

SOUTHERN AFRICA LITIGATION CENTRE

LAWFULNESS OF ZIMBABWE PRESIDENTIAL RUN-OFF

MEMORANDUM

of

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INTRODUCTION

1. The presidential election in Zimbabwe was held on 29 March 2008. According to the official results announced by the Zimbabwean Electoral Commission (*“the ZEC”*), no candidate achieved an absolute majority of the votes cast. Section 110(3) of the Electoral Act provides that in such a case a run-off election *“shall be held within twenty-one days after the previous election.”* The ZEC has however delayed the run-off election until 27 June 2008. It purported to do so in terms of section 192(5)(a) of the Electoral Act.
2. Our instructions are that the opinion is requested out of a concern that the continued retention of power by the President (and through his hand ZANU PF) is unconstitutional, and that the exercise of cabinet and Presidential powers by current incumbents is without lawful authority.
3. The Southern Africa Litigation Centre has asked us to advise on the validity of the delay. We are for the reasons set out in this opinion, of the view that the delay may be unlawful because section 192(5)(a) may well be unconstitutional and invalid.

THE PRESIDENTIAL ELECTION AND THE RESULTANT RUN-OFF

4. The 2008 Harmonised Election in Zimbabwe has been described as “*arguably the most historic of the post-independence elections, as for the first time in the last 28 years the ruling party lost its parliamentary majority and the President lost the first round of the Presidential election. This result represented the culmination of a decade of political and civic opposition to a former liberation party whose legitimacy has been greatly eroded by nearly three decades of intolerant rule*”.¹
5. The Presidential election was held jointly with the parliamentary and local authority elections on 29 March 2008.
6. After over a month of delay before the release of the election results the ZEC finally announced that the Movement for Democratic Change (“MDC”) won a majority of 109 seats in Parliament against ZANU PF’s 97 seats, thus defeating the ruling party’s majority in the House of Assembly for the first time since independence.
7. The more controversial Presidential count gave 47.9% of the vote to Morgan Tsvangirai, 43.2% to Mugabe, 8.3% to Makoni and 0.6% to Langton Towungana.²

¹ See the Report “*Punishing Dissent, Silencing Citizens: The Zimbabwe Elections 2008*”, Solidarity Peace Trust, 21 May 2008, Johannesburg, Executive Summary.

² Ibid.

8. The result meant that no Presidential candidate won a majority of the valid votes cast. In those circumstances, section 110(3) of the Electoral Act [Chapter 2:13] was triggered. It provides as follows:

“(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.” (emphasis added).

9. On that basis, the Chief Elections Officer of the ZEC issued a General Notice in the Government Gazette of 9 May 2008 which stated, *inter alia*, the following:

“Since no candidate received a majority of the valid votes cast, a second election will be held between the candidates who received the highest number of votes, namely: Tsvangirayi Morgan of MDC (Tsvangirayi) party and Mugabe Robert Gabriel of ZANU (PF) party.”

10. On 15 May 2008 the ZEC gazetted Statutory Instrument 73A/2008 making provision for the Presidential Run-off Election to be held within 90 days of 2 May (the day of the declaration of the Presidential Election results). This means that the run-off would have to be held on or before 31 July 2008.
11. We note what appears to be the operative provision in the Statutory Instrument, and which according to our instructions was quoted *in extenso* in *The Herald*:

“Notwithstanding section 110(3) of the Electoral Act (Chapter 2:13), following upon the poll taken on 29th March, 2008 in each constituency for the election of a President which resulted in no candidate receiving a majority of the total 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 of the election of a President.” (emphasis added).

12. We note too that on 16 May – by publication of a further Statutory Instrument 78 – the ZEC announced that the run-off would take place on 27 June 2008.³
13. It appears that the ZEC invoked the powers given to it by section 192 of the Electoral Act read with section 192(5)(a) thereof in order to extend the 21-day period for the run-off stipulated by section 110(3) of the Electoral Act.⁴ As will be seen, the powers accorded to the ZEC under section 192 are regulatory in nature.

“192 Regulatory powers of Commission

...

