

## **STATEMENT ISSUED BY THE MOVEMENT FOR DEMOCRATIC CHANGE**

### **THE MORNING OF THE FIRST DAY OF MORGAN TSVANGIRAI'S COURT CHALLENGE AGAINST THE MARCH 2002 ELECTION RESULT**

1. After a delay of more than 18 months Morgan Tsvangirai's court challenge against the result of the March 2002 Zimbabwe Presidential Election finally began in the Harare High Court today, 3 November 2003.
2. The initial signs were not auspicious. When Mr Tsvangirai's legal team and supporters arrived at the High Court Building at 9.40am, for a scheduled 10.00am start, they were shown to Court E, a cramped and dingy court room on the roof of the High Court building, noteworthy principally for the paint peeling in strips from its walls and ceilings. It is difficult to see how the allocation of that court room to a case involving a Presidential Election challenge amounted to anything other than a calculated insult to the Petitioner, Mr Tsvangirai.
3. For reasons that may or may not have had something to do with the arrival, as observers, of an American Federal Judge, a prominent Kenyan lawyer and members of the diplomatic corps, the hearing was re-allocated to the main court room, Court A.
4. It was in the spacious and wood-paneled surrounds of Court A that Advocate Jeremy Gauntlett S.C. of South Africa opened proceedings on behalf of Mr Tsvangirai before the Mr Justice Hlatshwayo.
5. Advocate Gauntlett addressed the court for some 2½ hours. He reminded the Judge that it had been agreed at the Pre-Trial Conference that the hearing would deal firstly with the points of law raised on behalf of Mr Tsvangirai and the Respondents, including Robert Mugabe. Advocate Gauntlett pointed out that, if the High Court found in favour of Mr Tsvangirai on any of his main legal arguments, that would necessarily entail a finding that the 2002 Presidential Election was not conducted in accordance with the law of Zimbabwe, and was a nullity. This would mean that Robert Mugabe had not been validly elected as President.
6. Advocate Gauntlett stated that Mr Tsvangirai's court challenge had been brought in terms of Section 102 of the Electoral Act, which requires that all elections in Zimbabwe must be free and fair, and permits the High Court to set aside any election which is flawed "by reason of irregularity or for any other cause whatsoever".
7. He went on to submit to the court that Section 102 of the Electoral Act must be read in terms of the Zimbabwean Constitution, which guarantees citizens freedom of expression (through, among other things, voting in free and fair elections), and in terms of Article 21 of the Universal Declaration of Human Rights, which contemplates that the political will of citizens be expressed through "*periodic and genuine elections*". Advocate Gauntlett informed the court that it

was Mr Tsvangirai's submission that the March 2002 Presidential Election had been conducted in a blatantly unconstitutional way; the genuineness and fairness of the election had been stifled at birth.

8. Advocate Gauntlett then dealt with the first of MorganTsvangirai's two principal arguments, namely the argument relating to Section 158 of the Electoral Act. This section was enacted by Parliament in 1990, and purports to give the President power to make any election law he sees fit.
9. Section 158 of the Electoral Act, argued Advocate Gauntlett, offends against the Zimbabwe Constitution, which states that only Parliament can make electoral laws. Furthermore, the granting of unlimited law-making power to the President is fundamentally destructive of the principle of separation of powers which underpins all democracies.
10. Mr Gauntlett submitted that the effect of Section 158 was to create the extraordinary spectacle of one of the contestants in the Presidential Election setting himself up as the rule-maker for that election, using that rule-making power for self-serving purposes.
11. Advocate Gauntlett argued that Section 158 of the Electoral Act was such a usurpation of power as has not been seen since the battle between Parliament and the King in England in the 17<sup>th</sup> Century.
12. Advocate Gauntlett contended on behalf of Mr Tsvangirai that it was beyond rational debate that Parliament cannot delegate to the President law-making functions which have been allocated to it by the Constitution. The Constitution of Zimbabwe says clearly that only Parliament can make electoral laws; therefore the President cannot do so.
13. Advocate Gauntlett went on to point out that only days before the 2002 Presidential Election, Robert Mugabe used Section 158 to make rules which radically altered, in his favour, the way in which the election was conducted.
14. What makes Section 158 particularly offensive, said Advocate Gauntlett, is that it imposes no restrictions whatsoever on the President; he is given unrestricted power to make any election laws he chooses. Section 158 is therefore fundamentally destructive of Parliament's right to legislate, and constitutes a blank cheque drawn on the political will of the Zimbabwean people.
15. Because Section 158 was enacted in violation of the Zimbabwean Constitution, it was void from the moment of that purported enactment. Therefore, all rules and regulations made by the President in terms of Section 158 were invalid. Because those rules related to issues of vital importance to the conduct of the election, the election itself was fatally flawed, cannot stand and should be set aside.

