widespread violence and intimidation, corrupt and illegal practices, vote rigging, voter fraud, polling irregularities, illegal disenfranchisement of voters, constitutional violations, and various contraventions of the Electoral Act.¹⁵⁷

Additionally, prior to the election, the MDC brought more than eight court cases before the High Court and Supreme Court challenging, *inter alia*, the illegal removal of names from the voters’ roll,¹⁵⁸ the clandestine registration of voters after the close of voter registration,¹⁵⁹ the restrictive residency and citizenship requirements for voter registration,¹⁶⁰ the legality of the General Laws Amendment Act,¹⁶¹ the illegal use of military personnel as staff on the Electoral Supervisory Commission,¹⁶² and the unconstitutionality of Section 158 of the Electoral Act.¹⁶³

¹⁵⁵ *Id.*

¹⁵⁶ See 31 October 2004 Communication submitted by the Zimbabwe Lawyers for Human Rights to the African Commission for Human and Peoples’ Rights.

¹⁵⁷ See *Tsvangirai v. Mugabe*, Election Petition HC 3616/2002, 12 April 2002, at 1-51.

¹⁵⁸ See, e.g., *Tsvangirai v. Registrar General*, HC 12092/2001, High Court Order, 31 December 2001, at 1 (enjoining the Registrar General from removing any person from the voters’ roll unless and until he complies with various provisions of the Electoral Act, and ordering the Registrar General to reinstate persons who have been improperly removed).

¹⁵⁹ See, e.g., *Tsvangirai v. Registrar General*, SC 76/2002, Judgment SC 20-02, 4 April 2002, at 7-8 (dismissing claim on grounds that relief sought must first be brought before the High Court).

¹⁶⁰ See, e.g., *Registrar General v. Tsvangirai* SC 30/2002 Judgment (SC 12-02), 28 February 2002, at 30 (holding that a person who ceases to be a citizen also loses his right to vote, and upholding the requirement for residency within a specific constituency for registration on the voters’ roll).

¹⁶¹ The General Laws Amendment Act 2002 prohibited, *inter alia*, civic organizations from conducting voter education. See *Biti v. Minister of Justice* SC 46/2002 Judgment (SC 10-2002), 27 February 2002, at 19-20 (declaring that the General Laws Amendment Act 2002 was invalidly enacted by Parliament and therefore has no force or effect). The provisions within the General Laws Amendment Act 2002 were later reintroduced by President Mugabe through Statutory Instrument No. 41B: Electoral (Amendment) Regulations, 2002, No. 13 (pursuant to § 157 of the Electoral Act); and through Statutory Instrument No. 41D: Electoral Act (Modification) Notice, 2002 (pursuant to § 158 of the Electoral Act).

¹⁶² See *Tsvangirai v. Electoral Supervisory Commission* HC 2182/2002 Urgent Chamber Application, 1 March 2002 (requesting order that all staff members of the Electoral Supervisory Commission or the Registrar General who are members of the defense forces, police, or prison services immediately cease to act in such capacity). The application was not proceeded with after the provisions of the Electoral Act were amended by President Mugabe on March 5, 2002 through Statutory Instrument No. 41D: Electoral Act (Modification) Notice, 2002 (pursuant to § 158 of the Electoral Act). The amendments revised the criterion for the Electoral Supervisory Commission staffing from “civil service” to “state” to enable members of the military to serve on the Electoral Supervisory Commission.

¹⁶³ Section 158 of the Electoral Act delegates legislative power to the president to amend or suspend any provision of the Electoral Act. See, e.g., *Tsvangirai v. Registrar General*, SC 76/2002, Judgment SC 20-02, 4 April 2002, at 7 (holding that the applicant lacked *locus standi* to bring the application before the Supreme Court due to the absence of any allegation establishing the infringement of a fundamental right). For a critique of the Supreme Court’s decision, see Geoff Feltoe, *Legal Standing in Public Law*, 7 Zimbabwe Human Rights Bulletin (2002).