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

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

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

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

(c) penalties for contraventions of any such statutory instrument, not exceeding a fine of level ten or imprisonment for a

³ See Negotiating Zimbabwe’s Transition, International Crisis Group Policy Briefing, Africa Briefing N°51

Pretoria/Brussels, 21 May 2008. This it did through Statutory Instrument 78 – fixing Friday 27 June as polling day for the Presidential run-off election (see Statutory Instruments on elections & procedures runoff & by-elections - Bill Watch 20/2008 Veritas May 17, 2008) (available at <http://www.kubatana.net/html/archive/legisl/080517veritas.asp?sector=ELEC> and accessed on 28 May 2008).

⁴ Our instructions are that *The Herald* of 15 May 2008 advised that the ZEC announced the dates through a statutory instrument which it described as The Electoral (Alteration of sections 39(20)[sic](b) and 110(3) of Electoral Act) Notice, published in the Government Gazette Extraordinary of 15 May 2008, pursuant to section 192 as read with section 192 (5)(a) of the Electoral Act. According to *The Herald*, the regulations were published with the approval of the Minister of Justice, Legal and Parliamentary Affairs.

period not exceeding one year or both such fine and such imprisonment.

(6) Regulations made in terms of subsection (1) and statutory instruments made in terms of subsection (4) shall not have effect until they have been approved by the Minister and published in the Gazette.

14. It appears that the ZEC has pursuant to its powers under section 192(5)(a) purported to extend the 21-day period that is stipulated in section 110(3) of the Electoral Act. The effect of publication of Statutory Instrument 73A is that the ZEC has effectively amended or side-stepped the terms of section 110(3). It has done so in two respects:

- 14.1. *First:* where section 110(3) provides that a second election “*shall be held*” within a period “*of twenty-one days*”, Statutory Instrument 73A reportedly provides that the period is “*extended from 21 days to ninety (90) days*”;

- 14.2. *Second:* where section 110(3) provides that a second election shall be held within twenty-one days “*after the previous election in accordance with this Act*”, Statutory Instrument 73A reportedly provides that a second election shall be held within ninety days “*from the date of the announcement of the results of the first poll of the election of a President*”.

SECTION 192 OF THE ELECTORAL ACT IS CONSTITUTIONALLY SUSPECT

Sections 28(4) and 58(4) of the Constitution

15. The Electoral Act is no ordinary statute. It is one that gives effect to various provisions of the Constitution of Zimbabwe (*“the Constitution”*). Included amongst these are the provisions that relate to the process by which the President is elected.

15.1. The mutuality that exists between the Electoral Act and the Constitution is demonstrated by section 2 of the Act which states that “[t]his Act shall apply to - ... elections to the office of President for the purposes of the Constitution”. Thus, one of the principles of the Electoral Law is to give effect to the purposes of the Constitution.

15.2. Furthermore, section 28(4) of the Constitution mandates that “[t]he procedure for the nomination of candidates for election in terms of sub-section (2) and the election of the President shall be as prescribed in the Electoral Law” (emphasis added).

16. Elections for the office of President have to be conducted in terms of the Electoral Law.

17. The Constitution itself defines the meaning of “*Electoral Law*” in section 113. It provides that “‘*Electoral Law*’ means the Act of Parliament having effect for the purposes of section 58(4) [of the Contitution] which is for the time being in force”.
18. Section 58(4) of the Constitution in turn dictates (the word “*shall*” is used) that “An Act of Parliament shall make provision for the election of members of Parliament, including elections for the purposes of filling casual vacancies” (emphasis added). The word “*shall*” emphasises the peremptory nature of the provision.⁵
19. It is thus clear that the Electoral Law must be an Act of Parliament. It is Parliament – and Parliament alone – that is accorded the constitutional imperative of initially declaring the terms of the Electoral Law and thereafter effecting any changes to the Electoral Law or abrogating aspects thereof.
20. Lawfulness requires that where a power is granted to a specific authority, that authority itself should exercise the power so granted. Wade and Forsyth state the principle as follows:

*“An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else. The principle is strictly applied, even when it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable”.*⁶

⁵ See *Sterling Products International Ltd v Zulu* 1988 (2) ZLR 293 (SC), *Standard Bank Ltd v van Rhyn* 1925 AD 266 and *Chizikani & Anor v Central African Building Society* 1998 (1) ZLR 371 (SC) at 374-5.

