

Judgment of MDC vs ZEC and Chief Elections Officer

FULL judgment (text) of Movement for Democratic Change and Morgan Tsvangirai versus The Chairperson of the Zimbabwe Electoral Commission and the Chief Elections Officer

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MOVEMENT FOR DEMOCRATIC CHANGE AND

MORGAN TSVANGIRAI VERSUS

THE CHAIRPERSON OF THE ZIMBABWE ELECTORAL COMMISSION AND

THE CHIEF ELECTIONS OFFICER ZIMBABWE ELECTORAL COMMISSION

m

HIGH COURT OF ZIMBABWE UCHENA J

HARARE 5, 6, 7, 8, 9 AND 14 APRIL 2008.

HH —/08

E/P 24/08

URGENT CHAMBER APPLICATION

Mr A Muchadehama, for the Applicant's.

Mr G Chikumbirike, for the Respondents.

Uchena J. The 1st applicant the Movement For Democratic Change is a political party, commonly known as the (MDC). It will be referred to as the 1st applicant. The second applicant Mr Morgan Tsvangirai is its president. He was the 1st applicant's presidential candidate in the just ended harmonized elections held on the 29th March 2008. He will be referred to as the 2nd applicant.

The 1st respondent is the Chairman of the Zimbabwe Electoral Commission, a Commission created in terms of section 61 (1) of the Constitution of Zimbabwe. He was appointed in terms of section 61 (1) (a) of the Constitution. He will be referred to as the 1st respondent. The Commission is commonly known as (ZEC), in reference to the abbreviation of its name. I will refer to it by its abbreviation in this judgment. The second respondent is (ZEC'S) chief elections officer appointed in terms of section 11 of the Zimbabwe Electoral Commission Act (Chapter 12: 12), hereinafter called the Zimbabwe Electoral Commission Act. He will be referred to as the 2nd respondent.

The Facts

The 1st respondent through (ZEC), conducted harmonised elections which were held on 29 March 2008. The elections were contested by candidates aspiring for the following positions, councilors of local authorities, members of the House of Assembly and the Senate, and President of the Republic of Zimbabwe. It is common cause that the contestants of the first three positions now know the results of their elections.

The results were announced at the Ward Constituency, House of Assembly and Senatorial constituency levels. The winners were declared by the respective Ward and Constituency Elections officers. House of Assembly and Senatorial results have also been announced by the National Collation Centre presided over by the 2nd respondent. It is conceded by the respondents that this was merely for the benefit of the general public as the legal requirements had been satisfied at constituency level.

The applicants who have an interest in the presidential elections, in which they were participants, filed an

Judgment of MDC vs ZEC and Chief Elections Officer

urgent application seeking this court's provisional order, compelling the respondents to announce the results.

The respondents while conceding that presidential results have not yet been announced contented that they will announce them when they are ready. They contented, in, limine that, they are not subject to the jurisdiction of this court.

After the court's ruling on the issue of jurisdiction Mr Muchadehama for the applicants submitted that the application was urgent and outlined the facts establishing the urgency. In his response, Mr Chikumbirike, for the respondents, submitted that the application is not urgent, and should have been brought by way of ordinary application.

Jurisdiction

On the 6th April 2008, before the hearing of this case on the merits Mr Chikumbirike for the respondents submitted that this court did not have jurisdiction to hear the applicant's application. He relied on the provisions of section 61 (5) of the Constitution which provides as follows;

(5) "The Zimbabwe Electoral Commission shall not, in the exercise of its functions in terms of subsection (4), be subject to the direction or control of any person or authority."

The relevant provisions of subsection (4) to this application are found in subsection (4) (1) (a) which reads;

(4) "The Zimbabwe Electoral Commission shall have the following functions-

(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. referendums;

and to ensure that those elections and referendums are conducted efficiently, freely, fairly, transparently and in accordance with the law;"

Mr Chikumbirike said this court has no jurisdiction to hear the applicant's complaint, and should therefore dismiss the application with costs.

