

**IN THE CONSTITUTIONAL COURT OF ZIMBABWE
HELD AT HARARE**

CASE NO CCZ____/18

In the matter between:

NELSON CHAMISA

Applicant

and

EMMERSON DAMBUDZO MNANGAGWA

First Respondent

JOSEPH BUUSHA

Second Respondent

MELBAH DZAPASI

Third Respondent

NKOSANA MOYO

Fourth Respondent

NOAH MANYIKA

Fifth Respondent

PETER WILSON

Sixth Respondent

TAURAI MTEKI

Seventh Respondent

THOKOZANI KHUPE

Eighth Respondent

DIVINE MHAMBI

Ninth Respondent

LOVEMORE MADHUKU

Tenth Respondent

PETER MUNYANDURI

Eleventh Respondent

AMBROSE MUTINHIRI

Twelfth Respondent

TIMOTHY JOHANNES CHIGUVARE

Thirteenth Respondent

JOICE MUJURU

Fourteenth Respondent

KWANELE HLABANGANA

Fifteenth Respondent

EVARISTO CHIKANGA

Sixteenth Respondent

DANIEL SHUMBA

Seventeenth Respondent

VIOLET MARIYACHA

Eighteenth Respondent

BLESSING KASIYAMHURU

Nineteenth Respondent

ELTON MANGOMA

Twentieth Respondent

PETER GAVA

Twenty-First Respondent

WILLIAM MUGADZA

Twenty-Second Respondent

ZIMBABWE ELECTORAL COMMISSION

Twenty-Third Respondent

THE CHAIRPERSON OF THE ELECTORAL COMMISSION

Twenty-Fourth Respondent

THE CHIEF EXECUTIVE OFFICER

OF THE ELECTORAL COMMISSION

Twenty-Fifth Respondent

APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION

- 1 The question to be determined is whether the 2018 presidential elections were free and fair. If they were not, they must be declared invalid and the results set aside.
- 2 On 3 August 2018, the Zimbabwe Electoral Commission (ZEC) announced that Mr Mnangagwa had won the presidential election with 50,8% of the vote. Mr Mnangagwa's margin of victory was barely over the 50% + 1 threshold required to avoid a runoff election. According to the announced results which soon changed, he avoided a runoff by a mere **37,306** votes.
- 3 The ZEC now admits that there were patent errors in the results. It subsequently published revised results, without explanation. The published results reduced Mr Mnangagwa's margin of victory to 50.65%, or just **31,830** votes over the threshold.
- 4 The published results contain further irregularities and miscalculations, most of which are now admitted by the ZEC. These include the double-counting of polling stations, the duplication of results, and the inflation of votes. All of these irregularities favoured Mr Mnangagwa, helping to push him clear of the 50%+1 threshold.
- 5 These irregularities followed in the wake of an election campaign which failed to achieve a level playing field. Observers noted violence, intimidation, coercion,

the abuse of state resources and bias in the state-owned media, among other imbalances.

6 As a result of these irregularities, the presidential elections must be invalidated in terms of section 93(3) of the Constitution, read with section 177 of the Electoral Act. Invalidation is justified on two independent grounds:

- i. First, the irregularities in the election process denied Zimbabweans their right to free, fair and transparent elections. The election is invalid on this basis alone, irrespective of the effect of the irregularities on the result.
- ii. Second, the evidence shows that the irregularities did, in fact, materially affected the election result. But for these irregularities, Mr Mnangagwa would, at the very least, have fallen far short of the 50%+1 threshold. This provides a separate basis to set aside the election.

7 We submit that the just and appropriate remedy is to declare that the elections were not free and fair and to invalidate the election. Following upon that remedy, it would be just and appropriate to either declare Mr Chamisa to be the winner or to order a fresh election.

9 In what follows, we develop this argument by addressing the following issues in turn:

- a. First, we outline the relevant legal principles, focusing on the right to free and fair elections and the test for the invalidation of presidential elections;

- b. Second, we address the irregularities in the ZEC's election results which rendered the elections unfree and unfair;
 - c. Third, we address the further irregularities that occurred on and before election day.
 - d. Fourth, we address the just and appropriate remedy.
 - e. Finally, we briefly address the respondents' technical objections.
9. These are dealt with in turn.
10. Mnangagwa fell far short of the 50%+1 votes required to avoid a run-off. That means, on the ZEC's published results, Mnangagwa avoided a run-off by a mere **31, 830** votes. This snapshot of election irregularities shows there are more than enough votes in doubt for the applicant to be entitled to the relief sought.
- a. The **ZEC admits** it did not verify the Excel spreadsheet that it used to calculate the election results.¹
 - b. At least **7,730** of these votes must be excluded due to double-counting of polling stations. The **ZEC admits** this discrepancy.²
 - c. There is a discrepancy of **8,944** votes between the official election results announced by the ZEC on live television on 3 August 2018 and the results that

¹ ZEC answering affidavit; para 34.6.

