



**MAYORAL ELECTIONS AND
ZIMBABWE'S LEGISLATIVE
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**Derek Matyszak, Senior Researcher,
Research & Advocacy Unit [RAU]**

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Abstract.

In recent years, Zimbabwe's legislation has been characterised by poor drafting. The resultant difficulty in determining the intention of the legislature has been exacerbated by the introduction of a new constitution for the country, which renders many laws unconstitutional. The hermeneutic conundrums presented by lacunae in legislation and conflicting provisions opens the door, to political, rather than legal, considerations playing a role when ascribing meaning to various statutes. This situation obtained in the recent election of mayors for the municipalities in Zimbabwe. The Ministry of Local Government decided that section 265(2) of the new constitution was clear and unambiguous. The section provides: "All members of local authorities must be elected by registered voters within the areas for which the local authorities are established." The argument is that, since the mayor is a member of a local authority, he too must be elected by registered voters within the areas for which the local authorities are established, and, in the absence of the direct election of the mayor, this means that the mayor must be a councillor, as all councillors are elected by registered voters within the areas for which the local authorities are established. However, the article shows that this provision is not the only, or even the best, interpretation of section 265(2), and all indications are that the meaning placed upon this provision by the Ministry is not the one intended by the legislature. This being the case, the election of mayors in all municipalities as directed by the Minister in September 2013, should be held to be unconstitutional.

“There is nothing ambiguous; it’s very clear” – Ignatius Chombo

Introduction

Zimbabwe’s legislative architecture, never particularly elegant, is becoming increasingly ramshackle. Legislation pertaining to the “indigenisation” of business in Zimbabwe probably leads this heavily contested field. Many of the provisions in this regard are simply legal gibberish and most are not authorised by superior legislation, with Government Notices issued which are *ultra vires* (beyond the powers granted by) the Regulations, Regulations *ultra vires* the enabling Act of Parliament, and the Act of Parliament itself of dubious constitutional validity. The Electoral Act has joined this ignominious array, after Mugabe claimed that the Presidential Powers (Temporary Measures) Act¹ allowed him to unilaterally set the rules for a poll in which he was a contestant and to thus introduce amendments to the Act. These amendments, themselves of questionable legality,² were introduced in haste, without the kind of careful scrutiny which ought to precede the passage of Bills through the parliamentary process. The result is an Act with contradictory provisions, cross references to sections, which were clearly intended to be key, but which have been inadvertently omitted and portions which are redundant.

This situation has been exacerbated by the adoption of a new Constitution for Zimbabwe, not only because the provisions of several Acts of Parliament are now subject to constitutional challenge, but also because of the absence of statutes, and the required insertion into extant laws of amending provisions, which ought to have been introduced before the Constitution became effective, but were not. As a result, the interpretation of statutes has become more akin to divination than jurisprudence. And when staring at the statutory entrails that purport to be legislation, like the Greek oracles before them, the door is open to judges and policy makers to divine meaning more from an astute understanding of political currents, rather than that which is ostensibly under examination.³

Such theatre recently obtained when determining the manner in which mayors ought to be appointed for the newly-elected municipal councils. Initially, it appeared as if this issue would mark the first exchange of fire between the ZANU PF Minister of Local Government, Ignatius Chombo, and the MDC-T on what is now likely to be the main terrain of battle between ZANU PF and the opposition – the municipal authority of the cities of Bulawayo, Harare and Chitungwiza. This is the locus of the sole vestige of power retained by MDC-T after the July 2013 election. However, after an application (which sought to counter a directive from the Ministry of Local Government on mayoral appointments) brought by the MDC-T to the High Court was dismissed on procedural grounds by Justice Bere (who ruled that the matter “was not urgent” and thus could not be heard,⁴) the MDC-T retreated and accepted the position of the Ministry on mayoral appointments.

¹ Chapter 10:20.

² For more on this see Matyszak, D. A. (2013), *The Domino Effect: Special Voting and Zimbabwe’s 2013 Election*, July 2013 RAU.

³ It is hoped that the poetic licence will be excused – in fact; the only Greek oracle that divined through entrails was the relatively obscure oracle of Trophonius. Rather than oracles, the reference should more correctly be to Etruscan Haruspices who made their prophecies through the examination of the entrails of sacrificed sheep and poultry.

