



HOW TO LOSE AN ELECTION AND STAY IN POWER

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An in depth legal analysis of Zimbabwe in the post March 29 2008 Election period.

This paper is an independent follow up from the IDASA reports An Inconvenient Truths part I and II, released in April 2008

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On the 18th April, 2008 President Robert Mugabe officiated at ceremonies commemorating Zimbabwe's 28th year of independence. Flanked by service chiefs throughout the militaristic displays, Mugabe gave not so much as a flicker of acknowledgement that but three weeks previously the electorate had indicated that they would prefer another person to carry out this role.

The semiotics of the occasion were clear. In Zimbabwe, the exercise of power is not the end of a trajectory which commences with the expression of democratic preference – more than that, the expression of democratic preference is utterly irrelevant to the exercise of power. In speeches prior to the March 29th poll, Mugabe made it clear that he regarded the election as simply an opportunity to show fealty and obeisance to power, and then to reap promised and consequent rewards. A vote for anyone other than the ruling ZANU PF party's candidates would, in his words, be "a wasted vote"². Supported by statements from service chiefs that they would not recognise or accept the opposition Movement for Democratic Change's candidate Morgan Tsvangirai as president if he won³, Mugabe also stated on numerous occasions that power would "never, ever" be yielded to the MDC and Morgan Tsvangirai.

Elections for the presidency, the two houses of parliament and local government were held simultaneously in March 2008. Presidential candidate Morgan Tsvangirai garnered 47.9% of the approximately 2 500 000 votes cast, against Mugabe's 43.2% - a convincing win, but one which did not take Tsvangirai above the 50 plus one threshold to prevent a run off between these two front runners of four candidates⁴.

¹ I am grateful to Veritas for some of the legislative material referred to and information supplied.

² www.guardian.co.uk 27/03/08.

³ See zimbabwejournalists.com report 13/03/08.

⁴ The other two candidates Simba Makoni and Langton Towugana won 8.3% and 0.6 percent of the vote respectively. Two other prospective candidates Chiota and Shumba had their papers rejected by the Nomination Court, and have appealed such rejection to the Supreme Court. Judgment is awaited.

ZANU PF lost its majority in the House of Assembly for the first time since independence. The combined MDC won 109 of 210 House of Assembly seats, an independent candidate⁵ won one seat and ZANU PF won 97 seats. Due to the death of candidates after nomination day, three by elections remain to be held in MDC strongholds (see below). The 60 constituency seats in the Senate were split 50:50 between the two MDC factions and ZANU PF. As before, the MDC made a clean sweep of most urban local government councils and gained control of several previously ZANU PF dominated rural councils.

Despite this loss at the polls, which Mugabe himself referred to as “a disaster” when addressing the party’s politburo, Mugabe has done everything possible to emphasise a disjuncture between the expression of democratic preference and his hold on power.

This paper examines the juridical mechanisms deployed to achieve this and examines their legality in respect of the Presidency, Parliament and Local Government. In so doing, it brings together the legal analyses and concerns raised in two other papers, *An Inconvenient Truth Parts I* and *II*⁶ and adds further issues which have arisen since those papers were compiled.

THE PRESIDENCY

Background

Until Constitutional Amendment Number 18⁷, the term of office for the President was six years, against five years for that of parliament. The last presidential election was held on the 11th March 2002. The March 29th date for the presidential election thus extended Mugabe’s six year term by 18 days⁸. Mugabe’s initial plan to retain power beyond March 2008, despite obvious and growing disaffection with his governance, was to extend his term of office under the guise of “harmonising” parliamentary and presidential elections, ostensibly in the interests of fiscal prudence. In terms of this scheme, the presidential election would be held when the

⁵ Jonathan Moyo, former ZANU PF critic, then ZANU PF Minister of Information to whom much of Zimbabwe’s draconian legislation enacted during his term of office is attributed, and after sacking from Mugabe’s government, a born again ZANU PF critic and Independent MP for Tsholotsho North.

⁶ Available at www.kubatana.net

⁷ This is something of a legislative misnomer as it implies that 18 changes have been made to the Constitution adopted at Lancaster House in 1980. In fact each of the amending Acts contained a plethora of changes.

⁸ On the legality of this see fn 11 below.

parliamentary elections were due in 2010. This would give Mugabe a further two years in office without a test of his popular mandate.

However, the plan was scuppered by disgruntled members of his own party when it was put to ZANU PF's plenary Congress in December 2006. It was replaced by a constitutional amendment introducing provisions that if the president died or retired while in office, the two houses of parliament would sit as an electoral college to appoint a successor⁹. Since ZANU PF parliamentarians held a clear majority in parliament following the 2005 elections and subsequent Senate election and had no history of defying the executive generally, let alone Mugabe, it was believed that the intention of this provision was to allow Mugabe to anoint a successor. As part of this plan, the House of Assembly seats were increased from 120 to 210 and the Senate seats from 50 to 93¹⁰, the motivation probably being to dilute both the opposition's holding in the Houses and seats held by disgruntled members of his own party whose support could not be assured. In accordance with this scheme, the "harmonisation" was still effected but by advancing the parliamentary elections, rather than deferring the presidential¹¹. Attempts by some members of ZANU PF to propose a candidate other than Mugabe (who was perceived correctly, as it transpired, to be an electoral liability) for the presidential race were (unprocedurally) squashed by Mugabe's supporters. Simba Makoni thus broke away from ZANU PF and stood as a candidate for the presidency on an independent ticket, hoping to attract supporters from both the MDC and ZANU PF. There were thus three credible contenders for the presidential election, which until then, had always been a two horse affair.

This background reveals numerous juridical manoeuvrings prior to the elections, all of which were designed to retain Mugabe's power over the office of the presidency. Mugabe has been afforded considerable room for further such manoeuvres through poor legislative drafting of electoral laws and constitutional provisions.

⁹ Section 28(3)(b)

¹⁰ As part of Constitutional Amendment No 18

¹¹ The actual amendment did not require this simply stating in section 29 that the term of office of the president "shall be five years concurrent with the life of parliament". Parliamentary elections were only due in 2010. Despite the fact that Mugabe had been elected on 11th March 2002, one could interpret this provision to mean that his term of office was now deemed to have commenced with that of the 2005 parliament. The old six year term expired on 10th March, 2008. By setting the election date for 29th March, 2008 the amendment, under the interpretation suggested, effectively extended Mugabe's six year term by 18 days.

The Presidential Election

After it became apparent that the presidential race would have three strong contenders, almost a week passed before anyone noticed the provisions of sub-sections 110(3) and 110(4) of the Electoral Act¹².

110 Determination and declaration of result of election to office of President

(1)

(2) ...

(3) Where two or more candidates for President are nominated, and after a poll taken in terms of subsection (2) no candidate receives a majority of the total number of valid votes cast, a second election shall be held **within twenty-one days after the previous election** in accordance with this Act.

(4) In a second election held in terms of subsection (3) only the two candidates who received the highest and next highest numbers of valid votes cast at the previous election shall be eligible to contest the election.

While it is only implicit under subsection 110(3) that a candidate requires an absolute majority (i.e. 50% plus 1 vote) to win, the wording of subsection 110(4) puts this beyond doubt. The provision was brought into electoral law with the introduction of the executive presidency in 1987¹³. However it was overlooked by those who drafted and included the Second Schedule in the new Electoral Act of 2004¹⁴. That Schedule reads as follows:

SECOND SCHEDULE (Section 110)

DETERMINATION AND NOTIFICATION OF RESULTS OF PRESIDENTIAL ELECTION

1..

2..

3. Determination, declaration and notification of result of Presidential poll

¹² Chapter 2:13

¹³ Constitutional Amendment No 7.

¹⁴ As will be seen there are several other instances where the drafters neglected to cross reference other sections of the Act when introducing changes. Indeed, the Second Schedule itself contains a further error, by referring in paragraph 3(2) to section 51, when it clearly ought to refer to section 50.

(1) Subject to subparagraph (2), after the number of votes received by each candidate as shown in each constituency return has been added together in terms of subparagraph (3) of paragraph 2, the **Chief Elections Officer shall forthwith declare the candidate who has received—**

(a) where there are two candidates, the greater number of votes;

(b) where there are more than two candidates, **the greatest number of votes;**

to be duly elected as President of the Republic of Zimbabwe with effect from the day of such declaration.

