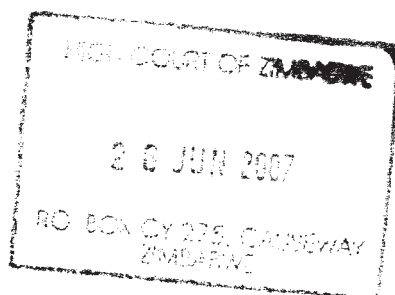


HLH 41-2007

H/C 6350/06

Roger Deane Stringer
Versus
The Chairperson Zimbabwe
Electoral Commission
and
Sekesai Makwavarara
and
Tendai Savanhu
and
Prisca Mupfumira
and
Jamisone Kurasha
and
Michael Mahachi
and
Justin Mutero Chivavaya
and
Alfred Simba Jome
and
Carlison Katafare
and
The Minister of Local Government
Public Works And National Housing



High Court Of Zimbabwe
Uchena J
Harare 15 May and 13 June 2007.

Opposed Application

Mr Chibwe for the Applicant
Mr G Chikumbirike for the 1st respondent
Advocate H Zhou for the 2nd to 9th respondents
Mr Terera for the 10th respondent

Uchena J The applicant is a resident of the City of Harare, a joint owner of stand 285 Mount Pleasant Township 11, of Lot 35 Mount Pleasant, Harare, and a registered voter for an area falling under the City of Harare. He is aggrieved by the 1st respondent's failure to conduct elections for Councillors and the Mayor for the City of Harare, which he claims were due in August 2006. He seeks an order compelling the 1st respondent to give notice in terms of section 124 of the Electoral Act [Chapter 2:13] hereinafter called the Electoral Act, of the holding of elections for Councillors and the Mayor of the City of Harare.

The 1st respondent is the Zimbabwe Electoral Commission, a Commission established in terms of section 3 of the Zimbabwe Electoral Commission Act [Chapter 2:12], hereinafter called the Electoral Commission Act. In terms of section 4 of the Act it is charged with the responsibility of conducting elections.

The 2nd to the 9th respondents are Commissioners appointed by the 10th respondent in terms of section 80 of the Urban Councils Act [Chapter 29:15] hereinafter called the Urban Councils Act, to manage the City of Harare. The 2nd respondent is their chairperson.

The 10th respondent is the Minister of Local Government Public Works and National Housing. He is the Minister responsible for local authorities, and is being jointly sued with the 1st respondent and the Commission managing the City of Harare for their failure to conduct elections for Councillors and the Mayor of the City of Harare in August 2006.

The facts.

The applicant seeks the following order against the 1st respondent;

1. "the Zimbabwe Electoral Commission shall forthwith cause a General Election to be held of Councillors for the City of Harare, and shall cause an election, to be, held for the Mayor of the City of Harare and in particular shall cause the relevant notices with regard to such elections to be published in terms of section 124 of the Electoral Act, (Chapter 2:13) within 7 days of the date of service of this order of court; and
- 2 the costs of this application be borne jointly and severally by the 1st Respondent and any other respondent opposing these proceedings."

He in his founding affidavit submitted that a general election to elect Councillors and the Mayor of the City of Harare should, in terms of section 121(2) of the Electoral Act, have been, held in August 2006. The Applicant basis his submission on the last elections for Councillors and the Mayor having been held in March 2002. In terms of section 121 (2), a general election for local authorities shall be held in August of the fourth year, after the previous general election. The applicant calculated the period of four years from March 2002. The respondents do not dispute that elections were not held in August 2006.

The 1st respondent in its opposing affidavit submitted that it postponed the elections and did not give notice of the postponement as section 123 of the Electoral Act provides that it may give such notice, but it is not mandatory that it should give notice.

The 2nd to the 9th respondents in an affidavit deposed to by their chairperson submitted that the applicant does not have locus standi in judicio to apply for an order compelling the 1st respondent to conduct elections.

The 10th respondent admits that elections were not held in August 2006, but states that elections could not be held due to circumstances beyond his control. He submitted that the appointment of a Provincial Governor for the Harare Metropolitan Province resulted in Harare's boundaries being extended, new wards being created and the boundaries of existing wards being altered. He also said the shortage of Surveyors resulted in delays in the creation of new boundaries for Harare and its wards.

