MORGAN TSVANGIRAI COURT CHALLENGE TO THE MARCH 2002 PRESIDENTIAL ELECTION

DAY TWO OF THE COURT HEARING

1. Morgan Tsvangirai's legal team concluded the presentation of their oral arguments. After the lawyers for Robert Mugabe and the Electoral Supervisory Commission ("the ESC") had presented their oral legal arguments (which are described below) Advocate Gauntlett and Advocate De Bourbon made their oral submissions in reply.

2. EXPLANATORY NOTE ON EVIDENCE AND LEGAL PROCEDURE

2.1 Before describing the oral arguments put up on behalf of Robert Mugabe and the ESC, an explanation of certain elementary rules of evidence and procedure is necessary.

2.2 Morgan Tsvangirai's court challenge to the March 2002 Presidential Election is a form of legal procedure known as a trial.

2.3 The Electoral Act stipulates that the first step in a trial which involves a challenge to the validity of an election result, is the filing of Affidavits by the challenger setting out his or her causes of complaint. The person who has been declared the winner of the election, and any other parties having an interest in the matter, then file their opposing affidavits. The challenger replies to those opposing affidavits by filing his/her own answering affidavits.

2.4 Then a hearing is held. If there are facts which are not common cause between the parties, ie: which one or more of the parties deny or dispute, then witnesses are called to give oral testimony on those facts, and to be cross-examined.

2.5 If all the parties involved in the trial agree on the relevant facts, but disagree as to the conclusions of law to be drawn from those facts, the hearing will not involve oral testimony by witnesses, but will involve only the presentation of oral legal argument by the lawyers for the parties, with each party's lawyers seeking to convince the Judge that that party's interpretation of the legal implications flowing from those facts is the correct one.

2.6 It is therefore a not infrequent occurrence that no oral testimony of witnesses is presented at a trial, and that the relevant agreed or undisputed facts are recorded in affidavits or some other form of written statement.

2.7 Where affidavits are presented by the parties, how does one determine what facts are undisputed or common cause?

2.7.1 Obviously, where one party admits, in his or her affidavit, a fact alleged by another party in that other party's affidavit, that fact is common cause.

2.7.2 In addition, where one party alleges a fact in his or her affidavit, and the other party does not respond to or deny that allegation, then that other party is taken to

have admitted that allegation as being true, and that allegation then becomes common cause between the parties.

2.8 Although Robert Mugabe and his fellow Respondents disputed, in their affidavits, many of the facts alleged by or on behalf of Morgan Tsvangirai in his Founding Affidavits, Robert Mugabe and his fellow Respondents either admitted or did not dispute a number of other facts.

2.9 The legal argument presented at the hearing of Morgan Tsvangirai's election challenge on 3 and 4 November dealt with the legal effect or interpretation of those facts which were common cause between the parties, ie: those facts which were alleged by Morgan Tsvangirai in his affidavits, and which were admitted or not denied by Robert Mugabe and his fellow Respondents in their own affidavits.

2.10 Among the facts which, on the basis of the elementary rules described above, were common cause between the parties, were the following:

2.10.1 Robert Mugabe had, in the run-up to the 2002 Presidential Election, used Section 158 of the Electoral Act to issue a number of Statutory Instruments which significantly changed the rules applying to the Presidential Election, including the rules relating to registration of voters and the conduct of the election itself. The contents of all those Statutory Instruments were not in dispute.

2.10.2 Morgan Tsvangirai was a candidate in the election, and Robert Mugabe was declared the winner of that election.

2.10.3 At the time of the March 2002 Presidential Election, only four members had been appointed to the ESC, and not the five members required by the Zimbabwe Constitution.

2.10.4 The High Court had, on March 2002, with the consent of the Minister of Justice and Robert Mugabe, issued an order requiring a third day of voting to be held throughout the whole of Zimbabwe on 11 March.

2.10.5 That Court Order was not complied with; in 80% of Zimbabwe's 120 constituencies, the polling stations did not open at all on 11 March 2002; the remaining 20% of Zimbabwe's polling stations, although they did open for voting on 11 March, did not remain open for the required minimum of 8 continuous hours.

3. ORAL ARGUMENT PRESENTED ON BEHALF OF ROBERT MUGABE

3.1 Robert Mugabe, as First Respondent, was represented by Mr Hussein. After Mr Hussein presented his oral argument, Advocate Gauntlett and Advocate De Bourbon replied on behalf of Morgan Tsvangirai. In the description of Mr Hussein's argument set out below, the replies given by Advocates Gauntlett and De Bourbon are recorded in brackets.