⁴ *MDC-T Mayoral Case Dismissed* The Herald 12.09.13. This judgement is difficult to understand given that time limits in terms of the Constitution pertaining to the assumption of office by mayors (and councillors) had already been breached. The belated elections were, however, imminent. Section 277(3) of the Constitution provides: *mayors, chairpersons and councillors of local authorities assume office on the **ninth** day after the announcement*

The Issue.

The argument of Minister Chombo is that it is now a constitutional requirement that any person chosen to be mayor must be an elected councillor. The law on the point, however, is not as straight forward as Chombo and several articles in the government-controlled Herald newspaper suggest.⁵ The MDC-T's concession on the point is more likely to have been made on the unfortunately not unreasonable supposition that its view would not be upheld by the courts, rather than its contention in this regard being unsupported by the law.

The Law

There are three pieces of legislation of relevance here – the Constitution, the Electoral Act⁶ and the Urban Councils Act.⁷

The Constitution contains several sections referring to the election of mayors. When viewed as a whole, the provisions are confusing.

Sections 274(2) and 274(4) of the Constitution provide:

274 (2) Urban local authorities are managed by councils composed of councillors elected by registered voters in the urban areas concerned and presided over by elected mayors or chairpersons, by whatever name called.

274(4) The qualifications and procedure for the election of persons referred to in subsection (2) must be set out in the Electoral Law.

Expanding section 274(4), (or combining it with 274(2)) the provision requires that:

The qualifications and procedure for the election of [councillors elected by registered voters in the urban areas concerned and elected mayors or chairpersons] must be set out in the Electoral Law

For the moment, here it should be noted that the Constitution requires that the Electoral Law seems to make provision for *both* the election of councillors and the election of mayors. It should also be noted that the provision in respect to mayors is for the election of mayors generally and not only “directly” elected mayors.

Section 157 of the Constitution further particularises what must be contained in the Electoral Law – provisions relating to delimitation, voter registration, proportional representation, etc. In addition, it repeats, in more general terms, that elections pertaining to local authorities must be governed by the Electoral Law, that is, that such law must provide for:

the conduct of elections to provincial and metropolitan councils and local authorities;[157(1)(f)]⁸

of the results of the general election in which the councillors were elected. With results announced on the 02.08.13, the entry into office of mayors on the 17.09.13 clearly contravened this provision.

⁵ *MDC-T Offside on Mayors: Madhuku* The Herald 03.09.13.

⁶ Chapter 2:13.

⁷ Chapter 29:15.

⁸ This provision is anomalous to the extent that all members of the Metropolitan Councils hold their seats *ex officio* (Section 269) and thus there are no elections to these councils. The Provincial Councils have ten seats appointed by proportional representation. The remainder are *ex officio*.

and

the nomination of candidates in any election to take place at least fourteen days after the publication of the proclamation calling for that election.⁹ Polling must take place at least thirty days after the nomination of candidates.¹⁰[157(3)].

Also of relevance are section 274(5) and sections 277(1) and 277(2):

*274(5) An Act of Parliament may confer executive powers on the mayor or chairperson of an urban local authority, but any mayor or chairperson on whom such powers are conferred must be elected **directly** by registered voters in the area for which the local authority has been established.*

277 Elections to local authorities

(1) Elections of councillors of local authorities must be held-

(a) in the case of a general election of mayors and councillors, concurrently with a general election of Members of Parliament and the President:

(b) in the case of an election, other than a general election, to fill one or more casual vacancies, as soon as practicable after the vacancies have occurred.¹¹

(2) Elections of mayors and chairpersons of local authorities, other than mayors or chairpersons on whom executive powers have been conferred under section 274(5), must be held at the first sitting of the councils concerned following a general election.

The finally, but of prime importance, is section 265(2):

All members of local authorities must be elected by registered voters within the areas for which the local authorities are established.

It is difficult to reconcile all these provisions with each other. They will be considered in detail below.

