

**HEAR NO EVIL, SEE NO EVIL, AND SPEAK NO EVIL:**

**A CRITIQUE OF THE  
ZIMBABWE ELECTORAL COMMISSION REPORT ON THE 2008  
GENERAL ELECTIONS**

**By Derek Matyszak, Research and Advocacy Unit, Zimbabwe**

**Introduction**

On the 29<sup>th</sup> March 2008 Zimbabwe simultaneously held elections for the presidency, two houses of assembly and local government councils, as required by a recent constitutional amendment<sup>1</sup>. The synchronisation of these four polls earned the elections the moniker “harmonised elections”, distinguishing these polls from the run-off in the presidential election held on 27 June, 2009 after no candidate officially emerged with an absolute majority (50% plus one vote).

There were two salient features of the period immediately after the harmonised elections which dominated political comment, observers’ reports and the media: the long delay in releasing the results of the first round of the presidential election, only announced on the 2<sup>nd</sup> May, 2009, and the endemic political violence that erupted, unmatched in scale and brutality since the Gukurahundi years<sup>2</sup>. Reports from human rights NGOs revealed that over 170 MDC supporters were murdered in over 17 000 incidents of violence and abuse and that more than 20 000 homes were burnt and destroyed, resulting in massive numbers of internally displaced people fleeing the violence.<sup>3</sup> With the exception of isolated and probably retaliatory attacks, the victims of the violence were almost exclusively those perceived to be MDC supporters. The perpetrators were almost exclusively ZANU PF supporters and predominantly members of the army.<sup>4</sup>

The extreme nature of the violence and its extent led to an almost<sup>5</sup> universal condemnation of the electoral process, and even “solidarity” observer missions usually sympathetic to the Mugabe government and ZANU PF party, found themselves unable to approve the election. The SADC Electoral Observer Mission noted that electoral violence was acknowledged by all parties. It concluded that the elections “did not conform to the SADC Guidelines Governing Democratic Elections” and that the elections “did not reflect the will of the people”.<sup>6</sup> The Electoral Commissions Forum of SADC countries reported that “the Principles for Election Management, Monitoring and Observation in the SADC region (PEMMO) guidelines in the Pre-Election phase, such as those relating to campaigning, access to the media, use of public resources, political

---

<sup>1</sup> The Constitution of Zimbabwe Amendment No. 18 Act (2007), sections 28 and 29 of the Constitution

<sup>2</sup> Gukurahundi refers to a period in the 1980’s when widespread atrocities were perpetrated during a government campaign to eradicate “dissidents” in Matabeleland and Midlands provinces.

<sup>3</sup> See ZESN’s Report on the Zimbabwe March 29 2008 Harmonised Elections and 27 June Presidential Run-Off (“the ZESN Report” p51

<sup>4</sup> Human Rights Watch Report June 2008 “*Bullets for Each of You*” *State-Sponsored Violence since Zimbabwe’s March 29 Elections* (“Human Rights Watch Report”) p 20 et seq

<sup>5</sup> Only two observer Missions, although noting the violence that accompanied the run off, alleged that the violence was instigated by the MDC and that ZANU PF violence was limited and retaliatory only. These Missions were those of the Zimbabwe National Drivers Union and the Zimbabwe National Association of Small and Medium Enterprises. These reports, by little known organisations and replete with grammatical and spelling errors, were deemed by ZEC to be of sufficient importance to be part of annexure J to ZEC’s report – comprising the observers’ reports. The Zimbabwe Federation of Trade Unions claimed that no violence (p1) had taken place at all, a claim made by no one else.

<sup>6</sup> At p 6.

violence and intimidation, were not adequately complied with”.<sup>7</sup> The Pan African Parliament observers noted that “the prevailing political environment through the country was tense, hostile and volatile as it has been characterised by an electoral campaign marred by high levels of intimidation, violence, displacement of people, abductions and loss of life”.<sup>8</sup> This Mission concluded that: “the current atmosphere prevailing in the country did not give rise to the conduct of free, fair and credible elections”.<sup>9</sup> International electoral observer missions conventionally adopt extremely diplomatic, if not euphemistic, language in their reports and are generally reticent when it comes to attributing the source of the violence. The fact that they departed from this convention to some extent is an indication of the extremity of the violence. The pre-electoral environment in the country was more graphically captured by Human Rights Watch:

*Around the country, the ruling party and its allies are blocking access to villages targeted by ZANU-PF violence, preventing people from fleeing, including those in need of medical treatment. Party allies have warned hospitals not to treat victims of political violence or face retaliation. Meanwhile, measures are being put in place to restrict both local and international electoral monitoring of the run-off poll. If current conditions are maintained, there is no possibility of a credible, free and fair poll. ... ZANU-PF officials and “war veterans” are beating, torturing and mutilating suspected MDC activists and supporters in hundreds of base camps, many of them army bases, established across the provinces as local operations centers. Abusive “re-education” meetings are being held to compel MDC supporters into voting for Mugabe. In one of these meetings, on May 5 in Chiweshe, ZANU-PF officials and “war veterans” beat six men to death and tortured another 70 men and women, including a 76-year-old woman publicly thrashed in front of assembled villagers. ZANU-PF and its allies are engaged in a campaign of looting and destruction, slaughtering animals, stealing food and property, and burning down homesteads. More than 3,000 people are known to have fled the violence and are now internally displaced in cities and towns throughout the country with inadequate access to food and water. An unknown number have fled across the borders to Mozambique, Botswana and South Africa. The violence is being orchestrated by the Joint Operations Command, which is headed by senior ZANU-PF officials and includes the heads of the Zimbabwe Defence Forces, police, prison services, and the Central Intelligence Organization. In some areas local police are attempting to enforce the rule of law, but they are being undermined by their own superior officers. Human Rights Watch investigations indicate that the army is playing a major role in supporting the violence. It has provided known “war veterans” and ZANU-PF supporters with guns, transportation and bases from which serious human rights violations are carried out. The government is allowing those perpetrating violence to do so with impunity. ... ZANU-PF supporters have attacked hundreds of observers from the independent election organization, the Zimbabwe Election Support Network, and forced many to flee their homes. The government has attempted to portray reports of the violence as exaggerated— and then mainly perpetrated by the MDC. Human Rights Watch investigations show that while there have been some attacks by MDC supporters on ZANU-PF supporters, the number of such incidents is far outweighed by those perpetrated by ZANU-PF and its allies. Government complicity in the violence is reflected in its failure to acknowledge the extent of the violence and the widespread involvement of senior army officers, police officials and groups*

---

<sup>7</sup> At p 4

<sup>8</sup> The Pan-African Parliament Election Observer Mission (“the PAP Report”) to the Presidential Run Off and By-Elections in Zimbabwe Interim Statement at p1

<sup>9</sup> Ibid at p 3.

*backed by the state security forces.*<sup>10</sup>

It is not the intention here to revisit in detail the electoral conditions prevailing at the time of the presidential run-off nor to discuss in detail ZEC's behaviour over that election. These have been adequately described by bodies such as ZESN<sup>11</sup> and EISA.<sup>12</sup> This paper only critiques ZEC's own report on the elections, though in so doing necessarily must touch upon the electoral conditions and ZEC's conduct during the elections. Given the almost universal condemnation of the presidential run-off election detailed above, ZEC's report on the process was awaited with some curiosity as to whether and how ZEC would claim to have fulfilled its constitutional mandate in terms of section 61(4) to:

- (a) to prepare for, conduct and supervise*  
*(i) elections to the office of President and to Parliament; and*  
*(ii) elections to the governing bodies of local authorities; and*  
*(iii) ...;*  
***and to ensure that those elections ...are conducted efficiently, freely, fairly, transparently and in accordance with the law.***

As will be seen, in fact ZEC makes no such claim.

### **ZEC's Approach**

ZEC's report is characterised by a glaring failure to address issues it considers unpalatable, dissembling sophistry, and patent falsehoods. It is also self-contradictory in several places. The opening preamble of its report sets the tone for what is to follow:

*May it please*

- *The President of the Senate,*
  - *The Speaker of the House of Assembly,*
  - *His Excellency, the President of the Republic of Zimbabwe, and*
  - *The Honorable Minister of Justice, Legal and Parliamentary Affairs*
- to note that the Zimbabwe Electoral Commission duly prepared for and conducted the 2008 elections.*

*Section 12 of the Zimbabwe Electoral Commission Act [Chapter 2:12] requires the Commission to submit a report to you after an election and, **in compliance with the respective law**, the Commission is pleased to present to you the report on the conduct of the 2008 elections.*

Elsewhere in the report, where ZEC outlines its duties, it has chosen to “cut and paste” the relevant sections of the legislation, thus setting out its tasks verbatim<sup>13</sup>. It has chosen not to do so in the case of section 12 which provides:

- (1) As soon as possible after the result of any election or referendum has been announced, and in any event **no later than six months** thereafter, the Commission shall submit a report on the conduct of the election or referendum to—*  
*(a) the President, the Speaker of the House of Assembly and the Minister; and*  
*(b) each of the political parties that contested the election or referendum.*

---

<sup>10</sup> Human Rights Watch Report p 7

<sup>11</sup> See footnote 3

<sup>12</sup> The Electoral Institute of Southern Africa. *EISA Election Observer Mission Report No 28.*

<sup>13</sup> See for example p 11 of the report.

ZEC chose not to quote section 12 in this instance as to do so would have revealed that the report was not, as ZEC states, submitted in compliance with the law, that is, it has not been submitted as soon as possible and certainly not within the six month time limit<sup>14</sup>. In fact ZEC's report was tabled before parliament only on the 13<sup>th</sup> May, 2009, which, if one takes the announcement of the result of the presidential run-off as the latest start date, means the report should have been presented by 31<sup>st</sup> December, 2008. ZEC offers no apology or excuse for its failure to comply with the legislation and the lateness of the report. It rather seeks to conceal its lack of compliance.

### **Electoral violence and the failure to hold a free and fair presidential run-off election**

Having set the tone of its report thus, ZEC adopts the same strategy in regard to the widespread condemnation of the electoral process and violence manifested in the reports of observers, samples of which were given above. Given these reports ZEC cannot with any credibility claim that the elections were “*conducted efficiently, freely, fairly, transparently and in accordance with the law*”. ZEC thus adopts the tactics of avoidance and omission. Its states:

*The Commission is satisfied that **it conducted** both the March 2008 harmonised elections and the resultant June 27, 2008 presidential run off election and House of Assembly by-elections efficiently, freely, fairly, transparently and in accordance with the law<sup>15</sup>.*

ZEC's constitutional duty relates to the conduct of the elections, not **its** conduct. It is the elections themselves which must be carried out efficiently, freely, fairly, transparently and in accordance with the law and this involves the conduct of all those involved with the process (whom ZEC thanks at the outset of its report) and not just that of ZEC. It is ZEC's duty to ensure that **the elections** are conducted in this fashion. Given the condemnation of the violence and electoral conditions by all international observers, ZEC clearly failed in its constitutional duty to ensure free and fair elections. It seeks to avoid stating that the run off was free and fair (which it clearly was not) while at the same time concealing its failure in this regard by sophistry and word play. ZEC's failure to address the issue of widespread and clearly manifest violence during the run-off election is replicated in its report. ZEC dedicates only one sentence to this subject, again retreating into sophistry:

*According to the police, save for some parts of Mashonaland Central and Mashonaland East provinces where some incidents of interparty violence were reported, the rest of the country was generally peaceful.*

By using the phrase “according to the police” ZEC disassociates itself from any opinion on whether violence took place at all and if it did, the extent of that violence. It further ignores that fact that complaints were received of police being complicit or inactive in regard to the violence. Given the numerous complaints that violence took place at a level that rendered free and fair elections impossible, and given that ZEC had a constitutional duty to ensure free and fair elections, ZEC had a constitutional obligation to investigate the allegations of violence, form an opinion on the violence of its own and determine whether such violence vitiated the possibility of a free and fair election as

---

<sup>14</sup> It should be noted that section 12 (like many other sections of electoral legislation) does not cater for the possibility of a presidential run-off. In terms of the letter of section 12, ZEC should have filed a report no later than six months after the results of the parliamentary and local authority elections were announced. Since these were announced at constituency and ward levels as required by the Electoral Act Chapter 2:13 on 31<sup>st</sup> March, 2008 the latest date for the report should have been the 1<sup>st</sup> September, 2008 with a second report on the presidential elections following later. While it may be reasonable for ZEC to present only one report on all the harmonised elections and the run-off this is not in compliance with the legislation and at the very least one would expect ZEC to recommend an appropriate legislation adjustment.

