YVONNE MUSARURWA
and
TUNGAMIRAI MADZOKERE
and
LAST MAENGAHAMA
versus
THE MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS
and
THE CHAIRPERSON OF THE ZIMBABWE ELECTORAL COMMISSION
and
THE ZIMBABWE ELECTORAL COMMISSION

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 10 February & 26 October 2022

Opposed Application

T Mafukidze, for the applicants
D Jaricha, for the 1st respondents
TM Kanengoni, for the 2nd & 3rd respondents

MUTEVEDZI J: Regrettably, due to circumstances beyond anyone's control, this application has a checkered history. The applicants initially filed their application sometime in 2017, presumably in anticipation to be eligible to vote in the country's harmonized elections in 2018. It was subsequently set down and argued before Honourable PHIRI J on 18 July 2018. He reserved his judgment. Unfortunately his LORDSHIP became unwell and passed on before he could deliver the judgment. Needless to say, the proceedings became abortive resulting in them commencing afresh before me.

At the time that this application was filed, the first applicant, Yvonne Musarurwa was serving 20 years imprisonment in Chikurubi Female Prison whilst her co-applicants, Tungamirai Madzokere who is second applicant and Last Maengahama, the third applicant were also serving the same sentence at Chikurubi Maximum Prison. They had all been convicted of murder on 6 September 2016 and sentenced on 12 December the same year. They chose throughout the application, to identify themselves as political prisoners despite the fact they were hardly distinguishable from other classes of prisoners. How they ended up being incarcerated has no bearing on the determination of the application before the court. For those

reasons, resort to the adjective 'political' is unnecessary. The court will simply describe them as prisoners.

The first respondent is the Minister of Justice, Legal and Parliamentary affairs. He was cited in this case because the President of the Republic of Zimbabwe assigned to him, the administration of the Electoral Act [*Chapter 2:13*] (hereinafter the Electoral Act). The second respondent is the Chairperson of the Zimbabwe Electoral Commission cited in her official capacity. The third respondent is the Zimbabwe Electoral Commission. The description ends there. I presume however that it is cited because it is the body that is given the constitutional mandate to run elections in Zimbabwe.

I must hasten to say that it is elementary that litigants, especially where they are represented by legal practitioners must be aware that in court applications, it is important to fully describe the parties. The reasons why each party appears in the application must be made known to the court from the onset. Simply mentioning people's names or their titles is not helpful.

The relief which the applicants seek is a multifaceted compelling order couched as follows:

1. Applicants and all persons who are prisoners during any election period, and are not disqualified in terms of paragraph 2 of the 4th Schedule to the Constitution of Zimbabwe are entitled to vote be registered as voters.
2. Applicants and all persons who are prisoners on any election day are entitled to vote if they have registered to vote in terms of paragraph 1 above.
3. Respondents are to make all necessary arrangements to ensure that applicants and all persons who are prisoners are registered as voters on appropriate voters' rolls and to ensure that they vote in any election relating to them.
4. Third respondent be and is hereby ordered within 30 days of this order, to serve applicants, through their legal practitioners of record, with an affidavit setting out the manner in which it will comply with paragraph 3 above, and lodge with the registrar of this court, a copy of such affidavit.
5. Any interested party may access a copy of the affidavit referred to in paragraph 4 above at the registrar's office once it has been lodged.
6. There shall be no order as to costs.

In summary, the applicants therefore beseech the court to declare that the law allows prisoners to be registered as voters and to vote in elections when so registered. They also wish that the court compels the respondents to facilitate theirs and other prisoners' registration as voters and the enjoyment by prisoners of that right to vote.

Applicants' Arguments

In motivating their application, the applicants argued that they were approaching the court to vindicate their right to vote in elections and referenda as enshrined in s 67(3)(a) of the

Constitution of Zimbabwe, 2013 (hereinafter the Constitution). Besides seeking to protect their own interests as prisoners, they argued that the relief they seek is by its nature of significant public interest and if granted will be beneficial to that class of persons who may be in detention during any electoral period. They also indicated that they are all registered voters who have participated in previous elections held before their incarceration. They all wish to participate in future elections regardless of their status as prisoners. In their view whilst the law has adequate provisions for the participation in electoral processes and the exercise of political rights by those who are not in bondage, the same law omits to make provision for those who are in detention. There is legislative silence as to what should happen to citizens who wish to participate in elections whilst in prison. They further argued that the state is obliged by the Constitution, to take all appropriate measures, including legislative steps to ensure that all eligible citizens are registered as voters and are granted the opportunity to cast their votes. Their own argument for eligibility is based on that they are all above the age of eighteen years and are Zimbabwean citizens. None of them is disqualified from voting in terms of the disqualification criteria provided by legislation.