Mr Muchadehama for the applicants submitted that the respondents can be sued and that is why section 18 of the Zimbabwe Electoral Commission Act provides for the citing of the 1st respondent, as a nominal citee. He further submitted that the court has jurisdiction to inquire into any complaint against the Zimbabwe Electoral Commission provided that it observes (ZEC'S) independence if it is complying with the provisions of the law. He further submitted that this court can intervene if the respondents stray from the provisions of the law. I agree with Mr Muchadehama's submissions as it could never have been intended by the legislature, that (ZEC) could conduct itself outside the provisions of the law including the provisions of section (4) of the Constitution itself, and still remain outside the jurisdiction of this court.

The clear intention of the Legislature in Section 61 (5) of the Constitution was to ensure (ZEC'S) independence provided it was operating within the law. It has to exercise its functions as provided by subsection (4) for it to enjoy that immunity. It can not for example conduct elections unfairly, outside the law, and which are not free and fair, but on being sued insist that the courts have no jurisdiction over it. The court would in such circumstances have jurisdiction to hear and determine complaints against (ZEC).

It was for these reasons that I ruled that this court has jurisdiction to hear the applicant's application.

Judgment of MDC vs ZEC and Chief Elections Officer

Urgency

After the ruling on the issue of jurisdiction, Mr Muchadehama made submissions on the urgency of the application. He told the court that section 110 (3) of the Electoral Act (Chapter 12; 13) hereinafter called the Electoral Act, provides, for a re-run within 21 days after the previous election in the event of no candidate obtaining a clear majority in the election. This he submitted means a delay in announcing the election results will deprive candidates of sufficient time to prepare for the re-run. He also pointed out that the respondents would not have enough time to prepare for the re-run.

Mr Chikumbirike for the applicants said there was no urgency in the applicant's application because its cause of action was based on the announcement of the results of the presidential poll. He argued, that those results were not due, as the provisions of the second schedule have not yet been complied with. He therefore reasoned that the cause of action would arise when the provisions of the second schedule of the Electoral Act would have been complied with. He summed up by saying the applicant's cause of action as stated in Tendai Biti's founding affidavit has not yet arisen hence the absence of urgency in the application.

Mr Muchadehama in response disputed Mr Chikumbirike's submission that the cause of action had not yet arisen. He pointed out that Tendai Biti's affidavit complaints of delays and the respondent's wasting time on already declared election results instead of doing what they are mandated to do, that is the collation and verification of presidential results and their announcement.

A reading of Tendai Biti's founding affidavit confirms that though he in some paragraphs emphasised the announcement of results he clearly brought out a case against the general delay. That was in fact the theme of the applicant's complaint in paragraphs 5, 11,12,13, 14,16,17, 24,26 and 27.1 am therefore satisfied that the applicant's application is premised on delays and the respondents' wasting time doing everything else other than what they should have been doing. Therefore the cause of action has arisen though the wording of the provisional draft order seeks the announcement of results within 4 hours of the service of it on the respondents. This can be corrected by a variation in terms of rule 246 (2) of the High Court Rules 1971 which provides as follows;-

(2) "Where in an application for a provisional order, the judge is satisfied that the papers establish a prima facie case he shall grant a provisional order either in terms of the draft filed or as varied."

This means an application for a provisional order which has been prima facie proved can not be dismissed because of a poorly drafted order. The court can vary it and grant a correctly formulated provisional order consistent with the prima facie case proved. In fact on being granted the order becomes the court's order so it must formulate it in a satisfactory manner before granting it.

I therefore found that the application was urgent and proceeded to hear it on the merits.

Procedural Issues

In response to Mr Muchadehama's submissions on the merits, Mr Chikumbirike for the respondents raised several procedural issues which he should have raised as preliminary issues. He in his first procedural issue contented that the applicant's application was not made in the correct form. Mr Muchadehama for the applicants in reply submitted that the applicant's application was made in the correct form and that even if it was not in the correct form, Rule 229C provides that such failure shall not in itself be a ground for dismissing the application. The court can however dismiss such an application, if it has caused prejudice to the other party which can not be cured by directions for service of the application on the other party with or without an order of costs.