Furthermore, as a result of a significant reduction in the number of polling stations in urban constituencies—areas where the MDC was known to have strong support—the queues at some of the urban polling stations had as many as 4,000 people waiting to vote.¹⁶⁴ With thousands of voters unable to cast their vote, the MDC brought an urgent application in the High Court requesting an extension of polling for an additional two days.¹⁶⁵ After conducting an *in loco* inspection of the polling, the court ordered all polling stations to be re-opened for a third day.¹⁶⁶ The Registrar General, however, failed to comply with the court order, and instead re-opened the polling stations only in Harare and Chitungwiza. And even in the constituencies where the polling stations were re-opened, voting was not allowed to begin until 11:00 am, and all polling stations were closed at 7:00 pm, despite the fact that at some polling stations as many as a thousand people were still standing in queue to vote.¹⁶⁷ The MDC brought another urgent application in the High Court requesting that the Registrar General be held in contempt of court for failing to comply with court order, and that polling should be extended for a fourth day.¹⁶⁸ The High Court, however, dismissed the application, holding that the available information provided an insufficient basis for the court to intervene and extend voting to a fourth day and that the Registrar General’s failure to adhere to the High Court order was not wilful and therefore the prayer that the Registrar General be held in contempt of court must fail.¹⁶⁹

In the months that followed the filing of the election petition, the Registrar General continued to flout court orders and thwart the MDC’s discovery requests. In contravention of multiple court orders, the Registrar General refused to allow the MDC to inspect the voters’ roll¹⁷⁰ and refused to provide the used ballot papers for inspection.¹⁷¹ In the same manner, the Electoral Supervisory Commission ignored court orders and failed to comply with the MDC’s discovery requests.¹⁷²

Added to this non-compliance was the fact that the High Court Registrar continued to delay in setting the matter down for hearing. Despite the numerous requests by Mr. Tsvangirai’s counsel to have the election petition set down for hearing,¹⁷³ twelve months had lapsed since the election and no date had been set. As a result, on 9 May 2003, the MDC ultimately had to file an urgent application in the High Court for a mandamus compelling the High Court Registrar to set the hearing down as a matter of urgency.¹⁷⁴ Two months later, the High Court granted the order.¹⁷⁵ At a pre-trial meeting under the direction of the Judge President, the election petition was divided into two phases. The first phase would comprise the legal and constitutional arguments and was scheduled to be heard from 5 to 7 November

¹⁶⁴ See, e.g., NORWEGIAN ELECTION OBSERVATION MISSION, PRESIDENTIAL ELECTIONS IN ZIMBABWE 2002, at 2 (2002).

¹⁶⁵ See *Tsvangirai v. Registrar General*, HC 2800/2002 Urgent Chamber Application, 10 March 2002.

¹⁶⁶ See *Tsvangirai v. Registrar General*, HC 2800/2002 Judgment (HH 36-2002), 10 March 2002.

¹⁶⁷ See, e.g., NORWEGIAN ELECTION OBSERVATION MISSION, *supra* note 145, at 9.

¹⁶⁸ See *Tsvangirai v. Registrar General*, HC 2815/2002 Urgent Chamber Application, 11 March 2002.

¹⁶⁹ See *Tsvangirai v. Registrar General*, HC 2815/2002 Judgment (HH 37-2002), 11 March 2002.

¹⁷⁰ See e.g., *Tsvangirai v. Registrar General*, HC 3175/2003 Urgent Court Application, 25 March 2003 (requesting an order to strike out the Registrar General’s defenses for failing to comply with discovery orders HC 469/2003, HC 470/2003 and HC 471/2003).

¹⁷¹ See, e.g., *Tsvangirai v. Registrar General*, HC 10321/2003 Court Application, 20 Nov. 2003 (application to hold the Registrar General in contempt of court for failing to comply with court order to produce used ballot papers for inspection).

