

**293/2004- Zimbabwe Lawyers for human Rights and the Institute for Human Rights and Development /Republic Of Zimbabwe**

**Summary of Facts:**

1. The communication is submitted by the Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa (Complainants) and deals with the Zimbabwean Government's (Respondent) failure to expedite administration of justice, the functioning of the judiciary and alleged violation of the right to participate in government.
2. The Complainants allege that in the 2000 General Elections that took place in Zimbabwe the results of 40 constituencies were contested and the court was petitioned to invalidate the results. It is alleged that Movement for Democratic Change (MDC), the main opposition party file petitions to invalidate results in 38 constituencies, the ZANU (PF), the ruling party filed one petition and the Zimbabwe Union of Democrats (ZUD) filed one petition.
3. The Complainants also allege that in an attempt to prevent the filing of petitions the President of the Republic of Zimbabwe passed a regulation giving him a wide variety of power in order to alter electoral laws as he sees fit. Further reasons for this action were to eliminate the jurisdiction of the courts from entertaining election petitions. According to the complainants, the Electoral Act (Modification) No. 3 Notice of 2000 Statutory Instrument 318/2000 (Annexure 1) passed by the Respondent had the effect of legalising the outcome of the elections and oust the jurisdiction of the courts from hearing the petitions.
4. The MDC challenged the Regulation in the Supreme Court, and the Court held in its favour stating that "the notice effectively deprived them of that rights...*The right of unimpeded access to courts is of cardinal importance for the adjudication of justiciable disputes*". This ruling opened the way for the filing of election petitions in 40 constituencies.
5. According to the Complainants, in spite of the ruling, the Supreme Court has failed to provide meaningful redress to the

petitioners. They claim that by delaying to address the grievances the Courts have deprived the petitioners of the right to protection of the law, and have their matter heard within a reasonable time by an independent and impartial court and invariably, the citizens' right to participate in their government.

6. The Complainants further allege that by failing to respect their own judgments, the judiciary and the Courts have proved ineffective in providing meaningful and practical redress which would constitute an effective remedy at national level. Thus, according to the complainants, the State has undermined the independence of the judiciary contrary to Article 26 of the Charter.
7. The Complainants hold that failure of the judiciary to expeditiously deal with the election petitions is not only in contravention of international norms but contrary to domestic laws of the country, in particular, Rule 31 of the Electoral (Applications, Appeals and Petitions) Rules 1995, (SI 74A/95) which states that "*the Registrar and all parties to any stated case, petition or application referred to in these rules shall take steps necessary to ensure that the matter is dealt with as quickly as possible*".
8. The Complainants annexed to the communication the different classes of petitions that were submitted to the Court. 7 petitions presented by political parties have not been addressed and no decisions have been made concerning them; in addition, any efforts made to have the petitions addressed have been met with reluctance and indifference on the part of the Court. Furthermore, 11 petitions have been dismissed by the High Court; and any appeals made in regards to the dismissal of the petitions have not been resolved.

## **Complaint**

9. The Complainants allege that the Respondent has violated articles 1, 2, 3, 7 (1) (a), (d), 13(1), and 26 of the African Charter on Human and People's Rights.

## **Procedure**

10. The complaint was received at the Secretariat of the African Commission on 6 October 2004.
11. On 12 October 2004, the Secretariat wrote to the Complainants acknowledging receipt of the complainant and informing them that it will be considered at the Commission's 36<sup>th</sup> Ordinary Session.
12. At its 36<sup>th</sup> Ordinary Session the African Commission considered the communication and decided to be seized thereof.
13. By Note Verbale of 13 December 2004 and letter of the same date the Secretariat informed the Parties of the Commission's decision.
14. By letter dated 3 February 2005, the Complainant submitted its arguments on admissibility and by letter dated 22 February 2004, the Secretariat acknowledged receipt of the complainant's submissions.
15. By Note Verbale dated 22 February 2005, the Secretariat transmitted the Complainant's submission to the Respondent State and informed the latter that the African Commission would like to receive its arguments by 13 March 2005.
16. By letter of 14 March 2005, the Office of the Attorney General of Zimbabwe requested the African Commission to defer consideration of the communication to its 38<sup>th</sup> Ordinary Session as it had not had time to prepare the responses.

17. By letter of 18 March 2005 addressed to the Attorney General, the Secretariat granted the State an extension of thirty days and requested it to submit its arguments by 18 April 2005.
18. At its 37<sup>th</sup> Ordinary Session held in Banjul, The Gambia, the African Commission deferred consideration on admissibility of the communication pending the Respondent State's submission of its arguments.
19. By Note Verbale of 24 May 2005, the Respondent State was notified of the Commission's decision and requested to submit its arguments within three months of the notification. By letter of the same date, the complainant was notified of the Commission's decision.
20. By Note Verbale of 2 September 2005, the Respondent State was reminded to send its arguments of admissibility of the communication.
21. By Note Verbale of 18 October 2005, the Respondent State was reminded to send its arguments of admissibility of the communication before 31 October 2005.
22. On 1 November 2005, the Secretariat received a Note Verbale from the Respondent State indicating that the latter's submissions with regards to six communications brought against it were ready for submission but due to logistical problems beyond its control, the transmission of the submissions had been slightly delayed.
23. On 23 November 2005 the Zimbabwean delegation attending the 38<sup>th</sup> Ordinary Session of the Commission handed the Respondent State's response on the communication. The Secretariat was informed that a copy had been given to the complainants, and the latter confirmed receipt thereof.
24. At its 38<sup>th</sup> ordinary session held from 21 November to 5 December 2005, the African Commission considered the communication and decided to declare it admissible.
25. By Note Verbale of 15 December 2005 and by letter of the same date, the Secretariat of the African Commission

informed both parties of the African Commission's decision and requested them to submit their arguments on the merits within three months.

26. By letter of 21 December 2005, the Complainant acknowledged receipt of the Secretariat's letter of 15 December and indicated that it will furnish its arguments on the merits "within the procedurally stipulated period".
27. By Note Verbale of 6 March 2006 and by letter of the same date the Secretariat of the African Commission reminded both parties to submit their arguments on the merits before 31 March 2006.
28. By letter dated 19<sup>th</sup> April 2006, the Secretariat received the submissions of the complainant on the merits of the communication. The Secretariat was informed that the State had equally been served with the same.
29. During the 39<sup>th</sup> ordinary session of the African Commission, the Secretariat received the submissions of the Respondent State.
30. At its 39<sup>th</sup> Ordinary Session held from 11 – 25 May 2006 in Banjul, The Gambia, the African Commission considered the communication and deferred further consideration on the merits to its 40<sup>th</sup> ordinary session because the State's submissions were received late.
31. By Note Verbale of 29 May 2006 and by letter of the same date both parties were notified of the Commission's decision.
32. At its 40<sup>th</sup> session, the African Commission deferred consideration of the communication to its 41<sup>st</sup> session due to lack of time.
33. At its 41<sup>st</sup> ordinary session the African Commission deferred consideration of the communication to its 42<sup>nd</sup> session to allow the Secretariat more time to prepare the draft decision.