An examination of the applicant's application reveals that it is in form 29B when it should be in form 29 with

Judgment of MDC vs ZEC and Chief Elections Officer

relevant modifications as provided by the proviso to rule 241 (2). The applicants have however, not suffered any prejudice. They were served with the application and they took no issue until during their Counsel's response on the merits. Even though the issue was raised no prejudice was alleged. I am satisfied that nothing turns on this as either rule 229C or rule 4C could be resorted to, to condone the application's failure to strictly comply with the proviso to rule 241 (2).

In his second procedural issue Mr Chikumbirike raised the issue of the applicants not having filed an answering affidavit. He submitted that, that means the applicants have accepted the respondent's averments in the opposing affidavit. Mr Muchadehama's response was that most of the issues had already been put in contention by the applicant's founding affidavit deposed to by Tendai Biti.

That may be so in respect of the delay and aspects related to it. It is however not correct in respect of the reason for the delay averred to in Justice Chiweshe's opposing affidavit Justice Chiweshe said the delay is due to (ZEC) having received complaints about miscounting and is considering the evidence for it to decide whether or not to order a recount of the presidential votes before announcing the results. The failure to file an answering affidavit disputing that fact means the fact that complains have been received is not in dispute. However the legality of the recount can still be challenged as it is a matter of law.

Mr Chikumbirike in his third procedural issue raised the issue of the second applicant not having filed any affidavit. He submitted that he should have filed a founding affidavit or at least a supporting affidavit verifying the averments made on his behalf by the 1st applicant's deponent. Mr Muchadehama's response was to the effect that the averment by Tendai Biti that he was authorized to depose to the founding affidavit by the second applicant, is sufficient. Mr Muchadehama relied on rule 227 (4) (a) which provides as follows-

(4) "An affidavit filed with a written application –

(a) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out in therein" There is no dispute that Tendai Biti is the Secretary General of the 1st applicant and can swear positively to issues involving the 1st and 2nd applicants as regards events which took place in connection with the announcement of presidential results. The issues in this case are purely party matters and the 2nd applicant being the 1st applicant's presidential candidate is merely joined not because he has issues for which he has separate and distinct information which the 1st applicant's Secretary General is not privy to. I would therefore find that nothing turns on this issue. The affidavit filed by Tendai Biti satisfies the requirements of rule 227 (4).

Mr Chikumbirike in his fourth procedural issue raised the issue of paragraph (1) of the draft provisional order seeking the same relief as that sought in paragraph (1) of the final order. Mr Muchadehama conceded that point and sought a variation of the provisional order so that it does not seek the same relief as that in the final order. This issue has already been dealt with in my ruling on the issue of urgency.

Mr Chikumbirike's final procedural issue was on what he alleged was an improper joinder of the 1st and 2nd respondents. He submitted that the 1st respondent plays no roll in the processing and announcement of presidential results, and should therefore not have been joined with the 2nd respondent in these proceedings. Mr Muchadehama in his reply correctly submitted that the 1st respondent was correctly cited in his nominal capacity as the Chairman of (ZEC). Section 18 of the Zimbabwe Electoral Commission Act provides for his being a nominal citee, just as the Minister of Home Affairs would be cited together with a Constable who would have committed a delict during the course of his duties. I find no merit in Mr Chikumbirike's submission on this issue, especially in view _ of Justice Chiweshe's concession that there was no issue on the citation of the parties. The applicant in his opposing affidavit said the Commission received complaints about

Judgment of MDC vs ZEC and Chief Elections Officer

miscounting of the presidential votes which it is considering with a view to ordering a recount before those results are announced. This clearly confirms the importance of citing the 1st respondent as a party as it is the commission which is considering the complaints.

The second respondent can not deal with that issue, and can not process the presidential results until that issue is resolved. The 1st respondent has therefore been correctly cited as a party in these proceedings.