It can be noted at the outset, however, that the Constitution clearly intended different electoral procedures for mayors generally and those upon whom executive authority has been conferred.¹² Although all mayors are to be elected, it is only those upon whom executive authority has been conferred that must be elected **directly** by registered voters in the area for which the local authority has been established (section 274(5)). However, section 274(4) requires that the qualifications and procedures for the election of *all* mayors, and not just executive mayors, must be set out in the Electoral Law. If this were not the case, and the intention was that only the election of executive

⁹ The phrase “to take place” must attach to “fourteen days” and not to “any election”, but is superfluous in either case.

¹⁰ Section 157(1)(f) and 157(3).

¹¹ This provision is badly phrased – it purports at the outset to attend to the election of councillors, but then includes mayors in its ambit.

¹² It is worth noting that the draft constitution, approved in the referendum, contained a provision, 272(9), to the following effect: *An Act of Parliament must provide for the election of mayors for the metropolitan provinces.*” This provision was removed from the Bill, with the parliamentary Committee claiming that the elision was editorial only. The change is clearly substantive, and had it remained, the argument presented here would be different.

mayors was to be set out in the Electoral Law, then section 274(4) should (as was done in section 274(5)) have referred to *directly* elected mayors, and not simply elected mayors.

Here recall that section 157(1)(f) requires that the Electoral Law must provide for elections to local authorities and that section 157(3) must ensure that nominations for candidates in *all* elections must take place no sooner than fourteen days after the proclamation of the election. In view of the fact that non-executive mayors are elected by councillors only after the general elections (section 277(2)), despite the fact that the reference in section 157(3) is to *all* elections, it seems that the section is not intended to apply to indirectly elected mayors, but only directly elected executive mayors. One may wish to make something of the fact that section 157(1)(f) refers to elections “*to*” local authorities and not “*by*” local authorities, thus seeming to exclude indirectly elected mayors. However, section 277 which clearly does include indirectly elected mayors also uses “*to*” and not “*by*”. Furthermore, this does not alter the effect of section 274(4) requiring that the qualifications and procedure for the election of mayors must be set out in electoral law.

Section 277(1) also requires that, where there is a general election, the election of mayors and councillors must take place simultaneously with the election of Members of Parliament and the President.¹³ However, once again we must assume that this provision is only intended to apply to directly elected mayors; the more so as the next subsection specifically provides for the election of indirectly elected mayors. This being the intent, the correct and usual way to draft section 277(1) would be to commence the provision with the phrase “*subject to subsection (2)*”. Due to the failure to include this phrase, indirectly elected mayors have been inadvertently included in section 277(1).¹⁴

There are thus three instances where provisions, seemingly unintentionally, include indirectly elected mayors within their ambit.

With this in mind, one can now return to the most contentious provision, section 265(2), repeated here for convenience:

All members of local authorities must be elected by registered voters within the areas for which the local authorities are established.

This provision, which Ignatius Chombo regards as clear and unambiguous is in fact polysemous, fraught with hermeneutic difficulty and poses a host of questions.

Is it intended, as with other provisions relating to mayors, only to apply to directly elected mayors, or is it to include all mayors – in other words, should the section be read to mean that, when mayors are directly elected, they must be elected by registered voters in the area for which the local authority has been established? Perhaps it is not intended to apply to mayors at all, but only councillors? Conversely, since it is clear that councillors must be elected at the same time as a general election, and it is thus already clear that they are elected by registered voters within the areas for which the local authorities are established, is the provision not superfluous? Must the word “*directly*” be assumed, so that the provision reads that the members of local authorities must be “*directly elected*” by registered voters, as surely the intention was not to allow indirectly elected councillors?

¹³ However, see fn 11 above on the lack of clarity of this provision.

¹⁴ The section should read “Subject to subsection (2), elections of mayors and councillors....etc” or to be even more consistent “Subject to subsection (2) elections of all member of local authorities... etc”.

The Minister regards the clear intention of the section to be as follows: All members of local authorities must be *elected by registered voters within the areas for which the local authorities are established*. A mayor is a member of council, and therefore the mayor too must be *elected by registered voters within the areas for which the local authorities are established*. Unless the mayor is an executive mayor who has been directly elected, this then means that the mayor must be a councillor, as every councillor has *been elected by registered voters within the areas for which the local authorities are established*.

