

14th October 2003

Dear Sir/Madam

**Re : Morgan Tsvangirai versus Robert Mugabe, the Registrar-General of Elections,
the Minister of Justice and the Electoral Supervisory Commission :
Presidential Election Petition : High Court, Harare 3rd to the 7th November 2003**

In March 2002 Robert Mugabe was controversially elected President of Zimbabwe in an election that was condemned by the Commonwealth, the SADC Parliamentary Forum, Zimbabwean NGOs and many democratic Governments and Institutions the world over. Some observer missions, in particular the South African Observer Mission, were of the view that “the outcome of the 2002 Zimbabwe Presidential elections should be considered legitimate”.

Shortly after the declaration of the result MDC President Morgan Tsvangirai filed a petition in the High Court of Zimbabwe (as he was entitled to do in terms of the Zimbabwean Electoral Act) challenging the result.

Despite every effort being taken by the MDC’s legal team and countless court applications to have the case heard urgently and in compliance with the rules, the Respondents have done all in their power to delay the case and it has taken some 18 months to get the trial underway. However the trial is now scheduled to commence on Monday the 3rd November in the High Court at Harare. In the first stage of the trial it will be argued that, aside from the violence and fraud that characterized the elections, the elections did not even comply with Zimbabwe’s Constitution and Electoral Act.

On the 13th October 2003 the MDC’s legal team, led by South African Advocate Jeremy Gauntlett SC, filed Heads of Argument in the High Court. These are attached to this document together with a summary.

We believe that the Heads of Argument show that the election of Robert Mugabe was anything but “legitimate” and trust that a fair and independent court will rule likewise.

The trial will be open to all and we hope that you will make every effort to attend.

Yours sincerely,

The Honourable Professor Welshman Ncube MP
Secretary General - MDC

MORGAN TSVANGIRAI'S COURT CHALLENGE ON THE 2002 ZIMBABWEAN PRESIDENTIAL ELECTION

Summary of latest developments and legal arguments

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NOTE:

This document provides background to the petition and includes a summary of the Heads of Argument filed in the High Court, Harare, on the 13th October 2003. It is not exhaustive and is designed as an aid for diplomats and journalists. If any clarification is sought the same can be obtained by contacting the MDC Legal Secretary, David Coltart MP, on 263-91-232397 or at coltart@mweb.co.zw. In his absence clarification regarding legal issues can be obtained from belliot@ggg.co.zw.

INTRODUCTION AND UPDATE ON COURT CHALLENGE

What is the court challenge about?

Morgan Tsvangirai, the leader of the Movement for Democratic Change (MDC), is asking the High Court to set aside the result of the Zimbabwean presidential election of 9 to 11 March 2002.

When is the date for the presentation of legal argument?

From 3 to 7 November 2003 in the Harare High Court, Morgan Tsvangirai's legal team will present legal arguments motivating for the setting aside of the March 2002 presidential election.

What led to the court challenge?

Robert Mugabe was declared the winner of the March 2002 presidential election and remains in office as president of Zimbabwe. The Electoral Act of Zimbabwe allows Morgan Tsvangirai, as an unsuccessful candidate, to challenge the election results by bringing an election petition in the Zimbabwean High Court.

How and when was the court challenge started?

On 12 April 2002, Morgan Tsvangirai launched an election petition in the Harare High Court to set aside the result of the March 2002 presidential elections. If successful, this would lead to a new presidential election.

Who is opposing the election petition?

Four Respondents are opposing Morgan Tsvangirai's election petition. These are Robert Mugabe, the Registrar-General of Elections, the Minister of Justice and the Electoral Supervisory Commission.

What has been the response to the election petition so far?

There was a delay of 2 months before the Respondents filed opposing papers in the High Court. The Respondents, in particular the Registrar-General, have prevented Morgan Tsvangirai's lawyers from having access to important documents such as the original voters' rolls and other voting materials. The Registrar-General has failed to move all the voting materials into Harare as he is required to do in terms of the Electoral Act. Numerous separate legal applications have been brought by Morgan Tsvangirai's lawyers during the last 18 months to ensure compliance with the Electoral Act. However as of the 14th October 2003 the Registrar-General was still in breach of the Act.

Furthermore the Registrar of the High Court has been dilatory in setting down the election petition for hearing before the High Court, despite the fact that the Electoral Act states that electoral petitions should be dealt with urgently.

As a result, Morgan Tsvangirai's lawyers brought a High Court application for an order forcing the Registrar to set the election petition down for hearing. This application was granted on 4 July 2003.

