Introduction

In the end, Zimbabwe’s presidential election turned into a complete fiasco. It was not simply a political and moral fiasco, but a legal one as well. The objective of this chapter is to look at how illegality undermined the democratic process in Zimbabwe’s 2008 presidential election. There were many instances of illegality. It has only been possible to consider the more important of these in this chapter. Some space has also been devoted to discussing the structure of important electoral institutions such as the Zimbabwe Electoral Commission (ZEC) and the Electoral Court. In the case of the ZEC this is because its flawed structure facilitated illegality. The Electoral Court is mentioned because it seems inappropriate, in a chapter on electoral illegality, not to draw the reader’s attention to the existence of the judicial institution responsible for ‘resolving’ electoral disputes.

Finally, a few words about the sources of Zimbabwe’s electoral law. Of primary importance are those provisions contained in the Constitution, the supreme law of Zimbabwe. Most of the detailed electoral law is to be found in the Electoral Act and in the Electoral Regulations (subordinate legislation enacted under the authority of the Electoral Act). The Zimbabwe Electoral Commission Act is also important, although many of the ZEC’s functions are in fact set out in the provisions contained in either the Constitution or the Electoral Act.

The Zimbabwe Electoral Commission

‘When I use a word,’ Humpty Dumpty said in a rather scornful tone, ‘it
means just what I choose it to mean – neither more nor less.’1

Ensuring that elections ‘… are conducted efficiently, freely, fairly, transparently and in accordance with the law’ is a responsibility conferred upon ZEC by section 61 (4) (1) of the Constitution. Like Humpty Dumpty, ZEC decided that it was not going to be bound by the definitions of words contained in standard dictionaries. As will be seen later in the chapter, ZEC’s interpretation of the words contained in section 61 (4) (a) was somewhat different from the meanings normally accorded to them.

That ZEC aspired to be another Humpty Dumpty is largely due to its structure which, to put it mildly, is not designed to facilitate fairness. Established as a result of a Constitutional Amendment in 2005,2 it consists of a chairman and six other members (Section 61 (1) of the Constitution). The chairman must either be a judge or a person qualified for appointment as a judge (Section 61 (1) (a) of the Constitution). The appointment of the chairman is made by the President after consultation with the Judicial Service Commission (JSC) (ibid.). But the recommendation of the JSC is not binding on the President who must however inform the Senate if he appoints someone other than the person recommended by the JSC (Section 61 (1) (b) of the Constitution). The six other members – of whom at least three must be women – are also appointed by the President (ibid.). However, his discretion is limited – at least in a formal sense – by the requirement that he choose from a list of nine nominees submitted by the Parliamentary Committee on Standing Rules and Orders (ibid.).

Some comments on the appointment process are appropriate at this point. In the first place, the purely ‘consultative’ role played by the JSC is cause for concern. But even if the JSC had some ‘teeth’ in respect of appointing the ZEC’s chairman, the significance of that would be diminished by the fact that the JSC is itself hardly an independent body. Its members are all appointed, either directly or indirectly, by the President (Section 90 of the Constitution). The JSC consists of the Chief Justice, the Chairperson of the Public Service Commission, the Attorney-General and up to three other members. The requirement that the Senate be informed should the President ignore a JSC recommendation is also of little significance. The Constitution does not authorize the Senate to do anything should such a situation arise. In any event, in the run-up to the 2008 elections, the Senate was dominated by ZANU(PF). The Parliamentary Committee on Standing Rules and Orders, responsible for compiling the list of ‘nine nominees’, was also under the control of ZANU(PF) at that time.

In view of all this it is not surprising that the ZEC did not act impartially when performing its functions. It is true that a number of provisions were

1 Carroll, Lewis (1871) Through the Looking Glass, and What Alice Found There.
inserted into the Zimbabwe Electoral Commission Act (ZECA) for the ostensible purpose of ensuring the ‘independence, impartiality and professionalism of commissioners’ (the language used in the heading to Section 8 of ZECA). For example, section 8 (2) (a) says that Commissioners ‘… shall exercise their functions in a manner that promotes … free, fair and democratic elections.’ In addition, they must maintain ‘strict impartiality in the exercise of their functions’ (Section 8 (2) (c) of ZECA). Provisions like this are all well and good of course. But the decisive role of the President in appointing the Commissioners, as well as ZEC’s performance in practice, show that ZEC was never ‘impartial’ in any objective sense but only in a subjective, ‘Humpty Dumpty’ sense.

ZEC’s structural partiality is also illustrated by section 6 (2) of the Electoral Act. In terms of that provision, ZEC must establish an ‘Observer’s Accreditation Committee’ chaired by the chairperson of ZEC. Other members are: the vice chairperson of ZEC; one member of ZEC; one person nominated by the Office of the President and Cabinet; one person nominated by the Minister of Justice, and one by the Minister of Foreign Affairs (Section 6 (2) of the Electoral Act). The function of the Committee is to accredit observers. However, no one may be accredited if either the Minister of Justice or the Minister of Foreign Affairs objects (ibid.). A provision structured like that can hardly be said to facilitate free and fair elections. Indeed, the government used this provision to exclude observers from countries seen as hostile to its policies.