For several reasons, the conclusion of the syllogism¹⁵ immediately appears dubious.¹⁶

First: the most obvious meaning to be accorded to the conclusion of the syllogism¹⁷ is that, if mayors must be *elected by registered voters within the areas for which the local authorities are established*, it is more sensibly read to require that mayors must be elected *directly* and *as such* by *registered voters within the areas for which the local authorities are established* who cast a vote. If this obvious meaning is the correct one, then like the other provisions referred to above, the section is not intended to apply to all mayors, but only directly elected mayors.

Second: The Minister's argument could be applied to render the intention to distinguish between directly and indirectly elected mayors meaningless. To revisit section 274(5):

*An Act of Parliament may confer executive powers on the mayor or chairperson of an urban local authority, but any mayor or chairperson on whom such powers are conferred must be elected **directly** by registered voters in the area for which the local authority has been established.*

All councillors are *elected **directly** by registered voters in the area for which the local authority has been established*. Thus a councillor who is indirectly elected as mayor is still a person who has been *elected **directly** by registered voters in the area for which the local authority has been established*.¹⁸

Third: Similarly, it is not only councillors who are elected by *registered voters in the area for which the local authority has been established*. For example, an MP in a constituency within the Harare or Bulawayo Municipal Councils has likewise been *elected by registered voters in the area for which the local authority has been established*¹⁹, and thus should be eligible to decline the seat in Parliament and to stand as mayor.²⁰

¹⁵ Syllogisms are logical arguments, largely derived from the original formulation by Aristotle. They take the form of a major premise [“all mortals die”], a minor premise [“all men are mortal”], and a valid conclusion [“all men die”]. It is therefore crucial that the two premises are true statements for the conclusion to be logically valid.

¹⁶ The section gives rise to the following true syllogism: All members of a local authority must be elected by registered voters in the area for which the local authority has been established (Major Premise). A mayor is a member of a local authority (Minor Premise). A mayor must be elected by registered voters in the area for which the local authority has been established (Conclusion). The Minister presents the following false syllogism. All members of a local authority must be elected by registered voters in the area for which the local authority has been established. A mayor is a member of a local authority. A mayor must be a councillor. As will be seen, the Minister claims this conclusion by reading section 265(2) together with section 103 of the Urban Councils Act.

¹⁷ See fn 10 above.

¹⁸ The syllogism is thus as follows. All councillors are directly elected. A mayor is a councillor. A mayor is directly elected.

¹⁹ This exposes the fallacy of the syllogism given above - All members of a local authority must be elected by registered voters in the area for which the local authority has been established. A mayor is a member of a local authority. A mayor must be a councillor. The fallacy arises precisely because “all members” of the local authorities are not councillors.

Fourth: the logic of the Minister’s argument means that the phrase “*elected by registered voters in the area for which the local authority has been established*” could apply to the candidate rather than the voters. To elaborate: the Electoral Act, using almost exactly the same wording as the Constitution, requires that all councillors must be *registered voters in the area for which the local authority has been established*.²¹ Accordingly, if a person other than a councillor is elected by councillors who are all *registered voters in the area for which the local authority has been established*, the requirements of section 265(2) will have been met; i.e. the mayor would have been elected by *registered voters in the area for which the local authority has been established* – that is, by the councillors.²²

Fourth: the tense of 265(2) makes it appear as if it refers to direct elections only, and not an indirect election of a mayor by councillors. The interpretation the Ministry wishes to place on this section, relating to a subsequent indirect election of a mayor, is that a person elected as mayor must be a person who *has been* elected by registered voters within the areas for which the local authorities are established. The need to change tense to accord the section the meaning given to it by the Ministry is telling. If “*must be elected*” is retained, the implication is that the mayor must be directly elected as such by registered voters within the areas for which the local authorities are established, and not indirectly by councillors.

Thus, the interpretation that a mayor must be an elected councillor is one step removed from the exterior meaning of section 265(2). Legislation does not normally, and ought not to, require the syllogistic reasoning deployed by the Minister to arrive at its intent.

Finally in this regard, it is uncertain that the major premise, that “All members of local authorities must be elected by registered voters” is intended to include mayors at all.^{23 24}

The Constitution makes a distinction between the council and its mayor. To revisit section 274(2):

*Urban local authorities are managed by councils composed of councillors elected by registered voters in the urban areas concerned and presided over by elected mayors or chairpersons, by whatever name called.*²⁵

²⁰ The same may be said of senators for Bulawayo Province, as unlike Harare Province, Bulawayo province is coterminous with the Bulawayo Municipality – though one might question whether a person elected on the basis of proportional representation may be regarded as directly elected.