The Merits

On the merits the applicants, contented through Tendai Biti's founding affidavit dated the 3rd April 2008, that there has been an unreasonable delay in the processing and announcement of presidential results. They submitted that the harmonised elections having been held on the 29th March 2008, the results for the presidential poll should have been announced. They accused the respondents of employing delaying tactics by announcing the already declared results for the House of Assembly and the Senate. They submitted that the respondents were thereby avoiding their primary responsibility. They explained the procedure which should have been followed and said it should not have taken long to collate, verify and announce the results. They submitted that the procedure to be followed signifies the Legislature's intention that the results of the poll must be processed and be announced without any undue delays.

On the main issue of delays Mr Chikumbirike for the respondents submitted that, the respondents had not strayed from what the electoral laws require them to do. They can therefore, not be compelled to release the results when they were operating within the law. He said there was no provision in the Electoral Act requiring the respondents to collate, verify and announce the results in a specified period. He therefore argued the respondents were entitled to act at their own discretion, but in terms of the electoral laws.

Provisions of the electoral laws and their interpretation

The question of whether or not the respondents are operating within the law can only be determined after an analysis of the provisions of sections of the Electoral Act which deal with the transmission of presidential results from polling stations through constituency centres to the Chief Elections Officer.

Section 64 (2) of the Electoral Act provides for the transmission of the polling station return as follows;

(2) "Immediately after affixing a polling station return on the outside of the polling station in terms of subsection (1) (e), the presiding officer shall personally transmit to the constituency elections officer for the constituency to which the polling station belongs-

(a)

(b) the polling-station return certified by himself or herself to be correct: Provided that if, by reason of death, injury or illness, the presiding officer is unable personally to transmit the ballot box, packets, statement and polling station return under this subsection, a polling officer who was on duty at the polling station shall personally transmit these"

It is clear from the provisions of this section that polling station-returns and other election results material must be urgently and under the personal care of the presiding officer be sent to the constituency elections officer. Even the death, injury or illness of the presiding officer is not allowed to delay the transmission of the polling station-returns and other election result materials to the constituency elections officer. The presidential polling station-return is part of the material to be urgently transmitted.

The Second Schedule to the Electoral Act in paragraph 1 (1) and (2) provides for the further handling and transmission of presidential results. It provides-

Judgment of MDC vs ZEC and Chief Elections Officer

(1) "After the number of votes received by each candidate as shown in each polling -station return has been added together in terms of subparagraph (i) of subsection (3) of section sixty-five and the resulting figure added to the number of postal votes received by each candidate, the constituency elections officer shall forthwith-

a) record on the constituency return the votes obtained by each candidate and the number of rejected ballot papers in such a manner that the results of the count for each polling station are shown on the return;

b) display the completed constituency return to those present and afford each candidate or his or her election agent the opportunity to subscribe their signature thereto; and

c) transmit to the Chief Elections Officer by hand through a messenger the constituency return or a copy thereof certified by the constituency elections officer to be correct.

(2) Immediately after arranging for the constituency return to be transmitted in terms of paragraph (c) of subparagraph (1), the constituency elections officer shall affix a copy of the constituency return on the outside of the constituency centre so that it is visible to the public." The provisions of paragraph 1 of the second schedule clearly express the urgency with which the constituency return has to be transmitted to the (second respondent) the Chief Elections Officer. A reading of subparagraph (1) (c) and subparagraph (2) reveals the urgency through the use of the word "immediately" and the fact that the affixing of the constituency return outside the constituency centre can only be attended to after the Constituency Elections officer has arranged for the transmission of the constituency return to the Chief Elections officer.

The question that has to be answered is why should these returns be hurriedly transmitted from polling stations and constituency centres, if the legislature did not expect the Chief Elections Officer to equally attend to them without delay? The inquiry must be taken to the next and subsequent stages of the process.

Paragraph 2 (1) of the second schedule provides-

(1) "The Chief Elections Officer shall give reasonable notice in writing to each candidate or his or her chief election agent of the time and place where the Chief Elections Officer will verify and collate all the constituency returns" Mr Chikumbirike seems to rely on this paragraph for the absolute discretion he claims for the respondents. It is true no time within which the notice shall be given is specified, but does it mean the 2nd respondent was intended to take whatever time he deemed necessary before inviting the candidates for the collation and verification of the constituency returns. An analysis of paragraph 2(1) seems to reveal that the apparent relaxation of the urgency previously insisted on in the preceding sections and paragraphs could be for the benefit of the invitees.