The Electoral Court

Section 161 (1) of the Electoral Act established an Electoral Court ‘for the purpose of hearing and determining election petitions and other matters in terms of this Act.’ According to Section 161 (2) of the Electoral Act, the court has no jurisdiction in criminal cases. Judges of the Electoral Court are in fact High Court judges appointed by the Chief Justice ‘...after consultation with the Judicial Service Commission and the Judge President of the High Court’ (Section 1161 (1) of the Electoral Act; emphasis added). In the past the Electoral Act did not involve the Judicial Service Commission in the appointment process. This gave rise to concern that the appointment process was unconstitutional since it was not consistent with section 92 (1) of the Constitution. That provision says:

‘The power to appoint persons to preside over a special court shall vest in the President, after consultation with Judicial Service Commission; provided that Parliament may provide that the Chief Justice may, after consulting the Judicial Service Commission, appoint a person holding the office of Judge of the High Court to preside over a special court for such a period as he may specify.’
Is the Electoral Court a ‘special court’? According to section 92 (4) of the Constitution, there are three types of special courts. The Electoral Court does not fall within the scope of the types described in paragraphs (a) and (c) of section 92 (4). That leaves only those courts or other adjudicating authorities that qualify as special courts because there is no right of appeal from their decisions to the Supreme or High Courts (section 92 (4) (b)). Decisions of the Electoral Court on questions of fact are final (section 172 (1) of the Electoral Act), but questions of law may be appealed to the Supreme Court (section 172 (2)) and must be determined within six months (section 172 (3)). Because appeals on points of law are permissible, the question arose as to whether the Electoral Court qualifies as a ‘special court’.

Answering this question in the affirmative, retired High Court Judge George Smith (writing extra judicially) said that the Electoral Court’s main functions involve determining questions of fact such as ‘… whether or not a person has been guilty of corrupt or illegal practices [and] whether … an election was conducted in accordance with the principles laid down in the Electoral Act and [if] any mistake or non compliance affected the result of the election’. Thus, in most cases, the right to appeal on a point of law will be no consolation to a petitioner, since electoral disputes normally turn on questions of fact.

The issue was finally resolved by the Supreme Court in *Marimo and Another v Minister of Justice and Another*. The facts were that in 2005 the Chief Justice purported to appoint five judges of the High Court to sit in the Electoral Court. The Supreme Court ruled that the Electoral Court is a ‘special court’, and that the Chief Justice ought therefore to have consulted the Judicial Service Commission. Because this did not happen, the court said that the appointments were invalid. It was this decision which eventually led to the amendment of section 162 (1) of the Electoral Act so as to make that provision consistent with the Constitution.

The main task of the Electoral Court is to deal with election petitions which ‘… shall be presented within fourteen days after the end of the period to which the election relates’ (section 168 (2)). Only candidates may present election petitions (section 167) which must be determined within six months of being presented (section 182).

The legal status within Zimbabwe of the SADC Principles & Guidelines Governing Democratic Elections

These Principles and Guidelines were adopted at the SADC summit in

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4 Ibid.
Mauritius in August 2004. Their purpose is to ‘consolidate, defend and maintain democracy’ in the SADC region (see Article 1 of the SADC Principles and Guidelines, which itself refers to article 5 of the SADC Treaty).\(^5\) The Principles include: full participation of the citizens in the political process; freedom of association; political tolerance; regular intervals for elections; equal opportunity for all political parties to access the state media; equal opportunity to exercise the right to vote and be voted for; independence of the judiciary and impartiality of the electoral institutions; voter education and the right to challenge election results in court (Article 2). The Guidelines are contained in Article 4 and are designed to ensure that the elections are conducted in an environment that is free, fair and peaceful. There must be discrimination-free voter registration and the voters roll must be accessible and up-to-date. Polling stations must be in neutral places and the counting of votes must take place at those stations. SADC observers should be deployed at least two weeks before voting day.

In its preliminary statement on the presidential run-off and House of Assembly elections, the SADC Election Observer Mission (SEOM) said that the ‘… elections … did not conform to SADC Principles and Guidelines governing democratic elections’.\(^6\) For this reason ‘the elections did not represent the will of the people of Zimbabwe’.\(^7\) The statement provides examples of violations of the Principles and Guidelines. It says: ‘Few rallies were held by the opposition party, and SEOM observed with concern disruption of campaigning of the opposition party and the regrettable inaction of the law enforcement agencies, despite the court order authorising such rallies’.\(^8\) Furthermore, there was ‘[t]he one-sided coverage in content and extent of one candidate on the part of the state media, print and electronic. In addition, no advertisements for the opposition party were carried’.\(^9\) Widespread ‘… politically motivated violence led to the internal displacement of persons and impacted negatively on the full participation of citizens in the political process and freedom of association’.\(^10\)

Since the Principles and Guidelines were violated, the question that arises is: are Zimbabwe’s courts able to enforce them?

Section 111 B (1) (b) of the Constitution stipulates that a treaty ‘shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament.’ Since the SADC Principles and Guidelines were never incorporated, they are not as such part of Zimbabwe’s law. However, in *Movement for Democratic Change v President of the Republic of Zimbabwe and Others* (2007), the applicant argued that it

\(^{5}\) The Guidelines may be found on <www.sadc.int/archives/read/news/167>.


\(^{7}\) Ibid.

\(^{8}\) Ibid. at p. 4.

\(^{9}\) Ibid.

\(^{10}\) Ibid.
had a legitimate expectation that the government would act, with respect to elections, in a way that accorded with its obligations under international law (i.e. the SADC Principles and Guidelines). In support of its argument the applicant referred to the Australian case of Minister of State for Immigration and Ethnic Affairs v Teoh. Australia had signed and ratified (but not yet incorporated) the United Nations Convention on the Rights of the Child. Article 3 (1) of the Convention says: ‘In all actions concerning children … undertaken by public … institutions … the best interest of the child shall be a primary consideration.’