<sup>15</sup> At paragraph 33 p10 of the report.

observers claimed. It fails to do so and seeks to avoid the perception that violence was an issue at all. However, ZEC slips in its attempt to avoid the issue of political violence by an inadvertent referral to it in its statutory report on the media (attached as Annexure D to its report). There it comments (at p 147) that Zimpapers gave attention to “the surge in political violence” from April, 2008. ZEC thus accepted that such violence had taken place. It did nothing about it. The Pan African Parliament Observer Mission Report on the run-off election refers to ZEC’s “deafening silence in the face of this violence as “alarming” and creating the perception of a “sequestered body”. ZEC’s report continues this policy of silence and makes no comment on the violence in its report. Either the international observers were wrong in their assessment of the violence, or the report by the police, often accused of complicity with ZANU PF supporters, was false, thus supporting the charge of police connivance in the violence. ZEC again makes no comment in this regard.

Furthermore, the violence was cited by the front runner in the election, Morgan Tsvangirai, (based on the first round results) as the main reason for his refusal to participate in the run-off. According to a letter from Tsvangirai to ZEC (attached to ZEC’s report as annexure L) Tsvangirai stated that the level of violence meant that it was impossible for a free and fair election to be conducted in accordance with the law. Since no legal election process could take place, Tsvangirai indicated he would not participate in what was a legal “nullity”. As the electorate had already expressed a preference for Tsvangirai ahead of Robert Mugabe in the first round, Tsvangirai’s ground for non-participation should have been taken up by ZEC as this matter was an extremely important aspect of ZEC’s duty to ensure that the electorate was able to exercise its democratic choice. ZEC responded by stating that section 107 of the Electoral Act required Tsvangirai to give 21 days notice of his withdrawal from the election, thus ignoring the fact Tsvangirai’s stance was that there was no legally conducted election from which to withdraw. In any event Tsvangirai presented cogent legal arguments that section 107 had no application to a presidential run-off election. ZEC made no attempt to rebut these legal arguments.<sup>16</sup>

Having won the majority of the votes in the first round, one can reasonably assume that Tsvangirai must have had very good reasons to withdraw from the contest. ZEC at the very least had a duty to investigate the complaints of violence and to detail its findings in its report on the election. Furthermore, since the media and observers and indeed SADC governments were seized with and extremely concerned about the extreme levels of political violence, the failure by ZEC to address the issue of this violence in its report is remarkable. Had it done so, the legitimacy of Mugabe’s election as president in the run-off would have been tainted. It appears that it is precisely to avert this taint, that ZEC has studiously avoided the issue and in so doing has provided clear evidence of partisanship. Accordingly, ZEC’s limited claim that **it** conducted the elections freely fairly efficiently and transparently cannot be sustained.

The figures presented by ZEC as the result of the presidential run-off also implicitly demand that ZEC should have reported on the levels of violence. The official results indicated that Morgan Tsvangirai had won 47.94% of the vote (1 195 562 votes) against 43.11% (1 079 730) for Robert Mugabe, with about 9% for two other outside candidates. Some 2 497 265 people comprising 42.73% of register voters cast their ballot. The reasoning behind a run-off election where no candidate has won an absolute majority is to determine which of the two front running candidates would draw enough of the 9% of the outside candidates’ votes to attain the support of more than 50% of the electorate. This meant that Mugabe required 77% of the outside candidates’ votes to be

---

<sup>16</sup> Since the Electoral Act provides that a run off election be held **within** 21 days, it does not make sense that at least 21 days should be given if a candidate should intend to withdraw. Furthermore, section 107(3) provides that once a candidate has withdrawn the deposit paid by such candidate in terms of section 105 is forfeited. As no such deposit need be paid for the run off, the section is clearly not intended to apply to a presidential run off, again indicating that the legislation does not cater for the situation of a run off.

elected. This was a tall order. In many democracies a candidate in Mugabe's position would simply have conceded defeat.

The run-off results claimed victory for Mugabe with 85.3% or 2 177 559 votes, and gave Tsvangirai 9.4% or 239 008 votes with 5.3% spoiled papers or 135 806 ballots. The voter turn out was given as 43.01%. These figures are inherently implausible and beg some explanation of a swing in voter preference on what is probably an historically unprecedented scale with such a short period. Bearing in mind that the voter turn out was recorded as being slightly more than the first round, there are several logical possibilities:

- That 956 554 people<sup>17</sup> who had voted for Tsvangirai in the first round, changed their allegiance and voted for Mugabe in the second round, without any of Mugabe's supporters switching allegiance. Zimbabwe's political terrain suggests that this is a far-fetched explanation;
- That an additional 1 097 829 Mugabe supporters who had not bothered to vote in the first round turned out to vote in the second round. This means that an equivalent of 40% of the electorate was suddenly inspired to vote in an effectively uncontested election when they had not bothered to turn up to vote for Mugabe in the first round. This is implausible and the more so given that observers noted a marked drop in voter turn out,<sup>18</sup> which was to be expected given the withdrawal of Tsvangirai.
- That violence, the withdrawal of Tsvangirai and reduction of electoral monitors (partly due to the violence, due to the withdrawal of one candidate and by the actions of ZEC itself<sup>19</sup>) meant that polling and polling station returns were not monitored allowing for the submission of fraudulent returns on a massive scale. This explanation is not only plausible but is supported by the fact that figures for the voter turn remained the same as those for the first round despite an observed drop in the number of voters.

Accordingly, the most reasonable explanation for the implausible figures presented as the result of the presidential run-off was endemic violence. ZEC's own figure thus constituted evidence of endemic violence. Yet ZEC still felt it was not necessary to attend to this issue or comment upon it in its report.

This is even more remarkable if one considers that some of ZEC's own staff was subjected to violence and intimidation and became victims of police harassment. Ignatius Mushangwe, a senior ZEC official, went missing after the harmonised election reportedly after he had objected to the manner in which postal ballots were to be issued (see below). *The Standard* newspaper claimed that Mushangwe had apparently attended a heated meeting of the multi-party liaison committee on 10 June 2008 in Harare:

*... a source who attended the... meeting said ... Mushangwe had clashed with senior security officers after he told the meeting that ZEC would only issue out postal ballots to [police] officers who would be on duty. The following week when the committee met, Mushangwe was not present. Other members asked about his whereabouts but one official told the meeting ... "You won't see him again".<sup>20</sup>*

---

<sup>17</sup> A further 141 275 voters would still be required to make up Mugabe's total.

<sup>18</sup> The Electoral Commission Forum of SADC Observer Mission p4

<sup>19</sup> ZEC reduced the number of ZESN Observers from the 8 667 in the first election to 500 – ZESN Report p55. ZESN felt that it was impossible to carry out its observation efficiently under the circumstances and withdrew from observing the election.

<sup>20</sup> *Standard*, 19-25.10.08

Mushangwe's body was later found in a mortuary in Norton. ZEC has not commented on this report which suggests violent interference with its independence. Furthermore, ZEC admits that some 131 ZEC employees were arrested and detained by the police after the March elections.<sup>21</sup> Allegations against them included tampering with election results, fraud or criminal abuse of duty as public officers and the manipulation of vote tallies, and acceptance of bribes to do so. The arrest of ZEC staff members is as unprecedented as Mugabe's electoral defeat. There are two possible responses by ZEC in regard to these arrests. Either to regard the arrests as justified, in which case it must admit that its management of the harmonised elections were marred by widespread fraud and abuse of office and could not be said to be efficient as it claims at the outset of its report, or if the arrests were not justified, then this points to intimidation of ZEC staff by the police to deter any persons not sympathetic to ZANU PF from offering their services for the run off election, which would itself point to preparations for electoral fraud. ZEC did nothing to protest these arrests or defend its staff. ZEC makes no comment on these arrests (other than ironically to thank the ZRP for its part in providing the security for ZEC staff<sup>22</sup>) and does not indicate how many arrests resulted in convictions, once again evading the issue by stating that the "cases are at different stages of processing in the courts".<sup>23</sup> In fact few convictions have resulted<sup>24</sup>, and some of the errors which had occurred were patently innocent clerical errors<sup>25</sup>. It thus appears that ZEC has chosen not to comment on these arrests as to do so would imply that the police connived with ZANU PF to intimidate ZEC officials. ZEC omissions and silence in this regard indicate a lack of independence and partiality.

Finally, in this regard, ZEC made no response and does not comment in its report on statements emanating from service chiefs that they would not recognise the result of the presidential poll if Tsvangirai won, implicitly threatening a coup<sup>26</sup>. As several international observer missions pointed out, the statements were highly intimidatory and violated the SADC Principles and Guidelines on Democratic Elections. The Pan African Parliamentary Observer Mission reported that it sought comment in this regard from an Assistant Commissioner of Police acting for the Commissioner-General and received a reply that was "unprofessional and regrettable".<sup>27</sup>

## **Delaying the Results and the Run-Off**

### **a) The Results**

The delay in announcing the presidential result and delay in the run-off election provided the time for a campaign of violence to subdue an electorate that had shown a preference for Morgan Tsvangirai rather than Robert Mugabe. The Electoral Act provides that a run-off election be held within 21 "of the previous election".<sup>28</sup> ZEC determined that the run-off should take place two months later, thus creating the space for the campaign of violence. This gives rise to the suspicion that the delay was not a result of an independent exercise of discretion by ZEC officials, but rather an action on the instruction of persons within the ZANU PF hierarchy and more particularly the military, which was reported by some as having taken over management of the electoral process, for precisely this purpose.<sup>29</sup> The delay in announcing the result and setting the date for the run-off thus

---

<sup>21</sup> ZEC Report p 7. See also the EISA report p 73

<sup>22</sup> p 4 of the report.

<sup>23</sup> Paragraph 2.28 p 38 of the report.

<sup>24</sup> Makumbe J. *Theft By Numbers: ZEC's Role in the 2008 Elections* KAF 2009 Publication pending

<sup>25</sup> One arrest for example was based on the fact that a V23 form had been complete showing Morgan Tsvangirai of MDC-T had 5 407 instead of 5 467, obviously the result of missing a badly written "6" as "0" - see the *Herald* 22/04/08.

<sup>26</sup> See for example Zimonline.com *Zimbabwe army threatens coup if Mugabe loses election 26<sup>th</sup> September, 2007.*

<sup>27</sup> Report of the Pan African Parliament on the Run Off Election p 3.

<sup>28</sup> Section 110(3) of the Electoral Act

<sup>29</sup> EISA report p 73.

attracted considerable comment, debate and “controversy”.<sup>30</sup> The MDC in fact brought a court application to in an attempt to compel ZEC to release the presidential result.<sup>31</sup> Government spokesperson Bright Matonga responded to queries by the international media in regard to the delay by averring that ZEC had “six days” within which to release the result. ZEC issued no corrective statement. In his opposing court papers Justice Chiweshe indicated that there is no time limit for the issuance of the result. Both were wrong. The Electoral Act clearly provides that each stage of the counting process follows **immediately** after or **forthwith** upon the completion of the proceeding. ZEC has no discretion to delay the process. The time scale for this process has been analysed in detail elsewhere and is attached to this paper as Annexure A.