² ZEC answering affidavit; para 57.

were subsequently published by the ZEC.³ The ZEC **does not deny** this discrepancy.⁴

- d. A further **9,592** votes for Mnangagwa at “ghost polling stations” also fall to be disregarded. The **ZEC does not raise a genuine dispute of fact** on this score.⁵
 - e. At least **10,343** votes for Mr Mnangagwa must also be excluded as they do not correlate with the sample of V11 forms. The V11 forms are in the ZEC’s control. It has refused to release them for public scrutiny. In light of the ZEC’s refusal to do so, the **ZEC does not raise a genuine dispute of fact** on this score.⁶
 - f. A further **40,717** votes are invalid in light of the disparity between the number of votes cast in the presidential and parliamentary elections. The **ZEC does not raise a genuine dispute of fact** on this score.⁷ At any rate, this is a matter of law and ZEC has not placed the relevant returns before the court.
 - g. The number of votes cast in the presidential election does not square with the voter turnout claimed by the ZEC. The ZEC does not adequately explain a discrepancy of more than **70,000** votes, meaning the ZEC **does not raise a genuine dispute of fact**.⁸
- 11 We pause to emphasise that on all of these issues, the facts are uniquely within the ZEC’s knowledge based on information readily available to it. As the organ of state charged with facilitating the right to free and fair elections, the ZEC has

³ See Annexure D, Record p 138.

⁴ ZEC answering affidavit; para 46.1.

⁵ ZEC answering affidavit; para 58.

⁶ ZEC answering affidavit; para 48.

⁷ ZEC answering affidavit; para 47.1.

⁸ ZEC answering affidavit; para 45.

a special constitutional duty to explain election results and to satisfy this Court that elections results reflect a free and fair process.

LEGAL PRINCIPLES

The constitutional right to free and fair elections

- 12 The right to free and fair elections is the foundation of Zimbabwe’s constitutional democracy.
- 13 The very first line of the Constitution commits Zimbabwe to “*the people*.” The right to free and fair elections is then enshrined as a founding value of the Constitution under section 3(2)(b), as a right under section 67(1), and as a guiding principle of the electoral system under section 155(1) of the Constitution.
- 14 In *Tsvangirai v Mugabe*,⁹ this Court held that “*a free, fair and credible election for any elective public office is an essence of democratic self-government.*” In similar terms, the Kenyan Constitutional Court has explained that:

"Elections are the surest way through which the people express their sovereignty. Our Constitution is founded upon the immutable principle of the sovereign will of the people. The fact that, it is the people, and they alone, in whom all power resides; be it moral, political, or legal. And so they exercise such power, either directly, or through the representatives whom they democratically elect in free, fair, transparent, and credible elections."¹⁰

- 15 This right to free and fair elections gives concrete effect to the right to vote and other political rights. As has been noted, “*the mere existence of the right to vote*

⁹ (CCZ 20/17, Constitutional Application No. CCZ 71/13) [2017] ZWCC 20 (20 August 2013).

¹⁰ *Odinga and Others v Independent Electoral and Boundaries Commission and Others*, Presidential Petition No 1 of 2017 (20 September 2017) (“Odinga v IEBC”).

*without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless”.*¹¹

16 Free and fair elections necessarily require an independent, competent body to give effect to this right. Section 156 of the Constitution makes the ZEC responsible for conducting free and fair elections.

17 In terms of section 156, the ZEC is duty-bound to ensure that:

“a. whatever voting method is used, it is simple, accurate, verifiable, secure and transparent;

b. the results of the election or referendum are announced as soon as possible after the close of the polls; and

c. appropriate systems and mechanisms are put in place--

i. to eliminate electoral violence and other electoral malpractices; and

ii. to ensure the safekeeping of electoral materials.”

18 Section 239 of the Constitution further obliges the ZEC to ensure that to ensure that elections are conducted “*efficiently, freely, fairly, transparently and in accordance with the law*”.