3.2 Mr Hussein began his oral argument by reading from and commenting on facts alleged by Robert Mugabe in his opposing affidavit, as follows:

3.2.1 In 1997 Robert Mugabe took the "bold and brave" decision to resolve a previously unresolved issue; Robert Mugabe "bit the bullet" and, impelled by conviction and principle, initiated the "Land Resettlement Programme".

3.2.2 In response to this initiative, Britain, a "former colonial power", vowed that Robert Mugabe would be "forced to relinquish power".

3.2.3 "Multilateral" organizations such as the International Monetary Fund, organizations which are "dominated by the US and Britain", withdrew their support for Zimbabwe.

3.2.4 In 1997, "when the first batch of farms for resettlement were designated, the Zimbabwe dollar tumbled to an all-time low".

3.2.5 Just before the March 2002 Presidential Election, Tony Blair had stated, in the British Parliament, that it was "absolutely outrageous" that Morgan Tsvangirai, a Presidential candidate, had been charged with treason during the Presidential Election campaign; that the people of Zimbabwe were living in a "hell hole"; that Robert Mugabe was "dictatorial"; that sanctions ought to be applied against Zimbabwe; and that, if Britain did not take action, the "right result" would not be obtained in the March 2002 Presidential Election.

3.2.6 After Robert Mugabe had "declared his principles" by initiating the Land Resettlement Programme, the MDC was "generously endowed" with foreign funding.

3.2.7 As if this was not enough, "Britain and the MDC got together to persuade the US" to pass domestic legislation to ensure that the "people of Zimbabwe voted properly" in the 2002 Presidential Election, ie; against Robert Mugabe.

3.2.8 Morgan Tsvangirai and "his party cheered on Britain and the US to isolate" Robert Mugabe.

3.3 Mr Hussein continued with his preliminary remarks as follows:

3.3.1 The "machinations" described above had never before "been witnessed in Africa".

3.3.2 Unfortunately for Morgan Tsvangirai, "these machinations came to naught", and Robert Mugabe won the election.

3.3.3 In bringing his court challenge against the election result, Morgan Tsvangirai was seeking to achieve what he failed to win in the political arena. His court challenge was a case of a political fight "spilling into court".

3.3.4 The High Court should be "extremely wary when a losing candidate comes to court to fulfill an agenda he failed to achieve on the political battleground".

3.3.5 Morgan Tsvangirai's court challenge was "devoid of any merit", and "must rank as one of the weakest petitions to come before the High Court".

3.3.6 "Absolutely no authority has been cited" by Morgan Tsvangirai's legal team "to justify how a person in an election petition can invalidate every single law in connection with the election." (In fact, in their written summary of their legal arguments, some 200 pages in length, Morgan Tsvangirai's lawyers had cited, in support of those arguments, more than 100 decided cases and statutes. Also, Morgan Tsvangirai was seeking to declare invalid only one section of the Electoral Act, Section 158, and the Statutory Instruments issued by Robert Mugabe in terms of that Section.)

3.4 (In reply, Advocate Gauntlett stated that it would be unnecessary – from a legal perspective - and undignified to respond to Mr Hussein's initial remarks, and gave them no further attention.)

3.5 After his initial remarks, Mr Hussein commenced presentation of his substantive legal arguments.

3.6 Mr Hussein's first contention was to aver to Mr Justice Hlatshwayo that "you have no facts before you – absolutely nothing". Mr Tsvangirai's lawyers, he said, "were doing cartwheels" when they argued that certain facts were common cause because Robert Mugabe had not denied those facts in his affidavits.

3.7 "What facts" Mr Hussein asked the Judge, rhetorically, "do you have to prove that polling did not take place on the third day?" Mr Tsvangirai's lawyers said Mr Hussein, had "not put up any facts" at all.

3.8 Mr Hussein submitted to the Judge that "what you are asked is to come up with a decision based on the flowery language" of Mr Tsvangirai's legal team.

3.9 A trial involving presentation of oral testimony of witnesses "was paramount" said Mr Hussein. The matter could not "be resolved on flimsy legal argument".

3.10 (Mr Hussein had apparently never heard of, or had forgotten, the elementary rules of procedure and evidence described in paragraph 2 above. He had also apparently overlooked the hundreds of pages of affidavits put up by Morgan Tsvangirai, containing a host of factual allegations.)

3.11 Mr Hussein went on to contend that Advocate Gauntlett was seeking "to declare 99% of Zimbabwe's laws invalid".

3.12 The legal arguments raised by Morgan Tsvangirai's lawyers were "unnecessary clutter" in the view of Mr Hussein. (He had apparently forgotten that all court cases are decided, following legal argument from the parties' lawyers, by application of the relevant law to the agreed or determined facts.)