34. By note verbale of 10 July and letter of the same date, both parties to the communication were notified of the Commission's decision.
35. At its 42<sup>nd</sup> Ordinary Session held in Brazzaville, Republic of Congo from 15 – 29 November 2007, the African Commission considered the Communication and decided to defer its decision on the merits due to lack of time.
36. By Note Verbale of 19 December 2007, and by letter of the same date, both parties to the Communication were notified of the Commission's decision.

## **The Law**

### **Admissibility**

#### **Submissions on admissibility**

37. The Respondent state argued that the communication be declared inadmissible claiming it does not meet the requirements of Articles 56 (2), (3), (4) and (5).
38. Article 56(2) stipulates that the communication should be in conformity with the Charter of the OAU and the African Charter on Human and Peoples' Rights. According to the State, and quoting from the African Commission's Information Fact Sheet No. 3 – Communication Procedure, the author of a communication should make precise allegations of facts attaching relevant documents, if possible, and avoid making allegations in general terms. The State avers that the complaint is written in general terms and does not make any precise allegations. The State notes further that the complainants simply alleged that the state has violated the Charter without stating the rights violated, where the violation took place and the date on which the violation took place and that the complainants did not provide the names of the victims.
39. The Complainants submit that four years after the elections the Supreme and High Court have failed to provide a speedy

and effective remedy. That the High Court initially allocated three judges to handle the matters. One of the judges resigned citing threats after he had ruled in favour of the opposition. The three judges were replaced and the matters have not been completed. That the violations that occurred during the election period have not been addressed for over four years.

40. The Complainants on the other hand aver that the communication details infringements of the provisions of the African Charter on Human and Peoples' Rights and according to them, a prima facie violation of human rights, and argued that the communication fulfilled the condition under Article 56 (2) of the Charter.

41. With respect to Article 56 (3), the State argues that the communication is written in disparaging language directed at the State of Zimbabwe and its Judiciary. It indicates that the complainants allege a failure of the State to guarantee the independence and competent functioning of the judiciary, and that the government has failed to observe the principle of separation of powers. The state argues further that the communication alleges that a judge resigned under pressure after ruling in favour of the MDC. The state added that none of the judges have been victimized or resigned as a result of their judgment and concluded that the complaint is a misrepresentation of facts and full of false information which are insulting to the State and its judiciary – aimed at bring the State into disrepute and therefore does not conform with the provisions under Article 56 (3) of the African Charter. The complainants aver that the communication is not written in an insulting or disparaging language, that no disparaging or insulting language of the government of the Republic of Zimbabwe or any institutions under the Organisations of African Unity has been used and as such it conforms to Article 56 (3).

42. The State further argues that the communication is based on information disseminated through the mass media or author's imaginations and as such not be admitted as stipulated under Article 56(4) which stipulates that communications should not be exclusively based on news disseminated through the mass media. The State adds that the communication does not state who was discriminated against or in which case a party was discriminated and by which judge, as a result the complaint is illusory and should not be admitted. The complainants on their part argue that the communication has been compiled from

affidavits and applications from the High and Supreme Court of Zimbabwe.

43. On the exhaustion of local remedies, the State argues that the complainants have not exhausted the local remedies available to them, noting that all election petitions are dealt with speedily and that all the petitions referred to by the complainants were dealt with, some were dismissed and some were withdrawn. The State indicates that it did nothing to frustrate the process as alleged by the complainants noting that in cases of any frustration, the parties to the petition can approach the Judge President or the Chief Justice and the government has no role to play in election petitions. The State notes that most of the petitions to the High Court were dealt with in 2001; some were appealed to the Supreme Court. The Complainants argue that the exception to the rule on the basis of unduly prolonged procedure applies in this case. They argue that the delays in the finalisation of the petitions by the Supreme and High Courts were unreasonable and warrants, according to the Complainants, invoking of the exclusionary rule to the exhaustion of local remedies as they are non-existent.

#### **Commission's decision on admissibility**

44. In its jurisprudence the African Commission on Human and Peoples' Rights (the Commission) has articulated a framework for allocating the burden of proof between complainants/petitioners and Respondent states. For purposes of seizure the complainant needs only to present a *prima facie* case and satisfy the conditions laid down in Article 56 of the Charter for admissibility. Once this has been done, the burden then shifts to the Respondent state to submit specific responses and evidence refuting each and every one of the assertions contained in the complainant's submissions.

45. In the present communications, the Complainants submit that the admissibility conditions in Articles 56 of the African Charter on Human and Peoples' Rights have been fulfilled while the State argues that some have not been, in particular Article 56 (2), 3, 4 and 5. Regarding the compatibility of the communication as provided in Article 56(2), the African Commission notes that the communication establishes a *prima facie* violation of the provisions of the African Charter and is thus compatible with both the Constitutive Act and the African

Charter. The communication alleges unreasonable delays in dealing with election petitions and as a consequence a violation of the right to fair trial under Article 7 (1) (d) and to participate of government under Article 13 of the Charter. It is hard to find the incompatibility invoked by the State.

46. Article 56 (3) requires that the communication is not written in an insulting or disparaging language. The State argues that by stating that the State has failed to guarantee the independence and competent functioning of the judiciary, and that the government has failed to observe the principle of separation of power, the complainants have used disparaging language. The state argues further that the communication alleges that a judge resigned under pressure after ruling in favour of the MDC. The state concludes that the complaint is a misrepresentation of facts and full of false information which are insulting to the State and its judiciary – aimed at bring the State into disrepute and therefore does not conform to the provisions under Article 56 (3).
47. A fundamental question that has to be addressed in the present communication *is how far one can go in criticizing the judiciary* or State institutions generally *in the name of free expression*, and whether the statement made by the complainant constitutes *insulting* or *disparaging* language within the meaning of Article 56 (3) of the African Charter. Indeed, the communication invites the Commission to clarify the ostensible relationship between freedom of expression and the protection of the reputation of state institutions.
48. The operative words in sub-paragraph 3 in Article 56 are *disparaging* and *insulting* and these words must be directed against the State Party concerned or its institutions or the African Union. According to the Oxford Advanced Dictionary, *disparaging* means *to speak slightingly of... or to belittle....* and *insulting* means *to abuse scornfully or to offend the self respect or modesty of...*
49. The judiciary is a very important institution in every country and cannot function properly without the support and trust of the public. Because of the importance of preserving public trust in the judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against vilification. One such protective device is to deter insulting or

disparaging remarks or language calculated to bring the judicial process into ridicule and disrepute.