19 Section 157 of the Constitution further provides that an Act of Parliament must provide for the conduct of elections. The Electoral Act (Chapter 2:13) is that legislation. Its provisions are meant to give effect to the constitutional rights and principles outlined above. This is made clear by section 3(a) of the Electoral Act, which provides, in relevant part, that:

¹¹ *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC) at para 11.

“Subject to the Constitution and this Act, every election shall be conducted in way that is consistent with the following principles—

(a) the authority to govern derives from the will of the people demonstrated through elections that are conducted efficiently, freely, fairly, transparently and properly on the basis of universal and equal suffrage exercised through a secret ballot

...

(e) voting methods must be simple, accurate, verifiable, secure and transparent.

The international consensus over free and fair elections

- 20 The concept of “free and fair” elections in Zimbabwean law must be interpreted in light of international law and norms.¹²
- 21 The Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights both entrenched rights to political participation, which included the right to participate in “*genuine*” elections.¹³ In time, the right to “*genuine*” elections came to be interpreted as a right to “free and fair” elections.¹⁴
- 22 The right to free and fair elections is further entrenched in the African Charter on Elections, Democracy and Governance.

¹² Section 46(1)(c) of the Constitution provides that any court “must take into account international law and all treaties and convention to which Zimbabwe is a party” in interpreting the rights contained in the Declaration of Rights.

¹³ Article 21 of the Universal Declaration of Human Rights, 10 December 1948. Article 25 of the International Covenant on Civil and Political Rights, 16 December 1966.

¹⁴ *Kham and Others v Electoral Commission and Another* [2015] ZACC 37; 2016 (2) SA 338 (CC) at para 83. The Constitutional Court of South Africa explained the genesis of the term “free and fair elections” as follows: “[the term] entered the general political lexicon in 1978 when it featured in the United Nations Security Council Resolution 435 calling for “the early independence of Namibia through free and fair elections under the supervision and control of the United Nations”.

- 23 Article 17 commits states parties to "*regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa.*"
- 24 The AU Principles in turn give further content to this right. Article II.4 commits all member states to conduct democratic elections "freely and fairly", by "*impartial, all-inclusive, competent and accountable national electoral bodies staffed by qualified personnel*".
- 25 At a regional level, the SADC Principles and Guidelines Governing Democratic Elections (SADC Principles and Guidelines) give further expression to these rights and duties.
- 26 These international law principles have been absorbed into the domestic law, resulting in a growing body of comparative law. In ***Kham v Independent Electoral Commission***,¹⁵ the South African Constitutional Court had regard to this comparative law in describing the right to free and fair elections as follows:

*"There is no internationally accepted definition of the term "free and fair elections". Whether any election can be so characterised must always be assessed in context. Ultimately it involves a value judgement."*¹⁶

...

"It must be stressed that the judgement whether an election was free and fair has to be made in the specific context of the Constitution. In certain instances it may be appropriate to be guided by identifiable international norms, where these exist. But the constitutional requirement is that elections must be free and fair. This is a single requirement, not a conjunction of two separate and disparate elements. The expression highlights both the freedom to participate in the electoral process and the ability of the political parties and

¹⁵ *Kham and Others v Electoral Commission and Another* [2015] ZACC 37; 2016 (2) SA 338 (CC).

¹⁶ *Kham v IEC* at para 34.

candidates, both aligned and non-aligned, to compete with one another on relatively equal terms...¹⁷

Challenges to presidential elections under section 93

27 A central component of free and fair elections is the availability of lawful means to challenge election results.

28 Section 93 of the Constitution is the mechanism to challenge presidential election. It provides, in relevant part, as follows:

“93. Challenge to presidential election

1. Subject to this section, any aggrieved candidate may challenge the validity of an election of a President or Vice-President by lodging a petition or application with the Constitutional Court within seven days after the date of the declaration of the results of the election.

...

3. The Constitutional Court must hear and determine a petition or application under subsection (1) within fourteen days after the petition or application was lodged, and the court's decision is final.

4. In determining a petition or application under subsection (1), the Constitutional Court may----

a. declare a winner;

b. invalidate the election, in which case a fresh election must be held within sixty days after the determination; or

c. make any other order it considers just and appropriate.”

29 As appears from section 93(4), this Court is vested with the power to make any just and appropriate order where the validity of a presidential election is challenged. This is in addition to this Court’s broad remedial discretion under

¹⁷ *Kham v IEC* at para 86.

under section 175(6) to declare invalid any conduct that is inconsistent with the Constitution, and to make any order that is just and equitable.