Teoh was an alien who had been convicted of drug offences and was facing deportation. If the Immigration Department had to take into account article 3 (1) of the Convention, a decision other than deportation might be adopted. The court ruled that while the Convention was not part of Australian law, Teoh had a legitimate expectation that the Australian government’s executive actions would conform with its international obligations under the Convention.

However, in Movement for Democratic Change (2007) Marakau J declined to follow this approach. In fact, it is quite clear that she did not understand the Teoh judgment. At page 7 of the cyclostyled judgment she says the Australian court ‘… reject[ed] the arguments advanced on behalf of Teoh.’ Well, the correct position, as indicated above, is that the court accepted Teoh’s argument! It was for that very reason that the court nullified the Immigration Department’s decision to deport Teoh.

It is a pity that the MDC did not appeal against the High Court’s decision. It is submitted that in terms of the legitimate expectations doctrine (which is part of Zimbabwe’s law) executive actions performed by Zimbabwe’s government in the context of elections must conform to the SADC Principles and Guidelines. Thus, the provisions of that treaty can, indirectly, be enforced by courts in Zimbabwe, even though it has not been incorporated.

The failure of the Nomination Court to accept the nomination papers of two prospective presidential candidates

An election can hardly be said to be free and fair if candidates are unlawfully deprived of the right to file their nomination papers. The Nomination Court for the presidential election sat on 15 February 2008. All persons wishing to contest the election had to file their nomination papers by 4.00 p.m. of that day. Daniel Shumba entered the Nomination Court with fifteen minutes to spare. Another prospective candidate, Bruce Chiota, was already inside and was filling in some forms. Mr Shumba was told to wait until Mr Chiota had been attended to. However, both of them were then told that the Nomination Court had closed, as a result of which their nomi-
nation papers would not be accepted.

The two men then brought an urgent chamber application before the High Court seeking an order compelling the ZEC to accept their nomination papers. However, Guvava J dismissed the application on the ground that it ought to have been brought before the Electoral Court.\footnote{Reference was made by the judge to section 46 (19) of the Electoral Act.} When the application finally reached that court, Uchena J, in his capacity as an Electoral Court Judge, dismissed it saying that the matter had prescribed (section 46 (19) (c) of the Electoral Act says that a candidate has four days in which to appeal against the decision of the Nomination officer). Thereafter, Shumba and Chiota brought a constitutional application directly before the Supreme Court in terms of section 24 (1) of the Constitution. In this they argued that their freedom of association, as enshrined in section 21 (1) and (2) of the Constitution had been violated by the failure of the Nomination Court to accept their papers. They also stated that their right to the protection of law (section 18 (1) of the Constitution) had also been violated. The constitutional application did not seek an order compelling the acceptance of their nomination papers (the ‘first’ election was over when the case was argued before the Supreme Court on 22 May 2008). Instead, the applicants simply sought a declaratory order that their rights had been violated.

Handing down its judgment in \textit{Shumba and Another v ZEC and Another} (not yet reported, judgment no. SC 11/08), the Supreme Court accepted the applicant’s submission that the matter was ‘… more than a mere academic exercise’ and that the applicants therefore had \textit{locus standi} (at p. 1 of the judgment). This was because a judgment from the court would ‘… provide a useful guideline for the future conduct of election officials’ (ibid.). In view of the rather strict approach adopted towards \textit{locus standi} by the Supreme Court in recent years, the court’s willingness to hear this matter is rather surprising. Since the applicants were only seeking a declaratory order, the matter was very close to being a ‘purely academic matter’ of the sort that has been rejected in the past. Normally applications will only be entertained if there is a real constitutional issue that requires a real remedy. Paradoxically, perhaps it was precisely because the applicants were not asking for a real remedy – such as an order nullifying the election – that a relieved court was prepared to hear the matter!

While on the subject of \textit{locus standi}, it is worth noting that the Supreme Court decided – rightly – that the matter ought never to have gone before the Electoral Court and that the court of first instance – the High Court – had jurisdiction in the circumstances. This was because an appeal to the Electoral Court from the decision of the nomination officer will only lie if the latter has rejected the nomination papers on one of the grounds specified in section 46 (10) of the Electoral Act. In fact, the rejection was not based on any of the grounds specified in that provision. Rather, the
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evidence before the court pointed to the fact that the papers had been rejected because they were submitted – in the opinion of the nomination officer – too late. However, such a rejection was contrary to the proviso to section 46 (7) of the Act, which states that if a candidate is already in the Nomination Court, ‘... the nomination officer shall give him or her an opportunity to [submit a nomination paper].’ The Electoral Act does not provide any right of appeal to the Electoral Court where section 46 (7) has been violated. The Supreme Court therefore rightly held that the ordinary review jurisdiction of the High Court would apply (at p. 6 of the judgment, per Chidyausiku CJ). Since both the High Court and the Electoral Court declined to entertain the Shumba/Chiota application, the Supreme Court held that a direct constitutional application to it in terms of Section 24 (1) of the Constitution was not prevented in the circumstances by section 24 (3) of the Constitution. (The latter provision says that once a constitutional point has arisen in proceedings in a lower court, a direct application to the Supreme Court is precluded. However, since the two lower courts concerned had declined to hear the matter, there had not been, strictly speaking, any proceedings in those courts.)