16. Advocate Gauntlett then turned to the second of Morgan Tsvangirai's two principal legal arguments, namely the argument concerning the Electoral Supervisory Commission ("ESC").
17. Section 61 of the Zimbabwe Constitution, said Advocate Gauntlett, stipulates that an ESC of 5 members must be created, with responsibility for supervising registration of voters and the conduct of Presidential and Parliamentary Elections. The Constitution makes it clear that the ESC must be independent, "not subject to the direction or control of any person or authority."
18. Advocate Gauntlett pointed out that it is perfectly obvious from the Constitution that the ESC is an integral part of the election process; the ESC is the only body which may register voters and conduct elections.
19. However, Robert Mugabe, for reasons which he has chosen not to disclose, appointed only four members of the ESC, not the required five. From the outset, therefore, the ESC was not validly constituted, and could not therefore, as a matter of law, conduct or supervise the election.
20. Furthermore, Robert Mugabe, only 4 days before the election, made a regulation which fundamentally affected the constitutionally-protected independence of the ESC, by compelling the ESC (in violation of Section 11 of the Electoral Act) to take on as staff persons who were not members of the public service and who were appointed by a Minister nominated by Robert Mugabe, even if the ESC did not need or want such staff.
21. Advocate Gauntlett argued that without an independent ESC in place, properly constituted and compliant with the Constitution and the Electoral Act, the election did not take place in terms of the most basic requirements of the Constitution, and was therefore a nullity.
22. Advocate Gauntlett also dealt with the principal submissions made by Robert Mugabe's lawyers in attempting to rebut Morgan Tsvangirai's legal arguments.

These submissions, said Advocate Gauntlett, were:

1. frivolous
  2. constituted ankle-biting procedural maneuvering
  3. without merit
  4. obsessive endeavours to cut down access to the courts by ordinary citizens
  5. a contrived attempt to escape addressing the merits of the matter.
23. One of Robert Mugabe's principal arguments, set out in his court papers, is that Morgan Tsvangirai does not have legal standing or *locus standi* to mount his court challenge. In response to this argument, Advocate Gauntlett pointed out that Section 102 of the Electoral Act expressly permits an unsuccessful candidate to challenge the validity of an election result. Furthermore, said Advocate Gauntlett, the argument that the leader of the official opposition, one of the two

main candidates in the election, couldn't come to court to challenge the validity of that election was startling and frivolous. He said also that other, shorter Anglo-Saxon words could have been used to describe such an argument.

24. In support of his attack on Robert Mugabe's contention that Morgan Tsvangirai lacks legal standing, Advocate Gauntlett cited a battery of Zimbabwean and international authorities which clearly demonstrates that, in law, Morgan Tsvangirai has the necessary legal standing.
25. Another of Robert Mugabe's principal arguments, mounted as a defence to Morgan Tsvangirai's claim that the Election was not conducted in accordance with the provisions of the Constitution, is that the High Court does not have jurisdiction to rule on matters dealing with an alleged breach of the Constitution. Robert Mugabe's argument is that only the Supreme Court, and not the High Court, can make rulings on the Constitution; because the Electoral Act requires a challenge to an election to be brought in the High Court and not in the Supreme Court, Morgan Tsvangirai is barred from alleging that the election was conducted in violation of the Constitution.
26. In answer to this argument, Advocate Gauntlett pointed out that Sections 13 and 23 of the High Court Act confer on the High Court full original Civil and Criminal jurisdiction over all matters in Zimbabwe. This jurisdiction clearly includes the making of rulings on the meaning and effect of the Constitution, and alleged breaches of the Constitution. Advocate Gauntlett cited some 40 High Court decisions in which that court had made rulings about provisions of the Constitution, as evidence that the High Court has now and always has had the jurisdiction to do this.
27. Therefore, concluded Advocate Gauntlett, the point raised by Robert Mugabe is an impudent, astonishing and startling submission, wholly without merit.
28. It is anticipated that the lawyers for Robert Mugabe and the Electoral Supervisory Commission will begin their answering oral arguments tomorrow morning, 4 November 2003.

Monday 3<sup>rd</sup> November, 2003  
MDC Department of Legal Affairs