The Chief Elections Officer must await their arrival before the collation and verification starts. Even if that was the intention of the legislature he could have been required to invite them forth with or immediately. It must be noted that these returns will be transmitted by hand from all constituencies scattered through out the country. They are transmitted by hand.

Judgment of MDC vs ZEC and Chief Elections Officer

The distance between each constituency centre and the National Collation Centre determines the arrival of each return. The legislature could in those circumstances have provided for urgency soon after the receipt of the last return. The fact that it did not leaves its intention unclear. However in the construction of statutes the intention of the legislature can be ascertained from the context within which the provision in question is found. This part of the second schedule should therefore be construed in conformity with the whole schedule and other provisions of the Electoral Act. The inquiry must therefore move on the remaining provisions under paragraph 2.

Paragraph 2 (2) and (3) provides as follows-

2) "At the time and place notified for the verification and collation of the constituency returns referred to in subparagraph (1) and in the presence of such candidates, their chief elections agents and observers as are present, the Chief Elections Officer shall display each constituency 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 constituency return."

3)

This paragraph establishes that at the time notified the collation and verification should start and continue irrespective of the absence of other candidates. The words "as are present" are instructive. The urgency which seems to have been abandoned in subparagraph (1) seems to have been resumed. In paragraph 2 (3) the legislature provided-

(3) "When the Chief Elections Officer has completed the verification of the constituency returns under subparagraph (2) the Chief Elections Officer shall, in the presence of such persons referred to in subparagraph (2) as are present, add together the number of votes received by each candidate as shown in each constituency return."

This means once the invitees referred to in subparagraph (1) arrive verification and collation shall continue in their presence. We move on to paragraph 3 (1) which provides-

3(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 (the qualifying votes in terms of (a) and (b))

To be duly elected as President of the Republic of Zimbabwe with effect from the

day of that declaration." This means once the verification and collation starts it continues until the winning candidate is forthwith declared the president of Zimbabwe if the result produces a winner with a majority of the votes cast. This clearly proves urgency is resumed from the time the invitees come till the declaration of the winner. This means from the transmission of the polling and constituency returns the legislature intended that officials must urgently forward returns to the Chief Elections Officer who must from the arrival of invited candidates or their agents urgently collate and verify and declare the result of the presidential poll.

Mr Muchadehama submitted that section 110 (3) of the Electoral Act must be factored in, in ascertaining the legislature's intention on whether or not the respondents were intended to act with urgency. The section provides as follows-

Judgment of MDC vs ZEC and Chief Elections Officer

"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 votes cast, a second election shall be held within twenty-one days after the previous election in accordance with this Act." He further submitted that the possibility of a second election within twenty-one days is consistent with the urgency expressed in the sections and paragraphs already discussed above. He said the time for the second election is fast approaching and according to his calculation the second election must be held on the 19th April 2008. He submitted that the legislature being aware of the possibility of a re-run could not have intended paragraph 2 (1) of the second schedule to give the 2nd respondent a wide discretion as to when he should collate and verify constituency returns. The limited period between the first and second election suggests that the first election's results must be processed with urgency to avoid prejudicing candidates who will be contesting the second election. The processing of presidential results must in my view be given priority when compared to the announcement by the National Collation Centre of other elections which have no possibility of a re-run. I am therefore satisfied that the legislature intended that presidential election results should be processed without any undue delay.

It is however not in dispute that the legislature did not specify the period within which presidential results should be collated, verified and announced. Mr Muchadehama said it must be within a reasonable time and relied on the provisions of section 3 (1) (b) of the Administrative Justice Act (Chapter 10: 28), hereinafter called the Administrative Justice Act. It provides as follows-

(1) "An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall-

d) act lawfully, reasonably and in a fair manner; and

e) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned."