50. The freedom to speak one's mind and debate the conduct of public affairs by the judiciary does not mean that attacks, however scurrilous, can with impunity be made on the judiciary as an institution or on individual officers. A clear line cannot be drawn between acceptable criticism of the judiciary and statements that are downright harmful to the administration of justice. Statements concerning judicial officers in the performance of their judicial duties have, or can have, a much wider impact than merely hurting their feelings or impugning their reputations. Because of the grave implications of a loss of public confidence in the integrity of the judges, public comment calculated to bring the judiciary into disrepute and shame has always been regarded with disfavour.
51. In determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, or any other State institution, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the institution. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute.
52. To this end, Article 56 (3) must be interpreted bearing in mind Article 9 (2) of the African Charter which provides that "every individual shall have the right to express and disseminate his opinions within the law". A balance must be struck between the right to speak freely and the duty to protect state institutions to ensure that while discouraging abusive language, the African Commission is not at the same time violating or inhibiting the enjoyment of other rights guaranteed in the African Charter, such as, in this case, the right to freedom of expression.
53. The importance of the right to freedom of expression was aptly stated by the African Commission in Communications **140/94**,

141/94, 145/94 against Nigeria<sup>1</sup> when it held that freedom of expression is

*A basic human right, vital to an individual's personal development and political consciousness, and to his participation in the conduct of public affairs in his country. Individuals cannot participate fully and fairly in the functioning of societies if they must live in fear of being persecuted by state authorities for exercising their right to freedom of expression. The state must be required to uphold, protect and guarantee this right if it wants to engage in an honest and sincere commitment to democracy and good governance.*

54. Over the years, the line to be drawn between genuine criticism of the judiciary and insulting language has grown thinner. With the advancement of the politics of human rights, good governance, democracy and free and open societies, the public has to balance the question of free expression and protecting the reputation of state institutions such as the judiciary. Lord Atkin expressed the basic relationship between the two values in **Ambard v A-G of Trinidad and Tobago (1936) 1 All ER 704 at 709** in the following words:

*But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public act done in the seat of justice. The path of criticism is a public way...Justice is not a cloistered virtue: she must be allowed to suffer scrutiny and respectful even though outspoken comments of ordinary men.*

55. In the present communication, the Respondent State has not established how by stating that the government has failed to observe the principle of separation of power and that a judge resigned under pressure after ruling in favour of the MDC, the complainant has brought the judiciary and the government into disrepute. The State hasn't shown the detrimental effect of this statement on the judiciary in particular and state institutions as

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<sup>1</sup> Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria, 13th Annual Activity Report of the OAU, 1999–2000, para. 36.

a whole. There is no evidence adduced by the State to show that the statements were used in bad faith or calculated to poison the mind of the public against the government and its institutions.

56. The African Commission does not therefore believe there has been any use of disparaging or insulting language against the government of the Republic of Zimbabwe or any of its institutions or the African Union. The African Commission is also of the view that the communication complies with Article 56(4) which stipulates that communications should not be exclusively based on news disseminated through the mass media. The present communication has been compiled from affidavits and applications from the High and Supreme Court of Zimbabwe.
57. Regarding Article 56 (5) relating to the exhaustion of domestic remedies the Complainants argue that the exception to the rule on the basis of unduly prolonged procedure should apply. They argue that the delays in the finalisation of the petitions by the Supreme and High Courts was unreasonable and warrants, according to the Complainants, the invoking of the exclusionary rule to the exhaustion of local remedies as they are non-existent.
58. What constitutes unduly prolonged procedure under Article 56 (5) has not been defined by the African Commission. There are therefore no standard criteria used by the African Commission to determine if a process has been unduly prolonged, and the Commission has thus tended to treat each communication on its own merits. In some cases, the Commission takes into account the political situation of the country, in other cases, the judicial history of the country and yet in others, the nature of the complaint.
59. The subject matter of the present communication is the validity of election results. Election results are supposed to be released as quickly as possible so as to enable those vying for office to know the outcome. In most jurisdictions, because of the very nature of elections, mechanisms are put in place to ensure that the results are released as expeditiously as possible and that whatever petitions are submitted by disgruntled contestants, they are dealt with speedily.

60. The exception under Article 56 (5) requires that the process must not only be prolonged but must have been done so “unduly”. Unduly means, “Excessively” or “unjustifiably”. Thus, if there is a justifiable reason for prolonging a case, it cannot be termed “undue”, for example, where the country is caught in a civil strife or war, or where the delay is partly caused by the victim, his family or his representatives. While the Commission has not developed a standard for determining what is “unduly prolonged”, it can be guided by the circumstances of the case and by the common law doctrine of a “reasonable man’s test”. Under this test, the court seeks to find out, given the nature and circumstances of a particular case, how any reasonable man would decide.

61. Thus, given the nature of the present communication, would a reasonable man conclude that the matter has been unduly prolonged? For all intents and purposes, the answer would be yes. More than four years after the election petitions were submitted, the Respondent State’s courts have failed to dispose of them and the positions which the victims are contesting are occupied and the term of office has almost come to an end.

For the above reasons, the African Commission holds that the communication meets the exception rule under Article 56 (5) and the other requirements of Article 56, and thus declares it **admissible**.

## **Submissions on the merits**

### **Complainant’s submissions**

62. The Complainants submit that the State Party has violated articles 1, 2, 3, 7(1)(a), (d), 13 and 26 of the African Charter on Human and Peoples’ Rights, and further that the violations were as follows:

(a) the right to equal protection of the law under Articles 2 and 3 based on the fact that the law courts failed to decide on the election petitions within a reasonable time and that the petitioners were discriminated against on the protection of law due to the political opinions which were expressed in the petitions;

(b) the right to be heard and tried within a reasonable time by an impartial court or the tribunal under Article 7 as the Zimbabwe courts failed to provide a remedy to the election petitions;

(c) the right of every citizen to participate freely in the government of his country either directly or through freely chosen representatives in accordance with provisions of the law under Article 13 by enacting laws that curtailed freedoms such as association, assembly and expression ; and

(d) the duty of the State to guarantee the independence of the courts and the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the Charter under Article 26 based on the fact that the principle of separation of powers was not duly observed as one of the judges resigned and fled the country citing threats after he ruled in favour of the opposition.