⁶ *Administrative Law* 8th Edition (2000) at 315.

21. In light of the foregoing, the first difficulty with section 192 of the Electoral Act is that it purports to delegate to the ZEC the power to amend or bypass the Electoral Law that the Constitution itself defines and has entrusted to Parliament, and which the Constitution has made plain in section 28(4) is the law that “*shall*” prescribe “[t]he procedure for the nomination of candidates for election in terms of subsection (2) and the election of the President”.
22. Accordingly, the effect of section 192 is a grant by the legislature to the ZEC of the power to amend or ignore one of the legislature’s own statutes.
23. In our view this is a constitutionally suspect delegation of Parliament’s legislative powers to the ZEC. That is because Parliament arguably cannot delegate its constitutional function in this regard to any person, including the ZEC.⁷
24. Sections 28(4) and 58(4) of the Constitution place constraints on the power of Parliament to abdicate its responsibility to the ZEC in respect of any amendments to the Electoral Law, whether by regulation or statutory instrument.⁸

⁷ The ZEC is a body created under section 61 of the Constitution. Section 61(1) provides as follows:

“(1) *There shall be a commission to be known as the Zimbabwe Electoral Commission which shall consist of*↓

(a) *a chairman who shall be a judge of the High Court or the Supreme Court or a person qualified to be appointed as a judge of the High Court or the Supreme Court appointed by the President after consultation with the Judicial Service Commission; and*

(b) *six other members, at least three of whom shall be women, appointed by the President from a list of nine nominees submitted by the Committee on Standing Rules and Orders.”*

⁸ We note in this regard section 32(2) of the Constitution which provides that “[t]he provisions of subsection (1) [legislative authority of Zimbabwe shall vest in the Legislature which shall consist of the President and Parliament] shall not be construed as preventing the Legislature from conferring legislative functions on any person or authority”. In our view section 32(2) of the

Separation of powers

25. Section 192(5)(a) may be unconstitutional insofar as it vests the ZEC with the legislative power to override an Act of Parliament.
26. There can be little doubt that sections 28(4) and 58(4) of the Constitution place clear constraints on the power of Parliament to abdicate its responsibility to the ZEC in respect of any amendments to the Electoral Law out of respect for the doctrine of separation of powers.
27. Within its constitutional structure the Zimbabwean state recognises the cardinal importance of separation of powers. For example, the judges of the Supreme Court of Zimbabwe made the following statement in relation to the political reaction to the judgment in *Smith v Mutasa NO & Anor* 1989 (3) ZLR 183 (SC).⁹

*“The Constitution of Zimbabwe lays down the separation of powers between the Executive, the Legislature and the Judiciary. Parliament makes the laws. The duty to interpret the laws made by Parliament is assigned to the Judiciary. The Judiciary presides over the observation of the Rule of Law. Parliament cannot disobey its own laws. If it does the courts of justice will determine whether Parliament has contravened the provisions of its own enactments”.*¹⁰

Constitution cannot plausibly be read as relaxing or altering the dictates of section 28(4) and 58(4) of the Constitution which constitutionally restrict the making and amending of the Electoral Law to Parliament and which do not permit the delegation of that power “on any person or authority”.

⁹ Reported at page 219 of the Law Reports.

¹⁰ See also the majority judgment in *Biti and Another v The Minister of Justice, Legal and Parliamentary Affairs* (2002) AHRLR 266 (ZwSC 2002) at para 34 where Ebrahim JA held that “Zimbabwe, unlike the United Kingdom, is not a parliamentary democracy, but a constitutional democracy - see *Chairman, Public Service Commission and Others v Zimbabwe Teachers' Association and Others* 1996 (1) ZLR 637 (SC) at 651, 1997 (1) SA 209 (ZS) at 218 and 219

28. In *Chairman, Public Service Commission & Ors v Zimbabwe Teachers' Association & Ors*,¹¹ the Zimbabwean Supreme Court explained that the separation of powers was a separation founded on the Constitution itself.