Furthermore, Paragraph 3 of the second schedule provides:

*...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.***

As Justice Uchena stated in the MDC’s court application:

*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 *MDC and Morgan Tsvangirai v the Chairperson of ZEC and the Chief Elections Officer* E/P 24/08)*

In other words, in terms of the Electoral Act, a running tally of the results of **all** the elections is made at each level. Thus the totals for the presidential election are made at polling station level and affirmed by the signatures of the parties’ polling agents, these tallies are sent to the ward stations added up and affirmed by the polling agents, and submitted to the constituency centres.<sup>32</sup> The constituency centres tally the results and must forward them to the Chief Elections Officer.<sup>33</sup> In terms of this procedure then, the Chief Elections Officer merely has to add together the four columns (one for each presidential candidate) on 210 returns and then must **forthwith** declare the winner. Yet it took the Chief Elections Officer until the 2<sup>nd</sup> May, 2008 (five weeks) to do this.

ZEC has offered a variety of explanations for this delay, none of which have any foundation in law. In response to the MDC’s court application in which the MDC pointed out that due to the procedure of running totals at each level, ZEC must have been in possession of the tallies for the presidential result from the 210 constituency returns by 30th March, 2008, Justice Chiweshe responded as follows:

*“... presidential votes cast at the polling stations are transmitted as raw materials, the*

---

<sup>30</sup> This term was used by Justice Chiweshe himself in papers submitted to the High Court – see immediately below.

<sup>31</sup> *Movement for Democratic Change and Morgan Tsvangirai v The Chairperson of the Zimbabwe Electoral Commission and the Chief Elections Officer, Zimbabwe Electoral Commission* E.P. 24/08.

<sup>32</sup> Paragraph 1(1)(c) of the Second Schedule to the Electoral Act.

<sup>33</sup> Not to the provincial centres as ZEC’s notice on “Movement of Results” published in the *Herald* erroneously suggested.

*finished product to the National Collation Centre; at national level. When unification and counting has occurred.” (sic).<sup>34</sup>*

This response from the High Court Judge and Chairperson of ZEC is almost unintelligible. He seems to be indicating the results of the presidential poll are determined from the V11 polling station returns. However, as indicated above, the second schedule to the Electoral Act makes it quite clear that the presidential results are to be determined by the Chief Elections Officer from the **constituency** returns and the constituency returns alone.

In its report ZEC provides the following explanations for the delay:

- *the need to go back to source documents to verify the results from provincial and other collation centres;*
- *logistical challenges, and*
- *the need to do recounts in some constituencies<sup>35</sup>.*

Ostensibly elaborating on the first of these explanations, ZEC continues as follows:

*Prior to the finalization of the verification and collation of the presidential result, it came to the attention of the Commission that there were anomalies in the summations of provincial and other collation centres. As a result, the Commission re-strategised the collation process by going down to the source of the results, that is, the V11 forms. As a result, the collation took longer than previously anticipated.*

As has been indicated above, the only collation centre of any legal relevance as provided by the Act in the Second Schedule are the tallies at **constituency** level, which ought to have been verified and signed for by each party up to that stage. Provincial and “other collation” centre tallies are of no legal relevance. There is no legal procedure allowing ZEC to conduct a forensic audit of the polling station returns unless it proceeded in terms of section 67(A)(4) of the Act, which is discussed below. The Chief Elections Officer is obliged to add up the constituency tallies **immediately after** the verification process is completed. Since it did not claim to be proceeding in terms of 67(A)(4) of the Act, ZEC has sought to justify the delay on this ground by suggesting that its reversion to the V11 forms was part of the verification process which it claimed it could do within any “reasonable” time. This is false. Section 65(2) sets out the verification process as follows:

*... in the presence of such candidates, their chief election agents, monitors and observers as are present, the constituency elections officer shall display each polling-station return to those present and shall, on request, allow a candidate or chief election agent of a candidate to make notes of the contents of each. ...*

This section applies *mutatis mutandis* to the presidential election. Accordingly, the Chief Elections officer should have displayed the constituency returns to those present and allowed them to make notes relating to the returns. That is the verification process, nothing more, and nothing less. It does authorise ZEC to investigate alleged anomalies at polling stations or to revisit the V11 returns. It also does not authorise each party to present their own figures from the polling stations and to challenge the returns – a procedure adopted by ZEC on 2<sup>nd</sup> May, 2008.<sup>36</sup>

This “elaboration” by ZEC raises more questions than it provides answers. If there were anomalies requiring ZEC’s attention as alleged ZEC should have dealt with this in a transparent manner and told us the nature of these anomalies. After all, they were important enough, ZEC maintains, to delay the announcement of the result and cause “controversy”. ZEC has claimed to have conducted

---

<sup>34</sup> Paragraph 7 of Chiweshe's Opposing Affidavit in that case.

<sup>35</sup> At paragraph 2.25 page 38 of the report.

<sup>36</sup> ZEC report p32 et seq.

the election “efficiently”. Disclosure of these “anomalies” would tell us if that is indeed the case. What exactly were these anomalies? How serious were they? How were they corrected? Were the returns which party agents had confirmed by appending their signatures altered? If so where the parties informed of the alterations? If, not on what basis did ZEC purport to unilaterally alter agreed returns and tallies?

The second explanation for the delay proffered by ZEC in its report is “logistical” challenges. These are “elaborated” upon by ZEC as:

*Transmission of results from some constituencies remains a challenge for the Commission. This was exacerbated by the need to bring in all source documents (VII) to the national collation centre following the discrepancies noted in the summations.*

The questions raised by reviewing V11 forms have already been noted. The only other “logistical problem” raised by ZEC relates to “transmission of results”. We are not told what this problem is. ZEC repeatedly states in its report that it had adequate funds to carry out its task<sup>37</sup> and that it carried out its duties “efficiently” so presumably it does not claim that this difficulty arose through inefficiency or lack of capacity. So what was it? We are also not told, why the problem (since it “remains a challenge”) manifested itself for the first round which Tsvangirai won, and not the second which Mugabe won and the results of which were declared in just over a day. Even if some difficulty were encountered in “transmission of results” ZEC should tell us when the documents were actually received. It seems unlikely to have caused a delay of more than a few days and can hardly have been a significant factor in delaying the result for five weeks, as was the case.

The third explanation for the delay proffered by ZEC is the necessity for a recount in some constituencies. The recount conducted by ZEC was patently unlawful (see Annexure B where the reasons for this are discussed in detail). At the time of MDC’s court application to compel the release the result of the presidential poll result Justice Chiweshe claimed that the delay was necessitated by the fact that it had received “complaints” in terms of section 67(A)(2) of the Act. That section allows a candidate to request a recount **after the declaration of the result**. The request must also be made within 48 hours of the declaration of the result. Once such a request has been received the Commission:

*shall order a recount of votes in the polling stations concerned if the Commission considers there 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**.*<sup>38</sup>

Justice Chiweshe noted that since a presidential candidate requires 50% plus one vote, a single vote could affect the result of the presidential election. Justice Chiweshe thus claimed ZEC was obliged to proceed with the recount and the presidential result had to be delayed. It is remarkable that a person with legal training should have advanced such an argument. A request for a recount must be made within 48 hours of the declaration of the result. Justice Chiweshe failed to disclose when the requests had been made, but they were only reported in the *Sunday Mail* newspaper a week after the results had been announced at constituency level. Furthermore, there is nothing in the section which suggests that the duty of the Chief Elections Officer to announce the results **forthwith** is suspended or does not still apply when a recount is ordered. The contrary is suggested. The section only has application **after** a result has been announced. The whole point of the MDC’s application was that there had been no announcement of the result. Furthermore, the requests had been received in relation to parliamentary elections and ought to have had no bearing on the presidential results. Section 67(A)(2) thus was not a legal basis to delay the release of the presidential result and rightly was not accepted as such by Justice Uchena. Having been told that this reason proffered by

---

<sup>37</sup> See paragraphs 2.10 and 3.7 of the report.

<sup>38</sup> Section 67(A)(3).

Chiweshe did not constitute a legal reason not to release the presidential result, Chiweshe should have then agreed to release the results. He did not. Instead his lawyer sought another basis for a recount. This sequence of events shows that it was not the parliamentarians' request for recounts which delayed the publication of the presidential result as once this impediment was shown not to be such, the results were not forthcoming. The sequence also shows that a decision had been made to delay the release of the results and the claim of the need for a recount was a subterfuge. When the impediment raised by ZEC had been removed ZEC's lawyer then suggested another - that a recount could take place under section 67(A)(4). That section provides as follows:

*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.*

Once again, there is nothing in this section which suspends the Chief Elections Officers duty to forthwith announce the result of the election, though Uchena J automatically assumed that it did without giving any reasons. In order to have a recount, there needed to have been a "count" so a preliminary result must have been known. Furthermore, in order for ZEC to make use of this provision it must have reasonable grounds for believing that the miscount would have affected the result of the election. This must mean more than that a candidate should have been allocated more votes than he or she had, as any miscount would imply this. It is the actual outcome of the poll which must be affected. In relation to the presidential vote this must mean the recount would alter the determination as to who was the frontrunner or whether the frontrunner had received more than 50% of the votes cast. When the results were eventually released they showed that Tsvangirai had 47.94% of the vote and Mugabe had 43.11%. To reverse this order would have required almost 5% more of the vote for Mugabe, and, with a voter turnout of about 2 500 000 this would have required a miscount of 125 000 votes. For Tsvangirai to surpass the 50% mark there needed to be a miscount of over 50 000 votes, the equivalent of 100% of the votes with 100% turnout in two constituencies. It is entirely implausible that ZEC could have had grounds for believing that a miscount to this extent had occurred. The requirements for the application of section 67(A)(4) were thus not met. Indeed, despite a recount of ballot boxes in 23 constituencies for all elections not a single one revealed discrepancies of any significance (as ZEC itself admits<sup>39</sup>), none sufficient to affect the result of any parliamentary poll and certainly none sufficient to affect the presidential poll. ZEC thus sees fit only to disclose the minor discrepancies for the House of Assembly results in annexure H to its report and not those, if any, for the presidential poll. The recount was thus not a genuine reason to delay the presidential result. Clearly, ZEC had other reasons for so doing and has not been transparent in its report in this regard. Even though the recount was completed on 27<sup>th</sup> April, 2008 ZEC inexplicably delayed the verification and collation exercise for a further four days.

Accordingly, in regard to the two most debated and controversial aspects of the presidential run-off, the delay in announcing the results and the violence, ZEC either avoids addressing the issue as in the case of the violence or advances implausible and legally untenable arguments to conceal the true motivation for its actions.

### **b) Delaying the Run-off**

There are other aspects relating to the delayed run-off which are important and should have been dealt with by ZEC in its report. Section 110(3) provides that the run-off election should be held within 21 days of the "previous election".<sup>40</sup> This provision alone makes it clear that ZEC had no power to delay the announcement of the results, as having done so for five weeks the 21 day time limit could not be met. ZEC was thus compelled to interpret "21 days of the previous election" to

---

<sup>39</sup> Paragraph 2.25.3 page 38.

<sup>40</sup> In keeping with ZEC's approach to the report, ZEC simply describes the requirement as being "within 21 days" without stating whence the period commences, for reasons which appear immediately – paragraph 1.6 page 15 of the report.

mean within 21 days of the “announcement of the result of the election”. In fact when the legislature intends something to be done within a period “after the announcement of the result of the election” it uses precisely those words. For example, as we have seen, ZEC is obliged to present its report in terms of section 12 of the Zimbabwe Electoral Commission Act to parliament no later than six months “after the result of the election has been announced”. A detailed argument as to why ZEC could not interpret the words “from the previous election” to mean the date the election result was announced, is attached as Annexure C.