¹⁷² See, e.g., *Tsvangirai v. Mugabe*, HC 3922/2003 Urgent Court Application, 21 May 2003 (requesting an order to strike out the Electoral Supervisory Commission’s defenses for failure to comply with discovery order HC 676/2003).

¹⁷³ See, e.g., *Tsvangirai v. Mugabe*, HC 3653/2003 Urgent Chamber Application, 9 May, 2003, at 37-48.

¹⁷⁴ See *id.* at 5.

¹⁷⁵ See *Tsvangirai v. Mugabe*, HC 3653/2003 High Court Order, 3 July 2003.

2003. If the High Court ruled against Morgan Tsvangirai in the first phase, then a second phase would be scheduled to hear the evidence of violence, intimidation, corrupt and illegal practices, voter fraud, vote rigging, and polling irregularities.¹⁷⁶

On 5 November 2005, the hearing of the election petition began. Uncharacteristically, the allocation of the judge to hear the case was not made known prior to the trial. However, the practice of assigning cases on a roster basis was abandoned when Chidyausiku became Judge President, to a system where the Judge President allocates the cases himself. “The outcome of this change in practice was that cases with important political implication [are] allocated to judges considered sympathetic to the Government.”¹⁷⁷ It came as no surprise that the judge who walked through the door on 5 November was Judge Ben Hlatshwayo. Of the High Court judges who had been assigned to hear the parliamentary election petitions, Judge Hlatshwayo was the only judge not to have ruled against ZANU (PF) in any of the election petitions. In addition, Judge Hlatshwayo had a good track record of not taking the election petitions seriously, evidenced by the fact that he hadn’t ever bothered to provide a written judgement or reasons for his dismissal of the MDC’s parliamentary election petition in the Goromonzi constituency. Finally, the ZANU (PF) government had significant financial leverage over Judge Hlatshwayo, given that he had accepted a prime agricultural estate from the government which could be withdrawn at the pleasure of the government.

Over the next two days, Morgan Tsvangirai’s counsel, led by Advocate Jeremy Gauntlett, outlined the legal arguments for setting aside the election. Mr. Tsvangirai’s main legal arguments can be summarized as follows:

First, section 149 of the Electoral Act, as published by the Law Reviser, states that an election shall be set aside if:

- (a) the election was not conducted in accordance with the principles laid down in this Act; and
- (b) such mistake or non-compliance did affect the result of the election (emphasis added).¹⁷⁸

However, when the Electoral Act was passed by Parliament, the word approved by Parliament was “or,” not “and.” Because section 149 was incorrectly published by the Law Reviser, section 149 should be correctly read as “and,” not “or.” As a result, for an election to be set aside, the evidence need not demonstrate that the irregularities actually affected the outcome of the election. All that Mr. Tsvangirai is required to show is that the election was not conducted according to “the principles of a free and fair election.”¹⁷⁹

Second, the Constitution of Zimbabwe provides that election law governing the conduct of elections must be law passed by Parliament.¹⁸⁰ However, section 158 of the Electoral Act delegates unlimited power to the president to amend the electoral law.¹⁸¹ Because section

¹⁷⁶ See, e.g., Tsvangirai v. Mugabe, HC 3616/2002 Petitioner’s Heads of Argument, 13 Oct. 2003, at vi.

¹⁷⁷ INTERNATIONAL COUNCIL OF ADVOCATES AND BARRISTERS, *supra* note 7, at 62-63.

¹⁷⁸ Electoral Act, amended to 28 Oct. 2003, at § 105.

¹⁷⁹ See Tsvangirai v. Mugabe, HC 3616/2002 Petitioner’s Heads of Argument, 13 Oct. 2003, at 94-104.

¹⁸⁰ See, e.g., Constitution of Zimbabwe, amended to 1 Sept. 2001, § 58(4). See also Tsvangirai v. Mugabe, HC 3616/2002 Petitioner’s Heads of Argument, 13 Oct. 2003, at 52-54.

