



# Zimbabwe's Election Ruling: A Constitutional Conundrum

Alan Wallis\*

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## Overview

On 22 May 2013 President Robert Mugabe assented to Zimbabwe's New Constitution, signing it into law. The new Constitution brought Zimbabwe's much anticipated general elections one step closer, paving the way for preparations to be made. However, just a week later, and catching many off guard, the final step was quickly taken by the new Constitutional Court when it, in its [first judgment](#), ordered President Robert Mugabe's government to hold Zimbabwe's elections by 31 July 2013.

President Mugabe, who has coincidentally been pushing for early elections, did not oppose the case and announced that he will abide by the decision. Conveniently invoking his adherence to the rule of law, he has found himself with no choice but to comply with the judgment. Prime Minister and MDC leader, Morgan Tsvangirai, believes that the Court over stepped its mandate and that it cannot dictate when the election is to be held, and he is looking for ways to challenge the decision, even [hinting at boycotting](#) the elections if they are held before 31 July 2013.

In the wake of the judgment a number of questions are on everybody's minds:

- Is Zimbabwe financially and logistically ready to hold free and fair elections in less than two months?
- Will the mandated constitutional safeguards and reforms be in place in time to ensure that the elections are free, fair and constitutionally compliant?
- Is the legal reasoning of the majority or the minority correct?

But are these the right questions? Perhaps the question that needs answering is whether the Constitutional Court used the right Constitution.

## The Case

Zimbabwean activist Jealousy Mbwire, who brought the case, argued, under the [old Constitution](#), that the failure to fix a date for the elections, before the expiry of Parliament's five year term on 29 June 2013, would result in Zimbabwe being governed unconstitutionally without a Parliament for up to four months. He contended that such a "*situation would be a crippling negation of a fundamental tenet of [Zimbabwe's] democracy which is a sine qua non of [Zimbabwe's] constitutional order*" and would breach his 1980 constitutional rights.

The Court was therefore asked to pronounce on the constitutionally required timing for the holding of a general election following the dissolution of Parliament. Under Zimbabwe's outgoing 1980 Constitution, this is governed by subsection 58(1), read with subsections 63(4)

and 63(7) (the election provisions). In terms of these provisions, the dissolution of parliament can take place in one of two ways: either pursuant to a proclamation by the President; or after the expiry of its constitutionally stipulated five year term. These provisions allow elections to be called within four months of the dissolution of parliament.

The judgments, of which there are three (the majority by Chief Justice Chidyausiku and two dissents by Deputy Chief Justice Malaba and Justice Patel) focused primarily on the old Constitution's election provisions.

The Chief Justice embarked on an extensive interpretative endeavor, correctly identifying (although the same cannot be said about his application - see [Derek Matzyak's](#) analysis in this regard) established canons of statutory interpretation, a host of jurisprudence. He ultimately found himself guided by his own version of the principle of constitutionalism and judicial respect for the separation of powers. Finding that the plain reading of the election provisions would permit Zimbabwe to function without a Parliament for four months the Chief Justice reasoned that to "*exist too long without a Parliament would be tantamount to shredding the Constitution and inviting a state of lawlessness and disorder.*" He ordered, with six other judges in concurrence, that the election provisions cannot be interpreted in a manner that would leave Zimbabwe without its Parliament, and set the controversial election date.

Justices Malaba and Patel, also sticking largely to the old Constitution, found that the election provisions provide that elections must be called within four months after the dissolution of Parliament, and that such situation is not uncommon in other countries. From an interpretational point of view their constructions of the election provisions are at least more palatable, reflecting the golden rule of statutory interpretation which stipulates that words must be given their plain and ordinary meaning. They found that elections could be held on 29 October 2013, giving the country much needed time to prepare.

The minority's interpretation is also consistent with provisions in the new Constitution which permits Zimbabwe to function without a sitting Parliament for up to 90 days after the dissolution of Parliament. On the majority's reasoning however the new Constitution would be unconstitutional.

### **Out with Old, in with the New**

Between the case being filed on 15 May 2013 and judgment handed down on 30 May 2013 Zimbabwe's new Constitution came into operation on 22 May 2013. The judges must have been aware, as they heard argument and wrote their judgments, that the passing of the new Constitution was imminent. The coming into force of the new Constitution, and specifically the transitional arrangements in the Sixth Schedule, should have received more attention from the Court.