63. Regarding article 1, the communication alleges that the Respondent state has failed to adopt legislative and administrative measures to give effect to the provisions of the Charter. It is submitted that the fact that elections that took place in Zimbabwe were organised in accordance with the Constitution and the laws of Zimbabwe does not mean that the manner in which those elections were conducted or their dispute were adjudicated do not violate provisions of the Charter. The law itself (including the constitutional provisions) can constitute the means whereby the rights protected under the Charter are violated.

64. The Complainants rely on the jurisprudence of the Inter-American Court on Human Rights in the case *Velasquez Rodriguez* where the Court held that:

*“The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it impossible to comply with this obligation... it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights”.*<sup>2</sup>

65. The Complainants also quote the advisory opinion delivered by the Inter-American Court on Human Rights where the Court found that:

*“... The fact that these are domestic laws adopted in accordance with the provisions of the Constitution means nothing if they are*

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<sup>2</sup> Velasquez Rodriguez case, Judgment of July 29, 1988.

*the means through which protected rights and freedoms are violated”.*<sup>3</sup>

66. It is submitted that although the Respondent State has enacted laws that make provisions for remedies, it has failed to render those remedies efficient as the proceedings can be unduly prolonged as was the case in the matter under consideration where “it failed to implement and uphold electoral laws through reasonably expeditious resolution or other measures that protect the rights of the citizens”.
67. The Complainants allege that the government of Zimbabwe has violated article 1 of the Charter because the existing electoral laws are not sufficiently certain, do not prevent candidates whose election is contested from sitting in the parliament before the Courts rule on their cases, and do not create any obligation upon the courts to determine the electoral challenges brought before them within a fixed period. The Complainants also rely on the jurisprudence of the Inter-American Commission on Human Rights, in the case of *Gustavo Arranza v Argentina* where it held that:

*“The absence of an effective remedy to violations of the rights recognised by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasised that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognised, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances in a given case, cannot be considered effective”.*<sup>4</sup>

68. The communication further recalls the interpretation made by the African Commission of article 1 in the case of ***Jawara v The Gambia***, where the Commission found that:

*Article 1 gives the Charter the legally binding character always attributed to international*

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<sup>3</sup> Inter-American Court on Human Rights Advisory Opinion 13/93 paragraph 26-27.

<sup>4</sup> Case No. 10.087 (September 30, 1997)

*treaties of this sort. Therefore a violation of any provision of the Charter automatically means a violation of Article 1. If a state party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of the Article. Its violation therefore goes to the root of the Charter."*

69. The Complainants note that the Respondent State's failure to enact laws that further the enjoyment of the rights and freedoms enshrined in the Charter and its failure to provide real and efficient remedy in the events of the violation of the same rights and freedoms amount to a violation of article 1. It is further submitted that the failure of the judiciary to decide promptly, effectively and meaningfully to the alleged violations of rights and electoral irregularities is imputable to the State since the Judiciary is a branch of the latter. The communication then quoted the decision of the Inter-American Court on Human Rights in the aforementioned *Velasquez Rodriguez* case, where it is stated that:

*"This obligation implies the duty of the State party to organise all the State apparatus and in general, all structures through which the exercise of public power is manifested, in such a manner that they are able to legally ensure the free and full exercise of human rights".*

70. The Complainants allege that the Respondent State cannot rely on its domestic law to justify its failure to perform its obligations under the Charter.

71. As for article 3 of the Charter, the communication recalls that equality before and equal protection of the law means equality with regard to interpretation, application and enforcement of the law. It emphasised that rights are guaranteed to all regardless of one's political opinion.

72. The Complainants note that successful petitions before Zimbabwean courts would have granted the opposition Movement for Democratic Change (MDC) a large majority in Parliament "should be taken into consideration by the judiciary in terms of the urgency with which the matters were disposed of". It is submitted that the MDC was victim of discrimination by the judiciary, although such discrimination might have been caused by the lack of resources or manpower to deal with the petitions. The lack of resources and manpower, it is alleged, cannot dispense the state from its obligation to respect and protect the rights enshrined in the Charter.

73. According to the authors of the communication, since the successful disposition of the petitions would have drastically altered the composition of Parliament, the failure of the Judiciary to deal promptly with those petitions is tantamount to the absence of equality before the law and equal protection of the law for victims of human rights violations.
74. The Complainants allege that the inordinate delay in dealing with petitions constitute a violation of Article 7 (1) (d), as that affects the right to have one's case heard within a reasonable time (right to due process of law). The Complainants quote the United Nations Human Rights Committee (HRC) General Comment No 13, where the HRC held that the right to have one's case heard within a reasonable time includes not only the time by which the trial should start, but also the time by which it should end and the judgment rendered both in first instance and on appeal.
75. In the Complainants' view, the right to due process of law was violated in the matter before the Commission as the courts have failed to rule on the electoral petitions within a reasonable period of time. It is also alleged that appeal to the High Court and the Supreme Court was ineffective. The communication recalls the approach of the African Commission to the right to appeal adopted in its decision on ***Amnesty International, Lawyers Committee for Human Rights v Sudan***, where the Commission held that:
- "The right to appeal being a general and non-derogable principle of international law must, where it exists, satisfy the conditions of effectiveness. An effective appeal is one that, subsequent to the hearing by the competent tribunal of first instance, may reasonably lead to a reconsideration of the case by superior jurisdiction, which requires that the latter should, in this regard, provide all necessary guarantees of good administration of justice"*
76. The authors of the Communication further denounce the lack of the independence of the judiciary in Zimbabwe. They cite the report of the Special Rapporteur on the Independence of Judges and Lawyers submitted with the United Nations Commission on Human Rights Resolution 2002/43,<sup>5</sup> and conclude that the "absence or weakening of institutions whose mandate is to provide remedies in instances of violations supports the assertion of petitioners of institutions that are not competent to render real and effective remedies, contrary to

the intentions of the drafters of the Charter under Articles 7 and 26”.