Mr Chikumbirike for the respondents contented that the Administrative Justice Act does - not apply to the respondents as the Commission is not an administrative authority. Mr Muchadehama contented that it is and relied on its being created in terms of section 3 of the Zimbabwe Electoral Commission Act. Mr Chikumbirike submitted that section 3 of the Zimbabwe Electoral Commission Act has since been repealed and substituted. He is correct the provision which created the Commission was repealed and was substituted by one which provides for the procedure it shall follow and how it shall perform its functions.

The Commission as it now stands was established in terms of section 61 (1) of the Constitution. Mr Muchadehama countered that in any event the 2nd respondent remains within the meaning of "an administrative authority" as defined by section 2 of the Administrative Justice Act, as he is authorized by "an enactment to exercise or perform any administrative power or duty". I agree with Mr Muchadehama's submission as the Chief Elections Officer is employed by (ZEC) in terms of section 11 of the Zimbabwe Electoral Commission Act, and his duties and functions are specified in that section. The remaining issue on that aspect is whether the establishment of (ZEC) by the Constitution excludes it from the definition of an administrative authority.

Judgment of MDC vs ZEC and Chief Elections Officer

Mr Muchadehama further submitted that (ZEC) remains an "administrative authority" by virtue of the provisions of Parts I and II of the schedule to the Administrative Justice Act. Mr Chikumbirike submitted that, that is not the correct way of determining whether or not (ZEC) is an administrative authority. Mr Muchadehama's submission is premised on the fact that (ZEC) is not mentioned among the administrative authorities for which, the application of the Administrative Justice Act is limited or excluded. It is true that (ZEC) is not mentioned in Parts I and II of the Schedule, but the limitation and exclusion must only apply to those who fall under the definition of "administrative authority". Those who do not fall within the definition need no limitation or exclusion from the application of the Act as they are already not affected by its application. I would therefore agree with Mr Chikumbirike that the fact that (ZEC) was not mentioned in Parts I and II does not assist in the determination of whether or not it is an "administrative authority."

Mr Muchadehama sought to establish the validity of the applicant's claim that (ZEC) had acted outside the law by proving that it as an administrative authority had not announced the presidential results within a reasonable time. In my view the conduct of (ZEC) should be measured against section 61 (4) (a) of the Constitution which provides as follows-

"The Zimbabwe Electoral Commission shall have the following functions-

(a) to prepare for, conduct and supervise-

I. elections to the office of President and to Parliament;

II. elections to the governing bodies of local authorities

III. referendums;

and to ensure that those elections and referendums are conducted efficiently, freely, fairly, transparently and in accordance with the law;"

The standard set by the legislature in the Constitution is for (ZEC) to perform any function required of it by the legislature through the Constitution, the Electoral Act or the Zimbabwe Electoral Commission Act, efficiently, freely, fairly, transparently and in accordance with the law. The use of the word efficiency when construed in conformity with the urgency provided for in the Electoral Act means (ZEC) must act accurately and timeously.

In this case the question to be answered is did the respondents act efficiently, fairly, transparently and in accordance with the law towards the collation, verification and announcement of presidential results. If they did so that should be the end of the inquiry. If they did not the failure must be identified then this court can intervene and order compliance.

When the above criteria is applied to the facts of this case and the law as provided in the Electoral Act the applicant's allegations that there was delay seems to be justified by the legislature's intention that the election results must be processed without undue delay. This intention is revealed through the provisions which provide for the transmission of polling station-returns and constituency returns to the Chief Elections Officer, and how he should conduct the collation, verification and declare the winning candidate. In the absence of an explanation the delay between the 29th March 2008 and the 4th April 2008 seems to be unjustified and points to a lack of efficiency.

The period between the holding of the elections and the date of application is six days. Three other elections involving greater numbers of candidates were processed and finalized at their levels within two days of the date of the elections. 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 to verify and display the constituency returns and add the figures thereon to identify the winning candidate whom he should forthwith declare the President of Zimbabwe. This task should all things being equal not have taken the 2nd respondent up to the 4th April 2008 to announce the presidential results.