Where significant legislative changes occur, transitional arrangements are put in place. In the new Zimbabwean Constitution, the Sixth Schedule governs the commencement of the new Constitution and puts in place transitional measures to ensure the smooth transition from the old Constitution to the new. The Sixth Schedule specifies which provisions of the new Constitution come into force and when.

### **The Sixth Schedule before and after Mugabe's Signature**

It should be pointed out that the Sixth Schedule in the version of the new Constitution that was voted on in the March 2013 referendum and the Schedule's wording in the final Constitution changed at some point. Specifically, section 3 of the Sixth Schedule, which stipulates which provisions come into operation on publication day (the day the new Constitution was signed by the President), was amended. At first glance these amendments may appear minor however, without the amendments Jealousy Mawarire's case might not have been possible. The changes are indicated in bold:

<b><i>Final Draft Constitution: Sixth Schedule</i></b>	<b><i>Final Constitution Published in the Government Gazette: Sixth Schedule</i></b>
<p><i>"3(1) This Schedule, together with –</i></p> <ul style="list-style-type: none"> <li><i>a) Chapter 3, relating to citizenship;</i></li> <li><i>b) Chapter 4, being the Declaration of Rights;</i></li> <li><i>c) Chapter 5, relating to the election and assumption of office of the President;</i></li> <li><i>d) Chapter 6, relating to the election of members of Parliament and the summoning of Parliament after a general election;</i></li> <li><i>e) Chapter 7, relating to elections</i></li> <li><i>f) Chapter 9, relating to principles of public administration and leadership;</i></li> <li><i>g) Section 208, relating to the conduct of member of the security services;</i></li> <li><i>h) Chapter 12, insofar as it relates the Zimbabwe Electoral Commission;</i></li> <li><i>i) Chapter 14, relating to provincial and local government</i></li> </ul> <p><i>come into operation of publication day."</i></p>	<p><i>"3(1) This Schedule, together with –</i></p> <ul style="list-style-type: none"> <li><i>a) Chapter 3, relating to citizenship;</i></li> <li><i>b) Chapter 4, being the Declaration of Rights;</i></li> <li><i>c) Chapter 5, relating to the election and assumption of office of the President;</i></li> <li><i>d) Chapter 6, relating to the election of members of Parliament and the summoning of Parliament after a general election <b><u>and to the assent to Acts of Parliament by the President;</u></b></i></li> <li><i>e) Chapter 7, relating to elections, <b><u>except sections 158, 160 and 161;</u></b></i></li> <li><i>f) <b><u>Chapter 8, relating to the jurisdiction and powers of the Constitutional Court</u></b></i></li> <li><i>g) Chapter 9, relating to principles of public administration and leadership;</i></li> <li><i>h) Section 208, relating to the conduct of member of the security services;</i></li> <li><i>i) Chapter 12, insofar as it relates the Zimbabwe Electoral Commission;</i></li> <li><i>j) Chapter 14, relating to provincial and local government</i></li> </ul> <p><i>come into operation on publication day."</i></p>

The signing of the final Constitution brought chapter 8 into operation. However, if the text of *draft* Constitution's Sixth Schedule had been approved, and amendments listed above had not been made, the Constitutional Court would only have become operative after the elections, and would therefore not have been in existence at the time this case was launched. Section 3(1)(d) of the *final* Constitution was also amended to suspend the coming into operation of section 158 of the Constitution, which governs the timing of the elections. The judges of the Court interpreted the exclusion of section 158 from the provisions that came into force immediately to permit them to consider and apply the timing provisions in the *old* Constitution.

The fact that Mawarire could not have launched the legal proceedings without these amendments could be a convenient coincidence or may, as some [media reports suggest](#), be slightly more sinister. However, although such a possibility does not require any great stretch of the imagination, speculating about the possibility of political puppetry having a hand in this case is a waste of time, and ultimately unnecessary.