The applicant, the 1st and 10th respondents agreed to incorporate papers filed in an earlier application in the case of Combined Harare Residents Association and Michael Jeffrey Davies versus The Chairperson Zimbabwe Electoral Commission and Others H/C 2587/05. This reference file brings the history of elections for the City of Harare into this case. The history is essential as Counsels for the applicant and the 1st respondent agree on the precedent created by the Supreme Court's decision referred to in that case, and the 1st respondent's submissions on when the elections are due is premised on previous elections referred to in those proceedings. The 2nd to the 9th respondents seem to be opposed to the incorporation of documents and papers from H/C 2587/05 into this case. The 2nd respondent in her opposing affidavit which she says represents the views of the 3rd to the 9th respondents, but is not covered by any supporting affidavits from them, seems to protest the inclusion of papers filed under H/C 2587/05 because she does not know the contents of that file. That to me is not a convincing reason for opposing the incorporation. A party is expected to familiarize himself with public documents he is referred to. One cannot simply refuse to look at public documents and expect the court to uphold their uninformed protest.

The History

According to documents filed in H/C 2587/2005, a general election to elect Councillors for the City of Harare was held in August 1995. The elected Councillors were all suspended by the Minister in February 1999. In terms of section 103 {I} of the now repealed Electoral Act [Chapter 2:01] a general election of Councillors was to be held in every fourth year on any day in the month of August. The fourth year from August 1995, can, be reckoned to August 1999. In terms of the then existing law the predecessor of the 1st respondent should have caused a general election to be held in August 1999. It is common cause, that, a general election, was not held, in August 1999, but instead Commissioners were repeatedly appointed until March 2002 when an election was held. This failure to comply with the law grieved Lottie Getrude Bevier Stevenson, who applied to this court for an order compelling the 10th respondent and others to conduct elections for Councillors and the Mayor of the City of Harare. She filed her application in October 2000 long after the period within which the Minister {1st} respondent in the Stevenson case and 10th respondent in this case could have postponed the elections. Her application was dismissed by the High Court which held that she had no locus standi in judicio, even though she had in her founding affidavit stated that she was a resident of the City of Harare and a registered voter. Stevenson appealed to the Supreme Court against the High Court's decision. Her appeal was upheld by the majority decision of the Supreme Court in SC 38/02, which held that she, as a resident and registered voter, had an interest in how the affairs of the City of Harare were being managed by Commissioners, and was entitled to be represented by elected Councillors. The Supreme Court therefore held that she had locus standi, and proceeded to determine the application, which had been dismissed by the High Court, and granted it.

While the appeal was pending in the Supreme Court elections for Councillors and the Mayor of the City of Harare were held in March 2002. These elections were not held as a result of a court order. They were initiated by the Executive in circumstances not disclosed to this court. The elected Mayor and Councillors managed the City of Harare, until the history of this City repeated itself when they like the Tawengwa Council, were suspended and subsequently dismissed. Commissioners were appointed and have been managing the affairs of the City of

Harare to this date. Their terms of office have been repeatedly renewed through reappointments.

In June 2005 the Combined Harare Residents Association and Michael Jeffrey Davies not being satisfied by the prevailing situation filed an urgent Chamber Application {H/C/2587/05}. The Court on 13/06/05 held that the case was not urgent. The applicants thereafter, filed a notice of withdrawal on the 5th October 2006. The withdrawal was followed by the filing of the present application on 6 March 2007.

Preliminary issues.

Legality of the order sought.

Mr Chikumbirike for the 1st respondent submitted that the application should be dismissed because the order sought can not be lawfully granted by this court. He submitted that section 121 {2} of the Electoral Act, provides for the holding of a local authority's, general election in August. He therefore submitted that it would be unlawful to order that elections be held during a period which falls outside the month of August. Mr Chibwe for the applicant submitted that the applicant's draft order can be lawfully made an order of this court.

The order sought seeks the publication of a notice in terms of section 124 of the Electoral Act, within 7 days of the service of the order on the 1st respondent.

Section 124 of the Act provides;

“ {1} Not more than sixty-six or less than twenty-eight days before the day appointed for any election, the commission shall, by notice published in a newspaper and posted at its office-

{a} -----

{b} fix a place or places within the council area at which , and a day or days, not less than seven or more than twenty-one days after the publication of the notice in the newspaper, on which a nomination court will sit in terms of section forty-six to receive nominations of candidates for election as Councillors or mayor, as the case may be; and

{c} fix a day or days, not less than fourteen or more than forty-five days after the nomination day or last nomination day, as the case may be, fixed in terms of paragraph {b}, on which a poll shall be taken if a poll becomes necessary; and

{d} fix a day on which the voters roll shall be regarded as closed for the purpose of accepting the enrolment of voters who may vote at the election which day may be on or after the day of publication of the notice or not more than thirty-one days before that day.”