Accordingly, the Second Schedule directly contradicts the absolute majority requirement of section 110(3), stating unambiguously that the candidate with simply the greatest number of votes will be declared duly elected when there are more than two presidential candidates. In a case such as this, where a Schedule to an Act contradicts the main body of the legislation, a principle of interpretation of statutes requires that the main body of the Act prevails¹⁵.

In view of this contradiction Zimbabwe Lawyers for Human Rights, wrote to the Zimbabwe Electoral Commission (ZEC) requesting clarification as to which of these two provisions ZEC intended to follow. The reply was that a run-off would be held within 21 days of polling day in the event that no candidate received an absolute majority. Given that the 21 day requirement was subsequently ignored, it is questionable whether the run off would in fact have taken place if Mugabe had gained more votes than Tsvangirai in the first poll, though less than 50% plus one. The actual results precluded that option.

Delaying the announcement of the result on logistical grounds¹⁶

The first mechanism by which Mugabe extended his term of office was by a protracted delay in announcing the results. A president remains in office after an election until the entry into office of the next elected president¹⁷. The person is duly elected on the day a winner of the poll is declared¹⁸ and, after taking the oath of office, must assume office within 48 hours of being

¹⁵ Du Plessis *The Interpretation of Statutes* (Butterworths 1986) at p 126

¹⁶ This section is a summary of a part *An Inconvenient Truth* Part I, and in part repeats some portions verbatim.

¹⁷ Section 29(1) of the Constitution.

¹⁸ Paragraph 3 of the second Schedule to the Electoral Act cited above.

declared duly elected¹⁹. A delay in announcing the result effectively suspends these provisions. In the event, it delayed the run-off.

Two tactics were deployed to this end. ZEC disingenuously announced that with over 9 000²⁰ polling stations, the task of collating the figures was a difficult and time consuming exercise and that results were still awaited. This explanation was inherently implausible. The procedure for the counting of the vote, the announcement of the results and the time frame for the process is reasonably straight forward and is set out in the Second Schedule and sections 61 to 67 and 112 of the Electoral Act. ZEC itself published a Notice setting out the procedure to be adopted²¹. The procedure indicated by ZEC is largely correct and is as follows.

The process for the counting of the votes begins “**immediately** after the close of the poll”.²² The candidate or their polling agents may be present at the counting of the votes. After the counting is completed the presiding officer shall “**without delay**”²³ and in the presence of the candidates or polling agents:

- a) record the number of votes for each candidate in each of the four elections on the polling station returns;
- b) display the completed polling station returns to each candidate or his or her polling agent and invite them to sign the same;
- c) affix copies of the returns to the outside of the polling station;
- d) send the returns, certified by the polling officer to the Ward Collation Centre.

At the Ward Collation Centre the polling station returns are collated and verified in the presence of the candidates or their polling agents. The presiding officer then repeats the steps set out in a) to c) above. Accordingly, returns displaying the results of all four elections up to the level of that Ward are displayed outside the Ward Collation Centre. The presiding officer declares the winner of the most votes in the council poll duly elected. “**Immediately**” after posting the

¹⁹ Section 28(5) of the Constitution.

²⁰ The number of polling station varies from report to report but is never less than 9000. The list published by ZEC for the run off is 9 231 polling stations and there has been no announcement of a reduction from the first round.

²¹ *Zimbabwe Electoral Commission: Movement of Results* undated ZEC Notice.

²² Section 61 of the Electoral Act Chapter 2:13

²³ Section 64 of the Electoral Act Chapter 2:13

results outside the polling station the presiding officer must transmit the returns to the constituency elections officer, who will declare the House of Assembly results.

The process is repeated by the constituency elections officer "on receipt of the polling station returns". The only part of the process where a time is not stipulated is that requiring the constituency elections officer to give reasonable notice to the candidates of the time and place for the collation and verification of the returns. Since there is nothing to be done prior to the verification and collation of the returns, it is implicit that the notice period is no longer than that required to give the candidates sufficient notice and time to be at the venue, a matter of hours, not days. The constituency elections officer is then required to "**forthwith**" declare the candidate with the most votes duly elected to the House of Assembly. The results for all the elections are posted outside the Constituency Collation Centre, including the results for the concluded count pertaining to the local government elections.

The Second Schedule to the Act sets out special procedures in relation to a presidential election. A Constituency Elections Officer, after completing the processes required at constituency level, is required to "**forthwith**" dispatch the returns to the Chief Elections Officer at the National Collation Centre. According to the Second Schedule "**on receipt of** the constituency returns", the Chief Elections Officer dispatches "reasonable" notice in writing to the candidates of the time and place for the verification and collation of the results. Once again, since there is nothing required of the Chief Elections Officer prior to giving such notice, and by the use of the word "time" rather than "date" it is implicit that the notice period will be a matter of hours rather than days. When the number of votes in the **constituency** returns have been added together the Chief Elections Officer shall "**forthwith**" declare the person with the greatest number of votes as the winner. This declaration must be read subject to section 110(3) which requires that the winner must obtain an absolute majority (i.e. 50% of the total votes cast, plus one vote) failing which there will be a run off of the two candidates with the highest number of votes.

From these procedures it is clear that the legislation contemplates an unbroken and fluid sequence with each step taking place "immediately", "forthwith", "without delay", "on receipt of" or "as soon as may be" after the other. The process thus must only take so long as is

required to complete each of the prescribed steps. The average polling station would have between 265 and 530 ballots to count in each of the four elections – the average maximum thus being 2 120 ballots in each polling station²⁴. The counting process should have been completed within a few hours, and most polling stations had indeed finished the count and completion of the returns by the early hours of Sunday morning at the latest²⁵.

The approximately 43 polling stations in each constituency should have sent their returns immediately to the Ward Collation Centres, nine or ten per constituency, meaning that each Ward Collation Centre would receive returns for the four elections from four or five polling stations. Accordingly, once the counting process is complete, the work of those tasked with collation at the succeeding levels is not particularly onerous. The Ward Collation Centres would thus receive 16 to 20 returns to verify and collate. The process should not have taken much longer than an hour.

Each Constituency Elections Officer would have received the result of the Local Government Election and the returns for the remaining three elections from the nine or ten Ward Collation Centres giving them 27 or 30 returns to verify and collate, of which only nine would relate to the House of Assembly Election. The Chief Elections Officer would receive the results of the Local Government Election, the result of the House of Assembly Election and 210 returns from the Presidential Election giving him 210 returns to collate. Accordingly, the results for all four polls should have been known late on Sunday night (the 30th March). And reports suggest that they were, but not released.

As stated by Justice Uchena in a court application to compel the release of the results application (discussed below):

The work to be done by the Chief Elections Officer is made simpler by the counting and collation done at polling stations and constituency levels. All he has to do is verify and display the constituency returns and add the figures thereon to identify the winning candidate who he should forthwith declare the President of Zimbabwe (at page 11 of

²⁴ See *An Inconvenient Truth* Part I (see above) for details as to how these figures were arrived at.

²⁵ As will be seen below, legislation relating to local government provides that councillors are deemed duly elected the day after the poll, thus contemplating a counting period shorter than 48 hours.

ZEC did not comply with the procedures it had itself spelt out. Firstly, ZEC arrogated to itself the right to announce the results for the Houses of Parliament, despite the fact that the Constituency Elections Officers had announced the results forthwith as required at constituency level many days before the results were announced by the National Command Centre and all that was required was for these results to be made more widely known. When ZEC was challenged on this point in the MDC's court application, the Chairperson of ZEC conceded that the results are announced at constituency level and that ZEC was merely assisting the nation by revealing the results nationally.

The results were released painfully slowly and initially for the House of Assembly only, at the rate of about 40 a day. Furthermore, the manner in which they were released was both curious and revealing. The results were released as if ZEC were dealing a pack of cards to the two parties, adopting a one each approach. Hence, at the end of each broadcast there was a rough parity of seats won between the two parties. In order to accomplish this, ZEC must have had the results of all constituencies to know that the process could be continued until all results had been disclosed. Yet ZEC sought to explain the delay by maintaining that results were still awaited from far flung polling stations.