### **Which Provisions and When? The Sixth Schedule**

As a result of the transitional arrangements the new Constitution does not come into operation in its entirety immediately, and so two operational dates are defined. First is the "publication day" which is the day on which the new Constitution was published in the Government Gazette – 22 May 2013. The second is the "effective date" which is the day on which the president elected in the first elections assumes office. The "first elections" are the first elections held under the new Constitution and are dealt with in Part 3 of the Schedule, which provides that "*the first elections must be conducted in terms of an Electoral Law in conformity with this Constitution*".

In respect of which provisions came into force, section 3(1)(a) – (j) of the Sixth Schedule brought the Schedule into operation on 22 May 2013 and a number of chapters of the new Constitution, including chapter 4, the declaration of rights; chapter 6, which regulates parliament; chapter 7 which deals with elections, barring sections 158, 160 and 161; and chapter 12 which covers the Zimbabwean Electoral Commission. Section 3(2) provides that the remainder of the Constitution comes into operation after the first elections – the effective date.

The only judge to make reference to the Sixth Schedule was Justice Malaba. Referring to the Sixth Schedule's stipulation that section 158 is not yet in operation the judge found that:

*"Reference to s 158(1)(a) of the New Constitution is inappropriate. Section 158(1) provides that 'a general election must be held so that polling takes place not more than thirty days before the expiry of the five-year period specified in s 143'. Section 158(1) cannot be used to support the applicant's contention ... Section 3 (1)(e) of Part 2 of the*

***Sixth Schedule to the New Constitution makes it clear that s 158 does not come into operation on the publication day.***

Malaba was of the opinion that:

*“In suspending the coming into operation of s 158 the framers of the New Constitution were aware of the provisions of s 58(1) of the former Constitution. They were aware of the clear conflict between the position provided for under s 58(1) and that enacted by s 158(1)(a) of the New Constitution.”*

If the drafters were aware of potential conflicts between the old and new Constitution, as alluded to by Malaba, that they went through the new Constitution suspending conflicting provisions in the final hour, surely the drafters would have suspended other conflicting provisions such as those that provide for the dissolution of Parliament in Chapter 6 of the new Constitution.

Section 3(1)(d) of the Sixth Schedule provides that “Chapter 6, relating to the *election of Members of Parliament*, the summoning of Parliament after a general election and to the assent to Acts of Parliament by the President” comes into force on publication day. Section 3(1)(d) does not except specific provisions in the same manner that section 158 was excluded in section 3(1)(e) despite the interrelationship between section 158 and some of the provisions in Chapter 6. The wording of section 3 is somewhat vague and it is difficult to ascertain how much of Chapter 6 is in force. For example, would section 143 of the new Constitution, which provides for the dissolution of parliament, and section 144, which provides for the timing of elections after the dissolution of Parliament, be considered to be in force? Both are in Chapter 6 and could be understood to relate to “election of members of Parliament”. Or does the cross reference to the inoperative section 158 in section 143 of the new Constitution render it inoperative by implication?

This question is important because section 3(3) of the Sixth Schedule reads: “*Between the publication day [22 May 2013] and the effective date, the provisions of this [new] Constitution specified in subparagraphs [3(1)(a)-(j)] ... **override the equivalent provisions of the Former Constitution***”. This raises the question of whether the Sixth Schedule warranted more of the Court’s attention in order to determine the proper role of the Sixth Schedule. The election provisions relied on in the old Constitution do have “equivalent provisions” in the new Constitution which may, in terms of section 3(1) of the Sixth Schedule, already be in force and override those in the old Constitution.

Similarly the applicant relied on the old declaration of rights which has been replaced by the new Constitution, and this aspect is not touched on by the judgments.

## The “first elections”

Malaba notes that *“Section 1 of Part 1 of the Sixth Schedule provides that the **“first elections” should be held in terms of the New Constitution. In fact s 8 of Part 3 of the Sixth Schedule specifically provides that the “first elections” must be conducted in terms of an Electoral Law in conformity with this Constitution.***

The “first elections” are defined:

- “(a) the first election for the office of President **under this Constitution**;*
  - (b) the first general election of Members of Parliament **under this Constitution**; and*
  - (c) the first elections of governing bodies of provincial and metropolitan councils and local authorities;*
- held **after the publication day**”*

Does the the Sixth Schedule’s explicit reference to Zimbabwe’s “first elections” accord a special status to these elections? Should the “first elections” be determined under Constitutional provisions which were drafted to provide generally for elections, under Zimbabwe’s old Constitutional order, that come about through the ordinary course of events (dissolution, passage of time etc.) as opposed to the very unique, and what can hardly be described as ordinary, process that has laid the foundations for Zimbabwe’s “first elections”?