My understanding of section 124 {1} of the Electoral Act is that the 1st respondent is required to give notice of an election not more than sixty-six or less than twenty-eight days before the day appointed for the election. This means the 1st respondent, has discretion, as to the actual date it can set for the election provided it falls between sixty-six days and twenty-eight days of the publication of the notice. The issue for consideration is whether or not it is legally possible for the 1st respondent to comply with the provisions of section 124 {1} of the Electoral Act, and still conduct the elections in August as required by section 121 {2} of the same Act. The times and periods mentioned in section 124 {1} {b} to {d} need not be considered as they are

meant to be triggered by and fall within the sixty-six days or twenty-eight days already mentioned in relation to the publication of a notice and the day appointed for the election. In his Heads of Argument Mr Chikumbirike had used the 2nd of April 2007 as the date of the granting of the order. If the case had been heard before that date and the court was able to grant its order on that day Mr Chikumbirike's submissions would have been correct, as the 1st respondent would have been required to set the date of elections between the 29th May and 9th July, 2007. This case was argued on the 15th May and assuming the order can be granted by early to mid-June the period between sixty-six days and twenty-eight days will fall between late July and early September 2007. This means if the 1st respondent uses its discretion wisely it can publish a notice setting an election date in August 2007. It is therefore not correct bearing in mind the date of hearing and the possible date of judgment that the order which this court might grant if it finds for the applicant will be unlawful. I would therefore dismiss the 1st respondent's preliminary issue.

Locus Standi.

Advocate Zhou for the 2nd to the 9th respondents raised two preliminary issues. He submitted that the applicant has no locus standi in judicio, because the Supreme court's remarks in Stevenson [supra], are obiter dicta and therefore not binding on this court. In Stevenson v Minister of Local Government & Ors 2002 {1} ZLR 498 {S} [the reported version] Sandura JA at page 501D said;

"The appellant's locus standi arose from the admitted facts that she resided in Harare and was a registered voter within the area falling under the jurisdiction of the Harare City Council. As a resident of Harare and as a registered voter, the appellant had an interest in the issue of whether the affairs of the City of Harare should be run by a commission appointed by the Minister or by an elected mayor and an elected council."

In developing his argument Advocate Zhou submitted that the issue which was before the Supreme Court was that of costs. I do not agree the issue was whether or not the appellant had locus standi and was entitled to the order she sought in the High Court. Even though the other respondents were not contesting the appeal and the second respondent was conceding it, the 1st respondent was contesting it. The court was therefore required to determine the issue of the appellant's locus standi and it did. After determining the issue of locus standi it proceeded to determine the application and granted it.

The doctrine of stare decisis requires inferior courts to follow precedents created by superior courts whose position in the hierarchy of the courts in their jurisdiction entitles them to create precedents. The doctrine also requires superior courts to follow precedents created by courts at their level of jurisdiction but decided by a greater number of judges. This means a judge of the High Court sitting alone is bound by the decisions of two or more judges of the same court and of the Supreme Court. However inferior courts are not required to follow every decision of superior courts. It is only the ratio decidendi, {the reason for the judgment} which binds inferior courts. The ratio decidendi can also be described as the legal principle on which the court bases its decision. In the case of Fellner v Minister of Interior 1954 [4] SA 523 (A) at p. 537, Greenberg JA said,

"It is the ratio decidendi of a case which is binding; the phrase literally means " the reason for the decision" and the decision means the order of court"

On the other hand obiter dictum is a passing statement made by the judge which is not strictly relevant to the judgment. It can be an incidental remark, postulation and answering of a hypothetical question etc.

Advocate Zhou further submitted that this court in the case of Christopher Magwenzi Zvobgo v City Of Harare and Dominic Muzavazi H.H 80/2005, held that the remarks of Sandura JA already referred to above were made obiter dicta. My reading of that case does not support that submission, because apart from the use of the word dicta it does not say the remarks were made obiter dictum. To the contrary that case confirms that Sandura JA'S judgment was binding as it created a precedent on the issue of the repeated reappointment of Commissioners being illegal, a decision it arrived at after finding that the appellant had locus standi.

In the Stevenson case [supra] the reason for the Supreme Court's finding that the appellant had locus standi was her being a resident of Harare and a registered voter entitled to vote in elections for Councillors and the Mayor of the City of Harare. The remarks by Sandura JA are therefore clearly not incidental, but are relevant to the court's decision and are the ratio decidendi.

In this case the applicant is also a registered voter and resident of the City of Harare. The issue has therefore been decided by a court of superior jurisdiction whose decision is binding on this court.. This case is on all fours with the Stevenson case on the issue of locus standi, it can not therefore be distinguished from it. I therefore find no merit in the preliminary issue raised by Advocate Zhou for the 2nd to the 9th respondents, it is dismissed.