In addition, the applicants argued that the second and third respondents embarked on a much publicized voter registration exercise which was intended to culminate in the compilation of a new voters' roll. To their knowledge however voter registration exercises do not extend into prisons because they are carried out either at voter registration centres which exclude prisons or are done through mobile voter registration programmes which again only benefit those not in custody. To illustrate the basis of their fear of disenfranchisement, the applicants alleged that during their time in detention, parliamentary by-elections were held for Bikita West and Mwenezi East Constituencies. Neither voter education nor voter registration for those elections was afforded to any prisoner. None of the prisoners they were in detention with was able to cast their vote.

The applicants also argued that much as they appreciated that the Electoral law permitted the imposition of reasonable restrictions such as residence requirements for purposes of ensuring that persons are registered on the most appropriate voters' roll any such restrictions had to remain *intra vires* the Constitution. Their status as prisoners, so they argued, is not a reasonable basis upon which their right to vote could be denied. By parity of reasoning, an omission by the law to make provision for mechanisms for the facilitation of enjoyment of the right to vote by prisoners is not sufficient justification for excluding them from participating in electoral processes. It is therefore incumbent upon the respondents to ensure that the applicants

are given an opportunity to register as voters and that mechanisms are put in place to enable them to vote whilst in custody.

In graphic terms, they concluded by painting the gloomy situation they find themselves in. They pointed out that given their twenty-year prison sentences, it meant that at least three general elections were going to be held before they completed serving their terms.

All the respondents opposed the application.

First Respondent's Arguments

The first respondent's opposing affidavit was deposed to by Virginia Mabhiza, the Permanent Secretary for the Ministry of Justice, Legal and Parliamentary Affairs. She indicated that by virtue of her position, she was authorized to attest to the issues on behalf of the first respondent. In essence, the first respondent's argument was that:

a. All prisoners in Zimbabwe are eligible to vote. The first respondent held this view on the backdrop of a comparison of the provisions of Zimbabwe's former Constitution and the current Constitution. In the former constitution, prisoners serving sentences of imprisonment of six months and above were specifically barred from voting. Those serving lesser sentences could vote. That distinction was scrapped from the current Constitution. The only hindrance in the country's electoral framework is that prisoners do not meet the residence requirements prescribed by law. It is the residence criteria which make the prisoners' registration as voters impossible.
b. The criteria are permitted by para 1(2) of the fourth Schedule to the Constitution which allows the Electoral Act to prescribe such requirements.
c. As such the applicants cannot seek to compel the respondents to do that which is not permitted by law.
d. The impugned law is not *ultra vires* the Constitution. The applicants' only recourse would be to lobby parliament to change the law. She further denied all other averments by the applicants except those that were specifically admitted in her affidavit.
e. There is no allegation that the applicants requested and were denied the authority to go and register as voters. Their complaint should have been that they sought and were denied permission to go and register as voters.

Second and Third Respondents' Arguments

The second and third respondents' filed a single notice of opposition. Their opposing affidavit was sworn to by Rita Makarau who was at the time the pleadings were filed, the

chairperson of the third respondent. She indicated right at the outset that the second and third respondents were by and large content to abide by the decision of the court. She however also pointed out that certain facts and legal perspectives had to be placed before the court to assist it in the final determination of the matter. Below I summarize the pertinent issues which the second and third respondents raised.