In view of the "one each" approach this explanation was already implausible, but rendered more so by the fact that the results released bore no relation to their distance from the command centre. Results from outlying rural areas were given well in advance of results for constituencies in Harare. Given that the National Command Centre must have had all the House of Assembly results in order to release them in this manner, the presidential returns must also have been received and the Chief Elections Officer was obliged to proceed as described above. He did not.

It is clear that the process was deliberately delayed in order to avoid disclosure of the result of the presidential poll. After the House of Assembly results had been released ZEC then

announced that it would not release the presidential poll result until the senate result had been released. There was no legal basis for this added delay.

Delaying the announcement of the result due to a recount

When the logistical excuse could no longer be sustained, and the Parliamentary results had all been released with no sign of impending disclosure of the presidential result, on the 6th April, 2008, lawyers for the MDC filed an urgent application to the High Court to compel the disclosure of the result²⁶. In its opposing papers ZEC indicated that it was considering a recount of the tally at several polling stations following complaints from various ZANU PF candidates. ZEC pointed out that a single vote could affect the result of the presidential election and that the presidential result thus could not be released until this process was complete.

Section 67A of the Electoral Act was relied on for this assertion, and it is useful to reproduce the entire section below:

67A Recounting of votes

- (1) Within forty-eight hours after a constituency elections officer has declared a candidate to be duly elected in terms of section 66(1), any political party or candidate that contested the election in the ward or constituency concerned may request the Commission to conduct a recount of votes in one or more of the polling stations in the ward or constituency.
- (2) A request in terms of subsection (1) shall—
 - (a) be in writing, signed by an appropriate representative of the political party or candidate making the request; and
 - (b) state specifically the number of votes believed to have been miscounted and, if possible, how the miscount may have occurred; and
 - (c) state how the results of the election have been affected by the alleged miscount.
- (3) On receipt of a request in terms of subsection (1) the Commission shall order a recount of votes in the polling stations concerned if the Commission considers there

²⁶ *MDC & Morgan Tsvangirai v Chairperson of ZEC and Chief Elections Officer* E/P24/08

are reasonable grounds for believing that the alleged miscount of the votes occurred and that, if it did occur, it would have affected the result of the election.

(4) The Commission may on its own initiative order a recount of votes in any polling stations if it considers there are reasonable grounds for believing that the votes were miscounted and that, if they were, the miscount would have affected the result of the election.

(5) Where the Commission orders a recount of votes in terms of this section, the Commission shall specify—

(a) the polling stations whose votes are to be recounted and, where appropriate, the votes that are to be recounted; and

(b) the date on which, and the place and time at which the recount is to take place; and

(c) the procedure to be adopted for the recount;

and shall take all necessary steps to inform accredited observers and all political parties and candidates that contested the election of its decision and of the date, time and place of the recount.

(6) Accredited observers and representatives of candidates and political parties that contested the election shall be entitled to be present at any recount ordered in terms of this section.

(7) The Commission's decision on whether or not to order a recount and, if it orders one, the extent of the recount, shall not be subject to appeal.

Section 112 must also be noted:

112 Application of Parts XIII, XIV and XV

Subject to this Part, the provisions of Parts XIII (other than sections *sixty-six*, *sixty-seven* and *sixty-eight*, for which the provisions of the Second Schedule are substituted), XIV and XV, shall apply, with any changes that may be necessary, to an election to the office of President.

Section 67A falls within Part XIII and thus applies *mutatis mutandis* to a presidential election. Given that the Chairperson of ZEC is a judge, his interpretation of section 67A was remarkable.

As was pointed out in argument, section 67A (1) only applied if a complaint had been brought within 48 hours of the declaration of the result. The whole point of the hearing was that no result had been declared in the presidential election. On this basis alone, the application should have succeeded. However the lawyer, arguing on behalf of ZEC then introduced a new averment and pointed out that subsection 67(A) (4) allowed ZEC to undertake a recount on its own initiative. Even though this explanation for the delay had not been advanced by ZEC itself, the Judge accepted this “evidence from the bar” (which he ought not to have done) and ruled that ZEC was entitled to conduct the recount. A non-sequitur then followed. The Judge went on to rule that “the reason proffered by [ZEC] for their failure to timeously announce the presidential results is legally valid”.

Two key points arise from this ruling. Firstly, as noted, ZEC had not stated that it was undertaking a recount on its own initiative under 67(A) (4). It stated that it was considering an application for a recount by several ZANU PF parliamentary candidates. Secondly, there is nothing in the Act which indicates the sequitur that if a recount is under way the result must or may be withheld. Indeed, the contrary is indicated by the fact that where the recount is at the instance of a candidate it can *only* be ordered *after* the results have been announced. Although such a criterion is not stated for subsection 67A (4) there is certainly no reason to imply or infer the reverse.

Furthermore, the Second Schedule to the Act makes it mandatory once the verification process and collation of the result is complete that the Chief Election officer announces the result “forthwith”. ZEC thus sought to portray the recount as part of the (incomplete) process of verification. However, the nature of the verification process is spelt out in sub-section 65(2) and refers simply to presidential candidates checking the integrity of the constituency returns sent to the Chief Election Officer, that is, that the numbers have not been altered en route and that the 210 returns to be added up are the same documents signed by their representatives at constituency level. The process is outlined as being simply the display of the returns to the candidates or their agents and allowing them to make notes relating to the return. It does not refer to a forensic audit of the count, as ZEC implied.

In fact close analysis reveals that 67A is a legislative anomaly. It was inserted into the Act shortly before the elections²⁷. If one revisits section 112, above, it will be noted that sections 66, 67 and 68 of the Electoral Act are not to apply to presidential elections. It is quite likely that in inserting section 67A, the draftsman neglected to cross reference section 112 and include section 67A into the sequence. It is thus most likely that section 67A was not intended to apply to presidential elections at all.

Section 67A is anomalous in several other respects. Section 67A (4) is silent as to the purpose for which a recount may be undertaken. In the case of a recount requested by a parliamentary candidate under 67A (1), the request must be made within 48 hours of the declaration of the result. Section 66(4) provides that a declaration of a parliamentary candidate is final and cannot be reversed other than by way of electoral petition. Accordingly, a recount by ZEC under 67A (1) cannot be to reverse the result. The purpose of a recount could only then be in order to provide supporting evidence for an electoral petition challenging the result which must be brought by a candidate within 14 days of the declaration of the result or to institute or support criminal proceedings against those responsible for the miscount.

For what reason then can ZEC initiate a recount under 67A (4)? The Second Schedule to the Act requires that the Chief Elections Officer announce the presidential result “forthwith” upon the verification and collation of the constituency returns. Nothing in section 67A (4) suggests that this process may be arrested because ZEC has initiated a recount. However, we are obliged, as was Justice Uchena, to read section 67A in conjunction with subsection 70(4). Subsection 70(4) provides that “**No person**” shall open any sealed ballot box or sealed packet of electoral material “or permit any such packet to be opened”, **except in terms of an order of the Electoral Court**, which is a court established in terms of the Act especially to deal with electoral matters. It makes no exception for ZEC officials acting in terms of section 67A (4). “No person” must be taken to mean precisely that. “No person” includes ZEC staff. Had the section been intended not to include ZEC officials acting under section 67A (4), it would have used words such “as other than in the case of” ZEC officials so acting, or would have said “subject to section 67A”. It does not.

²⁷ By section 48 of Act 17 of 2007

Accordingly, in order to open a ballot box ZEC must be in possession of a court order authorising the opening of that particular ballot box. To obtain such a court order ZEC needs to apply to the Electoral Court. But the Electoral Court will issue an order permitting the ballot boxes and sealed electoral material to be opened in **only** two prescribed circumstances. The first is for the purposes of determining an election petition brought before it. ZEC cannot bring an election petition. Only a candidate in an election may do that. ZEC thus cannot obtain an order to open ballot boxes by bringing an electoral petition. The second basis for the Electoral Court to issue an order permitting a sealed ballot box or packet containing electoral material to be opened is when this must be done to “for the purpose of instituting or maintaining a prosecution for an offence in relation to an election or return”. Thus ZEC may only open the ballot boxes and recount the ballots for the purposes of criminal proceedings.