²¹ Section 119(1)(c).

²² The syllogism is thus: All councillors are registered voters in the area for which the local authority has been established. The mayor is elected by councillors. The mayor is elected by registered voters in the area for which the local authority has been established. If one reads the provision to mean that the election must be by *all* registered voters who cast a vote in an election, and not just one section of them, the councillors, a different syllogism must apply.

²³ Section 332 (the definition section of the Constitution) provides that a “member” in relation to a statutory body, provincial or metropolitan council or local authority means a person who is *appointed or* elected to a council which is a statutory body, provincial or metropolitan council or local authority. In order to reconcile this with the requirement that all members of local authorities are elected, it is necessary to assume that the phrase “appointed or” is not intended to apply to local authorities, thus reading the definition to mean that member means a person elected to a local authority, elected or appointed to a Provincial Council, or appointed to a Metropolitan Council (see fn 8 in regard to the latter).

²⁴ It is worth noting that the provision appears to include others which are clearly not intended to be included in its ambit. The Town Clerk, for example, is a member of the council but surely the intention is not that this is now to be an elected rather than appointed position. The provisions of the old constitution are thus clearer in this regard, where reference is made to members of the “governing bodies” of town councils and not simply members of town councils.

Comparing this with section 265(2):

All members of local authorities must be elected by registered voters within the areas for which the local authorities are established

From section 274(2), it will be noted that the urban local authority comprises a council. It is the councillors who are “*elected by registered voters in the urban areas concerned.*” Mayors are excluded from this phrase, and we must assume deliberately so. When 265(2) thus refers to members of local authorities “*elected by registered voters within the areas for which the local authorities are established*”, using the same phrase as in 274(2), the likelihood is that this was intended to refer to councillors only and not to mayors. If this were not the case the section should read “*Urban local authorities are managed by councils composed of councillors and presided over by mayors all of whom must have been elected by registered voters in the urban areas concerned.*” Furthermore, the Electoral Act defines a councillor as being “a member of a council”.²⁶ It would not then be unreasonable to suppose that the phrase “all members of local authorities” means “all councillors”.

The Constitution contains specific provisions relating to mayors. Had it been the intention to introduce a requirement that all indirectly elected mayors must be councillors, it would have said just that. There was no need to express this intention in the circuitous manner claimed by the Ministry. The most obvious place to have included such a provision would have been as a subsection in section 277. It seems that had this been the intention of the legislature, such a provision would have been included there. Its absence thus suggests otherwise.

The Urban Councils Act²⁷

The Ministry has determined that section 265(2), which requires that all members of local authorities must be elected by registered voters within the areas for which the local authorities are established, applies to mayors and that the election of mayors is to be governed by section 103 of the Urban Councils Act.

The relevant parts of Section 103, which the Ministry regards as governing the election of mayors, extracted, read as follows:

The [municipal] councillors ... shall... elect... one councillor or other person to be mayor.

The complete section 103 of the Urban Councils Act is to the following effect:

103. Election of mayor, deputy mayor, chairperson and deputy chairperson

(1) At the first meeting of a council after it has been established and thereafter at the first meeting held—

(a) after the general election of councillors; or

(b) after an initial election of councillors referred to in section 17(1)(c); or

²⁵ Reported in *Govt Clarifies Position on Mayors* The Herald 03.09.13.

²⁶ Section 4.

²⁷ Chapter 29:13.

the councillors present at that meeting shall, under the chairmanship of the district administrator, or, in the case of the Harare and Bulawayo municipal councils, the provincial administrator²⁸ within whose province the municipal council lies, elect—

*(c) in the case of a municipal council, one councillor **or other person** to be mayor and thereafter another councillor to be deputy mayor;*

(d) in the case of a town council, one councillor to be chairperson and thereafter another councillor to be deputy chairperson.²⁹

The Act thus distinguishes between municipal councils, for which mayors are elected, and town councils for which chairpersons are elected.³⁰ In the case of municipalities, section 103 thus provides that mayors for municipal councils are elected by councillors who may choose one of their number “or other person” as mayor. In terms of the Urban Councils Act, as it currently stands, a municipal mayor need not therefore be a councillor.