The “first elections” must be considered to be different as they represent the culmination of Zimbabwe’s constitution making process. Specifically providing for the “first elections” demonstrates the importance of these elections, the holding of which has been conditioned on the coming into force of the new Constitution. It is recognition on the part of the drafters and the Zimbabwean people that the “first elections” under the new Constitution will greatly influence Zimbabwe’s future, and must be handled with care.

Malaba makes a valuable finding in this regard:

*“[E]lections are crucial to democracy. **This is particularly so at this stage of the history of our country.** The first elections which are due to be held under the New Constitution are bound to test the readiness of Zimbabweans to embrace the change embodied in the New Constitution ... **Choosing the precise date to hold the first elections is therefore a matter of utmost importance to be handled with greatest care.**”*

His position, which perhaps best embraces the notion of constitutionalism, was that in deciding on a date for the elections the Court and Executive must ensure the “**democratic quality of the first elections**”, an accepted constitutional imperative. If rushed, this quality risks dilution.

It is therefore significant that a date is not prescribed in the Schedule. This would be the most logical place to put it. Where better to prescribe a date for the “first elections” than in the transitional provision of the new Constitution that deals exclusively with the “first elections”? If the intention of the drafters was to subject the “first elections” to time frames why was this not stipulated in the Sixth Schedule? A plain reading of the Sixth Schedule appears to condition an “first elections” on the completion of identifiable processes (which have timing requirements of their own) and not to equate the “first elections” with elections generally and their timing.

The Sixth Schedule makes a number of references to the fact that the first elections must be held under the new Constitution, and specifically those provisions that came into operation on 22 May 2013 - none of which stipulate a specific date. The drafters, in deciding not to subject the “first elections” to the time constraints in section 158 of the new Constitution, did not necessarily intend, as reasoned by the Constitutional Court, that the timing of the “first elections” was to be determined under the old Constitution. A more constitutionally appropriate approach is that elections should be held when Zimbabwe has completed a host of constitutionally required tasks.

### **Zimbabwe’s Election To-do List**

As to when elections should be held, this decision is one that should have been guided by Zimbabwe’s readiness. The Sixth Schedule is concerned not about the timing but constitutional compliance, which once met will allow a date to be set.

A number of analysts have already pointed that in order for Zimbabwe to legally hold elections a number of things have to be done, the most important of which is the amendment of Zimbabwe’s Electoral Act to bring it in line with the provisions of the new Constitution. [Percy Makombe](#) notes that “the Electoral Act as well as other laws and regulations related to the elections must be amended so that they are in compliance with new Constitution”. Unfortunately, in failing to consider other constitutional requirements the judges did not sufficiently engage with the new Constitution and its requirements which Makombe believes “make the July 31 deadline an impossibility.” Additionally, as Derek Matzyak highlights, because the Electoral Act cannot be amended once an election date is announced, all the necessary amendments to the relevant laws must be made and sufficient resources and logistical arrangements must be in place *before* the announcement of a date. Another aspect of that the Sixth Schedule that was not considered was its requirement of a minimum of 30 days for voter registration and inspection of the voters roll.

When imposing these requirements the drafters must have appreciated the fact that these are legal processes and are subject to the Constitution and that the nature of these tasks creates their own time constraints. Consequently to require the first elections to be held by a specific date could not have been the intention of drafters. Common sense and constitutionalism suggests that they must have envisioned elections being held only on the completion of these constitutional tasks; the timing of which is impossible to predict. Makombe believes the unlikelihood of these tasks being completed in the time available means that the *“only way that 31 July deadline can be met is through violating the Constitution.”*

### **Implications of the Decision**

Why the Court did not consider the constitutional implications of their decision is perplexing to say the least and to borrow from the words of Chief Justice Chidyausiku, *“the mind boggles”*.

It could be argued that the application of the same principles of interpretation used by the Chief Justice, would actually result in a conclusion that the judges should have declined to hear this case, or at the very least should have heard this case under the new Constitution (in terms of the Sixth Schedule).