Since the ballot boxes must be opened to undertake a recount, and it may only obtain an order to do so for the purposes of criminal proceedings, ZEC, by necessary implication, could not order a recount to reassess the presidential result. That may only be done by way of a petition under section 111. The recount therefore could not provide an explanation for the delay in announcing the result, as the recount legally could not affect the initial count. Uchena J. ignored section 70 and its implications for section 67A (4).

Shortly after this application to compel the release of the results, a second urgent application was lodged at the High Court to declare the recount itself unlawful. The court declined to hear the matter on procedural grounds, ruling that the issue was not urgent, discounting the prejudice that would arise as a result of the earlier Uchena J. ruling that the recount would delay the release of the presidential result.

The recount

The recount was clearly unlawful. Aside from the fact that no court order had been obtained to open the ballot boxes as required by section 70, the legal criteria set out in section 67A (4) had not been met.

Before ZEC could initiate a recount, four other conditions had to be met:

1. ZEC had to believe that there were reasonable grounds for believing that a miscount occurred at **polling station** level [section 67A (4) and 67A (5)].
2. ZEC had to state the specific polling stations where a miscount of this nature was believed to have occurred and **in which election** the miscount occurred - Local Government, House of Assembly, Senate or Presidential [section 67A(5)(a)]
3. ZEC needed to have **reasonable grounds** for believing that the miscount was significant enough to have affected **the result** of the election [section 67A (4)].
4. ZEC had to undertake and complete the recount within 14 days of the declaration of the result in all constituencies where election petitions had not been filed [section 70(3) (a)].

Each and every one of these grounds had to pertain before any recount ordered by ZEC could be considered lawful.

On Saturday 12th April, 2008 Justice Chiweshe issued GN 58A/2008 in the following terms:

*"It is hereby notified, in terms of section 67A of the Electoral Act that the Commission [ZEC] being of the opinion that reasonable grounds exist for believing a miscount of votes occurred that would have affected the result of the elections concerned, has ordered that a recount in respect to Presidential, Senate, House of Assembly and Local Authority Elections be undertaken at the Constituency Centres at dates and time indicated in the Schedule in respect of votes polled at **all polling stations** that were counted at the Scheduled constituency centres".*

This was a convoluted way of saying that there would be a recount of every vote for every election at every polling station in the listed constituencies. A schedule of 23 constituencies followed. There were 1092 polling stations where a recount was to take place²⁸. With one ballot box for each of the four elections this makes at least 4 368 ballot boxes to be opened and recounted²⁹.

²⁸ Source www.kubatana.net

²⁹ 1092 x 4

In terms of section 67A(4), ZEC must have reasonable grounds for believing that a miscount occurred at a particular polling station in relation to a particular election. Accordingly, Chiweshe's notice suggests that ZEC had "reasonable grounds" (in other words objectively credible information) that a miscount occurred in all 1092 polling stations and in each and every one of the four elections at each of these polling stations. This in turn suggests it had evidence pertaining to each and every one of 4 368 ballot boxes that the ballots in each had been miscounted. The Act does not permit a recount on the basis of a belief or information that the *constituency* total is somehow incorrect. The suspicion must relate to a specific election at a specific polling station. In order to comply with the Act and to initiate a recount of this extent, ZEC must have reasonable information relating to a miscount in respect of 4 368 ballot boxes. This is inherently implausible.

ZEC's argument might be that, as reported, ZANU PF filed complaints in respect of 22 constituencies, and the MDC in respect of one³⁰. Although all but five or six of these were filed outside the 48 hour time limit for a recount at the instance of a candidate [in terms of section 67A(1)], ZEC might say the complaints nonetheless revealed evidence sufficient for it to order a recount on its own initiative under section 67A(4). Such an argument does not close the credibility gap however. A candidate applying for a recount under 67A(1) must state the polling station where the miscount was believed to have occurred, the number of votes believed to have been miscounted in relation to the particular election in which he or she was a candidate and the believed manner in which the miscount occurred, if known. Thus such an argument by ZEC would require one to accept that at least one candidate in each of the four elections provided credible evidence of a miscount pertaining to every single polling station, and pertaining to all four elections in 23 constituencies.

Put another way the argument requires there was evidence provided by candidates of about 4 368 instances of miscounting - a singularly unlikely proposition. This was clearly not the case. Indeed, the MDC's election officer advised that the MDC's complaint did not relate to the

³⁰ See Zanu PF retains Goromonzi West, April 23, 2008 - <http://www.kubatana.net/html/archive/elec/080423herald.asp?sector=ELEC> or <http://www.herald.co.zw/inside.aspx?sectid=33522&cat=1>. Some reports suggest that MDC filed complaints in respect of two constituencies, others only one.

constituency, Goromonzi West, as a whole but only to one ward within that constituency³¹. The basis of the complaint was a large discrepancy between the number of votes cast in the presidential election and the other three elections. There was thus not even the slightest basis for a constituency wide recount for Goromonzi West.

ZEC was also required to believe, again on reasonable grounds, that the miscount **was significant enough** to have affected **the result**. When the recount was completed the results of all three elections remained unchanged; they were unchanged for the Senate, the House of Assembly, and local authorities. In several instances it was singularly unlikely that ZEC could have genuinely believed that there was any possibility of the recount affecting the result. In many instances the margin between the candidates was too wide to render this plausible.

The margin in Chiredzi North was huge and a miscount of some 15 735 votes was required to affect the result in the House of Assembly Election. The miscount must be believed by ZEC to have affected **the result**; i.e. who emerges as the winner, not simply the percentages polled for each candidate as any error would do that. If ZEC was using evidence supplied in ZANU PF's complaints as its basis for its decision to order a recount in relation to polling for the House of Assembly seat in Chiredzi North, as suggested, then it appears that ZEC believed that ZANU PF had supplied them with credible evidence that a miscount had occurred in relation to this parliamentary seat of over 15 735 votes **and** that the result should have been a victory for the MDC candidate. It seems unlikely that ZANU PF supplied such evidence.

While several discrepancies did emerge between the first count and the recount in parliamentary elections, these were insignificant, often being as small as a single vote. Most of the results were unchanged. Since the first count was witnessed by polling agents and took place in less chaotic conditions than those of the recount, where all 4368 ballot boxes had been brought to a single venue, it is more likely that the first count was correct.

This illegality was even more apparent in relation to the recount of the presidential ballot. Nearly 25 000 votes were required to affect the presidential vote by 1%³². As ZEC stated, a single vote could mathematically affect the outcome, but this could only be so if the leading

³¹ During an interview in Harare, 07/05/08.

³² The official ballot in the presidential vote was just over 2.5 million.

candidate had exactly 50% of the vote³³. ZEC must have known the initial result from the constituency returns, and thus would have been aware of the extent of the miscount required to affect the result. When the (unaltered) result was declared, Tsvangirai emerged as the winner with 47.9% of the vote. To affect the result, i.e. to obviate the need for a run off, 2.1% of the votes, or 52 500 votes would have had to have been miscalculated to Tsvangirai's prejudice – again highly improbable. Yet ZEC was required to have reasonable grounds to believe that this was the case before it could initiate a recount for the presidential ballot. In the event, the discrepancies were counted in the hundreds rather than thousands. Clearly, ZEC's claim that it had sufficient grounds to believe that a miscount had occurred of sufficient significance to have affected the result of the presidential election was false. The recount was thus patently unlawful on this basis alone.

It is also implicit that ZEC must proceed with its recount within 14 days of the declared result. Section 70(3) requires the Chief Elections Officer to destroy all the ballots within 14 days of the declaration of the last constituency result, unless an election petition has been filed. Accordingly, in respect of the local authority, Senate and House of Assembly polls as at the 19th April, 2008 the ballots papers in all constituencies where an election petition had not been lodged ought to have been destroyed. If the legislation had intended to place a moratorium on the destruction of ballots where a ZEC recount had been initiated, it would have included such a moratorium in the same part of the section where it placed a moratorium on the destruction of ballots while the determination of an election petition is pending. It did not. ZEC clearly did not meet the 14 day requirement or, at the very least, the Chief Elections Officer did not comply with the mandatory requirement to destroy the ballots.