¹⁸¹ See Electoral Act, amended to 28 Oct. 2003, at § 105:

- (1) Notwithstanding any other provision of this Act but subject to subsection (2), the President may make such statutory instruments as he considers necessary or desirable to ensure that any election is properly and efficiently conducted and to deal with any matter or situation connected with or arising out of or resulting from the election.
- (2) Statutory instruments made in terms of subsection (1) may provide for –

158 gives the legislative power to the executive, section 158 violates the constitutional principle of separation of executive and legislative power. As a result, section 158 is invalid and any regulations made by the president under section 158 are also invalid. Furthermore, President Mugabe used section 158 to (1) disenfranchise large numbers Zimbabwe citizens who were declared to be “foreign” citizens,¹⁸² (2) disenfranchise some categories of postal voters, (3) significantly limit the number of polling stations in urban areas where the MDC was known to have strong support,¹⁸³ (4) repeatedly and secretly extend the cut-off day for voter registration, thus allowing late registration for voters sympathetic to ZANU (PF),¹⁸⁴ and (5) overturn court rulings that declared invalid some of the regulations passed by Mr. Mugabe used section 158.¹⁸⁵ Therefore, because section 158 was used to fundamentally affect the way that the election was conducted, the election was fatally flawed and should be declared invalid.¹⁸⁶

Third, the Constitution of Zimbabwe provides that the Electoral Supervisory Commission (ESC) must have five members.¹⁸⁷ At the time of the election, however, the ESC only had four members.¹⁸⁸ As a result, the ESC was not invalidly constituted. Because the ESC was not validly constituted, it could not validly carry out its constitutional function of supervising the conduct of the elections. Furthermore, the constitution provides that the ESC must be independent of the direction and control of any outside person or authority.¹⁸⁹ Four days before the election, however, President Mugabe issued an executive order permitting a government minister to appoint the staff of the ESC.¹⁹⁰ Because the government minister could appoint the staff over the objection of the ESC, the ESC could not independently carry out its supervisory function under the Constitution. Therefore, the election was fatally flawed and should be declared invalid.¹⁹¹

Fourth, because of the long queues of voters at the polling stations, the High Court ordered that voting be extended for a third day throughout the entire country.¹⁹² Furthermore, section 53(1) of the Electoral Act provides that polling stations must be open for “at least eight hours continuously on each polling day.”¹⁹³ In addition, section 53(4) of the Electoral Act stipulates that “every voter” who at the time of the scheduled closing of the polling station was within the “immediate precincts” of the polling station but was prevented from

-
- (a) suspending or amending any provision of this Act or any other law in so far as it applies to any election;
 - (b) altering any period specified in this Act within which anything connected with, arising out of or resulting from any election must be done;
 - (c) validating anything done in connection with, arising out of or resulting from any election in contravention of any provision of this Act or any other law;
 - (d) empowering any person to make orders or give directions in relation to any matter connected with, arising out of or resulting from any election;
 - (e) penalties for contravention of any such statutory instruments, not exceeding the maximum penalty referred to in section *one hundred and fifty-five*.

¹⁸² See Statutory Instrument 41D of 2002; Electoral Act (Modification) Notice, 2002.

¹⁸³ See, e.g., Tsvangirai v. Mugabe, HC 3616/2002 Petitioner’s Heads of Argument, Summary of Latest Developments and Legal Arguments, 13 Oct. 2003, at 9.

¹⁸⁴ See *id.* See also Statutory Instrument 41A of 2002; Electoral (Presidential Election) (No. 3) Notice, 2002.

¹⁸⁵ See Statutory Instrument 41D of 2002; Electoral Act (Modification) Notice, 2002.

¹⁸⁶ See Tsvangirai v. Mugabe, HC 3616/2002 Petitioner’s Heads of Argument, 13 Oct. 2003.

¹⁸⁷ See Constitution of Zimbabwe, amended to 1 Sept. 2001, § 61.

¹⁸⁸ See Tsvangirai v. Mugabe, HC 3616/2002 Petitioner’s Heads of Argument, 13 Oct. 2003, at 7.