1. That the High Court lacks jurisdiction to deal with the matter because the issues which arise are consequent upon s 162(2) of the Electoral Act which gives exclusive jurisdiction to the Electoral Court to deal with applications in terms of that Act. The relief which the applicants are seeking is therefore relief that falls within the exclusive jurisdiction of the Electoral court to the exclusion in the first instance, of the High Court.
2. In terms of s 23(1) of the Act, a person wishing to be registered as a voter in a particular constituency must be resident in that constituency at the time he/she presents a claim for such registration.
3. In terms of s 23(2) of the Act a person ceases to be resident in a particular constituency if for a continuous period of twelve months he/she has ceased to reside in that constituency.
4. Section 51(1) of the Act obliges ZEC to establish polling stations in each constituency adequate to take a poll of the voters registered in that constituency. The polling stations must, by law, be physically situated in the constituency concerned. In addition, it is a requirement that every such polling station be located in a place which is readily accessible to the public including people with disabilities. More importantly for the determination of this matter, she advised the court to note that s 51(1b)(b) of the Electoral Act in turn proscribes the location of a polling station in a police station, cantonment area or other area where police officers or members of the defence forces are permanently stationed.
5. Although s 51(2) of the Act allows the establishment of a polling station outside the physical boundaries of the constituency to which it relates it equally provides that such a polling station cannot be for more than one constituency.

Applicants' Answering Affidavit

Following the opposition by the respondents, the applicants filed an answering affidavit which for some strange reason dripped anger particularly towards the Secretary for Justice, Legal and Parliamentary Affairs, Virginia Mabhiza. The applicants unnecessarily directed

infantile insults at her. Some of the unrestrained language was so ridiculously juvenile that it has no place in the courts. For instance, the applicants allege in the last line of para 12 that:

> "I may also add that, with no offence meant, that when Virginia Mabhiza is unaware of any fact or law, she would do best to seek to be informed by those in the know rather than refuse to admit anything simply because of her lack of knowledge thereof."

In the last line in para 14 worse language is used where the applicants said:

> "I know no other way to shake Virginia Mabhiza from the bliss of her ignorance and get her to admit the stark facts prevailing."

Whilst it is not impermissible for a litigant to forcefully put across facts which assist in advancing his/her/its cause in an application, it is not ideal to make outlandish averments which sound like threats to a party against whom one is contesting. The language used must remain temperate and respectful. The objective of averments in affidavits is not to gauge which party throws more insults than the other but to simply help the court in the determination of the issues before it.

The intemperate language issue aside, the applicants took the view that the first respondent could not be represented by Virginia Mabhiza because there was no proof furnished that she was authorized to attest to the opposing affidavit. At the hearing, counsel for the applicant indicated that they no longer persisted with the point. It was consequently dropped.

The Parties' Heads of Argument

All the parties filed heads of argument to support their respective positions. I will deal with those as and when they become necessary.

First Respondents' Preliminary Objections at the Hearing

At the hearing the first respondent took the preliminary objections that:

(i) The application had become moot. The first applicant who deposed to the founding affidavit on which the entire application is grounded was released from prison through a presidential amnesty. The second and third applicants were also released from prison after the Supreme Court overturned their convictions. These facts were expressly admitted by counsel for the applicants.

(ii) It also turned out that sometime in 2021, a default judgment was entered against the three applicants in this same application. Their counsel sought to have it rescinded. In the affidavit filed in support of the application for rescission, both counsel for the applicants and first applicant positively stated that the first applicant was no longer pursuing this matter but had simply been included for

purposes of neatness of the record. On that basis, Mr *Jaricha* for first respondent was vehement that the relevance of the application had fallen away and the matter clearly became moot.

(iii) Counsel also emphasized the point that once the first applicant indicated that she was no longer pursuing the matter, there could not be an application before this court because the second and third applicants had no cases of their own. Their affidavits were simply statements to support the averments of the first applicant.

Second and Third Respondents' Preliminary Objections

In their opposing papers, the second and third respondents took the point that:

a. This court lacked jurisdiction to hear and determine the matter given the provisions of s 161(2) of the Electoral Act which reposed jurisdiction to deal with matters related to elections in the Electoral Court to the exclusion of the High Court at first instance. However, at the hearing and in their supplementary heads of argument, the second and third respondents conceded that their objection to the jurisdiction of this court in determining this application had also been overtaken by events. To begin with this court in the case of *Gwatipedza Dube* v *Minister of Local Government, Public Works and National Housing N.O. & 3 Ors* HMA 34/17 determined that on the basis of inherent jurisdiction, the High Court had power to deal with electoral matters notwithstanding the provisions of s 161(2) of the Electoral Act. It held further that s 161(2) may, to the extent that it sought to oust the High Court's jurisdiction, be ultra vires the Constitution. They also added that in addition to the *Gwatipedza Dube* decision, the Electoral Act had been amended in s 161(1) in such a way that the Electoral Court is no longer a standalone special court but has become a division of the High Court.