The Registrar then set 3 to 7 November 2003 as the initial 5 days of the election petition hearing. Earlier Judge President Garwe directed that, on these days:

- ◆ Only Morgan Tsvangirai's legal arguments will be presented (the 1st category of objections to the election – for more details, see page 4).
 - ◆ Morgan Tsvangirai's evidence of abuses will not be presented (the 2nd category of objections to the election – for more details, see page 4).
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What will happen after the hearing of 3 to 7 November 2003?

- ◆ Once the legal arguments are presented, the High Court will rule on them.
 - ◆ If the High Court rules in Morgan Tsvangirai's favour on the legal arguments, the presidential election of 2002 will be set aside. The election petition will then be over and a fresh election will have to be held within three months of the ruling.
 - ◆ If the High Court does not rule in Morgan Tsvangirai's favour on the legal arguments, then later court dates will be set to hear the evidence of abuses. If the High Court accepts Morgan Tsvangirai's evidence of abuses, the court may declare that the election was not free and fair, and that a new election must be held.
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BACKGROUND TO LEGAL ARGUMENTS IN COURT CHALLENGE

What are the main reasons for the court challenge?

In support of his election petition, Morgan Tsvangirai puts forward 2 main categories of objections to the March 2002 presidential election:

- ◆ Legal arguments
- ◆ Evidence of abuses.

1st category of objections: legal arguments

The election should be set aside because it was not conducted in full compliance with Zimbabwean law. There are 2 reasons for this:

- ◆ Some of the laws and regulations used to conduct the election were not in line with the Zimbabwe constitution, and were therefore invalid.
- ◆ The officials and institutions conducting the election did not comply with some important parts of the Zimbabwe constitution and other relevant laws.

2nd category of objections: evidence of abuses

The election should be set aside because it was not free and fair as a result of serious and sustained abuses by the Zimbabwean authorities and the ruling ZANU-PF party.

Morgan Tsvangirai presented evidence of these abuses that he claims demonstrate that the presidential election was rigged and stolen. These abuses include:

- ◆ A campaign of violence and intimidation against the MDC and its supporters, leading to the death of over 100 MDC officials and supporters.
 - ◆ The bribery of voters.
 - ◆ The misuse of state-controlled media.
 - ◆ The stuffing of ballot boxes.
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SUMMARY OF 3 MAIN LEGAL ARGUMENTS

There are 8 clusters of legal arguments that will be argued by Morgan Tsvangirai's legal team. From these 8 clusters 3 main legal arguments will be put forward from 3 to 7 November 2003. These arguments deal with the legal validity of:

- ◆ The Electoral Supervisory Commission
- ◆ Section 158 of the Electoral Act
- ◆ Section 149 of the Electoral Act.

1st legal argument: the Electoral Supervisory Commission

Morgan Tsvangirai will argue that the Electoral Supervisory Commission was not validly and independently able to carry out its functions during the March 2002 presidential elections.

What is the role of the Electoral Supervisory Commission?

Section 61 of the Zimbabwe constitution says that:

- ◆ The Electoral Supervisory Commission (ESC) must have 5 members.
- ◆ The ESC's main functions are to supervise the registration of voters and the conduct of elections, including presidential elections.
- ◆ In carrying out its functions, the ESC must be independent of the direction or control of any outside person or authority.

Why could the ESC not validly carry out its functions?

- ◆ At the time of the March 2002 presidential election, the ESC had only 4 members – not the 5 members it needed under the Constitution. The ESC was thus by law not validly constituted.
- ◆ Because the ESC was not validly constituted, it could not validly carry out its functions of supervising the registration of voters and the conduct of the presidential election.

- ◆ As it did not validly carry out its functions, the election was fatally flawed and should be declared invalid.

Why could the ESC not carry out its functions independently?

Section 11 of the Electoral Act says that, if the ESC requests, a minister may appoint members of the Zimbabwean public service as staff for the ESC.

Four days before voting began in the presidential election, Robert Mugabe issued a regulation stating that a minister of his government would appoint the staff of the ESC. As a result of this regulation:

- ◆ Government ministers could appoint staff to the ESC, even if the ESC had not requested this.
- ◆ Government ministers could appoint staff to the ESC, even if those staff members were not members of the public service.

Robert Mugabe's regulation violated Section 11 of the Electoral Act and undermined the independence of the ESC by forcing it to take on staff, including members of the military, selected by the executive arm of government. For this reason, the ESC could not carry out its independent supervisory functions under the Constitution and Electoral Act. This fatally compromised the elections and they should thus be declared invalid.