However, the argument of the Ministry of Local Government is that section 265(2) of the Constitution renders unconstitutional the phrase “or other person” in section 103 of the Urban Councils Act, as this person will not be a person who has been *elected by registered voters in the urban areas concerned*. In the view of the Ministry, only councillors fit into this category.³¹

Accordingly, on 21st August, 2013 the Permanent Secretary in the Ministry of Local Government, Rural and Urban Development, Mr Killian Mpingo, sent the following directive to Provincial Administrators:

It is underscored that in terms of Section 274 (2) as read with section 265(2) and section 275³² of the Constitution of Zimbabwe Amendment (no.20) Act 2013, mayors and chairpersons shall be elected from amongst elected councillors only.

The approach is problematic on a number of grounds.

Firstly, it is not for the Ministry to decide which parts of the Urban Councils Act, are, or are not, constitutional, and, more particularly, to hold that the phrase “or other person” must be regarded as unconstitutional. The Ministry should have approached the Constitutional Court to determine this issue. The law is deemed valid until the Constitutional Court rules otherwise. There is also a

²⁸ Although the posts of District and Provincial Administrators are referred to in numerous statutes, and they are given fairly extensive powers under these statutes, there is oddly, no legislation establishing these offices, setting out the qualifications for such offices, the powers accorded to each or conditions and terms of tenure. However, those appointed to these offices are generally empowered to enforce policy of the Ministry of Local Government in their respective areas. The intrusion of these officers, whose appointments are of dubious legitimacy, into local government elections, is contrary to the principles pertaining to devolution set out in the new Constitution - see sections 3(1) and 264(1).

²⁹ Symptomatic of the previously mentioned slovenly drafting, is that the cross referenced section 17(1)(c) was repealed in 1997, that the word “or” immediately thereafter has no business being there, and paragraphs (c) and (d) should manifestly be subparagraphs (i) and (ii). The quoted section is as it appears in an officially released electronic version. It is not known if the errors appear in the hard copy.²⁹

³⁰ Municipal authorities and status are established by the President. See section 4 of the Urban Councils Act and the Urban Councils (Municipal Status) Regulations, 49 of 1997.

³¹ A view which, it is suggested above, is false.

³² This section refers to the election of chairpersons of rural local authorities, not considered here.

presumption in favour of the constitutionality of legislation.³³ Hence it was for the Ministry to approach the courts to interdict the appointment of a person as mayor, who is not a councillor, rather than to adjudicate the issue itself and leave the challenge to the MDC-T.

Secondly, recall that the Constitution requires that “the Electoral Law”³⁴ must govern the election of mayors. The Urban Councils Act cannot be “the Electoral Law” referred to in the Constitution. The Constitution, in numerous places throughout, refers to “*the* Electoral Law” and not simply “Electoral Law”. The only place where “Electoral Law” is referred to simpliciter is as the title to Section 157 of the Constitution. However the first words thereafter are “*An Act of Parliament must provide for the conduct of elections...*”. The use of the singular in these instances suggests that what is intended is a single Act of Parliament governing electoral matters. This is confirmed in the definition section, section 332, of the constitution:

“Electoral Law” means the Act of Parliament that regulates elections in terms of this Constitution”

The Urban Councils Act also does not meet the constitutional requirement that “*the qualifications and procedure for the election of [mayors, chairpersons and councillor] must be set out in the Electoral Law*” as the Urban Councils Act also does not set out the qualifications for person to be elected to office of mayor.³⁵ The provisions relating to mayoral qualifications, previously contained in section 49, were repealed in 1997.³⁶