b. Counsel added that both the respondents and the applicants had found each other on that point and the debate which was brewing had itself become moot.

c. The second and third respondents also took the same view as first respondent that the application had become moot. Their view was that in addition to the release of the applicants from prison, there had been another very significant development outside these proceedings which rendered the determination of the application unnecessary. On 30 May 2018, a month or so after the last pleadings in this application were filed, the Constitutional Court of Zimbabwe (CCZ) handed down judgment in the case of *Gabriel Shumba & Ors* v *Minister of Justice & Ors* CCZ

4/18 (*Gabriel Shumba*). That case, so the second and third respondents submitted, dealt with essentially the same issues which arise in this application. Mr *Kanengoni* urged the court to note that in *Gabriel Shumba,* the applicants wished to be accorded the right to vote outside their constituencies. The three applicants *in casu* are principally exhorting this court to accord them the right to be registered as voters and to be afforded facilities to vote notwithstanding that they are outside their constituencies. The position in both matters is identical. In deciding the matter in *Gabriel Shumba,* the CCZ went at length in discussing all the issues which arise in the current application. Counsel's view was that the *Gabriel Shumba* case turned on the lawfulness and constitutionality of the residence requirements prescribed under s 23(3) of the Electoral Act. The CCZ not only held that the requirements are lawful and constitutional but that they did not only apply to citizens in the diaspora but also to citizens living within Zimbabwe who have ceased to reside in the constituencies where they are registered to vote. The court affirmed that citizens in the diaspora have the right to vote contrary to the allegation that it said they didn't. What it emphasized is that there is no obligation in terms of the law for the electoral commission to establish special mechanisms to allow those citizens in the diaspora to exercise their recognized right wherever they may be. As such the CCZ's holdings in that case apply with equal force to the application before this court. He concluded his argument by urging this court to regard the CCZ decision as creating some kind of issue estoppel with regards the legal issues set for determination *in casu*. Put differently, counsel's argument was that the question had already been determined and this court could therefore do no more than being bound by that decision.

Applicants' Response to Ojections *in limine*

In response to the preliminary objections the applicants raised the following:

a) On the allegation that the first applicant had abandoned the application, Mr *Mafukidze* first advised the court that in the absence of his instructing attorney, he was unable to confirm if the first applicant was persisting with the application. He was however certain that second and third respondents were definitely pursuing the relief they sought. In the midst of his submissions, he advised the court that indeed the first applicant was pursuing the application just like the other two. Mr

Jaricha for the first respondent then conceded that the question was a non-issue. It ended there.

b) Further counsel did not dispute that the applicants had all been released from prison. He accepted that for that reason, the matter could be regarded as having become moot. He however argued that there is authority that the mere existence of mootness does not absolutely bar the court from proceeding to determine the matter. The court retains the discretion to hear a moot case where it is in the interests of justice to do so. One of the considerations in that regard is to test if the order which the court will give will have a practical effect either on the parties or on others.

c) In this case, so he submitted, the question which the court was being asked to determine was whether Zimbabwean law allowed prisoners to register as voters and to vote in an election. If the answers are in the affirmative, the court is being further asked to direct the third respondent to ensure that the rights of people in detention to vote are given effect to. In his view, the questions have not been answered and the court ought to proceed and determine the matter.

d) On the decision in *Gabriel Shumba*, counsel argued that it related to people in the diaspora who challenged the residence requirements on the basis that they were discriminatory yet no such challenge was before this court. The simple issue before this court is whether prisoners have the right to vote. He said the distinction between the cases is that whilst in *Gabriel Shumba* the applicants were in the diaspora the applicants in the instant case were ordinarily resident in Zimbabwe. In support of his argument that the question of whether prisoners have the right to vote remained unanswered, he postulated several scenarios. These included that:

   i. In terms of the former constitution, prisoners serving sentences of 6 months or more imprisonment were disqualified from voting. Those serving lesser sentences were allowed to vote.

   ii. In the current constitution, the 6 months imprisonment demarcation was removed. The net effect is that all prisoners in Zimbabwe are allowed to vote

   iii. It is accepted that the Constitution admits that the electoral law may prescribe additional requirements which include the residence requirements but any such requirements are expected to be *intra vires* the Constitution.

iv. The applicants were not alleging any discrimination against prisoners

With the preliminary objections relating to the applicants' standing and the court's jurisdiction having fallen by the wayside, only one point *in limine* remained from what appeared to be a web of arguments and counter arguments. It was simply:

a) Whether the application has become moot by reason of the release of the applicants from prison and or the determination of the same legal questions which arise in this case by the CCZ in *Gabriel Shumba.*

I therefore turn to deal with the issue.