The none joinder of the Registrar General

Advocate Zhou for the 2nd to the 9th respondents submitted that the applicant's failure to cite the Registrar General even though he is the officer charged with the responsibility of preparing the voters roll in terms of section 117 of the Electoral Act is fatal to the applicant's application. The applicant's Counsel did not give a meaningful response on this issue.

There is no doubt that the Registrar General plays an important roll in the preparation of elections for local authorities as is specified in sections 115 to 118 of the Electoral Act. He is the one who prepares the voters roll and calls for its inspection. He is an interested and active participant in issues involving the holding of elections. If his participation in the election sought by the applicant was independent of that of the cited parties his none joinder would have been fatal to the applicant's application.

In this case the provisions of section 18 {2} of the Electoral Act as read with section 4 (1) (b) of the Zimbabwe Electoral Commission Act , are relevant. Section 18 (2) of the Electoral Act provides as follows;

“ The Registrar- General of Voters shall exercise such functions as are imposed or conferred upon the Registrar of Voters by or under this Act and, in the exercise of his or her functions, the Registrar-General of Voters shall be subject to the direction and control of the Commission,”---.

Section 4 (1) (b) of the Zimbabwe Electoral Commission Act provides as follows;

“The Zimbabwe Electoral Commission shall have the following functions-

a) -----

b) to direct and control the registration of voters by the authority charged with that responsibility under an Act of Parliament—“

The clear meaning of section 18 {2} of the Electoral Act as read with section 4 (1) (b) of the Zimbabwe Electoral Commission Act, is that the Registrar-General performs and exercises his functions under the direction and control of the Commission. Section 4 of the Electoral Act defines the Commission as follows

“ Commission “ means the Zimbabwe Electoral Commission established in terms of section 3 of the Zimbabwe Electoral Commission Act [Chapter 2;12]”.

There is no doubt that the Commission which directs and controls the Registrar-General in the performance of his duties is the 1st respondent. It is therefore my view that the none joinder of the Registrar-General in these circumstances is not fatal to the applicant’s application as the 1st respondent can ensure that the Registrar-General co-operates with it in complying with any order which requires it and the Registrar-General to do anything in connection with the holding of an election.

Issues on the merits of the application.

Advocate Zhou for the 2nd to the 9th respondents and Mr Terera for the 10th respondent agreed with Mr Chikumbirike’s submissions on the merits, but Mr Terera made an additional submission on the state of Harare’s boundaries and wards. The issues arising from the common response by the respondents, represented by Mr Chikumbirike’s submissions are;

- 1) The reckoning of the next election period.
- 2) Identity of the March 2002 elections.
- 3) When were / are the next elections due?
- 4) Can the elections for the Mayor be conducted during the incumbency of a Commission in Council?

The issue arising from the additional submission by Mr Terera is,

- 1) Can the order sought be granted before the boundaries of Harare and its wards have been established?

Reckoning of Election year.

Mr Chikumbirike for the 1st respondent submitted that, the year during which the next general election will be due should be reckoned from the August 1995 elections which were held, leading to Sandura JA holding in the Stevenson case [supra] that the following elections should have been held in August 1999. Advocate Zhou and Mr Terera agreed with him as that is

common cause in terms of the historical back ground of general elections for Harare City Council.

Mr Chibwe however submitted that the date of the next general election should be reckoned from the March 2002 elections. Mr Chikumbirike, with the concurrence of Advocate Zhou and Mr Terera submitted that the March 2002 elections were a by-election, therefore the date of the next election should be reckoned from August 1999, meaning the next election from August 1999, was due in August 2003, and thereafter in August 2007. He further argued that the election for which the applicant seeks an order is not yet due, therefore the applicant's application was prematurely made and should be dismissed.

Section 121 of the Electoral Act provides for "when elections for Councillors" should be held.. It provides as follows;

{1} "Subject to section 13 of the Rural District Councils Act [Chapter 29:13] and section 12 of the Urban Councils Act [Chapter 29:15], the first election for any council or ward shall be held on such date as may be fixed by the Commission in terms of section one hundred and twenty-four;

Provided that the first election for a council shall be held before the date fixed for the coming into being of the council.

{2} Subject to this part , a general election of Councillors shall be held in every fourth year on any day in the month of August fixed by the Commission in terms of section one hundred and twenty-four."

My understanding of section 121 {1}, is that no period is prescribed for the holding of a council's first election, provided that it shall be held before the coming into being of the council.