The Supreme Court concluded by finding in favour of the applicants. Chidyausiku CJ, writing for a unanimous bench, said: ‘... It is quite clear that the refusal to accept their nomination papers was not in accordance with the law’ (at p. 12 of the judgment). He did not refer to any of the constitutional provisions cited by counsel for the applicants. However, his reference to ‘the law’ implies that the court found that the constitutional right to protection of law (section 18 (1)) had been violated.

The correctness of the court’s decision cannot be disputed. However, it is perhaps surprising that the applicants restricted themselves to simply asking for a declaration that their right to be accepted as candidates had been violated. The case was argued after the ‘first’ presidential election, but before the ‘second’ one. It is interesting to speculate on what might have happened had the applicants sought an order invalidating the first election and compelling ZEC to hold an entirely fresh election. Section 24 (4) of the Constitution provides the Supreme Court with a wide range of measures to secure the enforcement of constitutional rights. In In Re Mlambo (p. 355), Gubbay CJ said: ‘It is difficult to imagine language which would give this court a wider and less fettered discretion.’ So an order setting aside the first election would have been within the competence of the court.

The recounting of votes

The credibility of the presidential election was seriously undermined by the

delay in announcing the results of the 29 March ‘First Round’ election. It seemed to many that something untoward was going on. (For more on this issue, see Chapter 8).

Because of ZEC’s decision to delay the announcement of the result of the presidential election, the MDC brought an urgent chamber application before the High Court, seeking an order compelling ZEC to release the result. In his opposing affidavit, the Chairperson of ZEC, Justice Chiweshe, stated that ZEC ‘had received several complaints in terms of section 67A of the Electoral Act.’ The complainants were ‘... various ZANu PF candidates’. Accordingly, he said that ZEC had to consider whether a recount would be necessary. He stated that even a single vote could affect the outcome. This was why the result had been withheld.

The issue of recounting votes is dealt with by section 67A of the Electoral Act. Section 112 of the Act makes it clear that section 67A applies to both parliamentary and presidential elections. In Movement for Democratic Change and Another v Chairperson of the Zimbabwe Electoral Commission and Another (2008), Uchena J ruled that ZEC had acted within the parameters of section 67A and he therefore dismissed the MDC’s application. However, it is submitted that the court’s decision was incorrect. Section 67A (1) states that a party or candidate may request ZEC to conduct a recount within 48 hours of the declaration of the result. (While parliamentary results need only be declared in the constituency concerned, the result of the presidential election must be declared by the Chief Election Officer; section 110 and paragraph 3 (1) of the Second Schedule of the Electoral Act.) As Alex Magaisa notes, Uchena J correctly ruled (at p. 13-14 of the judgment) that section 67A (1) did not apply in the circumstances, because there had been no declaration of the result, a necessary prerequisite for the operation of that provision. However, the court then went on to rule that ZEC could proceed with a recount on the basis of subsection (4) of section 67A. That provision says:

‘The Commission may on its own initiative order a recount of votes in any polling station if it considers there are reasonable grounds for believing that the votes were miscounted and that, if they were, the miscount would have affected the result of the election.’

Since ZEC was not itself claiming to be acting ‘on its own initiative’ but rather on the basis of ‘complaints’ received (the subsection (1) scenario), it is hard to see how Uchena J could properly invoke subsection (4). The latter provision seems to envisage a situation where there has been no complaint or request for a recount from a party or candidate but ZEC, for reasons of its own, has decided to order a recount.

15 This point is also made by Magaisa.
Subsection (4) limits ZEC’s discretion to order a recount. In the first place it may only do so ‘... if it considers there are reasonable grounds for believing that the votes were miscounted...’ (emphasis added). This means that it is not sufficient that ZEC wants a recount. ZEC’s subjective opinion, however sincerely held, must be based on objectively reasonable considerations. In *Forum party of Zimbabwe and Others v Minister of Local Government, Rural and Urban Development and Others*, the High Court accepted that the words ‘when it appears to the President that a situation has arisen ... which needs to be dealt with urgently ...’ in section 2 (1) of the Presidential Powers (Temporary) Measures Act indicate that the President has a subjective discretionary power to decide whether a situation is urgent. However, Adam J said, ‘... what appears to the President must surely accord with a true state of affairs ascertainable and not manifestly without reasonable foundation that a situation has arisen or is likely to arise which needs to be dealt with urgently. A situation cannot be said to have arisen if it is not so factually’ (ibid. at p. 486; this case is discussed in Linington 2001:80). Similarly, ZEC cannot resort to the procedure set out in section 67A (4) unless objective facts exist which justify and make explicable a decision to recount votes. In the *Forum Party* case the court had to infer a reasonableness requirement, but section 67A (4) expressly stipulates that reasonableness is required.

Uchena J’s decision in *Movement for Democratic Change* (2008) must therefore be wrong. There is nothing in the judgment that indicates the grounds upon which ZEC decided to act, let alone whether those grounds – if they exist at all – are reasonable. Moreover, section 61 (4) (a)\(^{16}\) of the Constitution says that ZEC must ‘... ensure that ... elections ... are conducted efficiently, freely, fairly, transparently and in accordance with the law.’ The effect of this language, like that used in section 67A (4) of the Electoral Act, is to limit the discretion of ZEC. By ordering a recount without good cause ZEC was not acting ‘fairly’. Neither was it acting ‘in accordance with the law’, since, as has been said already, the ‘reasonable grounds’ requirement set out in section 67A (4) was not satisfied.