The Law on Mootness

The starting point in discussing mootness is inevitably Mathew I. Hall's assertion in his article "*The Partially Prudential Doctrine of Mootness,"* The George Washington Law Review, 2009, Vol. 77 No. 3 that the doctrine of mootness lacks a coherent theoretical foundation. On one hand it is regarded as a limitation to a court's jurisdiction yet on the other the courts appear to almost always circumnavigate it and hear moot cases where there are reasons to do so. The latter approach is difficult to reconcile with the understanding that mootness is a mandatory jurisdictional bar.

Fortunately, the superior courts in Zimbabwe have over the years, developed an impressive corpus of precedent on the subject of mootness. The common thread which runs through the Zimbabwean authorities is that the exercise of judicial power is dependent on the existence of a live controversy between the parties to litigation. The Constitutional Court in *Khupe & Anor* v *Parliament of Zimbabwe & Ors* CCZ 20/19, at pp. 7-8 held that:

> "A court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy. The position of the law is that if the dispute becomes academic by reason of changed circumstances the Court's jurisdiction ceases and the case becomes moot …. The constitutional limits on the exercise of judicial power, combined with notions of the limited nature of judicial power, have evolved into a broad doctrine known as 'justiciability'."

My comprehension of justiciability is that it is dependent on four broad principles namely standing, ripeness, political question and mootness. Mootness, like all the other three principles imposes a limitation on justiciability. It regulates when a court can intervene in a dispute between warring parties. In that regard it must be understood as the opposite of the principle of ripeness which bars the courts from determining cases before they have become mature enough to be presented before the courts.

In the case of *Zimbabwe Schools Examinations Council* v *Victor Mukomeka (on behalf of a minor Charmaine Mukomeka) & Chingasiyeni Govhati (on behalf of a minor Anesu Govhati)* SC 10/20 PATEL JA (as he then was) quoted with approval the dicta in the Canadian case of *Borowski* v *Canada (Attorney General)* [1989] 1 SCR 342, that:

> "An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it. The approach with respect to mootness involves a two-step analysis. It is first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case."

In the above case, the Supreme Court prescribed a two stage process which a court must undertake when considering the mootness of a dispute. The first is to determine whether indeed the dispute as between the parties has become moot. If it has the court must be alive to the principle that that fact alone would not always render the matter unjusticiable. Instead the next inquiry must be to determine whether or not the court should exercise its discretion to hear the case despite it having become moot. In doing so, the court does not make a thumb suck decision but looks for guidance from the rationale and policy considerations which inform the doctrine of mootness. The most preeminent of such considerations is the all-encompassing concept of the interests of justice. A court may elect to determine a moot case if it is in the interests of justice to do so.

The case of *Independent Electoral Commission* v *Langeberg Municipality* 2001 (3) SA 925 (CC) at p. 11 again cited with approval in *ZIMSEC* v *Mukomeka* (*supra*), enumerated the issues which a court must turn to when considering whether or not to determine a moot issue in the following manner:

> "This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced."

The principles which I discern from the above decisions can be summarized as that a case becomes moot when it is not possible to grant effectual relief to the prevailing party; when events have completely and irrevocably removed the effects of the alleged violation and there is no reasonable chance that the alleged violation will recur. In addition, a case is moot because

none of the parties has a legally recognizable interest in the final determination of the questions of fact and or law which are in issue. More importantly, the fact that a dispute has become moot does not on its own proscribe the determination of that matter.

I further understand that there is a marked distinction between the types of mootness which can confront a court. There is on one hand, what I would call personal stake mootness and on the other what I would christen as issue mootness.

Issue mootness refers to a situation where the wrongful conduct alleged by an applicant has ceased and is reasonably unlikely to happen again. If that happened, then the case or controversy must be dismissed. The prudential considerations adverted to in the authorities cited above would not come into play. In contradistinction, personal stake mootness connotes a situation where a party's personal interest in the dispute has expired so to speak. In such circumstances and because the harm may recur to another person other than the applicant, the motivation for dismissal of the claim becomes weaker. It is for such cases that the consideration of discretionary factors must kick in. Put differently it is possible to have issues which have become moot as opposed to live controversies which have been raised by parties whose personal interest in the issues has expired.