However in terms of section 121 {2} of the Electoral Act, a general election for Councillors shall be held in every fourth year in August. The legislature used the words subject to this part to allow for exceptions provided such exceptions are provided for in Part XVIII

Therefore in terms of section 121 [1] and [2] the periods during which the first election and general elections, for Councillors should be held are calculated as follows;

{a} the first election for a council should be held before the council comes into being on a date to be fixed by the Commission.

{b} the following general election and subsequent general elections should be held in the fourth year after the initial election, or in the fourth year after the previous general election during the month of August, or on a date on which the election can be held in terms of Part XVIII.

Section 123 of the Electoral Act provides for the postponement of elections. It provides as follows;

"Notwithstanding any other provision of this Part, if the Commission considers that it is necessary to postpone any election—

{a} to enable a voters roll to be prepared or updated; or
{b} for any other reason, to enable the election to be held properly in accordance with this Act;

The Commission may, by notice in the Gazette, postpone the election to such later date as it may specify in the notice:

Provided that –

- {i} the date to which the election is postponed shall not be later than one year after the last date on which the election was due to be held in terms of section one hundred and twenty-one or one hundred and twenty-two as the case may be;
- {ii} in the case of an election to the office of mayor, the postponement shall not be for longer than three months after the office of mayor of the municipality concerned has for any reason fallen vacant”.

My understanding of section 123 is that;

- a) The Commission has authority to postpone any election, including general elections, and that is one of the exceptions provided by Part XVIII of the Electoral Act, when a general election can be held, after the period of four years has elapsed, and on any date other than during the month of August.
- b) The postponement should be for the preparation of the voters roll or for any reason connected to the proper holding of an election in accordance with the Electoral Act.
- c) The postponement shall be to a date not later than one year after the date on which the postponed election was due
- d) In the case of mayoral elections the postponement shall not be for longer than three months after the office of mayor fell vacant.
- e) The Commission can postpone an election notwithstanding any other provision of Part XVIII of the Act, for example the requirement that general elections be held in the fourth year after the previous one and during the month of August can be disregarded if the election is to be held after the postponement.

In his founding affidavit the Chairman of the 1st respondent deposed that the Commission had postponed the election which was due in August 2006. The 10th respondent also conceded that general elections were due in August 2006, but they could not be held due to circumstances beyond his control.

In his Heads of Argument Mr Chikumbirike seems to have abandoned the 1st respondent's argument that it postponed the general election which was due in August 2006. If the position conceded by the 1st and 10th respondents is persisted in the postponed elections would have been due not later than one year after August 2006, meaning they would have been due between August 2006 and August 2007.

The argument advanced by Mr Chikumbirike can not be determined without making reference to the repealed Electoral Act [Chapter 2:01], as the events of the periods 1999,2002,and 2003, he referred to occurred before the 1st February 2005 when the current Electoral Act was brought into effect.

It is therefore important to understand the law which should have governed the 1999, elections which were not held, and the March 2002 elections which were held.

The law as it was before 1st February 2005 was summarized by Sandura JA in the Stevenson case [supra], at page 503G-H of the reported version where he said

“With regard to the election of Councillors, s 103I of the Electoral Act requires a general election of Councillors to be held in every fourth year on any day in the month of August fixed by the second respondent in terms of s 103L of the Electoral Act. Since the councillors, all of whom were suspended by the Minister in February 1999, had been elected in August 1995, a general election of councillors should have been held in August 1999.

Although s103K of the Electoral Act allows the Minister to postpone the election of councillors for a period not exceeding one year, when the appellant filed her application in the High Court in October 2000 that year had already passed. The election of councilors was therefore long over due and again, no cogent reason was given by the respondents for their failure to comply with the law.”

It is clear that the law as to how long after a previous general election another general election should be held and during which month has not changed. The period of four years between general elections and the holding of such elections in August remains un-changed. The law on the postponement of such elections for a period not exceeding one- year also remains unchanged. The Supreme Court however made it clear that the general election was long over due in October 2000 even though the elections should have been held by not later than August 2000. This means if an election is not held within a year after its postponement it remains due in spite of the authorities’ failure to comply with the law.

The Supreme Court per Sandura JA also considered the effect of the repeated appointments of Commissioners on the holding of an overdue general election. He at page 505 F- 506A of the reported judgment said;

“ Having said that, it is clear beyond doubt that s 80 (5) of the Urban Councils Act, in terms of which the commissioners were re-appointed, on two or more occasions, was not meant to be a vehicle for the postponement of a general election of councillors. - In fact, the re-appointment of the commissioners did not in any way whatsoever affect the legal obligation to hold a general election of councillors every fourth year.

I say so because there is no provision in the Electoral Act which states that once commissioners are appointed or re-appointed any general election of councillors which is due is postponed indefinitely.