"We consider that this argument fails to take into account the fact that Zimbabwe, unlike Great Britain, is not a parliamentary democracy. It is a constitutional democracy. The centre-piece of our democracy is not a sovereign parliament but a supreme law (the Constitution). See Smith v Mutasa NO and Another 1990 (3) SA 756 (ZS) at 761I-762A (1989 (3) ZLR 183 at 192G-H)".

29. The constitutional foundation of this separation is well-expressed by the *South African Constitutional Court in President of the Republic of South Africa & Others v South African Rugby Football Union & Others*,¹² where it said this:¹³

"[132] The exercise of public power is regulated by the Constitution in different ways. There is a separation of powers between the Legislature, the Executive and the Judiciary which determines who may exercise power in particular spheres. An overarching Bill of Rights regulates and controls the exercise of public power, and specific provisions of the Constitution regulate and control the exercise of particular powers".

30. The Zimbabwean Supreme Court made clear in *Chairman, Public Service Commission & Ors v Zimbabwe Teachers' Association & Ors*,¹⁴ that the "centre-piece" of Zimbabwean democracy is the Constitution. It can thus only be the

(following Smith v Mutasa NO and Another 1989 (3) ZLR 183 (SC) at 192, 1990 (3) SA 756 (ZS) at 761-762)".

¹¹ 1996 (1) ZLR 637 (SC) at page 651; 1997 (1) SA 209 (ZS) at pages 218-219, per Gubbay CJ, Korsah JA and Ebrahim JA.

¹² 2000 (1) SA 1 (CC).

¹³ At para [132].

¹⁴ 1996 (1) ZLR 637 (SC) at page 651; 1997 (1) SA 209 (ZS).

Constitution which allows a body like the ZEC to make or amend the Electoral Law. Yet the Constitution expressly points the other way: it clearly states that the power to laws vests with the Parliament, and specifically that Parliament must deal with the Electoral Law, which includes amendments thereto.

31. In our submission the Zimbabwe Consitution provisions relating to the legislature, the executive and the judiciary posit a separation of powers. The value of putting legislative power, including the power to amend statutes, in the hands of Parliament, in accordance with the fundamental principle of the separation of powers, is that there can be an open and public debate about such legislation before it is enacted into law, and any issue of the constitutional validity of the legislation can be examined before it becomes operative.
32. For instance, had there been time to examine the proposed change, there would have been substantial reasons that might have been advanced to resist, for instance, the extension of the run-off date beyond 21 days after the elections.
33. Common sense and a reading of the Electoral Law suggest that it was intended that the ZEC would annouce the result of the Presidential election within a few days of polling and that immediately thereafter (on the assumption that no candidate won a majority of the votes) the run-off would take place while all the polling stations, officials and observers were in place but in any event not later than 21 days from the original poll.
34. But common sense and the scheme of the Electoral Law have been undermined by the ZEC's resort to its delegated powers under section 192. The protections

envisaged by the doctrine of separation of powers have moreover been undermined and public participation in the legislative process has been done away with. Those protections and that participation are not available when the change to the existing statute is simply made in a statutory instrument by the ZEC, without warning and debate.

Delegation of legislative functions

35. The power exercised by the ZEC under section 192 may be unlawful for a third (and again related) reason. That is because the power arguably flows from an impermissible delegation of legislative functions.
36. In a state that follows a system of parliamentary supremacy, Parliament, being supreme, could delegate as much power as it likes. In Apartheid South Africa, for instance, it was not uncommon for Parliament to delegate to the State President the power to amend or repeal an Act of Parliament through the means of what were known as “*Henry VIII clauses*”.
37. However, in a State such as Zimbabwe where the Constitution is intended to be supreme, it may be impermissible for Parliament to delegate its essential legislative functions. That much is clear from a range of cases decided in constitutional democracies around the world.
38. Guidance as to the effect of constitutional supremacy on the competence of Parliament to delegate essential legislative functions may be provided by the

approach of the South African Constitutional Court in *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC) (“*Executive Council 2000*”).