77. As regards article 13 of the Charter, the communication recalls the importance of the right to political participation and insists, in the wake of the Resolution on Electoral Processes and Participatory Governance adopted by the Commission at its 19<sup>th</sup> Ordinary Session, that:

a. *“Elections are the only means by which the people can elect democratically the government of their choice in conformity to the African Charter on Human and Peoples’ Rights”.*

78. That position, it is alleged, was confirmed by the Commission in **Constitutional Rights Project & Another v Nigeria**, where the Commission found that:

*“To participate freely in government entails, among other things, the right to vote for the representative of one’s choice. An inevitable corollary of this right is that the results of the free expression of the will of the voters are respected; otherwise, the right to vote freely is meaningless. In the light of this, the annulment of the election results, which reflected the free choice of voters, is in violation of Article 13(1)”*

79. The Complainants further submit that the right to freely participate in government is also rendered meaningless if the judiciary fails to decide expeditiously on the electoral disputes brought before it, since that allow candidates whose elections are contested to sit in Parliament while the petitions are still *lis pendens*. The Complainants quote the Inter-American Commission on Human Rights according to which:

*“the close relationship between representative democracy as a form of government and the exercise of the political rights so defined, also presupposes the exercise of other fundamental rights... the concept of representative democracy is based on the principle that it is the people who are the nominal holders of political sovereignty and that, in the exercise of that sovereignty, elects its representatives, moreover, are elected by the citizens to apply certain political measures, which at the same time implies the prior existence of an ample political debate on the nature of the policies applied – freedom of expression – between organised political groups – freedom of assembly. At the same time, if these rights and freedoms are exercised, there must be juridical and institutional systems in which laws outweigh the will of leaders and in which some institutions*

*exercise control over others for the sake of guaranteeing the integrity of the expression of the peoples' will – rule of law. ... Indeed any mention of the right to vote and to be elected would be mere rhetoric if unaccompanied by a precisely described set of characteristics that the elections are required to meet*<sup>6</sup>

80. The Complainants pray the African Commission to follow the jurisprudence of the Inter American Commission and to find the Respondent State to be in violation of article 13(1) of the Charter.

81. Regarding article 26 of the Charter, the authors of the communication recalls the comment made by the Commission in its 9<sup>th</sup> Annual Report, where it declared that:

*“Article 26 of the African Charter reiterates the right enshrined in article 7 but is even more explicit about State Parties’ obligations to ‘guarantee the independence of the Courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and the protection of the rights and freedoms guaranteed by the present Charter’. While Article 7 focuses on the individual’s right to be heard, Article 26 speaks of the institutions which are essential to give meaning and content to that right. This Article clearly envisions the protection of courts which have traditionally been the bastion of protection of the individual’s rights against the abuses of State Power”*

82. The complainants are of the view that trials conducted in accordance with the principles of due process of the law, and the conclusion of such trials within a reasonable time, *inter alia*, are essential tenets of a properly functioning judiciary. It is alleged that the failure by the Respondent to decide on the election petitions within a reasonable time contravenes Articles 13(1) and 26 of the Charter.

### **Respondent State’s submissions on the merits**

83. The Respondent State submitted that both parties to the election petitions filed in the Zimbabwean courts were afforded equal protection of the law evidenced by a reference to a number of decided cases. The State denies that the Complainants were discriminated against on the basis of political opinions expressed in the petitions.

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<sup>6</sup> Report 01/90 on cases 9768, 9780 and 9828 Mexico paragraphs 411 and 42, Annual Report of the Inter American Commission 1989-1990.

84. The Respondent State submits further that in Sibangani Mlanda vs. Eleck Mkandla HC 8228/00, the petitioner was a candidate for the Movement for Democratic Change Party (MDC) in the general election of June 24 & 25, 2000. The Respondent who was the candidate for Zimbabwe Africa national Union (Patriotic-Front) (ZANU PF) won the parliamentary seat by 15, 932 votes while the petitioner garnered 3,967 votes. The petitioner alleged corrupt practices during the election and that the electorate was coerced to support and vote for the Respondent and refrain from voting for him. He alleged that his campaign team were abducted, tortured and their property burned and destroyed. The Court held that it was grossly unfair for the Respondent to canvass for votes and the election was set aside.
85. The State noted further, in spite of the political opinions expressed in the petition suggesting that ZANU "PF" was a violent party which won elections through violence, the Complainants were not discriminated upon by the courts, and were afforded equal protection, as was evidenced with the setting aside of the election result of the Gokwe North Constituency.
86. To buttress its argument that the Complainants were not discriminated, the Respondent State drew the Commission's attention to the case of **Lameck Nkiwane Muyambi vs. Jaison Kokerai Machaya HC 8226/00**, where the petitioner was an opposition member of the MDC while the Respondent was a candidate of ZANU PF. The petitioner alleged that the Respondent and his party members were guilty of corrupt practices leading to a wide range of violent activities in the Constituency. The Court decided to set aside the election results and ruled in favour of MDC. The State also indicated that in many other cases involving election petitions, the Courts have ruled in favour of the opposition, for example, **Phioneas Chivazve Chiota vs. Registrar General of Elections and Ben Tumbare Mutasa HC 8221/00**, **Moses Mope vs. Elliot Chauke HC 110/01**, and **Edna Akino vs. Tobaiwa Muded N.O and Davison Tsopo and City of Mutare HC 14490/99**.
87. With respect to equal protection of the law, the Respondent State thus submitted that since seven or more election petitions were ruled in favour of the MDC, it is enough proof that the courts have not been biased towards the ruling ZANU PF, and have applied the law objectively, thus affording the

petitioners equal protection of the law as guaranteed in Article 3 of the African Charter and the Constitution of Zimbabwe.

**The right to be heard and tried within a reasonable time by an impartial court or tribunal under Article 7 (1) (d).**

88. The Respondent State submitted that it has always afforded the Complainants the right to be heard by impartial courts, and within a reasonable time, adding that Zimbabwean courts have in several judgments recognized this right.
89. The Respondent State contends that all the petitions filed in the High Court and more recently, in the Electoral Court were heard within a reasonable time, in accordance with Rule 31 of the Electoral (Application, Appeal and Petition Rules 1995) which provides that: *“The Registrar and all parties to any case, petition or application shall take all steps necessary to ensure that the matter is dealt with as quickly as possible.”*
90. According to the State, parties to an election petition have a duty to ensure the petition is determined quickly in accordance with Rule 31, adding that in most of the cases brought before the courts, the Complainants failed to expeditiously file papers to ensure the matters were dealt with quickly.
91. The State added further that in terms of Section 182 of the **Electoral Act [Chapter 2:13]**, *“Every election petition shall be determined within six months from the date of its presentation.”*
92. According to the Respondent, in order to give effect to this law, it has set up an Electoral Court to have petitions dealt with within six months, which the State considers as a reasonable time. However, the MDC is challenging the composition of the Electoral Court which, as a result of that challenge, has delayed petitions before Court, and it can therefore not be said that the judiciary itself has been reluctant to deal with petitions expeditiously.
93. It is further submitted by the State that it is the duty of the parties to avail the witnesses and apply for a set down date within the 6 months prescribed by law. In case of any frustrations, the concerned party can approach the Judge President or Chief Justice for redress. The Complainants, according to the State, have failed to show, the specific frustrations faced, if any, in having the election petitions set

down for hearing and what steps the petitioners undertook to have the matters expeditiously dealt with. Instead the Complainants have only resorted to allegations that the judiciary has been reluctant to deal with, and finalizing the petitions before it.