Consequently, the Minister could not avoid having a general election of councillors by continually re-appointing the commissioners. In my view s 80 [5] of the Urban Councils Act was not enacted for that purpose. The power given to the Minister by that section was intended for use, as a temporary measure, during the period preceding the holding of elections as required by the Electoral Act. The re-appointments of the commissioners were therefore, unlawful.” [emphasis added].

The law as it was before the current Electoral Act and as it is under the current Electoral Act, clearly establishes that the four year periods during which general elections for councillors should have been held should be reckoned from August 1999, when they were due because of

the lapsing of the four year period from August 1995. This should be subject to the effect of the Minister's implied postponement of the August 1999, elections to up to August 2000, referred to by Sandura JA and the subsequent continued pendency of the general elections. This means if the August 1999 elections were postponed to any time between August 1999 and August 2000, and had been held during that period, the four year period could be reckoned from August 2000. As a general election was not held in the fourth year which fell in August 1999, and in the following year up to August 2000 as allowed by reason of a possible postponement, it remained pending and in fact became long over due as was observed by Sandura JA in the above quoted paragraph. The four year period should in these circumstances be reckoned from the date, when the election which was not held over the periods referred to above was eventually held.

This in my view means the date of the next general election should be reckoned from the March 2002 elections if they can be proved to be a general election as submitted by Mr Chibwe, and not a by-election as submitted by Mr Chikumbirike. If the March 2002 elections were a by-election then they can not be used to reckon the date of the next election. In my view August 1999 can not be used to reckon the date of the next general election because no general election was held during that period and in my view the four year periods are reckoned from one general election to another general election.

The March 2002 Elections.

Mr Chibwe for the applicant submitted that these elections were a general election therefore the next general election should have been held in August 2006, as the period of four years reckoned from March 2002 results in the next general election being due in August 2006. He further submitted that the elections should have been held in August 2006 because section 121(2) of the Electoral Act provides that general elections should be held in August. Mr Chikumbirike whose submissions were adopted by Advocate Zhou for the 2nd to the 9th respondents and Mr Terera for the 10th respondent, submitted that the March 2002 elections were a by election as general elections are held in August. He referred the court to section 121 (3) which provides for when general elections of councillors should not be held. He concluded by submitting that since the March 2002 elections were a by-election for councillors' terms of office which should have started in August 1999, the next general election from August 1999 was due in August 2003 and therefore the next election is due in August 2007, and is not yet due, therefore the applicant's application is premature.

In view of the provisions of section 121(2) of the Electoral Act already referred to, the fact that the March 2002 elections were not held in August could have given credence to Mr Chikumbirike's submissions if they were held in the fourth year reckoned from the previous general election. The fact that they were held in the 7th year after the previous general election of August 1995 makes the provisions of section 121(2) which provides for election periods from August of one general election to August in the Fourth year of the next general election inapplicable. The provisions of section 121 (3), he referred to do not strengthen his argument but weakens it.

Section 121 (3) of the Electoral Act provides as follows;

- “No general election of councillors shall be held within four years after—
a) the first election of councillors to the council; or

- b) an initial election of councillors held immediately before the area of another local authority was incorporated into the council area; or
- c) a by-election held to fill vacancies in the seats of all the councillors of the council concerned.”

A reading of section 121 (3) (c) makes it clear that a by-election can be held to fill vacancies in the seats of all councillors. This seems to be what Mr Chikumbirike believed was intended to happen in March 2002. All the seats of councillors were vacant since all the councillors who were elected into office in 1995 had been suspended till their terms of office expired. When the next elections due in August 1999 were not held those posts remained vacant. This presents a challenge to Mr Chikumbirike’s submission as in my view a by-election can not be held for posts which were never given a term of office by the election of councillors at a general election. This in my view leaves the posts of councillors which were filled in the March 2002 election without a starting point if that election was a by-election. This view is supported by the general election which was due in August 1999, having remained due up to August 2000 and thereafter up to March 2002. A reading of sections 121 (2) and 121(3) of the Electoral Act, leaves no doubt that the intention of the legislature was that general elections should be held at intervals of four years and in the month of August. The use of the words “No general election of councillors shall be held within four years after”--- the situations mentioned in (a) to (c) of section 121(3), clearly means a general election can be held in August of the fourth year and thereafter, after the initial or previous general election, but not before the fourth year. The limiting of the elections to the month of August applies to general elections held in the fourth year. Section 123 of the Electoral Act makes it clear that it does not apply to elections held in the following year after a postponement. It seems to me clear that the legislature realizing that further delays are not desirable after a postponement provided that elections be held at any time between the date of postponement and the lapsing of a period of one year from the time the general election was due. If the general elections to be held soon after a postponement can not wait for the next August, I see no basis for requiring an election being held in the 7th year being required to be held in the month of August.