Application of the Law to the Arguments *in casu*

In this case, the first argument is that the applicants were all released from prison. It has been accepted by the applicants themselves that this is so. In other words there is no debate that they have lost their personal stake in the application before the court. Ordinarily, the matter would have ended with this inquiry but as illustrated above, the next question must be is there no live controversy which is being raised by parties whose personal interest in the matter has expired?

The applicants' argument is that right from the onset, they indicated that the order they are seeking will be of general application as it would also apply to people in circumstances similar to theirs. In particular they averred that the relief they are seeking is of significant public interest and of benefit to other prisoners. That argument as presented suggested that the applicants had instituted this suit acting in both the public interest and as members, or in the interests of a group or class of persons as envisaged in s 85(1)(c) and (d) of the Constitution of Zimbabwe, 2013 when in actual fact they did not. An application brought in terms of s 85(1) must clearly state so. It cannot be left to conjecture. The application before the court is unequivocal that the first, second and third applicants all sought the relief they applied for in

their personal capacities as prisoners serving lengthy prison terms. There is nowhere in the application that they indicate that they are suing in the public interest or on behalf of a class or group of persons in terms of s 85(1). In fact in para 12 of the applicants' founding affidavit, they specifically make the averment that they are approaching the court to protect **their own interests as prisoners** although being mindful of the fact that the relief they are seeking is of significant public interest and of benefit to other prisoners. Admittedly the Constitution of Zimbabwe introduced a paradigm shift from the common law understanding of *locus standi.* The expansion of the Bill of Rights came with a corresponding widening of standing. See L. Chiduza and P. Mukiwane in their article *Strengthening Locus Standi in Human Rights Litigation in Zimbabwe: An analysis of the Provisions in the New Zimbabwean Constitution.*[1]

The generous interpretation given to standing does not however detract from the fact that there are rules to be observed. Standing, relaxed as it may seem is not there for the taking. Where one seeks to act in the public interest or for a group or class of persons one has to illustrate that he/she/it is doing so genuinely. The most elementary requirement is that the applicant must specifically indicate that he/she/it is suing in terms of s 85(1) and cite the particular subsection under which that is being done. Commenting on an analogous provision of the South African Constitution, the South African Constitutional Court in the case of *Ferreira* v *Levin N.O. & Ors* 1996(1) SA 984 (CC) remarked that:

> "This Court will be circumspect in affording applicants standing by way of s 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case."

I allude to the above issues because if this were a class action, the considerations by the court regarding mootness would have been different. The law on mootness in relation to class actions stipulates that when the claim of a specified plaintiff in a certified class action becomes moot the class action will not be dismissed so long as a member of the class continues to have a sufficiently adversarial relationship to constitute a live controversy. It would have meant that the concession by the parties and the court's finding that the applicants' personal stake in the

[1] http://www.saflii.org/za/journals/PER/2016/30.html

application expired upon their release from prison would have been erroneous. But as can be gleaned from the authorities above the applicants in this case, did not even begin to fulfil the prerequisites. They cannot get standing to sue on behalf of others by virtue of the gratuitous statements which they make in their pleadings that they represent the public interest. Theirs was therefore not a class action. If the court has to exercise its discretion to hear the moot matter it has to be on some consideration other than that the applicants acted in the public interest or for a class of persons.

I have already indicated that the second rung of the two stage test formulated by the Supreme Court in *ZIMSEC* v *Mukomeka* is that where a court has found that the case is moot, it must then proceed to consider whether the interests of justice require it to exercise its discretion to hear the moot case. The considerations which must inform the court's decision have already been stated. They include that any order which the court may make will have some practical effect either on the parties or on others, the importance of the issue and its complexity. Those factors speak to issue mootness.

In this case, the applicants argued that much as they had been released from prison, the question which the court was being asked to determine was whether Zimbabwean law allowed prisoners to register as voters and to vote in an election. In their view, the decision which the court might make would have significant practical effects on other people who are still prisoners and who may be prisoners on any voting day in any election. The respondents on the hand persisted with the argument that the issues which the court was being asked to determine had become moot by reason of the decision of the CCZ in *Gabriel Shumba.*

There appears to be no controversy between the parties to this dispute. To put this into context it is necessary to deal with the question which the court is required to resolve as stated by the applicants themselves. The question is whether prisoners have the right to register as voters and if they do, to subsequently vote when so registered.