Clearly section 67A sits very uncomfortably with all the requirements of section 70 (relating to the opening of ballot boxes and destruction of electoral material) and ZEC might like to suggest that the provisions of section 70 were not intended to apply to the situation where a recount has been ordered. In this it would probably be correct. Section 67A has been inserted with little regard to its effect on other provisions in the Act and its interplay with them. But if one is going to adopt this line of reasoning, one should also accept that section 67A was not intended to apply to presidential elections at all. The point is academic. The law requires that it be

³³ The two main contenders garnered over 90% of the vote, so the question of a tie for second place did not arise.

interpreted in accordance with what is written in the Act and not what any particular person or body speculates ought to have been written. However, it **can** be deduced from the Act that 67A (4) was never intended to allow blanket recounts of all polling stations in a multitude of constituencies. ZEC's inability to comply with the requirements of section 67A (4) amply demonstrates that.

The ZEC initiated recount was thus clearly unlawful. Combined with the judgment of Uchena J., the effect was to delay the release of the result of the presidential election until 2nd May, 2008, and effectively to extend Mugabe's term of office.

Turning 21 days into 103³⁴

Section 110(3) was cited above. It will be recalled that it provides that if none of the contestants gain an absolute majority there must be a run off within 21 days of the "previous election". Prior to ZEC's juridical manoeuvring, in common parlance everyone understood the presidential "election" had taken place on the 29th March, 2009. "To elect" means "to choose". One has "an election" and thereafter one refers to the result of "the election" i.e. the result of the prior exercise of popular choice. The "result" and "the election" are two separate things and one must precede the other. The run off should have taken place within 21 days of the day upon which the election took place - on or before the 19th April, 2008. These trite observations become obscure in the Byzantine world of ZEC. The unlawful recount and the final announcement of the result took ZEC well beyond the 19th April, 2008 requiring the trite to be rendered complex.

The Minister of Justice suggested that an election is a process and not an event³⁵. Thus when the legislation refers to the "previous election" it is referring to a process which ended with the declaration of the result. The 21 days, in this argument, then runs from the declaration of the result and not from polling day. This argument cannot be sustained. When the Act intends something to happen within a certain time from the declaration of the result, for example in

³⁴ The run off date should have been the 19th April, 2008. As will be seen shortly, ZEC purported to allow the run off to take place anytime before the 1st August, 2008.

³⁵ Patrick Chinamasa. He was not alone. This interpretation was advanced by several others, including MDC supporters and officials.

section 67A itself or the bringing of an election petition challenging a presidential election, it uses precisely that phrase e.g. in the case of the latter “within 30 days of the declaration of the result”. When it intends to refer to the election as a process rather than an event it uses the term “election **period**”. Section 4 defines an “election period” as

*“in the case of a Presidential election, the period between the calling of **the election** and the declaration of the result of the poll in terms of paragraph 3(1) of the Second Schedule”*

It will be noted that “election” here undoubtedly refers to the day of the poll.

If the 21 days was to run from the declaration of the result, the legislation would have said so. Or it would have said within 21 days of the end of the election period. In fact it says 21 days from the “previous election”, thus referring to polling day, the 29th March, 2008. A further logical difficulty stands in the way of those who seek to interpret “election” not as an event but as a process. Where the election does not result in any candidate achieving an absolute majority, the “process” is not complete with the declaration of the result. A run off must be held. In the sense of an “election” as a process, there has not been “an election”. No one has been elected as president and the process is not complete. There cannot then be a run off within 21 days of the “previous election” because the “previous election” as a process is not complete and can never be complete without the run off itself. The election process thus has not yet taken place.

Proponents of the “process” position would then need to argue that by the process they do not mean the whole election process but only part thereof. It is entirely arbitrary to claim that it is only that part of the process which ends with “the declaration of the result”. And declaration of the result of what? If one adds in the elided phrase “the election”, the paucity of the interpretation is laid bare. There is no justification for interpreting the word “election” in section 110(3) in a way different to that elsewhere in the Act.

Without reinterpreting the phrase “previous election” to somehow mean “declaration of the result of the election” the unlawfulness of the recount, which exhausted the 21 day period,

would have been exposed. ZEC thus was compelled to perform these lexical gymnastics, conveniently forgetting that its own Public Relations Office had stated that the 21 days would run from the 29th March, 2008³⁶.

Furthermore the constitution provides in section 28(3) that:

An election to the office of President shall take place—

(a) on the day or days fixed in a proclamation in terms of section 58(1) as the day or days on which elections are to be held for the purpose of electing members of Parliament and members of the governing bodies of local authorities.

And section 58(1) provides:

(1) A general election and elections for members of the governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament.

The word “election” in both sections clearly refers to polling day, or days, if several are deemed required. But in addition it will be noted that if “election” in the electoral act is a process which ends with the declaration of the result, then “election” so interpreted does not comply with the constitutional requirement that it take place on the same day as the “election” of members of parliament.

Section 28 sits very uncomfortably with the run off requirement in section 110(3) of the Electoral Act³⁷, if it can be reconciled with it at all. In the event of a run off, the election to the office of president can hardly be said to take place on the same day as the election of members of parliament as section 28 requires. The closest one can get to reconciling the two is to regard the maximum 21 days allowed for the run off, as being a continuation of the constitutionally set polling day, *in casu*, 29th March, 2008, in the same way that a reconvened company board meeting may legally be a continuation of one adjourned. However, if the 21 days runs from the declaration of the result, the nexus with the constitutionally set Election Day is lost. The more so if there is an extended hiatus between Election Day and the declaration of the result - occasioned by a forensic examination of the count.

³⁶ See Veritas Bill Watch 14/2008

³⁷ Chapter 2:13

However, ZEC severed the connection with the constitutionally set date of the election completely by ignoring the 21 day requirement entirely. Confident that its powers exceeded those of what should have been a democratically elected legislature, it announced that the legislature had been over optimistic in setting the period at 21 days. ZEC would thus override the legislature, and introduce a more realistic period of 90 days. The legality of its so doing is examined in what follows.

On the 15th May, 2008 ZEC published a notice containing the following provision:

Extension of period within which second Presidential election to be held

Notwithstanding section 110(3) of the Electoral Act [*Chapter 2:13*], following upon the poll taken on the 29th March, 2008, in each constituency for the election of a President which resulted in no candidate receiving a majority of the total number³⁸ of votes cast, the period within which a second election to the office of President is to be held is hereby extended from 21 days to ninety (90) days from the date of the announcement of the results of the first poll for the election of a President³⁹.

It relied upon subsection 192(4) and 195(5) of the Electoral Act for its power to make this Statutory Instrument.⁴⁰

192(4)

Notwithstanding any other provision of this Act but subject to subsection (5), the Commission may make such statutory instruments as it considers necessary or desirable to ensure that any election is properly and efficiently conducted and to deal with any matter or situation connected with, arising out of or resulting from the election.

(5) Statutory instruments made in terms of subsection (4) may provide for—

(a) altering any period specified in this Act within which anything connected with, arising out of or resulting from any election must be done;

³⁸ The provision should in fact refer to the total number of “valid” votes cast.

³⁹ Section 3 of S.I. 73A/2008

⁴⁰ In fact the preamble erroneously cites section 192(1), though this does not affect the validity of the Instrument.

(b) empowering any person to make orders or give directions in relation to any matter connected with, arising out of or resulting from any election;
(c) ...

A specious reading of this section leads to consequences which could not have been intended by the legislature. The section is so loosely and badly worded that not only does ZEC appear to be vested with the power to virtually re-write the Electoral Act but under paragraph 192(5)(b) may delegate the power to re-write the Electoral Act to "any person". The only restriction is that it must consider the legislation necessary to ensure that an election is properly and efficiently conducted. On this reading, ZEC's extension of the 21 day period in section 110(3) could have been one of years rather than days. Or it could have "empowered any person" to set the period. This was not and could not have been the intention of the legislature in enacting this section.