Rather than citing its delay announcing the result as a reason for the non-compliance with the 21 days provided for by the Act, ZEC maintained that “due to logistical and other constraints, the period stipulated by the Act for holding the elections was not feasible”.<sup>41</sup> It is reasonable to suppose that had the run-off been held soon after the March poll as it ought, the electoral infrastructure already in place could have simply been reactivated for purposes of the run-off, making economic, ergonomic and logistical sense. Once again ZEC fails to provide any information as to the nature of these “logistical and other constraints”. Given that the extensive delay in holding the run off was believed by many to have facilitated a campaign of violence throughout Zimbabwe, ZEC would have been well advised to detail these logistical and other constraints to remove the suspicion that the “other constraints” were instructions from those orchestrating the violence.

In the event ZEC set the date for the run-off as the 27<sup>th</sup> June, 2008 some 103 days after the first round.<sup>42</sup> In so doing ZEC claimed it acted in terms of section 192(5) of the Electoral Act<sup>43</sup>. This provision purports to give ZEC the power of:

*altering any period specified in this Act within which anything connected with, arising out of or resulting from any election must be done...*

As ZEC must be and must have been aware, the constitutionality of section 192 and ZEC’s powers thereunder are doubtful. Section 192 replaced the previous equivalent section 158 which gave the same powers to the President. The Constitution in Section 28 (4) provides that ‘the procedure for ... the election of the President shall be as prescribed in the Electoral Law.’ Electoral Law is defined in Section 113 (1) as ‘the Act of Parliament having effect for the purposes of section 58 (4) of the Constitution which is for the time being in force.’ And Section 58 (4) requires that provisions governing elections “shall” be an Act of Parliament, that is, not regulations made by another authority. Only Parliament can enact the law governing elections. In considering the constitutionality of the previous section 158 Sandura JA said in *Tsvangirai v Registrar General and Others*<sup>44</sup>, [w]hat all this means is that the legislation which comprises the electoral law *must be an Act of Parliament*. He noted that ‘[t]hat act of Parliament is the Electoral Act.’ Parliament cannot abrogate its duty in that regard by purporting to give other persons and bodies the authority to make electoral law.<sup>45</sup>

## **Legislative Reform**

It is appropriate at this juncture to consider ZEC’s suggestions for legislative reform, as the real need for reforms concern sections of the Electoral Act touched upon above. Yet ZEC suggests minor legislative amendments only. The law provides that the voters’ roll is closed 24 hours before nomination day. ZEC says it is unclear how 24 hours from nomination day should be calculated. It also believes the period between nomination day and polling to be too short and, most

---

<sup>41</sup> Paragraph 3.0 page 44 of the report.

<sup>42</sup> The Electoral (Amendment of sections 39(2)(b) and 110(2) of Electoral Act) Notice, 2008

<sup>43</sup> Paragraph 1.6 p 15 of the report.

<sup>44</sup> 2002(1)ZLR 268 (S). Sandura JA was the only judge to deal with the substantive issue. The case with dismissed on procedural grounds.

<sup>45</sup> See Linington, G. *Illegality and Zimbabwe’s 2008 Presidential Election – an analysis of some of the legal issues arising in that election*. Unpublished paper, University of Zimbabwe

appropriately, that the powers given to commanding officers to witness postal votes of serving defence force personnel voters should be given to ZEC or other officials.<sup>46</sup> In this latter regard it is hoped that ZEC was motivated to make the recommendation on account of the fact that the number of applications for postal ballots supposedly increased from 4350 to a massive 48 410.<sup>47</sup> If it was so motivated, however, it neither indicates as much nor provides any explanation for the massive increase in postal ballots. The increase obviously supports allegations that the postal vote was used as a means of fraud in the run-off election. ZEC claims that “there are no proven cases to prove” that the secrecy of the postal ballot was compromised.<sup>48</sup> Its own figures relating to postal ballots would be a useful starting point for investigation of the issue.

It is peculiar that ZEC should mention these minor legislative changes in its report and disregard major discrepancies of great relevance relating to the electoral legislative structure that arose during the 2008 elections.

#### **a) Doubts Over the Lawfulness of the Run-Off**

Most significant is the apparent conflict between the Second Schedule of the Electoral Act and section 110(3). As noted above, paragraph 3 of the Second Schedule requires the Chief Elections Officer to

*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, this schedule provides that the Chief Elections Officer must declare the candidate who has won a *simple* majority of votes as duly elected president.

This provision is apparently contradicted by subsections 110(3) and 110(4) which provide:

*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.*

Together these two subsections of section 110 make it clear that an *absolute* majority is required, that is 50% plus one vote, not simply more votes than anyone else, as the Second Schedule provides. The provisions thus appear to contradict each other and ZEC was required to choose which part of the legislation to apply. In response to a letter to ZEC written by the NGO, Zimbabwe Lawyers For Human Rights prior to the March elections, ZEC indicated that it would apply section 110(3) and not the Second Schedule. This is generally the correct course of action if the two provisions cannot be reconciled, as according to the rules of interpretation where a schedule contradicts the main body of the legislation, the main body must prevail. However, there are cogent arguments that the Schedule should have been applied and these were advanced by several lawyers (the arguments are attached as Annexure D) and that the run-off itself was illegal. One is that the two provisions are not incompatible and that they should have been applied even though it may have led to an unusual result. In terms of this argument, the Chief Elections Officer should have announced Tsvangirai declared duly elected as president being the candidate who won the greatest number of votes. The run-off should then have taken place in terms of section 110(3) with Tsvangirai as incumbent. A second argument is that in terms of section 28(3) of the Constitution, the presidential election must take place on the same day as the parliamentary elections. The presidential election held on 29<sup>th</sup> March, 2008 complied with this constitutional requirement. A run-off could not and cannot comply

---

<sup>46</sup> Paragraphs 4.3, 4.4 and 4.6 page 51 of the report.

<sup>47</sup> Pages 7 and 10 respectively of ZEC's report.

<sup>48</sup> p 40 of the Report.

with the constitutional requirement of simultaneous elections, as it must necessarily take place on a different day. This then means that section 110(3) is unconstitutional and the Schedule must prevail. ZEC's report entirely ignores these arguments and the compatibility problem between the two provisions which urgently demands legislative attention.

#### **b) Impediments to ZEC's Independence and Democratic Practice.**

Several laws were applied during the course of the election which affect ZEC's independence and basic democratic practice. ZEC's report, however, makes it clear that it is unable to perceive anything amiss with this legislation.

Firstly, ZEC was happy to apply section 192. It has already been stated that this section is of dubious constitutional validity. Section 192(6) also provides that any regulations enacted by ZEC under the section must be approved by the Minister of Justice. This means that an individual having an interest in the outcome of the elections and possibly a candidate (as was the case for the parliamentary elections) has the power to influence the law governing his own election or the election of another in which he has an interest. From ZEC's report, it is clear that ZEC does not see anything wrong with this undemocratic procedure.

Secondly, the criticism applies even more strongly to the use of the Presidential Powers (Temporary Measures) Act<sup>49</sup> to amend electoral law. It is entirely undemocratic that a candidate in an election should have the power to amend the laws relating to an election in which he is a participant. The power ought not to be construed as constitutional. Prior to the election the political parties had agreed to exclude the police from polling stations. Human Rights organisations have repeatedly alleged that the ZRP engages in partisan policing, harassment of opposition supporters and complicity and participation in intimidation of opposition supporters and vote rigging.<sup>50</sup> For this reason, the opposition has argued that the presence of the police inside polling stations should not be allowed. Pursuant to negotiations facilitated by Thabo Mbeki, electoral legislation was amended to reflect this concern. Utilising powers under the Presidential Powers Act, the president purported to reverse this amendment passed by parliament.<sup>51</sup> International and other observers specifically criticised the presence of police officers in polling stations.<sup>52</sup> Far from criticising the use of the Presidential Powers Act in this way, ZEC praised the enactment of Presidential Powers Temporary Measures (Amendment of Electoral Act) (No. 3) Regulations 2008 published in Statutory Instrument 96/2008 "to allow the voters to be assisted by the presiding officer in the presence of persons of their own choice"<sup>53</sup> seemingly oblivious of the patent conflict of interest.

ZEC also appears to have no difficulty with the fact that its Observation and Accreditation Committee's powers are subject to the power of veto by the Minister of Foreign Affairs in the case of international observers and the Minister of Justice in the case of local observers, both of which Ministers are interested parties in the elections. As a result of these powers the numbers of observers for the run-off election were sharply reduced without explanation and local observers were obliged inexplicably to reapply for accreditation for the run-off election.<sup>54</sup>

Finally under this head, having stated that ZEC's funds consists chiefly of parliamentary appropriations<sup>55</sup> (the reason for this being to prevent ZEC's independence from being undermined by becoming beholden to those who might supply funds from elsewhere) ZEC unabashedly admits<sup>56</sup> that the Reserve Bank, whose governor is an appointee of Mugabe, a candidate in the

---

<sup>49</sup> Chapter 10:20

<sup>50</sup> See *Its the Count that Counts: Food For Thought. Reviewing the Pre-Election period in Zimbabwe* Report by The Zimbabwe Human Rights NGO Forum March 2005

<sup>51</sup> S.I. 43/2008 – Presidential Powers (Temporary Measures) (Amendment of Electoral Act) (no. 2) Regulations 2008

<sup>52</sup> See for example the African Union Observer Mission Report at p16.

<sup>53</sup> Paragraph 4.7 of the Report p 50.

<sup>54</sup> ZESN Report p 51.

<sup>55</sup> Section 9 of the Zimbabwe Electoral Commission Act and 61(6) of the Constitution.

<sup>56</sup> Paragraph 2.18 page 22 of the report.

election, provided 66 vehicles and facilitated the purchase of Commission vehicles.

### **Return forms**

Controversy arose over the accuracy of the final and delayed results announced by ZEC. S.I. 82A/2008 [Electoral (Amendment) Regulations (No. 5)] has amended the format of the V11 and V23 forms and contains a healthy provision that a copy of the completed form must be handed to each election agent and observer present, in addition to being posted outside the polling station.<sup>57</sup> For reasons best known to ZEC this salutary improvement does not apply to the completed forms V23A [Collation of Polling Station Returns and Postal Ballots] and V23B [Constituency Returns] which should also to be given to election agents and observers. This would be a simple way to avoid future disputes and was recommended by the AU Observer Mission to the March polls.<sup>58</sup> The omission is curious.

### **ZEC's Failure to Comply with Electoral Provisions**

#### **a) The Voters' Roll**

The voters' roll has long been a source of criticism in reports on elections published by NGOs and independent observer groups from 1985 and onwards. Numerous complaints were received about the process of registering voters<sup>59</sup> and ZEC's report canvasses only a select few of these complaints. The Registrar-General is perceived by observers and opposition candidates to be extremely partisan. As a result the voters' roll, under the control of these bodies, itself has been perceived as being deliberately inaccurate and inflated to facilitate manipulation of the vote count. This suspicion and taint to the claim of a democratic mandate by the winners of the elections could have been, and can still be, easily dispelled by an independent audit of the criticised voters' roll and subsequent rectification, an exercise made that much easier with the advent of powerful and easily accessible computer technology. It is one which should be welcomed by electoral supervisory bodies and a non-partisan Registrar-General in the interests of transparency and to support any claim of a fair election. In fact, the contrary has been the case. The Registrar-General has done everything possible to prevent access to the voters' roll, and has been found in contempt of court for failing to comply with court orders requiring that he adhere to his statutory obligations in this regard. Since legislative amendments have placed the roll under the authority of ZEC it was hoped that the roll would properly be treated as a public document and examination of its contents facilitated rather than hindered. Unfortunately, an obstructionist attitude in regard to the roll has been continued. ZEC reports:

*In keeping with Section 21(3) of the Electoral Act [Chapter 2:13], the Commission provided a copy of the voters' roll to any person who formally requested for it, as soon as the prescribed fee was paid.<sup>60</sup>*

ZESN itself reports that it only received copies of the rolls after the elections<sup>61</sup>. More importantly, very few electronic copies of the roll were issued as provided for by section 21(4). When further copies were requested ZEC claimed that it did not have the resources to issue more – this is despite ZEC's claims in its report that it was adequately resourced. More importantly, the whole point of supplying an electronic copy is so that the roll can be subjected to a computer audit. The roll was deliberately supplied in "TIFF" format on 210 discs in an attempt to prevent such an audit from taking place. It is doubtful that supplying the roll in this format constitutes an electronic copy as section 21(4) requires. The TIFF format is effectively a digital photograph of the printed roll rather

---

<sup>57</sup> See Veritas Bill Watch 25/2008.