Whether Zimbabwean Law allows Prisoners to vote

The applicants alleged that the law allows prisoners to vote. All the respondents agreed and even set out in elaborate terms the provisions of the law which support that prisoners have the right to vote. A dispute is a disagreement between parties. Where the parties are *ad idem* there is no dispute. In the court's view all the parties are right to take the position that Zimbabwean laws allow prisoners to vote because s 67 of the Constitution accords to every Zimbabwean over the age of 18 years without distinction, the right to be registered as a voter and once registered, to vote in any election or referendum according to law. The only persons

disenfranchised by the Constitution are those caught in the criteria which are set out in the fourth schedule to the Constitution prescribing the disqualifications of citizens otherwise eligible to register as voters and to so vote once registered. These include persons detained in terms of a statute as mentally handicapped or those declared by a court that they cannot handle their own affairs for the duration of such declaration or those convicted of an offence under the electoral law with a concomitant declaration by the High Court that such convicted person is disqualified from registration as a voter or from voting for the duration of such declaration. Significantly, the former Constitution expressly disenfranchised certain specified categories of prisoners. The removal from the current Constitution of those groups of inmates puts beyond doubt the interpretation that the Constitution does not bar prisoners from voting. As such there could not have been any disagreement between the parties on that aspect.

The bone of contention between the applicants and the respondents therefore seems to me to be the additional requirements to be eligible to register as a voter and to vote which are created by s 23(3) of the Electoral Act [*Chapter 23:*] (The Act). The reason why prisoners fail to vote is not that they are disqualified by the law but that because of their circumstances of captivity, they cannot satisfy the additional residence requirements which are stipulated by law. For that reason, the second and third respondents allege that the issues which were before the CCZ in *Gabriel Shumba* are substantially similar to those that this court is being asked to determine thereby creating issue mootness. They added that the decision of the court was not confined to Zimbabweans living in other countries but extended to every citizen who did not meet the residence requirements. In contrast, the applicants argued that the question of the eligibility of prisoners to register as voters and to vote was not determined by the CCZ in *Gabriel Shumba.* What the Court in that case decided, so they put it, was the residence requirements in relation to Zimbabweans in the diaspora.

The confluence of the parties' arguments is however apparent. They agree that if indeed the CCZ decided the legal issues which this court is required to determine, the application before it is moot. If it did not determine them, then this court can exercise its discretion to hear the application despite the release of the applicants from prison which extinguished their personal interest in the application.

From the above, it is necessary for me to consider what the CCZ's determination in *Gabriel Shumba* was in reality. The questions which were before the CCZ were:

i. *Whether the Constitution of Zimbabwe, directly or indirectly, allows for the diaspora vote?*

ii. Whether s 23 of the Electoral Act violated s 67(3) of the Constitution?

iii. Whether s 72 of the Electoral Act violated s 56 (1), (3) and (4) of the Constitution?

The applicants in *Gabriel Shumba* argued that ss 23 and 72 of the Electoral Act infringed their right to vote as accorded by s 67(3) as read with para 1(2) of the fourth schedule to the Constitution. They further argued that s 72 of the Electoral Act violated their rights in terms of s 56(1), (2), (3) and (4) of the Constitution. Needless to say, s 67(3) is the provision which confers on every Zimbabwean above the age of 18 years, the right to vote. In summary, the argument was therefore that in terms of s 67(3) every Zimbabwean over the age of 18 years was entitled to vote without regard of where they reside or are resident. The residence requirements set out in s 23(1) of the Electoral Act could not therefore be used to negate the right of any such Zimbabwean above 18 years to vote. They contended that the right to vote was not dependent on anything except age and citizenship. That right could not be attenuated by legislation and what it meant was that the state was obliged to track its citizens wherever they could be and ensure they voted. The further argument was that because neither the Constitution nor any other law facilitated the registration or the voting of Zimbabweans in the diaspora, the result was the negation of s 67(3). As can be seen, the last two questions which the CCZ dealt with were a corollary of the first question.

