

***Ex Parte:* SOUTHERN AFRICA LITIGATION CENTRE**

**In re: THE PROCEDURES GOVERNING THE DETERMINATION AND
DECLARATION OF THE PRESIDENT IN THE EVENT OF AN UNLAWFUL RUNOFF**

MEMORANDUM

1. Section 110(3) of the Electoral Act of 2004 is predicated upon two or more candidates being nominated for President. The subsection provides that where no candidate receives a majority of the total number of valid votes cast, a second election shall be held within 21 days of the previous election in accordance with the Electoral Act.¹
2. The need for a second election occurs in two situations. First, where two candidates are nominated for President, it could happen that the first election results in a dead heat, in which case neither candidate receives a majority of the total number of valid votes cast, and a second election is then required to resolve the matter. Second, where there are more than two candidates for President, no candidate may receive a majority of the total number of valid votes cast, and here too, a second election is required to decide the matter.
3. Section 110(4) regulates the second election contemplated in section 110(3).² In the second election, only the two candidates who received the highest and next highest number of valid votes cast at the previous election shall be eligible to contest the second election. Thus, where there were always only two candidates

¹ S110(3) provides: “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.”

² S 110(4) provides: “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.”

for President, the second election is held to resolve a dead heat between the two candidates. Where there were originally more than two candidates, but no outright majority was obtained by any candidate, then only two candidates go forward into the second election.

4. Section 110 is thus intended to ensure that the President is elected by a majority of the total number of valid votes cast, either in a first election, or in the second election provided for in section 110(4).

5. Item 3 of Second Schedule of the Electoral Act reads as follows:

“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 greatest 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.”

6. The question that arises is whether the provisions of item 3 of the Second Schedule, cited above, conflict with the requirements of section 110 of the Electoral Act. Item 3 of the Second Schedule contemplates a situation in which there are more than two candidates, and the candidate with the greatest number of votes, rather than the majority of votes, is elected President. This appears to contradict the requirements of section 110 in that, as indicated, section 110 sets out a procedure by which the election of the President requires a majority of the valid votes cast.
7. It is a fundamental principle of statutory construction that the provisions of a statute must be read in a consistent fashion, and, only where this cannot be done, should other interpretations of the legislation be considered.
8. Item 3 of the Second Schedule can be interpreted in a manner consistent with section 110. Where in a first election there are two or more candidates and one receives an outright majority of the total number of valid votes cast, then section 110 (3) determines that the candidate who has won the majority of votes is then the duly elected President. Where however a second election is required, item 3 of the Second Schedule is of application.
9. A second election must be held within 21 days after the first and inconclusive Presidential election. This requirement is clear from section 110(3). If a second

election is held within the stipulated time period, then there can only be two candidates as required by section 110(4). And as item 3(1)(a) of the Second Schedule stipulates, where there are two candidates, the candidate with the greater number of votes shall be declared the duly elected President. If, in a second round, there is a dead heat, then the provisions of Section 110(5) determine a procedure by which Parliament resolves the matter.

10. Where, however, a second election is not held within the 21 day period required by Section 110 (3), item (3)(1)(b) of the Second Schedule regulates the outcome. Where no second election is held and there were two or more candidates for President, and no candidate received a majority of the total number of valid votes cast, item 3(1)(b) provides that the candidate with the greatest number of votes, and not the majority of the total number of votes, shall be the duly elected President

11. On this interpretation, the purpose of section 110 is preserved in that where a second election is lawfully held within 21 days the President is elected on the basis of a majority of the total number of votes cast. For convenience, we call this the ‘majoritarian principle’. The majoritarian principle is predicated upon the requirement that a second election takes place within the 21 day period. If that requirement is not met, then item 3 of the Second Schedule provides for a residual principle to govern the election of the President. The residual principle is that it

will suffice that, absent a valid second election, the candidate with the greatest number of votes will prevail.

12. Since the second election was not held within 21 days, the residual principle applies, and the Chief Elections officer is required to declare the candidate with the greatest number of votes the duly elected President.

David Unterhalter SC

Chambers

Johannesburg

21st June 2008