Thirdly, both the old and the new constitutions³⁷ contain a constitutional requirement that “*elections for members of the governing bodies of local authorities*” must take place at the same time as general elections.³⁸ If we now apply the same reasoning as that applied by the Minister to section 265(2) of the new Constitution, we would then have the following syllogism: **All members of local authorities must be elected at the same time as general elections. Mayors are members of the local authorities. Any person elected as a mayor must be a person elected during a general election.** If this is then read with section 103 of the Urban Councils Act in the same way, then it must be claimed that the requirement for “harmonized” elections must likewise mean that the mayor must be a councillor and not some “other person”, as only councillors will have been elected at the same time as the general election. In other words, the requirement for harmonized elections, deploying the same logic, likewise renders the phrase “or other person” unconstitutional. Yet this reasoning was *not* applied in 2008. The Minister of Local Government allowed people who were not councillors, for example, in the case of Harare municipality,³⁹ to be elected as mayors by councillors. If the reasoning now applied by the Ministry to section 103 of the Urban Councils Act as read with section 265(2) of the Constitution were correct, all the mayors indirectly elected in 2008 were in their posts unconstitutionally.

The Electoral Act

³³ *Capital Radio (Pvt) Ltd. v Broadcasting Authority of Zimbabwe and Others* S.C. 162/2001 at p44.

³⁴ Section 274(4).

³⁵ It is, however, possible (just) to argue that if the Ministry’s contention that mayors must be councillors is correct, this then sets out at least one qualification.

³⁶ The Act does contain some detail as to the procedure to be adopted (section 102).

³⁷ Section 58(1) and 158(2) respectively.

³⁸ Section 58(1) and sections 158(2) and 277 respectively.

³⁹ Muchadeyi Masunda was nominated by the MDC-T for the post and dutifully elected as such by the MDC-T dominated council.

Part of the Electoral Act⁴⁰ does, as required by the Constitution, in fact provide for the election of mayors. However, the provisions for mayors elected under the Electoral Act are clearly intended to apply to mayors elected directly during the course of a general election. The Electoral Act does not set out the qualifications of mayors as required by the Constitution. Furthermore, Part XVIII of the Electoral Act on - “*Provisions relating to Local Authority Elections*” – is stated to apply only “to elections to the office of mayor *in terms of* the Urban Councils Act”, even though the terms of the Act to which reference is intended are clearly those which pertained to the election of “executive” mayors and have long since been repealed. The Electoral Act also makes no provision for the indirect election of mayors.

In order to assert compliance with the constitutional requirement that “the Electoral Law” must provide for the election of mayors, the claim would need to be made that this constitutional requirement was not intended to apply to indirectly elected mayors. But if one were to exempt indirectly elected mayors from this provision, section 274(4), then one could, with equal justification claim that section 265(2) is likewise not intended to apply to indirectly elected mayors, and thus not intended to render the phrase “or other person” in section 103 of the urban Councils act unconstitutional

From these provisions in the Constitution, it seems that what should have happened before the July 2013 election is that the Electoral Act ought to have been amended to take section 274(4) of the Constitution into account. This was not done.

However, many of these problems could have been sidestepped, and lapses into unconstitutionality avoided, if mayors *had* been directly elected during the course of the 2013 general election. This could have been done if mayors were regarded as having executive authority under the Urban Councils Act.⁴¹

The question as to what constitutes “executive” mayors is obscure. The obvious intention is that the reference to executive mayors is intended to allude to the situation when (prior to the amendments of 1997) the Urban Council Act conferred more executive authority on mayors than at present. Nonetheless, mayors still appear to retain residual executive authority under the Urban Councils Act and are more than ceremonial mayors charged with cutting ribbons and kissing babies. For example, in terms of section 104 of that Act, they preside over council meetings and have a casting vote, section 110 implies authority to execute contracts, and section 139 confers the power to suspend the Town Clerk. If this constitutes executive authority, as it seems to, then Section 274(2) applies:

An Act of Parliament may confer executive powers on the mayor or chairperson of an urban local authority, but any mayor or chairperson on whom such powers are conferred must be elected directly by registered voters in the area for which the local authority has been established.