It could not have been intended that if elections are not held in the fourth year, or during the next year by reason of a postponement then the next elections would remain pending until August of the next fourth year and that by-elections could be held in between in spite of the posts of councillors having remained vacant. A general election due in August 1999 could lawfully have been postponed to no later than August 2000. No elections were held up to August 2000 and at any time in 2001. The elections therefore remained due from August 1999 to March 2002 when an election was held. The election held in March 2002 is in all probabilities a general election as the failure to hold elections between August 1999 and August 2000 does not mean a general election could not be held thereafter in any subsequent year.

The only reasonable conclusion which can be drawn from the law and the facts established by the applicant’s founding and replying affidavits and the respondents’ opposing affidavits and the documents filed under H/C 2587/05, is that the March 2002 elections were a general election. The 1st and 10th respondents therefore correctly conceded this point in their opposing affidavits. There is no legal basis for holding a by-election when, the general election remained pending from August 1999 to March 2002. This leaves the by-election

hanging on a general election which was never held. A by-election can not be held before a general election has filled the posts which then fall vacant and can now be filled by it, within a prescribed period. Section 103I subsection {4} of the now repealed Electoral Act [Chapter 2:01] as amended by section 6 of Act No 21 Of 1997, which was the applicable law in March 2002, confirms the view that if that election was a by-election, it is not in legal harmony with any general election. Section 103I {4} provides as follows;

“A by-election to fill—

- a) a casual vacancy or special vacancy on a council; or
- b) a vacancy arising from---
 - i. any area added to a council area being constituted an additional ward; or
 - ii. the number of councillors of a council area or ward being increased;

shall be held on a date fixed by the Registrar-General in terms of section one hundred and three L, which date shall be not less than thirty-five days nor more than ninety days after the date after which the vacancy occurred”----

The clear meaning of this section is that a by-election is meant to fill a casual vacancy or special vacancy or a vacancy arising from a ward or wards being added to a council area or the number of councillors per ward or council area being increased.

The by-election must be held not less than thirty-five days nor more than ninety days after the vacancy occurred. There is no evidence that the vacancies of councillors of the City of Harare, fell vacant not less than thirty-five days nor, more than ninety days before the March 2002 elections were held. In fact it is conceded that no election for councilors was held between August 1999 and the elections held in March 2002.

I am therefore satisfied that the March 2002 elections were a general election and not a by-election.

The next elections.

Mr Chibwe for the applicant submitted that the next general elections were due in August 2006. He based his submission on his belief that the March 2002 elections were a general election.

Mr Chikumbirike, with the concurrence of Advocate Zhou and Mr Terera, submitted that the next general election is due in August 2007. He based his submission on his belief that the March 2002 elections were a by-election filling all posts of councillors for the City of Harare whose terms of office should have commenced in August 1999.

In view of my finding that the March 2002 elections for Harare City Council were a general election, I find no merit in Mr Chikumbirike's submissions. The date of the next election can be reckoned from the March 2002 council elections. The applicant has therefore proved his case that the next general election was due in August 2006. In view of the 1st respondent's admission, that it postponed the holding of that election the next general election is due by not later than one year from the last date the August 2006 elections were due. This means the next general election for the City of Harare is due,

by, not later than August 2007.

The Mayoral Elections and The Incumbency of a Commission.

Mr Chibwe for the applicant submitted that mayoral elections should have been held at the same time with elections for councillors in August 2006, and are, therefore due in August 2007.

Mr Chikumbirike for the 1st respondent submitted that mayoral elections can not be held during the incumbency of a commission managing the affairs of the City. He further submitted that mayoral elections should be held in August 2007 or such other time to which elections for councillors may be postponed. His submission is based on it not being possible to have a mayor who holds an executive post working with a commission which also exercises executive functions.

The Supreme Court in the Stevenson case [supra] found that the repeated re-appointment of a Commission was unlawful. The same view was also held in several judgments of this Court. In the case of Christopher Magwenzi Zvobgo v City of Harare and Anor HH 80/2005, Makarau J {as she then was} after referring to Sandura JA 's comments on the unlawfulness of the two or three re-appointments of commissioners, at page 3-4 said;

“This court had expressed similar sentiments in Combined Harare Residents Association and Another v The Registrar General HH 210/2001. In that matter, Hungwe J had to determine whether the power granted the Minister to appoint Commissioners in terms of the Act could be used to indefinitely postpone the holding of elections for councillors and for a mayor for the City. In useful dicta, the learned judge had this to say at page 9 of the judgment;

“The matter which gave urgency at the inception of this application, at least from the papers, was that the term of office of the current Commissioners expires at the end of December 2001. There is a real danger that should there be no duly elected mayor in office by 31st December 2001, then the City of Harare will grind to a halt as it will not be legally able to expend any money for any purpose. This fear arises from the fact that the Minister cannot lawfully reappoint Commissioners ad infinitum. Any such re-appointment is illegal.”