38.1. The Court was faced with a challenge to section 24 of the Local Government: Municipal Structures Act, No 117 of 1998 (“*the Structures Act*”).

38.2. Section 159(1) of the South African Constitution provides as follows:

“The term of a Municipal Council may be no more than five years, as determined by national legislation.”

38.3. Section 24 purported to delegate the power to call and set dates for municipal elections:

“24 (1) The term of municipal councils is no more than five years as determined by the Minister by notice in the Government Gazette, calculated from the day following the date or dates set for the previous election of all municipal councils in terms of subsection (2).

(2) Whenever necessary, the Minister, after consulting the Electoral Commission, must, by notice in the Government Gazette, call and set a date or dates for an election of all municipal councils, which must be held within 90 days of the date of the expiry of the term of municipal councils . . .”.

38.4. The constitutional attack on section 24 was premised on the proposition that it constitutes an impermissible assignment of plenary legislative power to the Minister.¹⁵

¹⁵ See para [121].

38.5. According to the Constitutional Court,¹⁶ “[t]he authority of Parliament to delegate its law-making functions is subject to the Constitution, and the authority to make subordinate legislation must be exercised within the framework of the statute under which the authority is delegated”. □ □

38.6. Previously, in its decision in another matter of a similar name (*Executive Council, Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC)) the Court had held as follows:

“The legislative authority vested in Parliament under s 37 of the Constitution is expressed in wide terms - 'to make laws for the Republic in accordance with this Constitution'. In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including . . . the power to amend the Act under which the assignment is made.”¹⁷ (emphasis added).

38.7. While this is an accurate description of the general approach, Justice Ngcobo in *Executive Council 2000* held that the specific enquiry is:

“whether the Constitution authorises the delegation of the power in question. Whether there is constitutional authority to delegate is therefore a matter of constitutional interpretation. The language used in the Constitution and the context in which the provisions

¹⁶ At paras [122]-[123].

¹⁷ At para [51].

*being construed occur are important considerations in that process.*¹⁸

38.8. The Constitutional Court stressed that the Constitution uses a range of expressions when it confers legislative power upon the national legislature with regard to local government. Justice Ngcobo stressed that where the Constitution states that “*national legislation must*” or “*as determined by national legislation*” (as opposed to the formulation “*national legislation may*”), then this constitutes a strong indication that the legislative power may not be delegated by the legislature.¹⁹

38.9. Having regard to the peremptory language of the Constitution in this respect, the Constitutional Court concluded as follows:

“Section 159(1) of the Constitution makes it clear that all municipal councils will have a uniform term of office, subject to a maximum of five years. It requires national legislation to determine such term of office by using the expression “as determined by legislation”. The term so established is subject to the prescribed maximum of five years. Section 159(2) requires that a municipal election be held within 90 days of the date that the previous council was dissolved or its term expired. The term of office of an elected legislative body such as a municipal council is a crucial aspect of the functioning of that council. In the case of the National Assembly, section 49(1) of the Constitution determines the term, and in the case of the provincial legislatures, section 108(1) of the Constitution determines the terms. Given its importance in the democratic political process, and given the language of section 159(1), the conclusion that section 159(1) does not permit this matter to be delegated by Parliament, but requires the term of office to be determined by Parliament itself, is unavoidable. In addition to the importance of this matter, I also take cognizance of the fact that it is one which Parliament could easily have determined itself for it is not a matter which requires the different circumstances of each municipal council to be taken into consideration. All that is required is to fix a term which will apply to

¹⁸ At para [125].

¹⁹ See para [126].

all councils. In my view, this is not a matter which the Constitution permits to be delegated. The delegation was, therefore, impermissible and section 24(1) must be held to be inconsistent with section 159(1) of the Constitution.”²⁰

38.10. In our submission the same reasoning may be applicable to section 192 of the Electoral Act. That is so if one has regard to the Constitution’s mandatory language where it determines that national legislation (the Electoral Act) must determine the terms of any Presidential election or run-off.