<sup>58</sup> Page 16 paragraph 5

<sup>59</sup> See ZESN's Report pp22-24.

<sup>60</sup> Page 40 Part III

<sup>61</sup> ZESN Report p 24

than an electronic copy of the roll itself. ZEC needs to explain why the roll was supplied in this format, which must have required considerable effort on the part of the Registrar-General's office in order to do this. When the Registrar-General's office complied with a court order to supply the national roll relating to the 2002 elections, the roll was copied onto a single disc in 30 minutes in a navigable format.<sup>62</sup>

Notwithstanding this deliberate obstruction under the authority of ZEC, optical character recognition software was deployed to convert the files and a preliminary audit conducted of some constituencies. The audit revealed some 8000 voters (the equivalent of nearly a third of a constituency) registered at a single address in Hatcliffe. ZEC was confronted with this information by an international observer mission. The Mission reports<sup>63</sup> that ZEC responded that the Act provides for "a communal address system whereby the community members can be registered using the same address." There is no such legislative provision, and if there were, as the mission rightly points out, this could lend itself to electoral fraud. ZEC does not address this issue in its report and simply glibly states that "ghost" voters can be removed from the roll if an appropriate application is made.<sup>64</sup>

### **b) Posting Results at Polling Stations and Collation Centres**

The requirement to post results at polling stations and running tallies for all elections at collation centres should have been the start of a healthy move towards transparency by ZEC. ZEC reports that:

*The votes received by each candidate for each of the 4 (four) elections are recorded on the Form V23, and the ward elections officer declares the results of the poll and the councilor-elect. The results are then posted outside the ward collation centre and forwarded to the constituency collation centre.*<sup>65</sup>

ZEC should have gone onto say that the results of the remaining three elections were then displayed at the constituency collation centre. This is what is required and what ZEC's notice on the "Movement on Results" indicated would happen. Both ZESN and EISA reported at a post election feedback conference that ZEC had failed to follow the prescribed procedure in this regard at numerous constituency centres.<sup>66</sup> ZEC entirely fails to mention this lapse. Had ZEC followed the correct procedure, the subsequent furore over the presidential results would have been avoided, and the difficulties which presented themselves on the 1<sup>st</sup> May, 2008, with each party trying to confirm the results through over 9000 polling station returns, obviated. The parties could have confirmed ZEC's results against 210 constituency returns, a far more manageable process. No explanation is provided as to why the running tallies were not displayed as statutorily required. This lack of transparency is continued into ZEC's report. While there is no statutory obligation to do so, ZEC should have provided a complete break down of the presidential returns in its report, showing the votes received at polling stations level, or at least the tallies at ward and constituency level to enable to public to satisfy itself the totals are correct and so that the figures can be subjected to psephological analysis which may expose or discount the possibility of rigging. The provision of tallies at provincial levels only provides no meaningful information. The implausibility of the figures for the presidential run-off has been mentioned above. These figures could be subjected to an informative and revealing scrutiny if ZEC exercised transparency and provided a detailed break down of the results. Its failure to do so suggests that it has not done so precisely to prevent such scrutiny.

### **c) Admissions by ZEC of Non-Compliance**

---

<sup>62</sup> Telephonic interview with the author of the "Expert Report" on the voter residue prepared for the 2002 Presidential Electoral Petition.

<sup>63</sup> See the Report of the Pan African Parliament Observer Mission p 2

<sup>64</sup> Page 39 of the Report.

<sup>65</sup> Paragraph 2.22.4 page 28 of the Report.

<sup>66</sup> Held at Victoria Falls on 28<sup>th</sup> and 29<sup>th</sup> April, 2009

Despite claims of efficiency by ZEC, ZEC admits to a host of incidents where legislative requirements were not met, many of these being exposed during the recount process. Many related to measures designed to prevent electoral fraud. ZEC identified the following “discrepancies” at polling stations where ballot boxes were subject to a recount:

- In a number of cases, the number of valid votes cast, inclusive of those using voter registration slips, did not tally with the number of cancelled out voters in the voters’ rolls and those registered as having used the slips.
- In other instances, some rejected votes were found to be valid, and vice-versa.
- Some votes were allocated to wrong candidates.
- There were no issue vouchers in some of the ballot boxes.
- Some voters who used voter registration confirmation slips were not recorded in the register(s), thus leading to unaccounted for ballot papers.
- In a few cases, some voters’ names were cancelled in two different polling stations, thereby implying multiple voting.
- In some cases no record of turned away voters had been compiled.
- Some ballot boxes were neither locked nor sealed, while others had broken seal straps.

ZEC states that these shortcomings would provide “lessons that should and would inform future training programmes for electoral officers”. Unfortunately, these are lessons which have been given before and, it seems, have failed to be absorbed by staff in ZEC and the Registrar-General’s office. Following on an election petition brought in relation to the 2002 presidential election, examination of electoral residue revealed<sup>67</sup> almost exactly the same instances of non-compliance with and violations of the Electoral Act.<sup>68</sup> Of greatest concern is the failure to properly reseal ballot boxes or to keep such ballot boxes sealed. Broken seals are strongly suggestive of tampering with electoral residue and electoral fraud. However, in the absence of properly secured and sealed electoral residue no conclusive determination can be made about the integrity of the ballot. The continued failure of the Registrar-General’s office and violations of the Electoral Act in this regard should be a matter of deep concern for ZEC and immediate action and investigation – not simply passed over as lesson to be learned.

In addition to the above instances of electoral malfeasance admitted by ZEC two potential presidential candidates<sup>69</sup> nomination papers were wrongly rejected;<sup>70</sup> insufficient ballot papers were delivered to some wards;<sup>71</sup> and incorrect advice by ZEC to voters was widely published and required correction.<sup>72</sup>

### **ZEC’s Passivity**

ZEC’s supine approach to its constitutional duty to ensure that “elections and referendums are conducted efficiently, freely, fairly, transparently and in accordance with the law” has emerged from the discussion of several preceding issues. ZEC generally appears to have adopted a policy that if legislation provides a remedy to a complainant no further action is required by it in order to ensure that elections are conducted in accordance with its constitutional mandate. This would imply that

---

<sup>67</sup> See *The Expert Report to Court T*. Whitehead prepared for the presidential Election petition in 2002 .

<sup>68</sup> For example section 70(4).

<sup>69</sup> Justin Chiota and Daniel Shumba see paragraph 2.27 of the report p 38.

<sup>70</sup> *Shumba and Another v ZEC and Another* SC 11/08.

<sup>71</sup> Part III of the report page 38.

<sup>72</sup> Paragraph 2.5 of the report page 18.

since a candidate has the power to bring an electoral petition if he or she is dissatisfied with the conduct of the election, ZEC need do nothing to ensure that elections are conducted properly. The approach is wrong but was clearly adopted by ZEC in several instances.

For example, most international and local observers expressed dismay at the total absence of opposition party political advertisements in the period preceding the presidential run-off election, in contrast to the period preceding the harmonised elections.<sup>73</sup> ZEC notes that MDC advertisements only appeared in the private media and states that the MDC claimed that its election advertisements had been rejected by the public broadcaster. Bias by state broadcasters has long been a complaint of opposition parties and necessitated the introduction of regulations precisely to deal with this difficulty. The total absence of MDC campaign material from the state controlled media reflected badly on the freeness and fairness of the election and ZEC should have undertaken an investigation on its own initiative as to what had caused this anomaly. The more so since reports appeared in the press that Zimbabwe Broadcasting Holdings had been ordered by senior ZANU PF officials and Ministers not to broadcast MDC advertisements and to increase the vilification of the MDC.<sup>74</sup> Instead ZEC was simply content to point out that if the MDC's election material was refused by the state broadcaster, that the MDC has a right to appeal.<sup>75</sup> In fact ZEC goes further and suggests that it can only intervene if a formal complaint is lodged.<sup>76</sup> This is simply incorrect. ZEC has a statutory duty to ensure the impartiality of the media<sup>77</sup> – it should not demand that others carry out this task for it. A detailed critique of ZEC's statutory report on the media is being prepared separately.<sup>78</sup>

There are numerous other instances of ZEC's passive approach to its duties throughout the report. To mention but a few:

In responding to complaints that persons were refused voter registration ZEC states:

*The process of voter registration is subject to the specifications outlined in the Constitution of Zimbabwe and the Electoral Act [Chapter 2:13]. In terms of the law, only citizens are allowed to register as voters subject to meeting the requisite residential qualifications. The law provides for recourse to the courts of law for aggrieved persons.*<sup>79</sup>

ZEC's obligation in its report is not to simply set out the law. That can be ascertained by reference to the legislation. ZEC's task is to ensure that the law is applied. It appears to have taken no action in this regard.

- In responding to the claim the presence of the police in polling stations is intimidatory, ZEC again simply sets out the law:

*In terms of the law, the police do not play an active role in the voting process except when called upon to witness electoral officers assisting a voter or to maintain law and order.*<sup>80</sup>

---

<sup>73</sup> See for example the PAP Report on the Run-Off p2 which in addition notes that the State media was used for a vilification campaign against the opposition.

<sup>74</sup> See for example Zimonline.com *Mugabe's Govt Wants Monopoly of the Airwaves* 7<sup>th</sup> May 2008  
thezimbabwetimes.com *Government Bans MDC Adverts* 13<sup>th</sup> June 2008

<sup>75</sup> Section 10(3) Zimbabwe Electoral Commission Media (Coverage of Elections) Regulations S.I. 33 of 2008

<sup>76</sup> At p 41 of the Report

<sup>77</sup> Section 16G of the Zimbabwe Electoral Commission Act [Chapter 2:12].

<sup>78</sup> By the Media Monitoring Project of Zimbabwe.

<sup>79</sup> Part III of the report p 39.

<sup>80</sup> Ibid p 40.

- And in responding to allegations of vote buying:

*Vote buying is a criminal offence which should be reported to the police.*<sup>81</sup>

- In responding to the refusal of nomination papers by some nomination courts:

*As long as prospective candidates met the requirements of section 46 of the Electoral Act, their papers were accepted. However, aggrieved persons were free to approach the Electoral Court for relief.*<sup>82</sup>

- This statement is contradicted elsewhere in ZEC's report where it concedes the Messrs Chiota and Shumba's nomination papers were wrongly refused. By the time relief was granted by the Supreme Court the elections were long over, emphasising the need for a proactive approach by ZEC in order to ensure the fairness of the elections.

ZEC was capable of acting pro-actively when it chose to do so. However, in the few cases that it did, it was with negative consequences. ZESN has many years of experience in providing an effective and useful voter education campaign. This would have been an important supplement to ZEC's own education campaign which was held by most observers to be inadequate<sup>83</sup> and began later than the minimum period of 90 days before the election as stipulated by the Act<sup>84</sup>, a fact which ZEC avoids. However, in mid-February, ZESN received an instruction from ZEC to discontinue all voter education and to withdraw its voter education material from the media. The basis for this instruction was that ZESN's material was not approved by ZEC. Although entities other than ZEC cannot disseminate voter education material without ZEC's approval<sup>85</sup> ZEC could immediately have given such approval unless it felt ZESN's material was undesirable. There is no need for ZESN materials to be submitted to ZEC unless ZEC requests as much in writing<sup>86</sup>. Apparently, ZESN's request for approval received no response.<sup>87</sup> ZESN was thus unable to continue with this important activity. A more helpful approach would have been for ZEC to have approved the material or to have pointed out to ZESN any objectionable part of its materials and asked for those only to be removed.