The recount ordered by ZEC applied to 23 constituencies. As Matyszak notes:\(^{17}\) ‘There were 1092 polling stations where a recount was to take place. With one ballot box for each of the four elections this makes at least 4368 ballot boxes to be opened and recounted.’ Section 67A (4), understood properly, requires ZEC to have reasonable grounds for believing that a miscount occurred at a particular polling station. This means that ZEC had to reasonably believe that a miscount occurred at all 1092 polling stations in respect of all 4368 ballot boxes! As Matyszak says,\(^{18}\) ‘This is

\(^{16}\) Magaisa in his article refers to section 64 (1) of the Constitution. This is obviously a misprint (section 64 (1) no longer exists). It is clear that he means section 61 (4).

\(^{17}\) Matyszak, ibid. p. 11.

\(^{18}\) Ibid.
inherently implausible.’ ‘It will not suffice that there is a belief that a constituency total is incorrect.’

Even if there are reasonable grounds for believing that a miscount occurred, according to section 67A (4) of the Electoral Act there must also be reasonable grounds for believing that ‘... the miscount would have affected the result of the election’ (emphasis added). When one considers the huge margins in some constituencies, it is hard to believe that ZEC sincerely, let alone reasonably, thought that any of the alleged ‘miscounts’ would have affected the result. In fact, no significant discrepancies emerged as a result of the recount.

In an effort to bolster his decision in *Movement for Democratic Change (2008)* to dismiss the MDC’s application, Uchena J referred to section 67A (7) of the Electoral Act. That provision says: ‘The Commission’s decision on whether or not to order a recount and, if it orders one, the extent of the recount, shall not be subject to appeal.’ He then said:

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

The judge added that since, in his opinion, ZEC had ‘not strayed from the law,’ the court was ‘not entitled to intervene’ (at p. 17 of the judgment).

Magaisa is right to question the constitutionality of section 67A (7). He does so on the grounds that prohibiting an appeal against a ZEC decision is inconsistent with the obligation cast upon ZEC by the Constitution (section 61 (4) (a)) to ensure that elections are conducted efficiently, freely, fairly, transparently and in accordance with the law. If ZEC decisions cannot be taken on appeal, how will it be possible to ensure that ZEC complies with these constitutional standards?

It is also probable that the appeal prohibition is inconsistent with section 18 (9) of the Constitution, which provides that every person is entitled to a fair hearing within a reasonable time before an independent and impartial court or other adjudicating authority. While section 79 (2) of the Constitution does permit an Act of Parliament to vest adjudicative functions in persons or authorities other than courts, such persons or authorities must still exercise their functions in a way that complies with the standards set out in section 18 (9). In view of everything that has happened in the course of the 2008 elections, serious questions about the impartiality and independence of ZEC have arisen.

19 Ibid.
20 Ibid. p. 12.
Even if the *appeal* prohibition is not itself unconstitutional, it would still be permissible to bring a constitutional *application* challenging ZEC’s decision as a violation of sections 18 (9) and 61 (4) of the Constitution. In *Hambly v Chief Immigration Officer* (1) the court said that the right to bring a constitutional application under section 24 (1) of the Constitution is not affected by statutory provisions that deny persons the right of appeal in certain circumstances. This is because such applications are not appeals, but are a distinct form of legal redress, established by the Constitution itself.21

The requirement that ZEC must act fairly and reasonably is not in any way affected by section 61 (5) of the Constitution which states that ZEC ‘… shall not, in the exercise of its functions, be subject to the direction or control of any person or authority.’ All this means is that, provided it acts within the parameters assigned to it by the Constitution, ZEC has a discretionary power, and cannot be subject to the dictation of any other person or authority when exercising that power. But an action by ZEC that is unfair, inefficient, non-transparent or unlawful, will fall *outside* the ambit of its proper discretion and may therefore be questioned by a competent court.

**Was the second presidential election on 27 June lawful?**

This is an important question because if the ‘requirement’ that there be a second or ‘run off’ election is unlawful, then Morgan Tsvangirai was lawfully elected President on 29 March, 2008.

None of the candidates in the presidential election held on 29 March managed to secure an absolute majority of the votes cast. The most popular candidate was Morgan Tsvangirai, who obtained 47.9 per cent of the votes cast. Section 110 (3) of the Electoral Act stipulates that if ‘… 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.’ According to section 110 (4) of the Act, ‘… 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.’ However, the same Act contains a provision that is not consistent with section 110. This is paragraph 3 (1) of the Second Schedule of the Electoral Act which bears the heading ‘Determination, Declaration and Notification of Result of Presidential Poll.’ It says:

‘… The Chief Elections Officer shall forthwith declare the candidate who has received –

21 See Linington (2001:600). Magaisa refers to the possibility of review proceedings in his article, but does not mention constitutional applications. Reviews are, of course, distinct from appeals.
(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’ (emphasis added).

How is this inconsistency to be resolved? Christo Botha\(^2\) (2005:81) says that sections in the substantive part of an Act will prevail over conflicting provisions contained in a schedule to the Act, citing as authority *African and European Investment Co v Warren* (at 360). More recently this rule has been reiterated by the South African Constitutional Court in *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others*. So on this basis it can be said that an absolute majority of votes is required in order to become President. Simply securing more votes than any of the other candidates will not suffice.