38.11. Section 192 thus in a constitutionally suspect manner purported to delegate to the ZEC the power to amend and/or determine those terms.

39. It is furthermore profitable to consider the decision of the Constitutional Court in *Executive Council, Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC) (“*Executive Council 1995*”), to which reference was made in *Executive Council 2000*.

39.1. As with section 192 of the Electoral Act, in *Executive Council 1995* the Legislature had purported to delegate the power to amend an Act of Parliament to another body, in this case, the President.

39.2. The rationale in that decision is that where there is a written constitution within which the separation of powers doctrine is entrenched, the power of one branch of government, namely the legislature, to pass its authority to

²⁰ At paras [125]-[126].

another branch of government, namely the executive, will only be permitted in limited circumstances. The one circumstance which is universally recognised is the right to delegate the power to make legislation (usually called subordinate legislation) to give effect to the laws passed by the legislature. Limited delegation might also be permissible in times of war and national emergency.

39.3. The majority of the Constitutional Court held that the purported delegation would subvert the “*manner and form*” provisions in the Constitution.²¹ In addition, members of the Court emphasised that delegating plenary powers of this nature entails giving away too much of the legislature’s lawmaking responsibility.²² Others recognised that allowing an organ of the executive to amend an enabling provision leads to the unacceptable conclusion that the executive can confer authority on itself.²³

39.4. Accordingly, the delegation by the South African Parliament was held to be contrary to the separation of powers principle in the Constitution.²⁴

40. The same restrictive approach to delegation of essential legislative powers is followed in the United States. The United States Supreme Court has tended to

²¹ See paras [62]-[63].

²² Ibid.

²³ Para [139].

²⁴ See in particular Chaskalson P paragraph [62]; Mahomed DP paragraphs [135 - 137], [142]; Kriegler J paragraph [162]; Sachs J paragraphs [199], [204] and [206].

take a very restrictive view of the extent to which Congress may delegate its functions to the executive. We refer in this regard to the following decisions:

40.1. In *Field v Clark*,²⁵ where Harlan J said:

“That Congress cannot delegate legislative power to the President is a principle universally recognised as vital to the integrity and maintenance of the system of Government ordained by the Constitution”.

40.2. See too *Panama Refining Co v Ryan*²⁶ where Hughes CJ said:

“The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested”.

40.3. In *Immigration and Naturalisation Services v Chadha*,²⁷ Burger CJ said:

“It emerges clearly that the prescription for legislative action in Art 1 represents the Framers’ decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure”.

40.4. And also *Loving v United States*,²⁸ where Kennedy J said:

“Another strand of our separation-of-powers jurisprudence, the delegation doctrine, has been developed to prevent Congress from forsaking its duties The fundamental precept of the delegation doctrine is that the law making function belongs to Congress ... and may not be conveyed to another branch or entity”.

²⁵ 143 US 649 (1892) at page 692; 36 L Ed 294 at page 310.

²⁶ 293 US 388 (1935) at page 421; 79 L Ed 446 at page 459.

²⁷ 462 US 919 (1983) at page 951; 77 L Ed (2d) 317 at page 344.

- 40.5. The US jurisprudence affirms that the important distinction, therefore, is between the delegation of power to make the law, which necessarily involves discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law.
- 40.6. The first delegation – which is exemplified by the terms of section 192 of the Electoral Act – is an unlawful one, whereas the second is not.
41. In our submission, and having set out the principles regarding the permissibility of delegation of legislative power, the purported delegation of legislative power to the ZEC under section 192 of the Electoral Act may be constitutionally objectionable. The argument would be that it constitutes an abdication by Parliament of its legislative authority, and in respect of legislation specifically dealt with in the Constitution itself as the Electoral Law.
42. If the legislation is an abdication of Parliament’s legislative function, then its effect may be to leave the ZEC in effect free to change or ignore by way of regulation and statutory instrument the electoral process as laid down in the Electoral Law without even the requirement to give advance notice.
43. It will be recalled that section 192(1) provides the ZEC with the power to “*by regulation prescribe all matters which by [the Electoral Law] are required or permitted to be prescribed or which, in its opinion, are necessary or convenient to*

²⁸ 517 US 748 (1996); 135 L Ed (2d) 36 at page 49.

be prescribed for carrying out or giving effect to this Act” (emphasis added); and section 192(4) empowers the Commission to “make such statutory instruments as it considers necessary or desirable to ensure that any election is properly and efficiently conducted and to deal with any matter or situation connected with, arising out of or resulting from the election.” (emphasis added).