A more sensible reading is that the section intends to give ZEC the powers to make regulations to enable it to efficiently carry out its responsibilities under the Act, not to alter the Act itself and therefore its legislated duties. That reading is implied by subsection 192(1):

The Commission may by regulation prescribe all matters which by this Act are required or permitted to be prescribed or which, in its opinion, are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Subsection 192(1) thus restricts the kind of regulations which may be passed to those which **give effect** to the provisions of the Act. One of the provisions of the Act is that there must be a run off within 21 days of the previous election if none of more than two presidential candidates achieves an absolute majority. This provision would need to be given effect to, not altered or ignored. Unfortunately, section 192(1) has not been included in the Act in such a manner that it applies to subsection 192(5) regulations, even though that may have been the intention of the legislature. 192(4) specifically states "notwithstanding any other provision of this Act..." which must include subsection 192(1).

However, there are constitutional provisions which more clearly restrict the power of ZEC to make Statutory Instruments under subsection 192(4) and 192(5) to those which give effect to the Act rather than to alter it. In terms of section 28(4) of the Constitution “the procedure....for the election of the President shall be as prescribed in the Electoral Law.” Reading this subsection in conjunction with the definition of Electoral Law in section 113 of the constitution, section 58(4) effectively provides that “**An Act of Parliament** shall make [electoral law]”⁴¹.

As Sandura JA stated in *Tsvangirai v Registrar General and Others*⁴² “[what] all this means is that legislation which comprises the electoral law must be an Act of Parliament.” Justice Sandura made this comment *obiter*⁴³ in a minority judgment in the case. The Supreme Court then was considering the constitutionality of section 158 of the old Electoral Act which essentially gave the same regulatory powers to the President as those now held by ZEC and under consideration here⁴⁴. Accordingly, if electoral law must be an Act of Parliament, ZEC cannot make electoral law and cannot do so by altering the provisions of section 110(3) of the Electoral Act. Section 192(4) is unconstitutional in that it purports to give ZEC the power to alter a period specified by an Act of Parliament.

ZEC’s “90 day” extension runs into other constitutional difficulties. All elections must be held within four months of the dissolution of Parliament.⁴⁵ Parliament was dissolved automatically the day before the start of the election period, that is, on the 28th March, 2008. Accordingly, elections must be held before 27th July, 2008. The “90 day” extension which expires on the 1st August, 2008, purports to allow the second presidential election to be held after this date.

Furthermore, and as will be returned to below, Parliament may not go more than 180 days without sitting. The last sitting was on the 16th January, 2008, so that this period expires on the

⁴¹ Section 113(1) defines Electoral law as “the Act of Parliament having effect for the purposes of section 58(4) which is for the time being in force.” Section 58(4) of the Constitution is concerned with parliamentary elections and the unparaphrased section provides: “An Act of Parliament shall make provision for the election of members of Parliament. Since section 28(4) requires the President to be elected in the same way, he or she too must be elected under electoral law which is an Act of Parliament. Debt for the succinct exposition of the argument is owed to Greg Linington of the University of Zimbabwe.

⁴² 2002(1)ZLR 268 (S)

⁴³ An obiter is a legal aside, and, since it is not part of the reasoning leading to the judgement in the case is not binding legal precedent.

⁴⁴ The Supreme Court majority declined to consider the merits of this argument, ruling, astonishingly, that Tsvangirai had no *locus standi* (essentially no legal interest in the outcome of the case).

⁴⁵ See section 58(1) cited above.

13th July, 2008. It is implicit that the new parliament is convened by the incoming president and not the old, as the life of parliament and the presidency are now coterminous. The amended constitution thus requires that the new president enters office and convenes parliament before the 13th July, 2008. The “90 day” extension purports to allow this to be done beyond this period. The Statutory Instrument is thus defective in itself, regardless of the fact that the run off date has in fact been set for the 27th June, 2008⁴⁶, bringing it within both periods.

Finally, for the sake of completeness, two other points may be made in passing. Firstly, the semantic point that it is moot whether the run off election date is something “connected with arising out of or resulting from an election”, and thus falls within section 192(5). It is an integral part of an election, as is, say, the casting of the ballot, rather than a peripheral “connected” with it. Secondly, the old section 158 which ostensibly gave the president the power to set the rules for the conduct of his own election, clearly violated basic democratic principles or, in constitutional speak, could not be held “to be reasonably justifiable in a democratic society”. These powers have been transferred to ZEC. ZEC’s chair is directly appointed by the president, the other six members indirectly⁴⁷. The statutory instruments made by ZEC must be approved by the Minister responsible for the administration of the Act, the Minister of Justice, before they become effective. The Minister is appointed by Mugabe. Mugabe is thus still able to influence the rules for the conduct of an election in which he is a contestant, and indeed, appears to have done so.

In short then, the delay in announcing the results, the protracted recount process and the extension of the period of “21 days from the date of the previous election” which have delayed the date of the Presidential run off election were unlawful and unconstitutional. The consequent extension of Mugabe’s presidential term must thus likewise be unlawful and unconstitutional.

THE MINISTERS

It has been suggested in several articles in the press that since Mugabe dissolved his Cabinet at the same time as the dissolution of parliament, Ministers have no constitutional authority to

⁴⁶ By Statutory Instrument 78/2008.

⁴⁷ Section 61(1) of the Constitution

continue in their posts and any actions undertaken by them are invalid⁴⁸. This is understood to be one of the grounds for a legal challenge to the regulations introducing the “90 day” extension to the period for the presidential run off, discussed above. It is contended that the Minister who approved the regulations, as required, had no authority to do so as Cabinet had been dissolved. The argument does not appear to be legally sustainable. It is not generally appreciated that one does not become a member of the Cabinet *ex officio* - by the simple virtue of having been appointed as a Minister. To be a member of the Cabinet one must be a Minister but the converse does not apply⁴⁹. The Cabinet comprises the president, the vice president(s) and “such Ministers as the president may from time to time appoint”⁵⁰. They remain members of the Cabinet at the pleasure of the President.

The President is given a broad power to appoint Ministers under section 31D of the Constitution. He need not appoint them from the party holding a parliamentary majority. The only restriction on this power is that no person may hold office as a Minister for longer than three months unless he or she is a member of parliament. However, if during the three months period parliament is dissolved, as it is at present, a Minister may continue to hold office without being a Minister until Parliament first meets after such dissolution. The tenure of office of a Minister does not cease on the dissolution of the Cabinet, but upon the assumption of office of a “new” president⁵¹. Accordingly, Ministers remain in their posts until the entry into office of a new president and may continue to carry out their duties. The exceptions to this are the six Ministers who lost their parliamentary seats in the March 29th elections⁵². Unless appointed to the Senate by the incoming President⁵³, they will lose their Ministerial posts as soon as parliament is convened.

A related question concerns the manner in which the various Ministries are currently being financed. Although official inflation figures have not been announced, inflation is believed to be

⁴⁸ This view was also expressed in a press statement by Zimbabwe Lawyers for Human Rights issued 06/06/2008.

⁴⁹ Section 31G(2)(i) of the Constitution.

⁵⁰ Section 31G(1) of the Constitution.

⁵¹ Section 31E(1)(c) of the Constitution.

⁵² They are Oppah Muchinguri, Mike Nyambuya, Patrick Chinamasa, Joseph Made, Munacho Mutezo and Chris Mushowe.

⁵³ As part of the five permitted presidential appointees (see below fn 66).

well over 1 000 000 % (sic)⁵⁴. Over the last few years such hyperinflation has required parliament to approve supplementary budgets for Ministries several times during the course of the year⁵⁵. Since parliament has not sat since 16th January, 2008, the current source of Ministerial funds needs to be located.

Generally, all fees, taxes and other revenues of Zimbabwe are paid into the Consolidated Revenue Fund⁵⁶. Money may not be withdrawn from the Consolidated Revenue Fund other than as provided for by the constitution, an Act of Parliament or in terms of an Appropriation Act, more commonly known as "the budget" - the estimate of various expenses anticipated by each Ministry for the course of the year⁵⁷. The Constitution anticipates expenditure by Ministries on occasion in excess of that allowed under an Appropriation Act. In such an event the Constitution, somewhat vaguely, requires "once the extent of the excess has been established" that a Bill is laid before the House of Assembly during one of the 14 days that the House next sits, seeking condonation of such authorised expenditure. The Constitution is silent as to what ought to transpire if such a Bill is not approved. These provisions seem to allow a Ministry to spend well beyond the approved budget, subject only to parliamentary censure when the excess is presented to the House. Since parliament is dissolved this irritation does not arise.