I agree that the re-appointment of the commission after the first six months period was not in accordance with the provisions of the Urban Councils Act and was therefore illegal.”

The issue of the legality of a commission appointed after its first six months in office has been resolved by several decisions of this court, which I agree with and settled by the Supreme Court's decision which is binding on this Court.

In view of the settled legal position on the status of the Commission its incumbency can not be used to prevent the holding of a mayoral election which is due. If the Commission's incumbency is unlawful, it can therefore not be a bar to the holding of mayoral elections.

City's Boundaries, New Wards and New Ward Boundaries.

Mr Terera for the 10th respondent submitted that the 10th respondent is not opposed to the holding of a general election for the City of Harare but is not yet ready for such elections in view of the appointment of a Provincial Governor for Harare Province and the extension of Harare to areas which previously fell outside it. In his opposing affidavit the 10th respondent said new wards had to be created to cover the new areas now under the City of Harare. This also made it necessary to rearrange the boundaries of existing wards. He further submitted that the creation of these boundaries is in progress but is taking long due to the shortage of Surveyors in the Surveyor General's office. The applicant did not dispute these facts in his answering affidavit but his counsel argued that they are not a legal basis for not holding a general election.

Elections are a serious event during which citizens exercise their right to choose their representatives to manage the affairs of their City or Country. The citizen's or resident's right to vote, can be lost, if elections are held at a time when his area is not covered in a constituency or ward. It can also be lost if his name is not in a voter's roll. The effect of holding elections under such circumstances would be to disenfranchise those whose wards have not been created or made ready for an election.

Section 123 {b} of the Electoral Act provides for the postponement of any election "for any other reason, to enable the election to be held properly in accordance with this Act".

In my view the absence of ward and City boundaries in a City for which Local authority elections are due to be held would be a good reason for the Commission to postpone such elections and therefore a reason for this court not to order that they be held in spite of the circumstances described by the 10th respondent. Holding elections in such circumstances would not be proper and in accordance with the law. In the circumstances the court should seriously consider whether it would be prudent to order that elections be held in spite of the absence of City and Ward boundaries. In my view doing so in the absence of proof that the boundaries are now in place or an accompanying order that they be put in place before the elections would have the effect of disenfranchising some residents. The applicant has not challenged the 10th respondent's evidence on the issue of boundaries and he has not sought an order compelling the 10th respondent to create them before the holding of the elections. If the order sought is granted in these circumstances it will have the undesirable effect of disenfranchising some residents. The applicant's application can therefore not be granted.

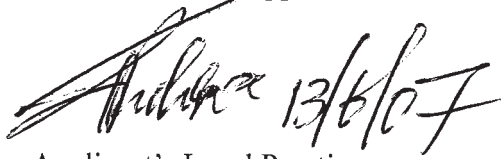
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Costs.

Mr Chikumbirike for the 1st respondent submitted that the applicant should pay the 1st respondent's costs on the higher scale as one should not lightly sue public bodies causing them to incur unnecessary costs. Advocate Zhou for the 2nd to the 9th respondents and Mr Terera for the 10th respondent sought costs on the ordinary scale.

Mr Chibwe for the applicant submitted that should the court not find in his client's favour costs should not be granted against him on the higher scale as this case raises important issues of public interest on the holding of elections for local authorities. I agree with Mr Chibwe that this case raises issues of public interest. Mr Chikumbirike also conceded that the case raised issues of public interest but persisted on seeking costs on the higher scale. I am satisfied that granting costs on a higher scale will have the undesirable effect of deterring residents from challenging authorities in circumstances where they may have a legitimate right to do so. I will therefore grant the respondents cost on the ordinary scale.

In the result it is ordered that the applicant's application be dismissed with costs.

A handwritten signature in black ink, followed by the date '13/6/07'.

Gill Godlonton & Gerrans Applicant's Legal Practitioners.

Chikumbirike and Associates 1st Respondent's Legal Practitioners.

Manase and Manase 2nd to 9th Respondent's Legal Practitioners.

Civil Division of the Attorney-General's Office 10th Respondent's Legal Practitioners.