94. The Respondent State submits that the Government has no role in the determination of election petitions thus it is untrue to allege that it frustrated the petitioners in the hearing of their petitions. The State added that most petitions filed in the High Court in 2001 were heard and judgments delivered to the parties within six months.
95. To substantiate the above argument, the State cited a number of cases that were disposed of within six months, including **Lucia Makesea vs. Isaiah Shumba HC 8070/00**, **Phineas Chivazve Chiota vs. Registrar General of Elections and Ben Tumbare HC 8221/00** which was set down for hearing on 18<sup>th</sup> July 2001 and judgment delivered on January 23, 2002; **Godfrey Don Mumbamarwo vs. Saviour Kasukuwere** set down on 9<sup>th</sup> July 2001 and judgment delivered on January 17<sup>th</sup> 2002; **Moses Mare vs. Elliot Chauke HC 8068/00** judgment delivered on June 20, 2001 and; **Patrick Tsumele vs. Aaron Baloyi HC 8072/00** judgment delivered on June 21, 2001.
96. More recently after setting up of the Electoral Court, petitions have been disposed of in six months. In cases decided by the High Court, the losing parties appealed to the Supreme Court. The Supreme Court heard most of the appeals and the MDC lost in some of the cases, such as **Hove vs. Joram Gumbo** with respect to the Mberengwa West Constituency. Some cases were dismissed as the appellants were not willing to prosecute their cases, for example, **Mazurani vs. Mbotekw**, with respect to the Zvishavane Constituency and **Mumbamarwo vs. S Kasukuwere** with respect to the Mt Darwin Constituency.
97. According to the Respondent State, in the above cited cases the petitioners were asked by the Supreme Court to file their heads of argument but they failed and the cases were subsequently dismissed under Rule 44 of the Supreme Court Rules for non-compliance with court rules. The same applies to Order 238 Rule 2 (b) of the High Court Rules.
98. The State added that the petitioners have over time withdrawn petitions after realizing the weaknesses of their cases and

paid wasted costs to the Respondents acknowledging their fault for bringing uncommitted and misconceived petitions. This was the case with respect to **Elphas Mukonoweshuro vs. Ben Mahofa Case No. EP 11/05; Aaron Chinhara vs. Lovemore Mupukuta EP 20/05; Eileen Heather Dorothy Bennet vs. Samuel Undenge Case No. EP 11/05; Evelyn Masaiti vs. Mike Nyambuya EP 18/05; Hilda Suka Mafudza vs. Patrick Zhuwawo 16/05** and; **Ian Kay vs. Sydney Tigere Sekeremayi Case No. EP 16/05.**

99. It is further submitted by the State that in the above mentioned circumstances the Government did not frustrate the petitioners in pursuing legal recourse according to the law. In fact, it is the petitioners who did not pursue their petitions expeditiously.

100. Further in terms of the Practice Directions of the Supreme Court, Practice Direction No. 1 of 1993 reported in the Zimbabwe Law Reports pages 241 (5) the Supreme Court as per Gubbay CJ directed that:-

*“If in any particular case, whether of a criminal nature, a delay in obtaining judgment should occur which is considered inordinate the aggrieved party or his legal practitioner is invited to bring such delay to the attention of the Chief Justice or the Judge President if it be in respect of a High Court matter, and to the Chief Magistrate, if it be a magistrates Court matter. Upon receipt of such notification the Chief Justice, the Judge President or the chief Magistrate whoever has been addressed to will proceed to investigate the complaint, and provided he is satisfied that in all circumstances the delay is unreasonable, will apply his best endeavors to obviate it.”*

101. The Respondent State submits that the Communication does not indicate if at any point the various Complainants addressed the issue of delays to the Judge President or Chief Justice, and if that was so whether the Judge President and the Chief justice did nothing after receiving the complainant. The complainant’s allegations are unsubstantiated and thus ought to be dismissed as unfounded.

102. Thus, in the opinion of the State, the judiciary and indeed relevant provisions of laws enable petitions to be concluded within a reasonable time contrary to the complainant allegations.

103. Concerning allegations of violations of Article 13, the Respondent State denied that the Republic of Zimbabwe violated Article 13 by enacting laws curtailing

freedoms of association, assembly and expression hence violating the rights of citizens to participate in governance issues and to exercise their right to a referendum in a transparent and conducive environment.

104. The State submitted that the Complainants simply aver that the Government has passed such laws, but did not state the specific laws enacted. Neither did they describe the human rights violations that took place, the dates or place the violations occurred, nor provide the names of the victims who suffered as a result of the enacted laws.

105. By making general and unsubstantiated allegations the Complainants are being untruthful and their claims should not be accepted. The Government is being called upon to “defend” itself in the dark which is very unfortunate.

106. Further, it is submitted that in terms of the African Commission’s Information Sheet No. 3 on Communication Procedure, it is a requirement that the author of the communication should make precise allegations of fact attaching relevant documents and not general allegations. Hence the Complainants have failed to prove a violation of Article 13.

107. With respect to allegations regarding violations of Article 26 of the Charter, the Respondent State denied that it had violated this Article. It denied that the Government failed to guarantee the independent functioning of the judiciary. It submitted that the judiciary of Zimbabwe has always been independent and free from executive interference, adding that this was evidenced by the fact that the election petitions filed in the courts resulted in the Courts setting aside the election results where irregularities were found. This, according to the State, was regardless of the party to which the petition belonged. The State added that quite a number of petitions were ruled in favor of the opposition, a situation which according to the State, would not have been so if there was executive interference, as alleged by the Complainants.