The only difficulty then currently facing Ministries is the question of where to the source the money for such unauthorised and excessive expenditure. The answer appears to be the Reserve Bank. For several years the Reserve Bank has been engaged in what has euphemistically be described as quasi-fiscal activities, or more bluntly, the process of printing money⁵⁸ and handing it out to various Ministries as and when political expediency requires. Since this is not money derived from "fees, taxes or other revenue", it need not be paid into the Consolidated Revenue Fund. Under section 7 of the Reserve Bank of Zimbabwe Act, the Bank is specifically authorised to lend money to the State, provided that it does not exceed 20% of the previous year's revenues and is repayable within twelve months⁵⁹. No doubt the bank will assess the previous year's revenues in real terms, and it arouses some curiosity as to what figure is used as the

⁵⁴ The Ministry of Finance is obliged to release these figures. It has failed to do so for several consecutive months, citing the inability "to find a basket of goods to assess the CPI."

⁵⁵ Permitted under Section 103(3) of the Constitution.

⁵⁶ Section 101 of the Constitution.

⁵⁷ Section 102(2) of the Constitution.

⁵⁸ Specifically authorized by section 40 of the Reserve bank of Zimbabwe Act Chapter 22:15

⁵⁹ Section 7(2).

inflationary index. The Governor of the Reserve Bank, who implements this convenient arrangement for the State, is appointed by the President.⁶⁰

The financing of the Zimbabwe Electoral Commission is also of some interest, particularly as it has been reported that ZEC exhausted its funds in the first electoral round and requires US\$60 million for the run off. The Constitution provides that ZEC is financed through a charge on the Consolidated Revenue Fund, presenting a difficulty, as Parliament is not sitting to authorise a further withdrawal from the Fund. The Presidential Powers (Temporary Measures) Act⁶¹ specifically precludes the President making regulations authorising withdrawals from the Consolidated Revenue Fund⁶². However, paragraph 9 of the Third Schedule to the Zimbabwe Electoral Commission Act authorises ZEC to raise loans with the approval of the Minister⁶³ and this provision will probably be used to finance the presidential election run off.

PARLIAMENT AND THE LEGISLATURE

Parliament and the legislature are not synonymous. In terms of section 32 of the Constitution, the legislature consists of both Parliament *and* the President, and this is reflected in the manner in which legislation is enacted. In its anxiety to conceal ZANU PF's electoral defeat in the House of Assembly, the State media has referred to Parliament as a "hung parliament". Given that the MDC faction holding 10 seats has indicated its intention to vote with the MDC faction holding 99 seats, against ZANU PF's 97, the description is inaccurate.

However, there is certainly a "hung" legislature. Bills passed by both Houses of Parliament must be assented to by the President, who has 21 days to do so. If the President declines to assent to the Bill, it must be passed by a two-thirds majority of the House of Assembly⁶⁴ before it may become law. Although Bills may be introduced in either the Senate or the House of Assembly, the primary legislative function lies with the House of Assembly, and the powers of the Senate are simply to delay a Bill by up to 90 days in the event of a disagreement between the two

⁶⁰ Section 14 of The Reserve Bank Of Zimbabwe Act.

⁶¹ Chapter 10:20.

⁶² Section 2(2)(a).

⁶³ The Minister of Justice, Legal and Parliamentary Affairs.

⁶⁴ The two thirds is not required by the Senate which does not vote on a returned Bill.

Houses as to the content of a Bill⁶⁵. The President's influence over the 33 non-constituency seats in the Senate thus is not relevant in relation to legislative power⁶⁶.

The Presidential Powers (Temporary) Measures Act⁶⁷ allows the President to introduce law in circumstances of urgency where the law is necessary in the interests of defence, public safety, public order, public morality, public health, the economic interests of Zimbabwe or the general public interest. The urgency must render it inexpedient to await the passage through Parliament of an appropriate Act. Regulations made by the President in this way cannot provide for the withdrawal or issue of moneys from the Consolidated Revenue Fund or condoning unauthorized expenditure from the Consolidated Revenue Fund; any other matter which the Constitution requires to be provided for by, rather than in terms of, an Act; or amending, adding to or repealing any of the provisions of the Constitution. These regulations must be laid before parliament for approval within eight days of Parliament's next sitting after they were made. Without parliamentary approval the regulations lapse.

Accordingly, subject to the restrictions indicated, Mugabe presently can legislate in this manner until parliament is convened. The Courts have given a generous interpretation to the President's powers in this regard. Most recently, the High Court dismissed a challenge to regulations introduced in this manner, which purported to alter electoral law shortly before the March 29th elections. The alteration re-introduced a provision which had but recently been removed from the Electoral Act by parliament⁶⁸. Furthermore, as argued above, electoral law is a matter which the Constitution requires is provided for by an Act of parliament and thus cannot be amended in terms of these presidential powers. The basis for rejecting the challenge to the regulations by the court ought not, therefore, to have been on the merits⁶⁹. Mugabe may continue to legislate in this manner for the moment. Although he cannot legislate withdrawals from the Consolidated Revenue Fund, he is able to finance the extended life of his government through loans from the

⁶⁵ See Schedule 4 to the Constitution.

⁶⁶ The 33 comprise (in terms of Section 34 of the Constitution): 18 chiefs, 16 appointed by an electoral college of provincial assemblies of chiefs (section 40 of the Electoral Act) and two taking their places *ex officio*. All chiefs are however, appointed by the President in terms of section 3 of the Traditional Leaders Act; 10 Provincial Governors who are appointed by the President (section 4 of the Provincial Councils and Administration Act Chapter 29:11); 5 direct appointees of the President.

⁶⁷ Chapter 10:20

⁶⁸ The section 55(1) of the Electoral Act, amended as a result of SADC mediated negotiations between the ruling and opposition parties.

⁶⁹ No further details of the case are currently available.

Reserve Bank, as indicated above. However, this situation will cease when parliament is convened. A legislative log jam will develop if Mugabe is then in office. Mugabe must assent to Bills passed by parliament, but parliament must approve regulations introduced by the President. The one cannot therefore legislate without the other. The convening of Parliament is thus all important.

The President has a broad power to determine the sessions of Parliament⁷⁰. The only restriction on this power is that there must be a session of Parliament beginning in every calendar year so that a period of more than 180 days does not intervene between the last sitting of either House in any one session and the first sitting of Parliament in the next session. Parliament last sat on the 16th January, 2008, requiring the President to convene the next session before 13th July, 2008. The question then arises whether following the harmonised presidential and parliamentary elections on the 29th March, 2008 the new parliament can be convened by the old president⁷¹.

The constitution does not provide explicitly for a situation where a new parliament has been elected and several months have passed without a determination of the presidential election, as the run off should have taken place within a matter of days rather than months. However, several clauses allow one to infer that the new parliament must be convened by the new president (or old president with a new term of office). Section 63 provides that the five year life span of parliament commences on the day a president elected in terms of subsection 28(3)(a) of the Constitution enters office. A president elected in terms of section 28(3) (a) must be a president elected at the same time as the members of parliament, which is not so in the case of President Mugabe. Accordingly, if President Mugabe gazettes an opening session of parliament, parliament will be sitting, but its five year "life" will not have commenced - an anomaly which could not have been intended and which can be avoided by reading the constitution as requiring that the convocation be by the new president.

A further anomaly is that the president has an absolute discretion to prorogue or dissolve parliament⁷², subject only to its constitutional life span and the automatic dissolution the day

⁷⁰ Section 62(1) of the Constitution

⁷¹ Mugabe is 84 but the pun is not intended.

⁷² Sections 63(1) and 63(2) of the Constitution

before polling⁷³. Unless it is assumed that the powers to dissolve the new parliament lie only with the incoming president, the sitting president may use these powers to dissolve a new parliament which reflects a present democratic preference as a result of harmonised elections different to one expressed five years previously when his or her term of office began.

From the above it may be seen that Mugabe can, to a limited extent, continue to legislate and continue governance without parliament. The situation cannot continue indefinitely, and unless parliament is convened before the 15th July, 2008 the Constitution will have been violated.