## Conclusion

ZEC's statutory duty to present a report on the elections should be an opportunity for ZEC to respond to questions which have been raised by electoral observers and to provide details of the electoral process which may serve to dispel misapprehensions which may have arise relating to aspects of the election, particularly where the election is accompanied and followed by considerable dispute and controversy. Instead ZEC's report is characterised by glaring omissions, evasions and demonstrably untrue statements. All of these statements have the same effect – of concealing that which was obvious to all observers other than ZEC, the Zimbabwe Drivers Union, The Zimbabwe National Association of Small and Medium Enterprises, and the Zimbabwe Federation of Trade Unions<sup>88</sup> – that is, that the presidential run-off election was not conducted efficiently, freely, fairly, transparently and in accordance with the law and that the actions of ZEC deliberately helped to

<sup>81</sup> Ibid p 41.

<sup>82</sup> Ibid p 40.

<sup>83</sup> See for example the PAP Mission Report p 2.

<sup>84</sup> Section 15A of the Zimbabwe Electoral Commission Act.

<sup>85</sup> Section 15(1)(d) of the Zimbabwe Electoral Commission Act.

<sup>86</sup> Ibid Section 15(2).

<sup>87</sup> See Matyszak D. *Civil Society and the Long Election* p6 KAF, publication pending.

<sup>88</sup> This company is not illustrious. The observer reports of the first two are scarcely literate, while the ZFTU report says that the run-off elections was free from any violence – a view held by no one else and patently false.

bring this about. ZEC's conduct during the elections revealed the need for a truly independent Electoral Commission. ZEC report itself is further evidence of this pressing need. The report raises questions (a sample is provided in Annexure E) rather than providing answers.

The Chair of the Commission, Justice Chiweshe, was honoured with an award by President Mugabe at the Independence Day celebrations of 2008.<sup>89</sup> This critique may provide some indication as to whether Chiweshe's conduct as the head of ZEC merited that award.

## ANNEXURE A<sup>90</sup>

The procedure for the counting of the vote, the announcement of the results and the time frame for the process ZEC, 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 adopted<sup>91</sup>. 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”.<sup>92</sup> 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**”<sup>93</sup> and in the presence of the candidates or polling agents:

- record the number of votes for each candidate in each of the four elections on the polling station returns;
- display the completed polling station returns to each candidate or his or her polling agent and invite them to sign the same;
- affix copies of the returns to the outside of the polling station;
- 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 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

---

<sup>89</sup> He was awarded the second highest medal, the medal of the Grand Officer of the Zimbabwe Order of Merit. Other recipients of this medal were Happyton Bonyongwe, head of the Central Intelligence Organisation, and Paradzai Zimondi, the prison service chief who said he would never recognise a Tsvangirai victory. *Mail and Guardian* 1 <http://www.mg.co.za/article/2008-08-12-zim-rivals-should-push-on-with-talks>.

<sup>90</sup> This Annexure is an edited extract from Matyszak D. *An Inconvenient Truth*, available at Kubatana.net.

<sup>91</sup> *Zimbabwe Electoral Commission: Movement of Results* undated ZEC Notice.

<sup>92</sup> Section 61 of the Electoral Act [*Chapter 2:13*]

<sup>93</sup> Section 64 of the Electoral Act [*Chapter 2:13*]

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 station<sup>94</sup>. 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 latest<sup>95</sup>. 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 this 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 30<sup>th</sup> 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:

*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 MDC and Morgan Tsvangirai v the Chairperson of ZEC and the Chief Elections Officer E/P 24/08)*

---

<sup>94</sup> See *An Inconvenient Truth* Part I (see above) for details as to how these figures were arrived at.

<sup>95</sup> 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. 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.

## ANNEXURE B<sup>96</sup>

Before ZEC may order a recount on its own initiative in terms of this subsection, six conditions must be met:

- ZEC must consider that there are reasonable grounds for believing that a miscount has occurred at **polling station** level [section 67A(4) and 67A(5)].
- ZEC must state the specific polling stations where a miscount of this nature is believed to have occurred and **in which election** the miscount has occurred - Local Government, Parliamentary or Presidential [section 67A(5)(a)]
- ZEC must have **reasonable grounds** for believing that the miscount is significant enough to have affected **the result** of the election [section 67A(4)].
- ZEC’s purpose in conducting the recount must be with a view to instituting a prosecution in relation to an election or election return [section 70(4)].
- ZEC must also specify the time, date and place for the recount and the procedure to be adopted [section 67A(5)(b)].
- ZEC must undertake and complete the recount within 14 days of the declaration of the result in all constituencies where election petitions have not been filed [section 70(3)(a)].

Each and every one of these seven grounds must exist before any recount ordered by ZEC may be considered lawful.

In what follows, an analysis is made as to whether ZEC has complied with these requirements in relation to the on-going recount. On Saturday 12th April, 2008 Justice George Chiweshe, head of ZEC 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]*

---

<sup>96</sup> This is an edited extract from Matyszak D, *An Inconvenient Truth PT II* available from Kubatana.net

*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 are 1092 polling stations where a recount is to take place<sup>97</sup>. With one ballot box for each of the four elections this makes for at least 4 368 ballot boxes to be opened and recounted.

## **Requirements 1 & 2**

With these facts in mind, we can now consider the first two of the requirements for a recount, that is, 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 has "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 has evidence pertaining to each and every one of 4 368 ballot boxes that the ballots in each have 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 21 constituencies, and the MDC in respect of two<sup>98</sup>. 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 sufficiently credible 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.

On 23<sup>rd</sup> April, 2008 the *Herald* newspaper released some of the results for the only constituency where the recount has been completed at that stage. ZANU PF's tally went up by one vote from 6 193 to 6 194 against the MDC's 5 931 in the House of Assembly poll. The Senate poll remained unchanged. Despite ZEC claiming to have evidence which gave reasonable grounds to believe miscounts had occurred, ZEC states in its report that "the exercise had little effect on the previously declared results". This suggests that the "reasonable grounds" ZEC was required to have to initiate a recount for the polling stations in this constituency either were not reasonable or did not exist at all.

---

<sup>97</sup> Source [www.kubatana.net](http://www.kubatana.net)

<sup>98</sup> 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>

The above analysis shows that two of the seven criteria were not satisfied for a recount. Whether any of the remaining criteria were satisfied will now be considered to show the extent of the illegality of the recount.

### Requirement 3

The third requirement is that ZEC must believe, again on reasonable grounds, that the miscount is **significant enough** to have affected **the result**. Those results in the 23 constituencies relating to the House of Assembly are as follows:

	MDC AM	MDC MT	ZANU PF	OTHERS	DIFFERENCE	No. of polling stations
Bikita West		7048	7029		19	57
Bikita South		6916	5284	299	1632	49
Chimanimani West		8558	7107		1451	49
Mutare West		7597	7577	536	20	52
Gokwe-Kabuyuni		7234	7156		78	46
Mberengwa North		2352	9722		7370	44
Mberengwa South	885	1309	8291		6982	43
Mberengwa West	315	2912	5508		2596	38
Mberengwa East	616	1251	7292		6041	34
Chiredzi North		2679	18413	336	15734	67
Gutu North		5045	4343		702	35
Gutu South	1570	5757	3559		2198	43
Gutu Central		6398	4767		1631	48
Masvingo West		4513	4122	1053	391	42
Masvingo Central		4905	4793	870	112	40
Zaka West		4734	4030	663	704	33
Bulilima East	3180	2181	3104		76	59
Goromonzi West		5931	6193		-262	41
Zvimba North	944	1701	6784		5083	56
Lupane East	5424	1352	3368		4072	53
Silobela	Cand1 679	4624	4137	1462	487	56
	Cand2 642					
Buhera South		8833	7613		1220	49
Zhombe	2289	5445	5122		323	58
Zhombe	2289	5445	5122		323	58

**Source: [www.kubatana.net](http://www.kubatana.net)**

Even though in some areas there is only a small margin of votes between two main parties (being as low as 19 in one constituency) suggesting that if a miscount occurred, it could be of sufficient significance to affect the result, in many instances the margin is so wide as to render this implausible. Most egregiously the margin in Chiredzi North is huge and a miscount of some 15 735 votes is required to effect the result in the House of Assembly Election. ZEC must reasonably believe that such a miscount of this extent occurred before it may order a recount of polling stations in this constituency. It is worth emphasizing that the miscount must affect **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.

In Goromonzi West, discussed under criteria one and two, ZEC's alleged reasonable grounds that the recount was significant enough to affect the result turned out to be a single vote in a margin of difference between the two candidates of 262 votes. Once again it must be deduced that the "reasonable grounds to believe a miscount had occurred significant enough to affect the result" (in this case 263 votes) that ZEC was required to have before initiating a recount either were not "reasonable" or did not exist.

Excluding the presidential election, the "reasonable grounds to believe that a miscount had occurred sufficient to affect the result" that ZEC's Commissioners claimed in 3 276 instances proved to be unfounded 3 276 times, i.e. a 100% failure rate. ZEC's bona fides in initiating a recount in this manner cannot but be called into question as a result.

No comment can be made as to whether the recount has affected the presidential tally as, once early 25 000 votes are required to affect the presidential vote by 1%. ZEC must be aware that the margin in the first presidential count is extremely small for there to be any effect on **the result**. The result must either be that a candidate has an absolute majority or a simple majority, meaning that **the result** is either that requiring a run off or an outright declaration of a winner. For the miscount to have affected one or other of these possible results there must be one candidate with almost exactly 50%, failing which the recount does not meet the legal requirement of being significant enough to affect the result (The two main contenders are believed to have garnered over 90% of the vote, so the question of a tie for second place does not arise).

#### **Requirement 4**

This requirement touches upon the reason for the recount. Section 67A(4) is silent about the purpose behind the recount. 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. It could only then be in order to provide supporting evidence for an electoral petition which must be brought within 14 days of the declaration of the result and determined by the Electoral Court within six months, 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 section is silent on this point. 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. The recounts in relation to parliamentary results, in the same section, specifically provide that where a candidate requests a recount by ZEC the result must have been released. There is nothing suggesting that the position under 67A(4) is any different. The reason ZEC may initiate a recount may be deduced from section 70(4) which allows for criminal prosecutions.

Nowhere in section 67A is ZEC authorized to change a declared result. This is consistent with section 66(4) of the Act which provides that a result declared by a constituency electoral officer “shall be final” and may only be changed by way of petition to the electoral court. It is also consistent with the Second Schedule to the Act, which requires that the result based on constituency returns is declared “forthwith” by the Chief Elections Officer. Section 67A(4) does not stipulate that ZEC may initiate a recount for the purposes of auditing the constituency returns for the presidential election and the Chief Elections Officer is thus excused from complying with the provisions of the Second Schedule. Yet Justice Uchena, ruling on the MDC’s urgent application for the release of the results, correctly found that ZEC may initiate a recount, and then proceeded to rule that the recount may be for the purpose of checking the veracity of the constituency returns and delaying the presidential result. That the recount may be deployed for this purpose is simply assumed by the judge on the basis of ZEC’s say so and without any support in Section 67A(4) or elsewhere in the legislation.<sup>99</sup>

### **Requirement 5**

ZEC must specify the time, date and place for the recount and the procedure to be adopted. This is the only requirement that ZEC has come anywhere close to meeting. ZEC’s published notices specified the time and date (19<sup>th</sup> April, 2008) for the recount and a single location in each constituency for all the polling station ballots in each constituency to be recounted. However, the procedure ZEC announced that it will adopt for the recount is illegal. A notice published in the *Herald* on the 14<sup>th</sup> April, 2008 outlining part of the procedure makes ZEC’s intentions clear. This states that after the recount the constituency election officer shall declare the person who has the most votes after the recount the winner. As stated above, once the winners have been declared by the constituency election officers, as they have been, the declarations are final in terms of section 66(4). If the legislature had intended ZEC to be able to override the express provisions of section 66(4) by virtue of its powers under 67(A) it would have said so.