108. On the issue of the legal status of the Judges, the State submits that Section 79B of the Constitution of Zimbabwe states that members of the judiciary “**shall not be subject to the direction or control of any person or authority**”

109. On the issue of the removal of the Judges from office, the State drew the Commission's attention to Section 87 (1) of the Constitution of Zimbabwe which provides that **"Inability to discharge the functions of [the], whether arising from infirmity of the body or mind or any other cause, or for misbehavior is the only ground upon which dismissal may be authorized. The words 'any other cause'",** it is submitted, refer to medical causes or causes not relating to the moral blameworthiness of the judge in question.
110. On the issue of salaries payable to the judges, the State submits that the salaries of judges may not be reduced during the tenure of office in terms of the Constitution. This provision is meant to uphold the independence of the judiciary.
111. On the issue of judicial proceedings, the State notes that all court proceedings in Zimbabwe are carried out in open court in accordance with Section 18 (10) and (14) of the Constitution. This includes the announcement of the court's decision and the reasons for the decision delivered at the same time.
112. The Respondent State affirms that all election petitions were held in open court, and that the State endeavored to guarantee the independence of the courts.
113. The State concluded in the regard by submitting that in light of the above mentioned provisions to guarantee the independence of the judiciary, the Complainant's assertion that a number of judges were victimized after they ruled in favor of the MDC is denied.
114. The State cited the case of Justice Makarau who according to the State, was re-appointed to the Electoral Court despite ruling against ZANU PF in the Election Petitions, while Justice Ziyambi was promoted to the Supreme Court. The State added that several petitions were decided in favour of the MDC and none of the judges were victimized for the judgments.
115. The Respondent State submits that Mr. Morgan Tsvangira, the leader of the opposition MDC was acquitted of the treason charges. The presiding judge, Justice Paddington Garwe was not victimized for the decision and he remains the Judge President of the High Court of Zimbabwe.

116. For all the judges who resigned from the bench, no specific reasons were availed as is mandatory in law. None has openly stated if they resigned because of political reasons.

117. The State submits that the Complainants make bold allegations to the effect that one judge who ruled in favour of the MDC was victimized and fled the country without naming the judge or giving proof for the reasons of his resignation. Thus the complainants have failed to establish a case against the Respondent State.

118. The Respondent State submits that the relief sought by the Complainants is not sustainable because the Republic of Zimbabwe has complied with the provisions of the African charter in letter and spirit by:

- Enacting laws which improve Electoral transparency;
- See Section 182 of the Electoral Act [Chapter 2:13];
- Rule 31 of the Electoral (Applications Appeals and Petitions) Rules 1995 Statutory Instrument 74A/95;
- Practice Directions of the Supreme Court No. 1 of 1993, relating to complaints on delays;
- Constitution of Zimbabwe Section 87 (1), 79B, 18 (10 and (14);
- Zimbabwe Electoral Commission Act No. 22/04, which Act established the Zimbabwe Electoral commission and independent Board responsible inter alia of the preparation and conduct of elections in Zimbabwe;
- Setting up the Electoral Court.

### **The African Commission's decision on the merits**

119. In this Communication, the Complainants alleged violation of Articles 1, 2, 3, 7(1) (a), (d) 13 (1) and 26 of the African Charter.

120. The Complainants allege that Article 2 was violated in the sense that there was discrimination in the protection afforded and equality before the law, and that this failure by the domestic courts to protect the rights of the petitioners amounted to discrimination. The Complainants noted that if the Courts had dealt with the petitions and finalised them as envisaged by the petitioners, then the composition of Parliament would have been different and this would have altered the balance of power. This, in the opinion of the

Complainants, is a 'plausible ground for supporting the assertion of non-equality in the protection of the law and discrimination'. The Respondent State does not advance any arguments regarding the allegations of discrimination, but noted that all the parties to election petitions were afforded equal protection of the law.

121. To establish discrimination, it must be shown that, the Complainants have been treated differently in the enjoyment of any of the Charter rights by virtue of their race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

122. The Complainants have failed to set forth with clarity any particular instance in which they were denied the enjoyment of any of the Charter rights by virtue of the reasons set forth in Article 2 of the African Charter. The claim under this head therefore fails.

123. The Complainants also allege the violation of Article 3 of the African Charter. This Article provides: *'Every individual shall be equal before the law, and every individual shall be entitled to equal protection of the law'*. According to the Complainants, since the successful disposition of the petitions would have drastically altered the composition of Parliament, the failure of the Judiciary to deal promptly with those petitions is tantamount to the absence of equality before the law and equal protection of the law for victims of human rights violations. The State on its part cited a number of cases to demonstrate that both parties to the election petitions filed in the Zimbabwean courts were afforded equal protection of the law, and denied that the parties were discriminated against on the basis of political opinions. In fact, this position is confirmed through the analysis the Commission made on the list of different petitions that were cited in the complaint submitted to the Commission.<sup>7</sup>

124. Article 3 of the African Charter has two arms, one dealing with equality before the law, that is, Article 3(1), and the other, equal protection of the law, that is, Article 3(2). The most fundamental meaning of equality before the law or equality under the law is a principle under which each individual is subject to the same laws, with no individual or groups having

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<sup>7</sup> See paragraph 8 which refers to annex in the Communication, and also paragraphs 84 and 86 herein above on petitions filed by both parties.

special legal privileges. On the other hand, equal protection of the law under Article 3 (2) relates to the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts both in procedures and in the substance of the law. It is akin to the right to due process of the law, but in particular, applies to equal treatment as an element of fundamental fairness.

125. In its decisions on Communication **211/98 - Legal Resources Foundation v/ Zambia**,<sup>8</sup> the Commission makes this distinction even clearer by linking the principle of discrimination to that of equal protection of the law. This Commission held in that Communication that 'Article 2 of the Charter abjures (sic) discrimination on the basis of any of the grounds set out, among them "language... national or social origin, birth or other status..." The right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. The right to equality is important for a second reason. Equality or lack of it affects the capacity of one to enjoy many other rights. For example, one who bears the burden of disadvantage because of one's place of birth or social origin suffers indignity as a human being...'

126. In terms of Article 60 of the Charter, this Commission can also be inspired in this regard by the famous case **Brown v. Board of Education of Topeka**,<sup>9</sup> in which the Chief Justice of the United State of America Earl Warren argued that 'equal protection of the law refers to *the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts, both in procedures and in the substance of the law. It is akin to the right to due process of law, but in particular applies to equal treatment as an element of fundamental fairness.*<sup>10</sup>

127. In order for a party to establish a successful claim under Article 3 (2) of the Charter therefore, it must show that, the Respondent State had not given the Complainants the same treatment it accorded to the others. Or that, the Respondent

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<sup>8</sup> See para 63, communication 211/98. It is observed that the use of the word 'abjures' could have been intended to mean 'abhors', hence the use of the (sic) to show that it was an incorrect word.