Judgment of MDC vs ZEC and Chief Elections Officer

The explanation

The respondents explained the delay through Justice George Chiweshe's opposing affidavit. In paragraph 18 of his opposing affidavit he said-

"In response to the letter of the 2nd April 2008 Annexure "B" I had prior to receiving the application, which was served on me last night, prepared a press statement, which I intended to release, not only to inform the applicants of the Commission's position on these issues, but to the country and world at large. I attach a copy of the statement and request this Honourable Court to incorporate it as part of this affidavit. The statement relates extensively and accurately to the correct legal position. This statement is annexed as Annexure "C".

On page 2 to 3 of Annexure "C" he explained that (ZEC) had received several complains in terms of section 67 A of the Electoral Act..

At page 2 of Annexure "C" he said "In this process, sight must not be lost of the provisions of section 67A of the Electoral Act (Electoral Laws Amendment Act No 17/07) which provides as follows:

"Within 48 hours after a constituency elections officer has declared a candidate to be duly elected in terms of section 66 (1), any political party or candidate that contested the election in the ward or constituency concerned may request the Commission to conduct a recount of votes in one or more of the polling stations in the ward or constituency."

This is a right accorded to a candidate or a political party that contested an election for either of the house of Assembly. The same is also applicable to a presidential candidate, by virtue of the provisions of part xviii, in section 112, which imports part xiii of the Electoral Act (where section 67A is found). For the avoidance of doubt, I relate to this section below:

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

After explaining the effect of a miscounting even by one vote could have on a presidential election, Justice Chiweshe concluded on page 3-4 by saying-

"The Commission, it must be put on record, has received several complaints in terms of section 67A.

The Commission is in the process of considering the evidence submitted, to determine whether a recount should or should not be done? The question, as to whether to order a recount, or not, is entirely in the discretion of the Commission. This is provided in section 67A (7) which provides-

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

Interpretation of the Law applicable to the explanation

The prospect, of a recount, generated spirited legal arguments for and against it. Mr Muchadehama submitted that section 67A being part of section sixty-seven was excluded from the sections which were imported into Part XVII by section 112. He further argued that section 67A does not apply to presidential elections, because it is not found in Part XVII where presidential elections are provided for.

Mr Chikumbirike for the respondents argued that section 67A is a section of the Electoral Act in its own right and was imported into Part XVII by virtue of its not having been mentioned among the sections excluded by section 112.

I agree with Mr Chikumbirike, because a section in a statute has its own separate existence even if it shares a number with another section. It is distinguished from the preceding section by the letter added to the number it shares with the preceding section. A section in a statute is constituted by the provisions after the number up to the last subsection under it. In this case section 67 ends with subsection (3), and the next section which is section 67A follows. Section 67A was not in the original Electoral Act. It was introduced by section 48 of Act 17 of 2007. If the legislature intended to make it part of section 67 it would have introduced it into the Act as a

Judgment of MDC vs ZEC and Chief Elections Officer

subsection of section 67. A new section is usually placed in the part of the statute where it fits into the scheme of the Act. In this case it was placed between section 67 which provides for the notification of the result of an election, and section 68 which provides for the publication of the names of elected candidates in the Gazette, because that is where a recount conveniently fits into the scheme of the Electoral Act, because it determines the actual winning candidate whose name should be published. I am therefore satisfied that section 67A enjoys a separate existence from section 67. Therefore its exclusion from the sections of Part XIII, excluded by section 112 from importation into Part XVII, means it was imported into Part XVII.

Mr Muchadehama for the applicants summed up by submitting that even if section 67A is held to be part of Part XVII it does not apply to presidential elections because they have not yet been announced. He for that argument relied on section 67A (1)'s provision that the complaint by a party or candidate must be made within forty-eight hours after a candidate for that election has been declared duly elected. Mr Chikumbirike for the respondents submitted that the forty-eight hours within which the complaint must be raised after the winning candidate has been declared does not apply to presidential elections because section 112 provides for necessary changes in the importation of Parts XIII, XIV and XV into Part XVII.