As this case has demonstrated it is all too easy to get lost in interpretation. When interpreting the Constitution most courts ultimately adopt a purposive and contextual approach to best give effect to the purpose, objects and values of the Constitution. Drawing on the spirit of constitutionalism, the judges of the Constitutional Court should have proceeded to decide this case in a manner that would have given effect to the new Constitution, not potentially frustrate it.

The Constitutional Court is not only tasked with defining what is constitutional but it must also make decisions that ensure conformity to and advancement of the principles and values underpinning constitutionalism. Constitutionalism, at its most basic, requires upholding the values of society, which includes free and fair elections. As [Shadrack Gutto](#) notes:

*“[C]onstitutionalism” is a broader concept than the text of a constitution. Constitutionalism is both the “letter and spirit” of a constitution. In other words, constitutionalism is about fidelity to the letter of the constitution and the core values and principles upon which a constitution is based. The spirit of a constitution is expressed in, amongst others manifest deeds, policies, laws, regulations and the manner of their implementation or practical realisation.*

*Constitutionalism is about constitutions in practice and not only in form or in theory ...*

*At another level, the practice of constitutionalism also implies the degree to which constitutions and their implementation address the real social needs of society. Here lies the imperative of interpreting constitutionalism from the perspective of human rights.*

The existence of a new Constitution does not necessarily mean that Zimbabwe has embraced constitutionalism – constitutionality is not necessarily synonymous with constitutionalism - and the decision of the Constitutional Court, by potentially jeopardising the democratic quality of Zimbabwe's first elections, has fallen short in this regard.

Although this judgment is not appealable and is likely to stand, especially in light of Mugabe's backing, but the failure of Mugabe's government to ensure preparations are conducted in accordance with the Constitution may see the Constitutional Court hearing more legal challenges, causing further delays. It is also a possibility that if the elections are not held by 31 July 2013, Mugabe may find himself in contempt of court.

### **Free and Fair Elections**

Whilst one can appreciate that the delay in having elections perpetuates the state of limbo Zimbabwe finds itself in and that this must be frustrating for Zimbabweans, rushed elections are not the solution. It is perhaps this frustration that prompted Zimbabwean legal scholar [Lovemore Mudhuku](#) to come out in support of this judgment and to say that he "*would rather [Zimbabwe] have flawed elections than no elections at all.*" But this ignores the very purpose of elections and their rationale and the fact that credible elections are at the heart of any constitutional democracy's legitimacy. Elections are an essential component of the rule of law, if not its foundation. To focus solely on the act of elections, ignoring the need for electoral safeguards and constitutionally required reforms is not conducive to the creation of an environment in which elections can be free and fair.

Free and fair elections do not begin and end with a simple checklist of administrative tasks and performance. An inherent feature of free and fair elections is that they are conditional on the political will to address issues such as funding, media access, media coverage, election monitors and oversight by an independent, impartial and competent electoral commission. Susan Rice in *The Riddle of All Constitutions* observed that "flawed" elections may produce what she calls a "low intensity democracy" and that although they "generate governments" these governments are likely to be fragile and simply unable "to redress fundamental political and economic problems". The risk in Zimbabwe is a repeat of the 2008 elections and the aftermath that followed.

The first judgment of the Constitutional Court has very serious legal, practical and logistical implications. Legally, the decision is potentially bad in law. Practically and logistically Zimbabwe may not be ready by July, rendering the elections susceptible to abuse. Even if the judges were simply applying the law, the judges have defended the constitutionality of a decision that may have unconstitutional results, contrary to the spirit of constitutionalism. This is exactly the situation that Constitutions, and Constitutional Courts, should seek to prevent. If the Constitutional Court is to be seen as the guardian of the Constitution, the Court is not off to a good start and its first judgment does little to inspire confidence

If Jealousy Mwarire was concerned that that the failure to announce an election date violates his constitutional rights, perhaps he should be more concerned about the impact unconstitutional elections will have not only on his rights, but the rights of all Zimbabweans. By effectively derailing the constitutional process, his decision to launch this case has done far more harm than good and renders him partially responsible for the repercussions that might follow this ruling.

*\*Project Lawyer, International Justice Programme, Southern Africa Litigation Centre*