44. The date of a Presidential Election is a “*constitutional*” date set and prescribed in the Constitution following the end of term of a sitting President. The term of office of the sitting president expired on 28 March 2008 following the dissolution of Parliament and consistent with Constitutional Amendment No 18 which became law on the 30 October 2007. In terms of section 28(3) of the Constitution, an election takes place on a date proclaimed by the President *in terms of section 58(1) of the Constitution*. Section 58(1) of the Constitution provides as follows:

“(1) A general election shall be held on such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or, as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the Gazette, fix.”

45. It is thus submitted that when the President made the proclamation, any extension of the Presidential election period (by the run-off period of 21 days as defined by section 110(3)) is an integral part of that announcement and not subject to determination or variation by the ZEC’s resort to administrative regulatory powers under section 192 of the Electoral Act.

Insufficient guidelines

46. Where delegation is concerned it is not only wide lawmaking powers that present difficulties but also wide discretionary powers more generally.
47. The South African Constitutional Court has stressed that Parliament may not delegate law-making powers in terms which are so vague that they do not in any meaningful sense fetter the administrative body in the exercise of its delegated powers. The jurisprudence of the Constitutional Court indicates that Parliament must furnish adequate guidelines in order to indicate how officials are required to exercise their discretionary powers.
48. In *Dawood v Minister of Home Affairs*,²⁹ Parliament had conferred an administrative discretion on functionaries without providing any guidelines regarding the circumstances in which the discretion should be issued. The Constitutional Court held that this was constitutionally impermissible since

*“no attempt has been made by the legislature to give guidance to decision-makers in relation to their power”.*³⁰

49. In *Janse van Rensburg NO v Minister of Trade and Industry*,³¹ Goldstone J held as follows:

“[A]s this Court has already held (in the context of a limitation analysis), the constitutional obligation on the Legislature to promote, protect and fulfil the rights entrenched in the Bill of Rights entails that, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised. The absence of such guidance [renders] the procedure provided in s 8(5)(a) [of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988]

²⁹ 2000 3 SA 936 (CC) paras [47]-[55].

³⁰ See para [55].

³¹ 2001 1 SA 29 (CC) para [25].

unfair and a violation of the protection afforded by s 33(1) [of the Constitution]”.

In footnote 29, Goldstone J indicated that other provisions of the legislation under consideration

“may also be of concern because they confer a wide discretion without any guidance as to their exercise by the Minister”.

50. The Constitutional Court reiterated this principle in *Affordable Medicines Trust v Minister of Health*:³²

“...the delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may well lead to the arbitrary exercise of the delegated power. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. These constraints will generally appear from the provisions of the empowering statute as well as the policies and objectives of the empowering statute.”

51. The above-mentioned judgments indicate that, in circumstances where Parliament confers a discretion on an administrative body, it must provide adequate guidance as to the manner in which that power should be exercised, failing which the law will violate the constitutional guarantee of just administrative action. We refer to this as *“the guidance principle”*.
52. Administrative law provides a useful analogy with regard to the guidance principle. Subject to the wording of the enabling legislation, it is not permissible to delegate a power without prescribing guidelines in terms of which the power must be

³² 2006 3 SA 247 (CC) para [34].

exercised. Thus in *Arenstein v Durban Corporation*,³³ the Court was concerned with the validity of a by-law which provided that “*no person shall within the city organise or take part in any procession, display, performance or gathering in any public street or place without permission had and obtained from the mayor, who may in his discretion impose such restrictions or conditions as may to him seem desirable*”. This by-law was held to be invalid. Hoexter JA stated:³⁴

“In the result the Municipal Council has delegated to the mayor the power to do by arbitrary executive act what it ought to do itself by legislative act. The effect of the by-law may be described mutatis mutandis, in the words of Feetham JP in the case of Natal Organic Industries (Pty) Ltd v Union Government 1935 NPD 701 at p 715:

‘Really the effect of the regulation is to make the Commissioner the legislator on the particular point with which the regulation seeks to deal, and such a delegation of authority is not a good delegation.’