2nd legal argument: section 158 of the Electoral Act

Morgan Tsvangirai will argue that section 158 of the Electoral Act is unconstitutional, and that this invalidates the 2002 presidential elections because the conduct and outcome of the elections was strongly influenced by regulations made under section 158.

Who decides on election laws?

Sections 28, 58 and 113 of the Zimbabwe constitution make it clear that the "electoral law" governing the conduct of presidential and parliamentary elections must be a law passed by parliament. In other words, parliament must decide on the content of electoral laws.

What does section 158 of the Electoral Act say?

Section 158 of the Electoral Act delegates to the president of Zimbabwe the power to amend the electoral law mentioned in the constitution. This may include the power to make deletions from or additions to election laws.

Why is section 158 of the Electoral Act unconstitutional?

- ◆ By giving the president, a member of the executive branch, the power to amend the Electoral Act, section 158 goes against the Zimbabwe constitution that says only parliament can make electoral laws. Section 158 thus violates the principle of the separation of legislative, executive and judicial powers.

- ◆ By unconstitutionally delegating parliament's legislative power to the president, section 158 is invalid, and any regulations made by the president under section 158 are also invalid.
- ◆ By effectively granting the president unlimited powers, section 158 is clearly unconstitutional. For example, the president is able to exercise these delegated powers "as he considers necessary or desirable" without any limitations and without getting any parliamentary approval.
- ◆ By allowing Robert Mugabe the power to make electoral laws unilaterally, section 158 removes the possibility of public and parliamentary debate on these laws, in accordance with the principle of the separation of powers.

How did Robert Mugabe use section 158 of the Electoral Act?

Robert Mugabe used section 158 to introduce a number of regulations and orders that:

- ◆ Fundamentally affected the way the presidential election was run.
- ◆ Fundamentally changed important parts of the Electoral Act.

For example, Robert Mugabe used section 158 to pass regulations that had the effect of:

- ◆ Disenfranchising large numbers of Zimbabwean citizens who were declared to be "foreign" citizens.
- ◆ Disenfranchising some categories of postal voters.
- ◆ Limiting the number of voting stations set up in urban areas, where the MDC was strongest.
- ◆ Repeatedly and secretly extending the cut-off date for voter registration, thus allowing late registration of voters in areas sympathetic to Robert Mugabe and ZANU-PF.
- ◆ Overturning court rulings that had declared invalid some of the regulations passed by Robert Mugabe under section 158.

3rd legal argument: section 149 of the Electoral Act

Morgan Tsvangirai will argue that section 149 of the Electoral Act was incorrectly published.

Who is responsible for publishing laws?

The Law Reviser is the official with the responsibility for publishing legislation passed by the Zimbabwe parliament.

What does section 149 say?

Section 149 of the Electoral Act, as published by the Law Reviser, states that an election may be declared invalid by a court if:

"There was a demonstrable failure to conduct the election in accordance with the principles for a free and fair election laid down in the Electoral Act, and

There occurred a mistake or failure which demonstrably affected the result of the election."

In other words, Morgan Tsvangirai must not only show that there were serious irregularities in the conduct of the election, but he must also show that, if those irregularities had not occurred, he would have won the election.

Why is the wording of section 149 important?

The word "*and*" between the 2 paragraphs of section 149 is vitally important. If that word was "*or*" instead of "*and*", it would be much easier for Morgan Tsvangirai to win his election petition. If the word was "*or*":

- ◆ Morgan Tsvangirai would have to show only that the election was not conducted according to the rules for free and fair elections.
- ◆ He would not have to show that, without those irregularities, he would or would probably, have won the election.

Was the correct version of section 149 published?

In fact, the version of section 149 published by the Law Reviser is wrong. Morgan Tsvangirai will demonstrate that:

- ◆ When the Zimbabwe parliament voted for and approved section 149 of the Electoral Act, the word they approved was indeed "*or*", not "*and*".
- ◆ It was the Law Reviser who – whether by error or otherwise – changed the text actually approved by parliament, by substituting "*and*" for "*or*".

Other legal arguments

Other legal arguments include failures related to the extension of the election for a third day (on the 11th March 2002), the unlawfulness of holding local council elections in the key urban constituencies of the capital Harare and Chitungwiza during the same period as the Presidential election and discriminatory practices which prejudiced urban voters