ZEC relied on section 110 when organizing the second (run-off) presidential election on 27 June 2008. But was that second election lawful? In fact, it is submitted that it was unconstitutional. There are a number of reasons for arriving at this conclusion. In the first place, it is necessary to consider section 28 (3) (a) of the Constitution. That provision says: ‘An election to the office of President shall take place … on the day or days fixed in a proclamation in terms of section 58 (1) as the day or days on which elections are to be held for the purpose of electing members of Parliament and members of the governing bodies of local authorities’ (emphasis added).

Thus the Constitution states, in imperative language, that a presidential election must take place on the same day or days as parliamentary and local government elections. The election held on 29 March complied with this requirement, since all three types of election took place on the same day. The election on 27 June did not. Although three House of Assembly by-elections were held on that date, it would appear that what is required by section 28 (3) is a general parliamentary election. This interpretation of section 28 (3) is supported when the section is read together with section 29 (1) of the Constitution. The latter states:

‘(1) The term of the office of the President shall be a period of five years concurrent with the life of Parliament … or

(a) a lesser period where the President earlier dissolves Parliament … or

(b) a longer period where the life of Parliament … is extended …;

in which event the term of office of the President shall terminate on the expiration of such lesser or longer period, as the case may be.’

From this it can be seen that the life of Parliament is closely linked to the term of office of the President. Moreover, the fact that section 28 (3) says that a presidential election must be held together with parliamentary and

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local government elections indicates that what the provision envisages is a general election and not merely parliamentary by-elections. Even if a parliamentary by-election is enough to satisfy the requirements of section 28 (3), the fact remains that no local government elections took place on 27 June. As already stated above, section 28 (3) does stipulate that a presidential election must take place on the same day or days as parliamentary and local government elections. Thus the second election did not comply with section 28 (3). Section 3 of the Constitution says: ‘This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.’ Thus sections 110 (3) and (4) of the Electoral Act, the provisions authorising the ‘second’ presidential election, must be invalid since they are inconsistent with section 28 (3) of the Constitution.

If sections 110 (3) and (4) are invalid, the issue of the clash between those provisions and paragraph 3 (1) of the Second Schedule of the Electoral Act automatically falls away. This means that paragraph 3 (1) is the only valid provision in the Electoral Act dealing with who becomes President where no candidate secures an absolute majority of votes. Since it states that a candidate need only secure ‘the greatest number of votes,’ and since Tsvangirai did just that on 29 March, it would appear that he was lawfully elected President on that date.

Could ZEC argue that the second or ‘run-off’ election was ‘... a continuation of the constitutionally set polling day ... in the same way that a reconvened company board meeting may legally be a continuation of one adjourned?’ If so, this would mean that sections 110 (3) and (4) are not unconstitutional. However, the argument is not sustainable. As Matyszak notes, ‘the word “election” in [section 28 (3) of the Constitution] clearly refers to polling day.’ The election that took place on 29 March ended on that date. Moreover, by making reference to the ‘second election’ and ‘the previous election’ section 110 (3) of the Electoral Act is also making it clear that an ‘election’ is a thing that begins and ends on polling day. This understanding of the word ‘election’ is not undermined by the definition of ‘election period’ in section 4 of the Electoral Act. There we read that an ‘electoral period’ is ‘in the case of a presidential election, the period between the calling of the election and the declaration of the result of the poll in terms of paragraph 3 (1) of the Second Schedule.’ As Matyszak observes, “election” here undoubtedly refers to the day of the poll.’ The declaration of the result of the election is thus a thing distinct from the election itself.

A somewhat different approach to the section 110/Second Schedule clash has been advanced by South African advocate David Unterhalter. He sees paragraph 3 (1) of the Second Schedule as having the status of a kind

\[\text{Matyszak (2008) ibid, p. 15.}\]
\[\text{Ibid.}\]
\[\text{Ibid. p. 14.}\]
of ‘residual principle’ that ‘kicks in’ when the second election required by section 110 does not take place lawfully within the stipulated 21 day period. Since the stance adopted in this chapter is that sections 110 (3) and (4) are ultra vires the Constitution, and therefore invalid, it follows that Unterhalter’s argument must be rejected. Paragraph 3 (1) is not a residual principle. As stated above, it is the only valid provision dealing with the question of who becomes President when no candidate has managed to secure an absolute majority of the votes cast. It is worth noting however that in view of the fact that the 21-day period expired long before the 27 June ‘election’, his ultimate conclusion – that the decisive provision is paragraph 3 (1) of the Second Schedule – is correct.

Even if one were to regard sections 110 (3) and (4) as constitutionally valid, the 27 June election would still be invalid. This is because ZEC unlawfully purported to extend the 21 days by ‘amending’ the Act and substituting ‘90 days’ for ‘21 days’. In doing this ZEC relied on section 192 of the Electoral Act which states that ZEC can amend the time limits contained in the Act.