The Electoral Act provides for the direct election of mayors and thus mayors could have been elected during the general election of 2013. It would need to be argued that the qualifications of

⁴⁰ Part XVIII section 113 *et seq.*

⁴¹ Section 103 the Urban Councils Act has been construed as providing for the *indirect* election of mayors. Thus, if mayors have executive authority under the same Act, the section may be held to be unconstitutional. However, it is also clear, that the Urban Councils Act cannot now be reconciled with the Electoral Act in regard to mayoral elections of any kind.

mayors, which the Constitution requires be set out in the Electoral Law, are those set to qualify for election as a councillor.⁴²

Conclusion

What then is to be made of this legislative quagmire? It seems that what the legislature intended (but did not express) is that the requirement, that the election and qualifications of mayors must be governed by the Electoral Act, was not intended to apply to indirectly elected mayors. Section 265(2), requiring that all members of local authorities must be elected by registered voters within the areas for which the local authorities are established, was likewise not intended to apply to indirectly elected mayors. There was no intention to change the provisions for the election of indirectly elected mayors under section 103 of the Urban Councils Act. The true intention of section 265(2) may be determined by legislative history and the apparent “mischief” that legislation seeks to cure⁴³ The Urban Councils Act provides that councils are composed of both elected councillors and persons appointed to represent “special interests” such as the disabled.⁴⁴ The intention of section 265(2) of the Constitution was thus clearly to render the appointment of “special interest” councillors unconstitutional to prevent the appointment by central government of councillors who do not have support in the area of the local authority.

The provision may thus not have been intended to encompass mayors at all. It is then a moot point (as the provision does refer to *all* members of local authorities) as to whether this intention is accomplished if democratically elected councillors from the area of the local authority elect the mayor, or whether the mayor must be a person directly elected by voters in the area of the local authority. Since there is a presumption in favour of constitutionality, the former must be deemed the more likely.⁴⁵

This analysis has been necessitated by the claim that the Urban Councils Act provides for the election of mayors as mandated by the Constitution. It manifestly does not. Neither does the Electoral Act. Yet on 17th September, 2013, mayors countrywide (and chairpersons of town councils) were elected by councillors under the aegis of Provincial and District Commissioners, in accordance with the interpretation placed on the Constitution and section 103 of the Urban Councils Act by the Ministry of Local Government. These mayoral appointments appear to be unconstitutional. The Ministry of Local Government ought to have approached the Constitutional Court to obtain clarity on the matter. The Constitutional Court could then have ruled that section 103 of the Urban Councils Act is unaffected by the new Constitution, or held that the Constitution requires specific legislation to be enacted for the election of mayors. It would then have been appropriate to have interdicted these mayoral elections on an urgent basis and placed government on terms to ensure the necessary legislation is enacted. That is what ought to have happened. It is more likely, given the confused nature of the law, that the Court would have held its finger to the political wind, and agreed with the Minister – in a manner dressed in the language of the law, of course.

⁴² The Urban Councils Act defines an “elected councillor” to include “a person elected or appointed as a mayor or deputy mayor”.

⁴³ *Registrar General of Elections and Others v Tsvangirai* S.C. 30/2002 p13 *et seq.*

⁴⁴ Section 4A of the Act. The provision was abused by the Minister whose appointees were clearly placed in the councils to represent the interest of ZANU PF and none other.

⁴⁵ The MDC-T sought to direct the councillors as to whom should be elected as mayors in MDC-T controlled municipalities. This “guided” democracy by a central authority is certainly not in line with the principles of devolution set out in the constitution

However, having waded through the above, at the very least, the statement by Ignatius Chombo that:

“It’s the MDC-T that changed the whole thing saying they should be no outsiders and that is now in the Constitution. You have to choose from the councillors elected in that area under jurisdiction. There is nothing ambiguous; it’s very clear.”⁴⁶

and the article in the Herald⁴⁷ in which constitutional law expert, and now also aspirant politician, Dr Lovemore Madhuku, is said to have “*expressed shock at the ignorance of the Constitution*” on the part of the MDC-T on account of its refusal to accept the interpretation of the effect of section 265(2) advanced by the Minister and Madhuku, maintaining that the section “*admits of no other interpretation*” and that he:

“was deliberately keeping quiet in the hope that some lawyers in the relevant political circles could raise that key provision [section 265(2)]. They were neglecting or choosing to be dishonest and we have to set the record straight.”

may be considered by the reader not to be entirely accurate. Phew!

⁴⁶ “*I will Block Tsvangirai Mayors*” [Chombo] Newsday 28.08.13. This is a plausible exposition of the “mischief” section 265(2) sought to cure.

⁴⁷ *MDC-T Offside on Mayors: Madhuku* The Herald 03.09.13.