### **Requirement 6**

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 19<sup>th</sup> April, 2008 any recount should have involved sifting through ashes, not counting ballots, in all constituencies where an election petition has not been lodged. If the legislation had intended to place a moratorium on the destruction of ballots where a ZEC recount has 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 has not met the 14 day requirement or, at the very least, the Chief Elections Officer has not complied with the mandatory requirement to destroy the ballots.

---

<sup>99</sup> *MDC & Morgan Tsvangirai v Chairperson of ZEC and Chief Elections Officer* E/P24/08 p 14.

## ANNEXURE C<sup>100</sup>

Section 110(3) of the Electoral Act 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 29<sup>th</sup> 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 19<sup>th</sup> 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 19<sup>th</sup> April, 2008 requiring the trite to be rendered complex.

The Minister of Justice<sup>101</sup> suggested that an election is a process and not an event. 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 section 67A 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 29<sup>th</sup> 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. Quite. Polling day. 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.

---

<sup>100</sup> This is an edited extract from Matyszak, D *How to Lose an Election and Stay In Power*, available from kubatana.net.

<sup>101</sup> Patrick Chinamasa. He was not alone. This interpretation was advanced by several others, including MDC supporters and officials.

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 29<sup>th</sup> March, 2008<sup>102</sup>.

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

- An election to the office of President shall take place—*
- *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 Act<sup>103</sup>, 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*, 29<sup>th</sup> 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.

## **ANNEXURE D**

### **OPINION**

- We have been asked to provide an opinion on the legality of the presidential election which took place in Zimbabwe on June 27<sup>th</sup> 2009, and the legitimacy of any incumbent assuming office on the basis of the result of such an election.
- The election took place pursuant to three Statutory Instruments made by the Zimbabwe Electoral Commission.

---

<sup>102</sup> See Veritas Bill Watch 14/2008

<sup>103</sup> Chapter 2:13

- Presidential Results: Results of Poll General Notice 71 of 2008.
- Electoral (Amendment of Sections 39(2)(b) and 110(3) of the Electoral Act) Notice, 2008 Statutory Instrument 73A of 2008
- Electoral (Date of Second Presidential Election) Notice 2008 Statutory Instrument 78 of 2008.

The first Instrument published the tallies of votes received by the presidential candidates in a poll on the 29<sup>th</sup> March, 2008 - the “first” presidential election, held simultaneously with elections for both houses of parliament, and local government. The tallies published were as follows:

<i>Candidate</i>	<i>Party</i>	<i>Votes received</i>	<i>% of total votes cast</i>
Tsvangirayi Morgan	MDC (Tsvangirayi)	1 195 562	47.9
Mugabe Robert Gabriel	ZANU(PF)	1 079 730	43.2
Makoni Stanley Herbert	Independent	207 470	8.3
Towungana Langton	Independent	14 503	0.6
Total valid votes received		<b>2 497 265</b>	

The first Instrument also stated that since no person had received a majority of the total valid votes cast, a second poll would be held, a run off between Morgan Tsvangirai and Robert Mugabe.

The second Instrument purported to extend the time period within which the run off must be held.

The third Instrument set the date for the run off as the 27<sup>th</sup> June 2008.

- The first Statutory Instrument, GN 71/2008, purported to be pursuant to sections 110(3) and 110(4) of the Electoral Act 2:13 which provide as follows:

*110(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.*

*110(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<sup>104</sup>.*

- These sections thus introduce a requirement that in the absence of a candidate obtaining an absolute majority a run off election must be held between the candidates with the highest

<sup>104</sup> Sections 110(3) and 110(4) also contradict each other. 110(3) claims to come into operation where there are two candidates and none receives a majority of valid votes cast. The can only happen where there is a dead heat. Yet a run off may only take place in terms of section 110(4) between the candidates who received the “highest and next highest” numbers of valid votes cast – which cannot pertain in the event of a dead heat.

and next highest number of votes.

- However, at first glance, they appear to be directly contradicted by the Second Schedule to the Act. The Second Schedule sets out the procedure to be followed after a poll and provides as follows in paragraph 3:

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

*(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.*

- The Second Schedule thus does not require an absolute majority but provides in the instant case, where there are more than two candidates, that the candidate with the “greatest number of votes” be declared forthwith the duly elected president. In the case of a run off under section 110(3) there cannot be more than two candidates, therefore 3(1)(b) can only have application at the first poll.
- The Second Schedule thus requires that a person with a **simple** majority, the most votes, be declared duly elected as president. Section 110(3) requires a run off between candidates if none achieve an **absolute** majority.
- In interpreting these two provisions and making the Statutory Instruments referred to above, ZEC purported to follow the provisions of section 110(3), and ignored the provisions of paragraph 3 of the Second Schedule.
- Our conclusion in this opinion must depend upon whether ZEC acted lawfully in so doing.
- A basic rule of statutory interpretation is that the provisions of a statute must be read in a consistent fashion wherever possible. It is only in cases where this cannot be done that other interpretations of the legislation may be considered.
- Paragraph 3(1)(b) of the Second Schedule and section 110(3) are not in conflict. They are two separate components of a sequence. The components are compatible with each other. The intention of the legislature is that the provisions be implemented sequentially.
- The sequence provided for by the Second Schedule, section 110(3) and section 28(5) of the Constitution is as follows:
  1. The verification of the polling returns [paragraph 2(2) of the Second Schedule]
  2. The addition of the polling returns[paragraph 2(3) of the Second Schedule]
  3. The **immediate** declaration of the candidate with the greatest number of votes as duly elected president of the Republic of Zimbabwe [paragraph 3(1)(b)].
  4. The assumption of the office of president of the candidate with the greatest number of votes with 48 hours of the declaration [section 28(5) of the Constitution].

5. A second, run off election between the candidates [provided for by section 110(3)] with the highest and next highest number of votes [section 110(4)] within 21 days of the declaration that a candidate is duly elected.

- After the tally of the votes in accordance with the Second Schedule the Chief Elections Officer is **obliged** “forthwith” to declare the person with the greatest number of votes duly elected as president of the Republic of Zimbabwe. He has no discretion in this regard. His failure to do so was, and is, thus unlawful. The second run off election takes place only after the candidate with the most votes has been declared and assumed office as president.
- Section 110(3) requires that where no candidate has received a majority of the valid votes cast a **second** election must be held within 21 days **after** the **previous** election.
- The use of the term “second election” means that the two elections are to be regarded as separate and discrete processes.
- The use of the term “previous election” requires that the first election must be in the past, that is, completed, before the 21 day period commences, and that the 21 days begins running from the moment of such completion.
- The first election is not completed, and thus cannot be considered as “previous” until the end of the election period.
- An election period is defined in section 4 of the Electoral Act as follows:

*“election period” or “period of an election” means—*

*(a) 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;*

- Accordingly, the first election is only completed when there has been a declaration of the result **in terms of paragraph 3(1) of the Second Schedule**, that is, a declaration that the candidate with the greatest number of votes is duly elected as president of the Republic of Zimbabwe.
- ZEC’s Notice, GN 71 of 2008, the first statutory instrument referred to above, does not constitute a declaration in terms of the Second Schedule as required by the Act.
- As a result there has been no declaration of the result in terms of paragraph 3(1) of the Second Schedule and the election period for the first election is not completed.
- The 21 day time period for the holding of a second election only runs from the completion of the first election. Since that election is not complete, that 21 day period has yet to commence.
- Holding a second ‘election’ on 27<sup>th</sup> June 2008 is *ultra vires* section 110(3) as the first election is not yet complete.
- The election held on 27<sup>th</sup> June, 2008 is therefore a legal nullity.

**ZEC’s notices extending the time limit and setting 27<sup>th</sup> June 2008 for a run off election**

- The second Statutory Instrument (73A of 2008) made by ZEC sought to amend the period within which it would have to hold the second election, in the following terms:

***Extension of period within which second Presidential election to be held***

*3. 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 number 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 President.*

- Firstly, by its words highlighted, ZEC acknowledged that the 21 day period for the second election after the initial election can only run from the latter's completion, not from the polling day, which is only a part of the process.
- Secondly, the "announcement of the results of the first poll" must be the announcement that is required by the Electoral Act. It therefore must be the declaration in terms of paragraph 3(1) of the Second Schedule, in order to comply with the requirement in section 110(3), as read with the definition in section 4, that the first election be completed first.
- At the time of writing, this stage has not been reached.
- The third Statutory Instrument setting the second election presidential run off for the 27<sup>th</sup> June, 2008 is thus unlawful. It is unlawful as it is not in compliance with S.I 73A of 2008, the date set not being within "90 days **from** the date of announcement of the results" i.e. the declaration of the result in accordance with the Second Schedule, which has yet to take place. The date is *ultra vires* ZEC's enabling Statutory Instrument 73A of 2008, as the first election is incomplete.
- For this reason too, if that enabling Statutory Instrument 73A of 2008 is valid<sup>105</sup>, the election held on 27<sup>th</sup> June, 2008 would still be a legal nullity.
- Before a valid second election can be held the candidate with the most votes in the first election must be declared duly elected president of the Republic of Zimbabwe. Based on GN 71/2008, that candidate is Morgan Tsvangirai.
- By ZEC's own reckoning the initial procedure [(a) and (b) of the sequence above] required by the Second Schedule was completed on the 2<sup>nd</sup> May, 2008. With the Act's requirement that there be a declaration "forthwith" of who was duly elected President, that declaration is clearly long overdue. It should be implemented without further delay.
- Section 28(5) of the constitution requires that the duly elected candidate assume office within 48 hours of that declaration. On the basis of the law and the results gazetted by ZEC's Chief Elections Officer, Morgan Tsvangirai ought to have assumed office no later than the 4<sup>th</sup> May, 2008. The continuation in office of Robert Mugabe after that date was, and is, irregular and unlawful.

---

<sup>105</sup> The Constitution requires that Electoral Law must be an Act of Parliament. It has been argued elsewhere [for example in a recent opinion by South African senior counsel Max du Plessis and Wim Trengrove published by the Southern African Litigation Centre] that ZEC cannot be given power under section 192(5) to amend the Electoral Act. This issue will not become critical until the first election has been completed.

- It is worth noting here that the provision for a run off in section 110(3) was brought into Zimbabwe’s electoral law in 1987 when constitutional changes [Amendment No 7] turned the ceremonial presidency into an executive presidency.
- The Second Schedule was introduced through changes to electoral law in 2004 [Act 25 of 2004] adopted by the ruling party, while the definition of an “election period” was introduced in 2007 [Act 17 of 2007] as a result of the changes to that law agreed by three main political parties. As the definition of an election period makes specific cross reference to paragraph 3 of the Second Schedule, the legislature was well aware of the existence of paragraph 3 of the Second Schedule at the time of its latest drafting, as properly too was the President, who was required to assent to all the legislation involved before it became law [section 51 of the Constitution].

**ALTERNATIVELY, IF SECTION 110(3) AND PARAGRAPH 3 OF THE SECOND SCHEDULE ARE CONSIDERED TO BE IRRECONCILABLE, THEN**

- Several basic interpretative principles come into play in the event that section 110(3) and paragraph 3 of the Second Schedule are considered to be in conflict with each other.
- Devenish *Interpretation of Statutes* (Juta 1992) states at pp 113

*The general rule is that if there is an irreconcilable conflict between the schedule and a section in the body of a statute, the section prevails. Thus the Appellate Division has held ‘in the case of a clear conflict between either of them (i.e. a schedule or a rule attached to a statute) and a section in the body of the statute itself, the former must give way to the latter’.*

Devenish, however, indicates that the nature of the subject matter and the statute can influence the position. He gives two examples where the body of a statute does not override a schedule; one is the S.A. Constitution Act (110 of 1983), where the schedule was specially entrenched; the second is where the statute itself states that the schedule has the same legal force as the provisions of the Act itself.