However, a careful reading of the Constitution reveals that section 192 of the Electoral Act is in fact unconstitutional and therefore invalid. Accordingly, any purported changes to the Electoral Act effected by ZEC in terms of section 192 are obviously also unconstitutional and invalid. Section 28 (4) of the Constitution stipulates that ‘the procedure for ... the election of the President shall be as prescribed in the Electoral Law.’ Section 113 (1) of the Constitution defines ‘Electoral Law’ as ‘the Act of Parliament having effect for the purposes of section 58 (4) of the Constitution which is for the time being in force.’ Section 58 (4) of the Constitution is concerned with parliamentary elections and says: ‘An Act of Parliament shall make provision for the election of Members of Parliament.’ As can be seen, these three constitutional provisions are closely linked and must therefore be read together. The requirement that only Parliament can enact the law governing parliamentary elections (contained in section 58 (4)) applies equally to presidential elections through the operation of sections 28 (4) and 113 (1). As Sandura JA said in Tsvangirai v Registrar General and Others ‘[w]hat all this means is that the legislation which comprises the electoral law must be an Act of Parliament’ (emphasis added). He noted that ‘[t]hat Act of Parliament is the Electoral Act.’ Since the Constitution stipulates that only Parliament can make electoral law, Parliament cannot abrogate its duty in that regard by purporting to give other persons and bodies the authority to make electoral law. Because section 192 of the Electoral Act is clearly inconsistent with the constitutional duty imposed on Parliament to enact electoral law, it must be void.

The case of Tsvangirai v Registrar General, referred to above, was a 2002 Supreme Court decision in which the constitutionality of section 158 of the old Electoral Act (a provision similar to section 192 of the current Act) was challenged. Although Sandura JA’s judgment was a dissenting judgment, the majority of the court dismissed the application on the (incredible) ground that the applicant lacked *locus standi*. The majority judgment (unlike that of Sandura JA) did not therefore address the substantive merits of the application. Sandura JA’s view that Parliament alone must make electoral law has thus not been contradicted by the Supreme Court in any case, and must therefore be regarded as accurately stating the law.

Prior to the election, the President purported to amend a number of provisions in the Electoral Act by utilizing the Presidential Powers (Temporary) Measures Act. For example, changes were made to sections 55, 59 and 60 of the Electoral Act in order to facilitate a police presence within polling stations, supposedly in order to ‘assist’ illiterate voters. These ‘amendments’ were in fact void for the same reason that the ‘amendment’ made by ZEC was void: only Parliament can create electoral law. So neither ZEC nor the President is constitutionally empowered to remove or change provisions in the Electoral Act.

Even if the Constitution did not expressly state that electoral law must be made by Parliament, the exclusive power of Parliament in this regard may still be inferred from the structure of the Constitution. In *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* the Constitutional Court of South Africa held that the South African legislature may only confer *subordinate* law making powers upon the South African President. Chaskalson P (*Executive Council*, at 1311-131, paragraph 51) said:

‘The legislative authority vested in [the South African] Parliament under section 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 lawmaking. 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.’

The court in this case was applying what is known as the delegation doc-

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trine. The doctrine has its origins in the separation of powers theory, and has been developed and applied in a number of countries including the United States. The essence of the doctrine is that law-making is a function properly left to the legislature. Accordingly, excessive legislative powers should not be delegated to the executive.29 The court noted that in South Africa Parliament ‘… is subject in all respects to the provisions of the Constitution and has only the powers vested in it by the Constitution expressly or by necessary implication’ (Executive Council, 1317, paragraph 62). Thus, delegating the power to make primary legislation to the executive or any other person or body would amount to subverting the Constitution.30

The approach adopted by the South African Constitutional Court in the Western Cape case applies equally to the Zimbabwean Constitution. Section 32 (1) of the Constitution states that ‘[t]he legislative authority of Zimbabwe shall vest in the legislature’. It is true that section 32 (2) permits Parliament to confer legislative functions on ‘any person or authority’. However, it is submitted that this refers to Parliament’s power to confer subordinate legislative powers, not primary law-making powers. Even if this were not the case, the fact remains that the Constitution stipulates that electoral law must be made by Parliament.

As has been indicated above, the stance adopted in this chapter is that sections 110 (3) and (4) of the Electoral Act are unconstitutional and therefore invalid. However, it is worth mentioning here an ingenious argument advanced by Sheila Jarvis.31 She states – in effect – that section 110 and paragraph 3 (1) of the Second Schedule of the Electoral Act can be interpreted in a way that removes any inconsistency between the two provisions. Her conclusion is that Morgan Tsvangirai was entitled to become president following the 29 March election.

According to Jarvis – relying on paragraph 3 (1) – the candidate who got the ‘greatest number of votes’ in the 29 March election was entitled to be declared President. That candidate was Tsvangirai. However, since he did not get more than 50 per cent of the votes cast, a second election had to be held, as required by section 110. But between the first and second elections Tsvangirai, not Mugabe, was entitled to be President.32

David Coltart has been highly critical of the approach adopted by Jarvis and says that she does ‘… not refer to section 110 in her article’.33 It is true that she does not refer to the provision by its section number. But when she

32 Ibid.
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says that ‘[t]he run-off requirement is a separate rule in the electoral law …’, she obviously means section 110. In fact, it is clear that Coltart has not understood her argument. As far as the present writer is concerned, the problem with the ‘Jarvis argument’ is that it does not take account of the Constitutional requirement, referred to earlier, that presidential, parliamentary and local government elections must all take place on the same day. This precludes a ‘run-off’ presidential election. However, it is submitted that if this constitutional argument were to be rejected by the courts, they would have no option but to accept and apply the interpretation enunciated by Jarvis.

Thus, for all of the reasons advanced above, it is submitted that the ‘second’ presidential election was unlawful, and that Morgan Tsvangirai was lawfully elected President in the ‘first’ election. He ought therefore to have been declared President.

When does a new President assume office?