¹⁸⁹ See Constitution of Zimbabwe, amended to 1 Sept. 2001, § 61(6).

¹⁹⁰ See, e.g., Tsvangirai v. Mugabe, HC 3616/2002 Petitioner’s Heads of Argument, 13 Oct. 2003, at 6.

¹⁹¹ *Id.* at 6-9.

¹⁹² See Tsvangirai v. Registrar General, HC 2800/2002 Judgment (HH 36-2002), 10 March 2002, at 5-7.

¹⁹³ Electoral Act, amended to 28 Oct. 2003, at § 53(1).

entering the polling station because of the “congestion therein” shall be permitted to vote “before closing the polling station.”¹⁹⁴ It is common cause, however, that on the third day of voting (1) polling station were only re-opened in Harare and Chitungwiza and not throughout the entire country, (2) the polling stations were only re-opened around noon and did not remain open for “at least eight continuous hours,” and (3) all polling stations were closed at precisely 7:00 pm, despite the fact that voters were still waiting to vote.¹⁹⁵ Therefore, because the conduct of the election did not comply with the law, the election was fatally flawed and should be set aside.¹⁹⁶

Fifth, section 61(2) of the Electoral Act provides that a person who will not be in his home constituency during the polling period may apply to vote by post.¹⁹⁷ However, a mere four days before the election, President Mugabe issued a statutory notice that prohibited postal voting by registered voters other than the police, members of the defence forces and diplomats.¹⁹⁸ Because of the failure to accept applications for postal ballots, thousands of registered voters living or temporarily outside of Zimbabwe were prevented from exercising their constitutional right to vote. As a result, because the election was not conducted in accordance with the principles laid down in the Electoral Act, the election was fatally flawed and should be set aside.¹⁹⁹

Finally, on 10 January 2002, the Registrar General issued a statutory notice stating that the voters’ roll shall be “regarded as closed with effect from the 10th January, 2002, for the purpose of accepting the registration of voters who may vote at the election of the president.”²⁰⁰ However, on 1 March 2002, the Registrar General issued a second statutory notice that retroactively extended the registration of voters for the presidential elections to 3 March 2002.²⁰¹ Because the retroactive extension of the date of closure of the voters’ roll failed to provide proper notice of the extension, the voter registration for the presidential election after 10 January 2002 was unlawful. As a result, because the election was not conducted in accordance with the principles laid down in the Electoral Act, the election was fatally flawed and should be set aside.²⁰²

After Mr. Tsvangirai’s legal team concluded its arguments, counsel for Mr. Mugabe, presented its oral arguments. Mr. Hussein chose not to focus on Mr. Tsvangirai’s legal arguments, but opened his submissions with as follows:

I agree with my opponent that this is an important and unique election petition.

My client, the Head of Government, the President took a bold and brave step to embark on a land reform programme to redress the imbalance in the ownership of land and restore it to its rightful people. I describe the move as brave because it came with a price . . . the British government vowed that one way or the other, my client would be removed from office.”

¹⁹⁴ *Id.* at § 53(4).

¹⁹⁵ *See* Tsvangirai v. Mugabe, HC 3616/2002 Petitioner’s Heads of Argument, 13 Oct. 2003, at 108-105.

¹⁹⁶ *Id.*

¹⁹⁷ *See* Electoral Act, amended to 28 Oct. 2003, at § 61(2).

¹⁹⁸ Statutory Instrument 41D of 2002; Electoral Act (Modification) Notice, 2002.

¹⁹⁹ *See* Tsvangirai v. Mugabe, HC 3616/2002 Petitioner’s Heads of Argument, 13 Oct. 2003, at 113-115.

²⁰⁰ Statutory Instrument 3A of 2002; Electoral (Presidential Election) Notice, 2002.

²⁰¹ Statutory Instrument 41A of 2002; Electoral (Presidential Election) (No. 3) Notice, 2002.

²⁰² *See* Tsvangirai v. Mugabe, HC 3616/2002 Petitioner’s Heads of Argument, 13 Oct. 2003, at 116-118.