<sup>9</sup> 347 U.S 483 (1954)

<sup>10</sup> [www.legal-explanations.com](http://www.legal-explanations.com)

State had accorded favourable treatment to others in the same position as the Complainants.

128. In the present Communication, the Commission has examined the evidence submitted by both parties and is of the view that the Complainants have not demonstrated the extent to which the Courts treated the petitioners differently from the Respondent State, or vice versa, to the extent that their rights were violated. The Commission thus does not find the Respondent State to have violated Article 3 of the African Charter.

129. The Complainants allege violation of Article 7 (1) (a) and (d) of the African Charter. This Article provides: *“Every individual shall have the right to have his cause heard. This comprises: 1(a) ‘the right to an appeal to competent national organs against acts violating his fundamental rights recognised and guaranteed by conventions, laws, regulations and customs in force’ and (d) ‘the right to be tried within a reasonable time by an impartial court or tribunal.’*

130. It should be noted that even though the matter before the Commission is a civil matter, the principles enshrined under Article 7 (1) still apply in the consideration of this matter, that is, the principles to have one’s cause heard and the principle to have one’s matter decided within a reasonable time.

131. The Complainants argue that the inordinate delay in dealing with petitions affects the right to have one’s case heard within a reasonable time (right to due process of law). They refer to General Comment No. 13 of the United Nations Human Rights Committee (HRC) where the HRC held that the right to have one’s case heard within a reasonable time includes not only the time by which the trial should start, but also the time by which it should end, and the judgment rendered both in first instance and on appeal. In their view, the right to due process of law has been violated as the courts have failed to rule on the electoral petitions within a reasonable period of time. It is also alleged that appeal to the High Court and the Supreme Court was ineffective.

132. On its part, the Respondent State cited several cases to demonstrate that it has always afforded the Petitioners the right to be heard by impartial courts or tribunals within a reasonable time. The Respondent State contends further that all the petitions filed in the High Court and more recently, in

the Electoral Court were heard within a reasonable time. The State cited Rule 31 of the Electoral (Application, Appeal and Petition rules 1995) Statutory Instrument 74A/95 and Section 182 of the **Electoral Act [Chapter 2:13]** and concluded that parties to an election petition have a duty to ensure the petition is determined quickly, adding that in the present situation, in most of the cases brought before the court, the Petitioners failed to expeditiously file papers to ensure the matters were dealt with quickly. The State further submitted that it set up an Electoral Court to have petitions dealt with within a reasonable time. However, the MDC challenged the composition of the Electoral Court which delayed the petitions before it and it cannot therefore be said that the judiciary has been reluctant to deal with petitions expeditiously.

133. Article 7 (1) (d) of the Charter imports two things; the right to be heard within a reasonable time and the right to be heard by an impartial tribunal. These are the issues which must be borne out by the evidence to warrant the Commission's findings of a violation thereof.
134. In respect of the first arm of this claim – the right to be tried within a reasonable time, the Responded State conceded in its response to delays in disposing with some of the claims, but emphasized that the delay was occasioned by the Complainants who had failed to file processes expeditiously before the Courts as required by the law and/or failed to file their heads of arguments as required by the Supreme Court. These are not a mere blanket denial of the allegations; they raise serious irregularities against the Complainant's averments, which were not controverted by the Complainants.
135. In respect of the second arm of the claim – the right to be heard by an impartial tribunal, the submission of the Respondent State and the evidence before the Commission show that, the Courts had actually resolved some cases in favour of the petitioners as against the ruling party (ZANU-PF), that the Supreme Court had thrown out some cases in which the petitioners failed to comply with the Court's directives requesting them to file their heads of arguments. There is no evidence to suggest that the Courts refused to adjudicate on the Complainants cases as filed before the Courts, but did so in respect of cases filed by the ruling party (ZANU-PF), or that the Court failed or refused to grant the Complainants the relief sought, but did so to other petitioners. This Commission does

not therefore find any violation of Article 7 (1) (d) of the Charter.

136. The Complainants also alleged violation of Article 13 (1) of the Charter which provides that: *“Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law”*.

137. The Complainants’ submissions in support of this allegation hinged on their argument that the Courts failed to render judgment on the elections petitions on time. According to the Complainant, the right to freely participate in government is rendered meaningless if the judiciary fails to decide expeditiously on the electoral disputes brought before it, since that would allow for candidates whose elections are contested to sit in Parliament while the petitions are still *lis pendens*. The Respondent State on its part argued on the expeditious disposal of petitions by the High Court, usually, within six months as stipulated by the law establishing the Electoral Court.<sup>11</sup> The Complainants have not adduced any evidence before this Commission to contradict the assertions of the State. It is thus the findings of this Commission that the Complainants have failed to convince it that there has been a violation of Article 13 (1).

138. The Complainants submitted further that violation of Article 7 (1) (d) constitutes in one respect violation of Article 26 of the Charter. Article 26 of the Charter provides that:

*“State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter”*.

139. According to the Complainants, the judiciary is weak and ineffective. The Complainants argue that the judiciary in Zimbabwe is not independent and further that judges who entered decisions against the government interest were victimized. The Respondent State replied that the Judiciary in Zimbabwe was independent and judges were not victimized

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<sup>11</sup> See para 95 and 96 for details about these petitions in which the judiciary disposed them within the prescribed time limit.

for their decisions, adding that one such judge was promoted to the Supreme Court.

140. The Respondent State submits that those judges who resigned never made any public statement as to the cause of the resignations. For the Complainants to link their resignations to victimization from the government, without leading any evidence in support thereto, does in the view of the Commission, amount to speculations.

141. The evidence before the Commission relating to the conduct of the judiciary in respect of the petitions forming the basis of this Communication does not show that the judiciary was influenced by other institutions or persons in the discharge of its functions but acted with full independence. The Commission does not therefore find a violation of Article 26 of the Charter.

142. Relating to the issue of the violation of Article 1 of the Charter, the Commission finds that the Respondent State did not violated any of the rights, alleged by the complainants, and cannot therefore be held to have violated Article 1 of the Charter.

In conclusion, the African Commission on Human and Peoples' Rights finds that the Respondent State has not violated **Articles 1,2,3,7 (1) (a) and (d), 13 (1) and 26** of the African Charter as alleged by the Complainants.

***Done at the 43<sup>rd</sup> Ordinary Session in Ezulwini, Kingdom of Swaziland,  
from 7 – 22 May, 2008***