In the absence of a clear constitutional prohibition on the convocation of parliament by the old president, Mugabe may well have chosen to do so had it been expedient. The opposite is the case. As will be seen below in relation to local government, Mugabe's government is doing everything possible to prevent the MDC from exercising any power they may have gained through the ballot – presumably aware of the powerful signal this would give to the electorate and because it runs counter to the strategy of emphasising the disjuncture between democratic preference and power. In keeping with this strategy, Mugabe failed to comply with the Electoral Act in relation to three by-elections necessitated by the death of candidates before polling but after nomination day.⁷⁴ A date for the by-elections should have been promulgated within 14 days of the 29th March, 2008, and a day for the sitting of the nomination court set no less than 14 and no more than 21 days after such proclamation⁷⁵. All three by-elections are in MDC strongholds⁷⁶.

Mugabe simply ignored these requirements, necessitating a successful court application to compel him to implement them. The resultant Court order was ignored. Instead ZEC, in the same notice that purported to extend the 21 days for the run off in the presidential election, likewise extended the 14 day period for the proclamation of the by-elections to 90 days⁷⁷. It is doubtful that this Notice by ZEC could apply retroactively and override the Court order. ZEC and

⁷³ Section 63(7) of the Constitution.

⁷⁴ Section 50(1) of the Electoral Act.

⁷⁵ Section 38(1) and 39(2) of the Electoral Act.

⁷⁶ Gwanda South, Pelandaba-Mpopoma, and Redcliff.

⁷⁷ S.I 73A/2008 referred to above.

Mugabe assumed that it did, eventually setting by-elections to be held concurrently with the run off in the presidential election on the 27th June, 2008⁷⁸.

ZANU PF and Mugabe thus avoided the announcement of another electoral defeat prior to the presidential run off and have been able to continue to emphasise the narrowness of the margins in the House of Assembly, in keeping with the tactic of stressing the retention of power. The tactic in relation to local government has been less subtle and the violation of the relevant statutes more blatant.

LOCAL GOVERNMENT

Mugabe's response to the loss to the MDC of numerous urban and local councils has been to ignore it. Due to the manner in which the ballots were counted and collated the results of the council elections were the first to be known. The Chief Elections Officer is obliged to declare the candidates duly elected "immediately" after "ascertaining the results of the polls". He is then obliged "as soon as possible" to publish the results in a newspaper⁷⁹. After the March 29th poll, when it was feared that ZEC would delay the release of the result presidential poll even further by maintaining that it would not be given until the local government results had been announced, ZEC stated that the local government results would not be announced at national level and that this had already been done at ward level. However, since it is the duty of the Chief Elections Officer to declare the candidates duly elected, this should have been done at national level. Subsequently, the government proceeded to act as if the candidates had not been officially declared elected and this was somehow dependent upon the official publication of the results. Rather than happening "as soon as possible" as required, the process has been drawn out way beyond any period that may be considered reasonable and is still not complete over two and a half months after these results were known.

⁷⁸ The date was determined by using the earliest possible date for the by-elections after announcing the date of the sitting of the nomination court. An election must be held no sooner than 28 days and no more than 50 days after nomination day.

⁷⁹ Section 130 of the Electoral Act.

Despite the failure to follow these procedures it is clear that the candidates for the local government have been duly elected. A person who is elected as a councillor assumes office "on the day following polling day".⁸⁰ Section 84 of the Urban Councils Act provides:

84 Meetings and special meetings of council

(1) A council shall hold its first meeting on such date and at such place as the Minister⁸¹ may fix and thereafter the council shall, subject to this Act, meet for the dispatch of business and adjourn, close and otherwise regulate its meetings and proceedings as it thinks fit:

Provided that the council shall hold an ordinary meeting—

- (a) as soon as is practicable after each general election; and
- (b) at least once in each month.

This infers that the Minister's discretion to fix the date of the first meeting of a council is fettered to the extent that the date must be "as soon as practicable" after the election. The legislation also contemplates that this will not be longer than a month after the election.

By the 27th June, 2008, the councils therefore should have met at least three times. In fact the Minister of Local Government has not fixed the date as required. A press report has quoted officials of his Ministry as saying that the date will be not set until after the presidential run off⁸². There is no provision allowing such delay which obviously contravenes section 84. The same report suggests that the Minister has contemplated appointing caretakers to run the councils in the interim. Such appointment would be unlawful as the circumstances under which caretakers may be appointed do not exist.⁸³ However, these provisions have been ignored by the Minister in the past who has removed elected councillors in all major urban, MDC dominated areas and unlawfully replaced them with "Commissioners". Even was the appointment of such

⁸⁰ Sub-section 49(2)(b) of the Urban Councils Act Chapter 29:15

⁸¹ The Minister of Local Government, Public Works and Urban Development

⁸² See Zimonline 03/06/08

⁸³ The Councillors would need to have been suspended for certain specified reasons in terms of section 80 of the Act, such as committing stipulated criminal offences etc while acting as councillors. Since they have yet to sit as councillors the grounds for suspension cannot come into operation.

commissioners lawful, they were only able run the council's affairs for a maximum six month period.⁸⁴

This term of office was ignored by the Minister in the past. Several legal actions brought by the City of Harare Rate Payers Association challenging the appointment of these Commissioners have succeeded in the courts. However, inordinate delays were experienced before the Supreme Court finally delivered the favourable judgments, effectively extending the unlawful running of the councils by the Commissioners. After the Commissioners were displaced following elections in 2005, the Minister of Local Government again "dismissed" the elected councillors, despite the previous court rulings on the illegality of such action. The Minister's reported threat to resort again to these provisions may be an attempt to counter any attempt by elected councillors to sit as a council⁸⁵. In the case of rural district councils, the councillors assume office the day after a general election.⁸⁶ Unlike the Urban Councils Act, there is no requirement that the Minister fix the day for the first meeting after an election. The Councillors are, however, likewise required to meet "as soon as practicable" after a general election. It is not known why these councils have not met, but is most likely due to concerns for the safety of MDC councillors given the endemic violence in rural council areas.⁸⁷

CONCLUSION

This paper has been concerned only with juridical manoeuvres around the electoral process and governance thereafter. Mugabe's hold on power has obviously been retained through other juridical mechanisms including distortions and violations of public order legislation⁸⁸, the Criminal Procedure and Evidence Act,⁸⁹ and electoral regulations relating to broadcasting during elections⁹⁰ to name but a few. Furthermore, since the March 29th election, endemic, systemic

⁸⁴ Section 80(3)(b).

⁸⁵ Section 80 has been amended slightly. The Minister can now appoint no more than three persons, now referred to as "caretakers" and whose term of office has been reduced to 90 days.

⁸⁶ Section 30 of the Rural District Councils Act Chapter 29:13.

⁸⁷ See "*Bullets for Each of You*" *State-Sponsored Violence since Zimbabwe's March 29 Elections* Human Rights Watch June 2008

⁸⁸ Particularly the Public Order and Security Act Chapter 11:17 and sections of The Criminal Law (Codification and Reform) Act Chapter 9:23

⁸⁹ Chapter 9:07

⁹⁰ S.I.22/2005. These violations have been well documented in the Media Monitoring Project of Zimbabwe's various reports since the start of the electoral period on May 16th, 2008.

and organised violence has pervaded the country. The violence is believed to be co-ordinated by the Joint Operations Command, comprising service chiefs, Mugabe and close advisors.⁹¹

The violence is intended to intimidate and discourage people from voting for the MDC, prevent them from doing so by displacement⁹² and confiscation of essential National Identity cards and to prevent MDC campaigning through the beating, abduction and murder of MDC activists and officials. The violence is also intended to be a display to the electorate of ZANU PF's power, and that such power has been retained regardless of the result of the March 29th poll.

As such the juridical manoeuvrings outlined here and undertaken to feign compliance with the rule of law for regional leaders, dovetail with this strategy. Of particular concern for lawyers is the willingness of members of Zimbabwe's judiciary to assist in this regard through rulings which support juridical distortions and ignore legislative violations. It is hoped that the distortions and violations of the law documented here will not only expose the unlawfulness of the actions of the Mugabe government to date, but will serve as a resource base against which further such distortions can be measured as events unfold following the presidential run off on the 27th June, 2008.

⁹¹ See the Human Rights Watch report fn 87

⁹² Voters are required to vote in the wards in which they are resident.