Mr. Hussein never bothered to rebut the petitioner’s arguments regarding the constitutionality of section 158 of the Electoral Act, the independence and ESC, or the failure to hold a third day of elections pursuant to electoral law and in defiance of court order. Rather, Mr. Hussein chose to leave with Mr. Justice Hlatshwayo with the argument that “[i]t is inconceivable that the election of the President, the highest officer in the land, the Commander-in-Chief of the army, and the signatory of all the laws should be set aside because of the flowery language of three lawyers.”

In the end, Mr. Justice Hlatshwayo found the arguments of the respondent’s counsel to be compelling. Mr. Hlatshwayo played his role, and after deliberating on the matter for seven months, he issued a one-page judgement summarily dismissing the petitioner’s claims. In what can only be interpreted as a show of utter contempt for the rules of the court, that require election petitions to be dealt with in a manner of urgency, three years after the elections he has yet to provide reasons for his decision, and the election petition remains in abeyance.

V. CONCLUSION

Based on the foregoing examination of the allegations and findings in the presidential electoral challenge and the thirty-nine parliamentary election petitions, the following conclusions can be drawn:

First, the High Court of Zimbabwe found that leading up to the 2000 parliamentary elections, ZANU-PF agents murdered,²⁰³ abducted and tortured,²⁰⁴ brutally assaulted,²⁰⁵ threatened to kill,²⁰⁶ and burned down the homes of MDC officials and party supporters.²⁰⁷ In nearly half of the cases heard by the High Court, the court held that the ZANU-PF candidate had not been duly elected and set aside the election results on the grounds that corrupt practices had been committed or that gross intimidation prevailed to such an extent that persons of ordinary nerve and courage would have been unduly influenced from exercising their right to vote. Based on these findings, it must be concluded that for a substantial number of voters in the 2000 parliamentary elections, freedom of election did not exist.

Second, in its landmark 2001 decision, the Supreme Court held that the petitioners in the electoral challenges had a constitutional right “to be afforded a fair hearing within a reasonable time”²⁰⁸ and “to seek practical and meaningful redress.”²⁰⁹ However, despite the fact that the election results were invalidated by the High Court in nearly half of the 2000 parliamentary election petitions heard by the court, the Supreme Court—under the new Chief Justice, Godfrey Chidyausiku—stalled the appeals and not a single seat in Parliament was ever vacated. Moreover, three years after the 2002 presidential election, the hearing for the factual allegations in the presidential electoral challenge has still not been set down by the High Court, and Judge Ben Hlatshwayo has still not provided reasons for dismissing Morgan Tsvangirai’s legal claims. It must therefore be concluded that the gross failure of the

²⁰³ See, e.g., *supra* text accompanying note 98.

²⁰⁴ See, e.g., *supra* text accompanying note 99.

²⁰⁵ See, e.g., *supra* text accompanying note 114.

²⁰⁶ See, e.g., *supra* text accompanying note 104.

²⁰⁷ See *id.*

²⁰⁸ See *supra* text accompanying note 14.

²⁰⁹ *Id.*

judiciary to resolve the electoral challenges in a “reasonable time” and to afford the aggrieved parties “meaningful redress” was a violation of the petitioners’ constitutional rights.

Finally, the judiciary’s failure to enforce electoral morality also meant that the courts failed in their duty to “bequeath” freedom of election to “future generations.”²¹⁰ One need only look to the 2004 parliamentary bi-election held in Zengeza to see the human cost of this failure. In Zengeza, on the second day of polling—March 28, 2004—ZANU-PF cabinet minister Elliot Manyika is alleged to have brazenly shot and killed in public MDC activist Francis Chinozvina.²¹¹ In the same manner as the previous elections, the ZANU-PF candidate was subsequently declared the winner of the election, he has retained his seat in Parliament despite an electoral challenge brought by the MDC, and Elliot Manyika has not been prosecuted for the murder of Francis Chinozvina.²¹²

The judiciary’s failure to enforce electoral morality has sent a repeated and unmistakable message that the will of the Zimbabwean people is less important than protecting those who violate human rights at the behest of the ruling party.