He goes on further to say

*In cases where the body of the Act and the schedule are equally authoritative of the will of the legislature and a conflict occurs between the two it is the duty of the court to read them together in such a way as to effect reconciliation.*

*Where the statute and the schedule are not of equal value and it is clear that it was the intention of the legislature that the statute should prevail over the schedule, then obviously in the event of a conflict the relevant section of the Act must prevail.”<sup>106</sup>*

- However, these rules of interpretation cannot apply where the section in question contradicts the Constitution and the schedule does not. Or put differently, the two provisions are not of equal value in that the weight of the section can be discounted where it is in conflict with the constitution.

---

<sup>106</sup> *African and European Investment Co Ltd v Warren & others* 1924 AD 308 at 360; and *R v Kok* 1955 (4) SA 370 (T) 374; and *Skinner v Palmer* 1919 WLD 39 at 46.

- Constitutional Amendment Number 18 (Act 11 of 2007) made several fundamental changes to the Constitution and electoral process in relation to the presidency and parliament. A key change was to make the term of the President and the life of parliament coterminous.

The tenure of office of the President is provided for as follows:

*28(5) A person elected as President shall, on the day upon which he is declared to be elected or no later than forty-eight hours thereafter, enter office by taking and subscribing before the Chief Justice or other judge of the Supreme Court or the High Court the oaths of loyalty and office in the forms set out in Schedule 1.*

### **29 Tenure of office of President**

*(1) The term of office of the President shall be a period of five years concurrent with the life of Parliament referred to in section 63(4), or—*

*(a) a lesser period where the President earlier dissolves Parliament in terms of section 63(2), or the President is elected pursuant to section 28(3)(b);*

The life of parliament is determined by section 63

### **63 Prorogation or dissolution**

*(1) The President may at any time prorogue Parliament.*

*(2) Subject to the provisions of this Constitution, the President may at any time dissolve parliament.*

*(3)...(repealed)*

*(4) Parliament, unless sooner dissolved, shall last for five years, which period shall be deemed to commence on the day the person elected as President enters office in terms of section 28(5) after an election referred to in section 28(3)(a), and shall then stand dissolved:*

- The life of parliament only commences on the day a person elected as president in terms of 28(5) enters office.
- Then crucially, section 28(3) provides;

*An election to the office of President shall take place—*

- 1. 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;*

The day fixed by proclamation in terms of section 58(1) was the 29<sup>th</sup> March, 2008.

- Accordingly, the constitution made it mandatory that the election to the office of the president took place on 29<sup>th</sup> March 2008 and not on the 27<sup>th</sup> June 2008 or any other day. The election on the 27<sup>th</sup> June, 2008 is thus a nullity.
- Since Instruments 78 and 73A of 2008 also purport that the election for the president is to be held on a different day to that of the members of parliament (setting 27<sup>th</sup> June 2008 instead as election day), they too are in conflict with section 28(3) of the constitution and void on

that basis alone.

- There cannot be a hiatus between the election of members of parliament and the election of the president as various constitutional anomalies would arise, for example:
  1. Parliament could be convened in terms of section 62 of the constitution, yet its “life” would not have started as a president elected under section 28(3) would not have not assumed office in terms of section 28(5).
  2. A parliament which has a fresh democratic mandate could be dissolved under 63(2) by a president who does not.
  3. The five presidential appointees and ten governors appointed by the president [sections 34(1)(b) and (e)] would be appointed to the new parliament by a president holding a possibly obsolete democratic mandate.
- The constitution could not have intended the possibility of such anomalies. They arise due to a hiatus between the election of members of parliament and the president and that hiatus has been created through the application of section 110(3). Any run off would create such a hiatus. Section 110(3) being in conflict with section 28(3), is void in terms of section 3 of the Constitution. Any run off election in terms of section 110(3) would thus be equally void.
- Accordingly, if section 110(3) is void the difficulty of a conflict with the Second Schedule of the Electoral Act is resolved. Section 110(3) is no longer of any force and effect. The Second Schedule alone must thus apply.
- The Second Schedule requires that the Chief Elections Officer forthwith declare the person with the most votes from the presidential poll, held on the same day as the parliamentary poll, duly elected as president. That person in terms of the results published would be Morgan Tsvangirai. A run off to change this position is contrary to section 28(3) of the Constitution and unlawful.

## Conclusion

- In summary therefore, either on the basis of the main argument or the alternative, the second presidential election held on the 27<sup>th</sup> June 2008 is a legal nullity.
- Furthermore in terms of the Electoral Law enacted in Zimbabwe, Morgan Tsvangirai, the candidate with the greatest number of votes ought to have been declared duly elected as president of the Republic of Zimbabwe on 2<sup>nd</sup> May 2008 – either to complete the first election period before entering the second, or because the run off provision itself is unconstitutional.
- On the main argument the continuation in office of Robert Mugabe after 4<sup>th</sup> May, 2008 pending any valid second ‘run off’ election is unlawful; on the alternative, following the constitutional amendment to harmonise all national elections, the assumption of office by any candidate pursuant to a separate election held on the 27<sup>th</sup> June 2008 is unlawful and illegitimate, in terms of Zimbabwe’s laws.
- We advise accordingly.

.....  
HARARE, ZIMBABWE

## ANNEXURE E

### (QUESTIONS RAISED BY ZEC'S REPORT)

The figures in brackets after the question refers to the page of the critique where the facts give rise to the question

1. Why was ZEC's report not presented before the 31<sup>st</sup> December, 2008 as the law requires and why has the explanation for the delay not been included in the report, which falsely claims that it has been presented in compliance with the law? (3-4)
2. Why did ZEC take no action to investigate the truth of numerous reports of widespread violence during the period preceding the presidential run off election (including a complaint by Tsvangirai that the violence had reached a level where an election as contemplated by the constitution could not be held) and present its opinion in that regard in its report?(4-5)
3. Does ZEC concede that the dramatic swing in votes in favour of Mugabe in the presidential run off supports the claims of endemic violence? (6)
4. Is the *Standard* Newspaper report on the death of Ignatius Mushangwe correct? If not did Mushangwe die and what were the circumstances of his death? (6)
5. How many of the 131 ZEC employees were convicted of the offences for which they were charged? How many cases have not been completed? In how many cases have charges been withdrawn? Does ZEC accept that the large number of prosecutions either suggests massive fraud on the part of ZEC clerks, or, if there are few convictions, harassment, and thus bias by the police? (6-7)
6. Why did ZEC do nothing in respect of statements by service chiefs that they would not recognise the result of the election? Does ZEC accept that such statements are intimidatory coming as they do from persons in charge of the armed forces and impact on the conduct of a free poll? If not why not? Does ZEC accept that such statements violated The SADC Principles and Guidelines on Democratic Elections which make it a requirement in clause 2.1.9 that political parties accept and respect the election results when these have been proclaimed to have been free and fair by the competent National Electoral Authorities in accordance with the law of the land? (7)
7. Why did Justice Chiweshe state that there is no time limit for the declaration of the results when it is clear that each stage in the collation process must be done "forthwith" and "immediately"?(7)
8. Why did ZEC seek to check the election results of the March presidential election against the V11 forms when the Second Schedule clearly provides that the Chief Elections Officer must calculate the presidential tally from the constituency returns? (8).
9. In terms of what section of the Electoral Act did ZEC claim to be acting when it sought to check "anomalies" in the V11 forms? (8)
10. Why did ZEC claim that the check of the V11 forms was part of the "verification" process when that process is set out in section 65(2) of the Electoral Act and does not authorise the procedures adopted by ZEC? (9)
11. What were the anomalies in the returns detected by ZEC? If the anomalies were numerical, what was the extent of the errors and how many were there? Were the returns containing anomalies signed by polling agents? Did ZEC alter the figures on the returns? If so did ZEC consult with the political parties before so doing? If the anomalies were not numerical what were they, and why did they require a delay in the Chief Election Officers duty to "forthwith" announce the result and what corrective steps were taken. Were such steps taken

- in consultation with the contestants? Do these anomalies undermine ZEC's claim to have conducted the election efficiently? (9)
12. What difficulties did ZEC encounter with the transmission of results? ZEC had received the constituency returns at the very least within 5 days and most probably by within one day. Why were these not forwarded "immediately" to the chief elections officer as legally required? If "these challenges remain" how is it they did not manifest themselves during the presidential run off when the result was announced in a day? (10)
  13. When were the transmission challenges for the March election overcome i.e. the returns actually received in respect of a) the constituency returns and b) the V11 forms? (10)
  14. Why did ZEC initially say the presidential result was delayed due to a recount under section 67(A)(1) of the Electoral Act, and then later claim to delay the result in terms of Section 67(A)(4), and then only on the prompting of its lawyer? (10-11)
  15. Section 67(A)(4) requires that ZEC must have reasonable grounds to believe that a miscount had occurred in relation to each ballot box examined for each election and that the miscount was sufficient to affect the result. What grounds did ZEC have in this regard and from what source? On what basis did ZEC believe the miscount was sufficient to affect the result in a) the parliamentary elections b) the presidential elections? How does ZEC explain that "its reasonable grounds" in this regard proved false in each and every instance and not one result was affected? (11)
  16. On what section of the legislation does ZEC rely to claim the Chief Elections Officers is not obliged to "forthwith" announce the result and otherwise proceed in terms of the Second Schedule as the law requires because a recount is taking place? (11)
  17. What were the "logistical" constraints which prevented ZEC from holding the run off within the 21 days stipulated by the Act? Does ZEC concede that it would have been easier to hold the run off within a few days while all electoral infrastructure was in place? (11)
  18. How does ZEC explain the massive increase in applications for postal votes between the March election and the run-off election? Why does this explanation not appear in its report? (12)
  19. Why does ZEC not mention the apparent incompatibility between section 110(3) and the Second Schedule of the Act in the section in its report making recommendations for electoral reform?(13)
  20. Does ZEC accept that there is a conflict of interest in allowing government ministers and candidates to a) have the final say in approving electoral regulations and b) accreditation of observers? If so, why is this not mentioned under recommendations for electoral reforms? (14)
  21. Why did the regulations altering the V11 and V23 forms and procedures not include a provision that a copy of the V23A and V23B forms be handed to candidates like the V11 forms? (15)
  22. Why were so few copies of the "electronic rolls" released by ZEC? Why were the rolls released in TIFF format on 210 discs rather than a user friendly and cheaper format on a single disc as had been done in 2002? (16)
  23. Did ZEC claim to observers as reported that there was "a communal address system whereby the community members can be registered using the same address" in order to explain 8000 voters registered at a single Hatcliffe address? If so what section of the legislation authorised this? Does ZEC agree that such a procedure lends itself to electoral fraud? If so, why does not an appropriate recommendation for amendment appear in its report? If ZEC did not proffer this explanation as reported, what is the reason 8000 voters are registered at single address? (16)
  24. Does ZEC agree that it would be desirable to provide an electronic copy of the voters roll in navigable format to an independent body or parliamentary committee for an independent audit? If not why not? (16)
  25. Why were the running tallies of presidential electoral results not posted at all constituency

- collation centres as statutorily required? (16)
26. Does ZEC agree that in publishing its report it should provide a detailed break down of the tallies of the vote at each level of the process in the interests of transparency and to remove suspicions, for example, in relation to the presidential run-off vote? If not why not? (16)
  27. Why have no corrective steps been taken to prevent recurrences of non-compliance with the Electoral Act, which had already been exposed during the audit of the 2002 electoral residue, particularly in regard to the safeguarding of that residue, and which were again exposed during the recount? (17)
  28. Does ZEC believe that if legislation provides a remedy for a complaint in an electoral issue (for example, where the public broadcaster rejects campaign material) that it should not investigate the matter? (18)
  29. Why did ZEC's voter education programme commence late, when ZEC states that it is adequately resourced? Why did ZEC not approve ZESN's voter education material? Why was it ordered off the air? What was wrong with that material, if anything? Does ZEC admit that ZESN's voter education programme played a useful role and has done so in the past? If not, why not? (19)