As is common knowledge now, the CCZ rejected the above arguments by the applicants. It found that the power to make residency requirements in s 23 of the Electoral Act, as an addition to the requirements which appear in the fourth schedule to the Constitution came from the Constitution itself. As a result, the concept of additional residency requirements is both lawful and constitutional. It further found that the Zimbabwean electoral system is constituency based. As such the residency requirements did not in any way violate s 67(3) as they were meant to ensure that a voter was registered on the appropriate voters' roll to facilitate the implementation of the constituency based voting process. Crucially for the purposes of this application, the CCZ held at pp. 16-17 of the cyclostyled decision that:

> "It should be noted that the residency requirement does not affect only the diaspora vote, since it also affects those who live in Zimbabwe. For example, a person who has ceased to live in Mount Pleasant for the relevant period will not be allowed to vote in Harare North elections notwithstanding that they still live in Zimbabwe, albeit in a different constituency, e.g. Harare West. In this regard, the residency requirements are not directed only at the diaspora vote."

That the court in *Gabriel Shumba* dealt with the diaspora vote and this court in this application is dealing with prisoners' vote is to me a distinction without a difference. The applicants in both cases challenged the propriety of the residency requirements. The CCZ found

that the law allows Zimbabweans in the diaspora to vote. There is consensus in this application that prisoners are allowed to vote. What detracts from the right to vote in both instances are the residency requirements which have to be met before the right to register as a voter and to subsequently vote can be exercised. The argument before this court is therefore essentially the same as that in *Gabriel Shumba.* The applicants' prayers in both applications may be worded differently but the intended results of the orders sought are not dissimilar. Like in the CCZ case, the applicants *in casu* pray that I declare that the applicants and all prisoners who may be in detention and are not disqualified from voting during any election period be entitled to be registered as voters and to vote. I have already said that there is no dispute in that regard because the law does not bar prisoners from voting. Except for the substitution of the word *prisoners* with *diaspora* it is exactly what the applicants in *Gabriel Shumba* were seeking. The CCZ held that the law did not disenfranchise Zimbabweans in the diaspora. In the instant case the applicants moved that I should find that the residency requirements which inhibit prisoners' right to vote is *ultra vires* s 67(3) and that I make an order that the respondents must facilitate the registration of the applicants as voters and that they vote on election day. The CCZ was equally beseeched to make the same finding. It arrived at the conclusion that the residency requirements were both lawful and constitutional. It added that those requirements did not only apply to citizens in the diaspora but to those who were in the country but had ceased to reside in their constituencies.

The CCZ is the highest court in Zimbabwe in relation to constitutional matters. Its decisions bind all other courts below it. This court is therefore eternally bound by that decision. I agree with the respondents that the passing of the CCZ judgment in *Gabriel Shumba* during the pendency of this application is an issue outside the record which served to terminate the controversy between the parties. There are no factual disputes in this case. The only question is the legality or otherwise of the residency requirements in our electoral system. It will be futile for this court to grapple with a legal issue which has already been resolved by a court of superior jurisdiction. The nature of our legal system is that Zimbabwe is a common law jurisdiction where the doctrine of precedent is sacrosanct. To make a finding contrary to the CCZ decision in *Gabriel Shumba* would be awarding a pyrrhic victory to the applicants. A decision which goes against the clear findings of the CCZ would be unenforceable. It will be undoubtedly a judgment *per incuriam.* I have already held that mootness may occur when a controversy which initially existed at the commencement of the law suit is no longer live due to a change in the law or a shift in the status of the parties. When this application was filed in

2017 no argument could be made that there didn't exist a live dispute between the parties.

Unfortunately for the applicants between 2017 and this hearing their personal stake in the application expired making their interest in the case moot. In addition, in the same period the intervening interpretation of the law by the highest court in the country in *Gabriel Shumba* put the legal question which arises in this case beyond disputation. This amounts to issue mootness. I held earlier that when issue mootness exists the case or controversy must be dismissed because the prudential considerations which usually allow the court discretion to determine a moot issue cannot be resorted to.

Disposition

For the above reasons I find that the application is moot. Equally, for the rationale spelt out, I refuse to exercise my discretion to determine the moot application on the merits. In the circumstances, the respondents' objection *in limine* that the matter is moot is upheld. The application is therefore dismissed with costs.

*Mbidzo Muchadehama and Makoni*I, applicants' legal practitioners
Civil Division of the Attorney General's Office, first respondent's legal practitioners
Nyika, Kanengoni & Partners, second and third respondents' legal practitioners