Twenty out of the original thirty-nine ZANU (PF) respondents facing electoral challenges will stand once more for election in the same constituencies. All have been accused of complicity in election misconduct and some are implicated in heinous crimes; four of the 2005 ZANU (PF) candidates were found by the High Court to have acted illegally in the course of the 2000 electoral process and to be not duly elected. Yet they saw out their terms and now stand again. Many thousands of voters in these constituencies can be expected to have very little faith in the parliamentary process and in any democratic right of appeal.

Over the last five years, freedom of election has been consistently subverted in Zimbabwe with the complicity of the judiciary. The electorate goes into the 2005 election against this background, with their faith in democratic processes seriously undermined. This alone is enough to render the forthcoming election not free and not fair.

²¹⁰ See *supra* text accompanying note 97.

²¹¹ See ZIMBABWE HUMAN RIGHTS NGO FORUM, POLITICAL VIOLENCE REPORT MARCH 2004, at 11-13 (2004). See also Brian Mangwende, *Minister Cited in MDC Supporter’s Death*, FINANCIAL GAZETTE (Zimb.), July 29, 2004, <http://www.fingaz.co.zw/fingaz/2004/July/July29/6093.shtml>

²¹² See Mangwende, *supra* note 212, <http://www.fingaz.co.zw/fingaz/2004/July/July29/6093.shtml>

APPENDIX ONE

**Appendix One: 2000 Parliamentary Electoral Challenges:
Specific allegations, findings and outcomes**

Appendix One is a separate 135-page document, summarising the 39 election petitions: this can be found at: www.solidaritypeacetrust.org.za
or can be sent on request to selvanc@venturenet.co.za

APPENDIX TWO

Bibliography: International

Report of the EU election observation mission on the parliamentary election in Zimbabwe on 24-25 June 2000

Report of the Commonwealth observer group, on the parliamentary elections in Zimbabwe, 24-25 June 2000

International Bar Association; "Report of Zimbabwe Mission", 2001

International Council of Advocates and Barristers; "The State of Justice in Zimbabwe", 2004

Legal Resources Foundation; "Justice in Zimbabwe", 2002.

Norwegian election observation mission; "Presidential elections in Zimbabwe", 2002

Zimbabwe Institute; "Playing with fire", June 2004

Bibliography: Zimbabwe

Amani Trust; "The Presidential elections and the post-election period in Zimbabwe", 2002.

Amani Trust; "Beating your opposition: torture during the 2002 Presidential campaign in Zimbabwe", 2002.

Electoral Supervisory Commission; "Report on the 2000 Parliamentary Elections", June 2002.

Electoral Supervisory Commission; "Report on the March 2002 Presidential, Mayoral and Council Elections", 2002.

Feltoe, Geoffrey; “An unfair contest: the Presidential elections in Zimbabwe”; Zimbabwe Human Rights Bulletin, 81, 2002.

Zimbabwe Election Support Network, 2002 presidential elections report 83 (2002)

The Legal Resources Foundation and the Catholic Commission for Justice and Peace in Zimbabwe; “Breaking the silence, Building true peace: a report on the disturbances in Matabeleland and the Midlands 1980 to 1988,” (Harare, Zimbabwe, February 1997, reprinted October 2001).

The Solidarity Peace Trust, “Disturbing the Peace: an overview of civilian arrests in Zimbabwe: February 2003 – January 2004”, June 2004

Zimbabwe Elections Support Network;

“2000 parliamentary report”, 2000

“September 2002 report on local authority elections”, 2002

Zimbabwe Human Rights NGO Forum;

“Who is responsible? A preliminary analysis of pre-election violence in zimbabwe,” July, 2001.

“Are they accountable?”. An analysis of violence linked to the presidential election in Zimbabwe, July 2002.”

Violence monitoring: monthly violence updates.