3.13 Mr Hussein contented that, in the type of court challenge mounted by Morgan Tsvangirai, no order could be sought (as Morgan Tsvangirai was seeking in

respect of Section 158 of the Electoral Act) to declare a law unconstitutional. (In reply Advocate Gauntlett emphasized that Section 102 of the Electoral Act stated that a challenge to an election result could be brought on the basis of "any cause whatsoever", including on the basis that the election law was unconstitutional.)

3.14 Mr Hussein asserted that the High Court does not have the jurisdiction to decide whether a law violates the Constitution, and that the question of whether Section 158 of the Electoral Act – which gave unrestricted power to Robert Mugabe to make election laws – was unconstitutional would have to be referred to the Supreme Court. (Mr Hussein did not attempt to explain how this assertion was compatible with the fact that the High Court, as shown in a list of more than 40 decided cases put up by Morgan Tsvangirai's legal team, had ruled on the constitutional validity of otherwise of statutes passed by Parliament.)

3.15 Morgan Tsvangirai did not have legal standing to come to the High Court to challenge the 2002 Presidential Election result, said Mr Hussein. (In reply, Advocate Gauntlett pointed out that the Electoral Act expressly states that a court challenge can be brought against an election result by any one who was an unsuccessful candidate in that election.)

3.16 Mr Hussein offered no oral argument, and cited no authorities, in respect of any of the following questions (which questions, Morgan Tsvangirai's lawyers had already argued, should be decided in Morgan Tsvangirai's favour, and should lead to the Presidential Election being declared a nullity):

3.16.1 Whether Section 158 of the Electoral Act, which gave unrestricted power to Robert Mugabe to make election law, was indeed unconstitutional or not.

3.16.2 Whether or not the election should be declared invalid if Section 158 was indeed found to be unconstitutional.

3.16.3 Whether the fact that the ESC was not validly constituted was a basis for declaring the election a nullity.

3.16.4 Whether or not the election should be declared invalid because no third day of voting was held.

3.17 Mr Hussein did, however, put up the following argument: "to set aside the election of the President of Zimbabwe, the Commander-in- Chief of its armed forces, and the person who signs all Zimbabwe's laws in order to make them of force and effect, simply because three lawyers appeared in court asking for this, would be a legal disaster."

4. Mr Chikumbirike then presented argument on behalf of the ESC.

4.1 Mr Chikumbirike's first contention was that the court should make a ruling that Morgan Tsvangirai had acted incorrectly in joining the ESC as a respondent party

to the litigation; that the ESC, despite the fact that the Constitution gave it ultimate responsibility for supervising the election, had no substantial interest in the case; and that the ESC should be released from further participation in the case, as were the Minister of Justice and the Registrar-General in terms of the recent Judgment by Mrs Justice Guvava.

4.2 Mr Justice Hlatshwayo said that the ESC should have made this application for release earlier; that he would decide this question in due course; and that Mr Chikumbirike should, in the meantime, proceed with the rest of his argument.

4.3 Mr Chikumbirike contented that the meaning of Section 61 of the Constitution, which confirms the independence of the ESC by stating that it should not be subject to the control of any person or authority, is that not even the High Court can scrutinize its actions, or hold it to account.

4.4 On the question of whether the ESC had been properly constituted, Mr Chikumbirike said that the ESC had in fact come into being in 1980 when the Constitution was enacted, because the Constitution contained the words "there shall be an Electoral Supervisory Commission …". Because the ESC had come into being by operation of the Constitution, and not when its members were first appointed, it was irrelevant whether or not the full complement of five members had ever been appointed . (In reply Advocate Gauntlett pointed out, to much laughter in the court that, on this reasoning, there was no need ever to elect a President, or even members of Parliament, because the Constitution said "there shall be a President …" and "there shall be a Parliament …")

5. After Advocates Gauntlett and De Bourbon had presented their closing remarks, Mr Justice Hlatshwayo said that the matter involved complex legal arguments which would require some time to digest, and therefore that he was reserving Judgment. He did not give any indication of when he might be in a position to deliver Judgment.

6. If Mr Justice Hlatshwayo finds in favour of Morgan Tsvangirai on any of the principal legal points advanced by his legal team, then the Presidential Election of March 2002 will be set aside. If the court finds against Morgan Tsvangirai on all his legal arguments, then the case will go to the second stage, which will involve the presentation of oral testimony on the disputed facts, namely the allegations made by and on behalf of Morgan Tsvangirai concerning overt abuses on the part of the authorities in the conduct of the election.

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