According to section 28 (5) of the Constitution, ‘[a] person elected as President shall, on the day upon which he is declared to be elected or no later than forty-eight hours thereafter, enter office by taking and subscribing before the Chief Justice or other judge of the Supreme Court or the High Court the oaths of loyalty and office in the forms set out in Schedule 1.’ Thus, the new President must assume office, at the latest, 48 hours after having been declared elected. Some confusion arose because of the wording used in section 110 (7) of the Electoral Act. That provision says:

‘Notwithstanding subsection (5) of section 23 of the Constitution, a person elected as President in terms of subsection (5) [of section 110 of the Electoral Act] shall assume office on the day upon which he or she is declared so elected by the Chief Elections Officer.’

First of all, section 23 (5) of the Constitution has nothing to do with elections. In fact, section 23 is the protection from discrimination provision. There is obviously a mistake in section 110 (7) of the Electoral Act: the reference ought to be to section 28 (5) of the Constitution. Secondly, the application of a constitutional provision cannot be limited by an inferior law, which of course is what section 110 (7) of the Electoral is. The exact purpose of the latter provision is unclear. It makes reference to section 110 (5) of the Electoral Act. That provision is designed to deal with a very unlikely scenario: a situation where both candidates in a ‘second’ presidential election secure an equal number of votes. It says that if this occurs, ‘… Parliament shall, as soon as practicable after the declaration of the result of that election, meet as an electoral college and elect one of the two can-

34 http:www.nehandaradio.com
candidates as President by secret ballot and without prior debate.’ It may be that the draftsperson responsible for producing the text of the Electoral Act read section 28 (5) of the Constitution as imposing a time limit of 48 hours within which a candidate has to become President after the ‘second’ election. In order to secure extra time he sought to limit the application of the constitutional provision through the use of the word ‘notwithstanding’ in section 110 (7) of the Act. However, as indicated above, the supreme law cannot be limited by provisions contained in an ordinary Act of Parliament. If the draftsperson was in fact concerned in some way – rightly or wrongly – about the possible limiting effect of a constitutional provision, he ought to have sought the amendment of the constitutional provision concerned.

This chapter has already argued that Morgan Tsvangirai ought to have been declared President after the ‘first’ presidential election. But this was not done. What is the legal effect of such a declaration, or of a failure to make such a declaration? If the Chief Elections Officer fails to declare the result of the presidential election, does this mean that the incumbent President can simply remain in office indefinitely? In other words, is a declaration an absolutely necessary prerequisite in law to the advent of a new President? The answer must be no. Any other view would amount to saying that the Chief Elections Officer has the power to derail the whole democratic process. Accordingly, it is submitted that a declaration has no ultimate legal significance: it is simply a statement about an existing factual situation – that one of the candidates has won the election.

Section 114 (1) of the Constitution says: ‘[a]ny power, jurisdiction or right conferred by this Constitution may be exercised and any duty imposed by this Constitution shall be performed from time to time as occasion requires’ (emphasis added). Subsection (1a) of the same provision says: ‘Where any power, jurisdiction or right is conferred by this Constitution, any other powers that are reasonably necessary or incidental to its exercise shall be deemed also to have been conferred’ (emphasis added). When a person is elected President, he acquires the right to become President. This right is protected by section 18 (2) of the Constitution which says: ‘Subject to the provisions of this Constitution, every person is entitled to the protection of law.’ Thus, the decisive consideration is that someone has been elected, not the declaration of the result. This also accords with common sense.

It is also quite obvious that the Chief Elections Officer has no discretion with regard to whether or not to issue a declaration. This chapter has adopted the stance that Mr Tsvangirai won the presidency in the ‘first’ election, and that the ‘second’ election procedure set out in section 110 (3) is unconstitutional. Therefore, the relevant ‘declaration’ provision is the one contained in paragraph 3 (1) of the Second Schedule of the Electoral Act. This says: ‘... The Chief Elections Officer shall forthwith declare the candidate who has received ... the greatest number of votes, to be duly
elected as President’ (emphasis added). The effect of the emphasised words is to impose a mandatory obligation on the Chief Elections Officer. First, he must declare the winning candidate to be duly elected as President. He has no discretion in the matter. Secondly, he must do this ‘forthwith’. The meaning of ‘forthwith’ was considered by the High Court in Hickman and Another v Minister of Home Affairs (at 185) where it was held to mean ‘as soon as reasonably possible in the circumstances.’ Implicit in this definition is the idea that the action concerned must proceed unless reasonable grounds exist justifying and making explicable any delay.

For the reasons set out above, Tsvangirai ought to have been declared the winner of the presidential election. But the fact that no such declaration was made does not change the fact that, legally, he was entitled to become President after the ‘first’ election.

Conclusion

Unless and until all those participating in elections in Zimbabwe are properly afforded the protection of law, the prospects for genuinely democratic elections will remain slim. The requirement of legality and the rule of law cannot be satisfied merely by setting out fine words on a piece of paper. It is essential that those concepts are upheld by those administering the election concerned. Sadly, there is little sign of that happening in Zimbabwe at the moment.

The Presidential Election was a fiasco because of one man: Robert Mugabe. His vast executive and legislative powers enabled him to undermine, both directly and indirectly, the democratic process. He appointed the members of the country’s electoral institutions. The violence and intimidation perpetrated by members of ZANU(PF) made it impossible for Tsvangirai to participate in the 27 June ‘run-off’ election. Like Shakespeare’s Richard III Mugabe was ‘... determined to prove a villain’.35 Sadly, he succeeded. Illegality blocked the winds of change.

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