In my opinion the delegation to the mayor in the by-law under consideration is invalid.”

53. We have already submitted that it is impermissible for an elected legislature to authorise an administrative body to exercise powers which should properly be exercised by the legislature itself. An improper exercise of power will also include situations where a delegation of legislative powers is not accompanied by a sufficiently rigorous framework that has been established to channel the exercise of those powers. Where the administrative body has not been constrained by the act of delegation in any meaningful sense, the delegation will be invalid on the basis of its inconsistency with the constitutional principle of separation of powers.

³³ 1952 1 SA 279 (A).

³⁴ At 296H-297A.

54. The reasons of principle which underlie this rule emerge clearly from American jurisprudence. In the United States, a delegation of congressional legislative functions will be constitutionally permissible only in circumstances where Congress lays down, by legislative acts, an intelligible principle to which the person or body authorised to act is directed to conform. Congress must clearly delineate the general policy and the boundaries of the delegated authority. The delegation must not be so broad or vague that the authority to whom the power is delegated makes law rather than acting within the framework of law made by Congress.
55. The United States Supreme Court has held that the non-delegation doctrine does not prevent Congress from delegating its legislative powers, as long as this satisfies the “*intelligible principle*” test. The test was formulated as follows in *J W Hampton Jr & Co v United States*:³⁵
- “[So long as Congress] shall lay down by legislative act an intelligible principle to which the person or body authorized [to exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”*
56. Thus, in *Panama Refining Co v Ryan*³⁶ the United States Supreme Court struck down as unconstitutional a law which gave the President wide powers to regulate trade in petroleum products. It was found that the delegating legislation did not establish any criteria to govern the President; nor did it require the President to make any finding before taking action.³⁷

³⁵ 276 US 394 (1928) at 409.

³⁶ 293 US 388 (1935).

³⁷ At page 54.

57. The Supreme Court held that this was an unconstitutional delegation of legislative power since it contained no definition of the circumstances in which transportation should be allowed or prohibited. *“The Congress left the matter to the President without standard or rule, to be dealt with as he pleased.”*³⁸
58. Similarly, in *Schechter v United States*³⁹ the United States Supreme Court held that the delegation of legislative power in that case failed to provide standards to channel the delegate in the exercise of his power. Cardozo J made the fundamental point in blunt terms:
- “This is delegation running riot. No such plenitude of power is susceptible of transfer.”*⁴⁰
59. When regard is had to the wording of section 192 then it is submitted that it may be argued that the delegation to the ZEC is overly wide with little by way of guidance.
60. The power purportedly given to the ZEC under section 192 may be exercised as it considers *“convenient to be prescribed for carrying out or giving effect to this Act”* and as it *“considers necessary or desirable to ensure that any election is properly and efficiently conducted and to deal with any matter or situation connected with, arising out of or resulting from the election.”*
61. There is thus little guidance regarding the use of this legislative power by the ZEC, and no need to procure subsequent parliamentary approval.

³⁸ At 458.

³⁹ 79 L Ed 1570 (1935).

⁴⁰ At 1592, emphasis added.

CONCLUSION

62. For the reasons set out above there are constitutional concerns about section 192 and the ZEC's reliance thereon to extend the election period. An argument may thus be made that the power of the ZEC to amend or ignore the constitutionally required periods of the Electoral Law by abrogating or amending the provisions regarding the run-off period is constitutionally objectionable.

63. We advise accordingly.

WIM TRENGOVE SC

MAX DU PLESSIS

Chambers

Sandton and Durban

4 June 2008