Section 67A as already found is part of Part XVII, by virtue of its importation thereto by section 112. It therefore applies to presidential election results with the necessary changes referred to by section 112. I however do not agree with Mr Chikumbirike that the necessary changes extend to the substantive provisions of section 67A. Where in a statute a provision from one Part of a Statute is imported into another part of the same statute, to "apply, with any changes that may be necessary" the court interpreting that statute is not allowed to re-enact the relevant provision. It can only make necessary changes, to make the provisions, fit into the importing Part. That power is limited to the names of officers who act in the importing Part, the sections empowering them to act, and the places where they are authorized to act etc. The substantive provisions can not be changed. They are in fact the reason for the importation. They are intended to influence the provisions of the importing Part.

In this case section 67A (1), will after the necessary changes have been made read as follows-

(1) "Within forty-eight hours after the Chief Elections Officer has declared a candidate to be duly elected in terms of section 110 (6), as read with the provisions of the Second Schedule, any political party or candidate that contested the election for the office of President, may request the Commission to conduct a recount of votes in one or more of the polling stations".

In its changed form section 67A (1) means a recount can only be requested within forty-eight hours after the declaration of the results of the presidential election. A recount before the announcement of the results, is in terms of section 67A (1) as imported into Part XVII, not provided for. If the request for a recount in terms of section 67A (1), is the reason for the delay in announcing the presidential results, the delay is based on an incorrect interpretation of section 67A (1). It would thus be an invalid reason for delaying the announcement of the presidential election results.

Mr Chikumbirike for the respondents, further submitted that even if the forty-eight hours apply (ZEC), can on its own initiative order a recount in terms of section 67A (4) which 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".

Mr Muchadehama for the applicants, submitted that section 67A (4) should not be read in isolation, but together with section 67A (1). He submitted that if read in the context of the whole section, it means any recount contemplated by it can only be done after the announcement of the results.

An analysis of section 67A (4) reveals that (ZEC) can act on its own initiative to order a recount. It does not state when it can do so as is specified in respect of subsection (1). The information on which it may act on can come from any source including a complain as provided in subsection (1). It simply should have grounds for believing that votes were miscounted. If the legislature intended to restrict the 1st respondent to considering a recount after the announcement it could have made reference to subsection (1) as is done in subsection (3).

Judgment of MDC vs ZEC and Chief Elections Officer

The wide discretion given to the 1st respondent on this aspect is confirmed by the provisions of subsection (7) of section 67A. It provides as follows-

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

The fact that (ZEC'S) decision to recount and the extent thereof is not subject to an appeal means that it was intended to act independently and that its decision would be final. The provision barring an appeal simply means (ZEC) has been given a very wide discretion as to whether or not to order a recount. The provision that (ZEC'S) decision shall not be subjected to an appeal also means this court can not inquire into that decision. This should therefore be the end of the inquiry, as the respondent's conduct can only be open to the jurisdiction of this court when it strays from the law.

I should therefore find that the reason proffered by the respondents for their failure to timeously announce the presidential results is legally valid. It can therefore justify the delay. The respondents have not strayed from the law. This court is therefore not entitled to intervene and order the respondents to announce the results on the basis of failure to comply with the law.

Mr Chikumbirike sought costs against the applicant's and their legal practitioners, at a higher scale. He submitted that the applicant's application was not necessary as the applicants could have sought for information from the respondents. He also relied on the fact that there are no time limits within which the respondents are required to act, a fact which the applicants should have known. Mr Muchadehama in response to the issue of costs said if any costs are to be ordered they should be on the ordinary scale. He disputed that the application could have been avoided as their letter of the 2nd April 2008 was not responded to. The issue of costs is in the court's discretion. That discretion must be exercised in a manner that does not discourage people from approaching the courts.

Electoral matters are very important to candidates, political parties and the nation. In this case the whole nation is waiting for results. The applicants were anxious at the time they made their application. Their legal practitioners wrote a letter expressing anxiety and demanding the results but did not get a reply till they resorted to this application. They should not be penalized by costs on the higher scale for making an application in circumstances where delay is conceded but has now been explained because of their application.

I would in the result dismiss the application with costs on the ordinary scale.

Messers Mbidzo Muchadehama & Makoni, Applicant's Legal Practitioners.

Messers Chikumbirike & Associates, Respondent's Legal Practitioners./