- 30 Section 93 does not, itself, expressly state the test that is to be applied in determining the validity of a presidential election. This test is to be found in two places: the constitutional right to free and fair elections and section 177 of the Electoral Act.

The constitutional test for invalidation: free and fair elections

- 31 *In Tsvangirai v Mugabe*, this Court explained the connection between section 93 and the right to free and fair elections:

"The investigation by the Court in terms of s 93(3) of the Constitution to establish the truth of what happened in the election and the giving of a final and binding decision on the validity or invalidity of the election is a protection of the right of every Zimbabwean citizen to a free, fair and credible election of a President."

- 32 This Court proceeded to hold that the right to free and fair elections therefore informs the content of section 93 of the Constitution.

"Section 93 of the Constitution must be considered as one whole and all other provisions which have a bearing on its true meaning must be brought into view and considered so as to enforce the spirit and underlying values of the Constitution."

- 33 In that light, this Court went on to hold that the test for invalidating a presidential election under section 93(3) involves two components:

"The meaning of s 93(3) of the Constitution is that the Court must [first] inquire into and establish whether the alleged acts of corrupt practices, irregularities or acts, on which the validity of the election is impugned, happened. If acts are found to have happened, the Court

must inquire into the question whether they materially affected the validity of the election.”

34 Notably, this Court did not require proof that an irregularity materially affected the result of the election. That would involve speculation.

35 Instead, this Court required proof that an irregularity "*materially affected the validity of the election*". Validity is a legal question which must be answered in light of the Constitution.

36 The validity of a presidential elections therefore must be determined by asking whether an irregularity breached the constitutional right to a free and fair election. Where the election process was unfree and unfair, the elections fall to be invalidated under section 93.

37 An unfree and unfair election stands to be invalidated even if it could not be said that the result would have been different, but for the irregularity. It is a process-based test, not a results-based test. As the European Court of Human Rights held in *Aliyev v Azerbaijan*:¹⁸

“The applicant was entitled . . . to stand for election in fair and democratic conditions, regardless of whether ultimately he won or lost.”

38 This test is consistent with the approach adopted by courts in other African countries which, like Zimbabwe, have a constitutionally entrenched right to free and fair elections.

¹⁸ *Case of Namat Aliyev v Azerbaijan* (Application no 18705/06) at para 75.

39 In Kenya, the Constitutional Court recently adopted this test in ***Odinga v IEBC***.¹⁹

There the Court invalidated the presidential elections due to irregularities in the election process, which included the failure to verify election results against individual polling station returns. The Court held that these irregularities rendered the election unfree and unfair, even though it could not be conclusively determined that the results would have been different.

40 The Court articulated the test for invalidation as follows:

*"[A]n election must be one that meets the constitutional standards. An election such as the one at hand, has to be one that is both quantitatively and qualitatively in accordance with the Constitution. It is one where the winner of the presidential contest obtains —more than half of all the votes cast in the election; and at least twenty-five per cent of the votes cast in each of more than half of the counties as stipulated in Article 138(4) of the Constitution. In addition, the election which gives rise to this result must be held in accordance with the principles of a free and fair elections, which are by secret ballot; free from intimidation; improper influence, or corruption; and administered by an independent body in an impartial, neutral, efficient, accurate and accountable manner as stipulated in Article 81."*²⁰

41 The Kenyan Constitutional Court stressed that an obsessive focus on results rather than the constitutionality of the election process was mistaken:

*"[E]lections are not only about numbers as many, surprisingly even prominent lawyers, would like the country to believe. Even in numbers, we used to be told in school that to arrive at a mathematical solution, there is always a computational path one has to take, as proof that the process indeed gives rise to the stated solution. Elections are not events but processes."*²¹

¹⁹ *Odinga and Others v Independent Electoral and Boundaries Commission and Others*, Presidential Petition No 1 of 2017 (20 September 2017) ("Odinga v IEBC").

²⁰ *Odinga v IEBC* at para 212.

²¹ *Odinga v IEBC* at para 224.

42 In doing so, the Kenyan Constitutional Court emphasised that an election that is unfree and unfair cannot be said to be a true expression of the will of the people. It quoted the following passage with approval from the Indian Court of Appeal:

"[W]hile it is important to respect a popular verdict and the courts ought to be slow in upsetting the same, it is equally important to maintain the purity of the election process.

*An election which is vitiated by reason of corrupt practices, illegalities and irregularities.....cannot obviously be recognized and respected as the decision of the majority of the electorate."*²²

43 Similarly, in South Africa, the Constitutional Court has held that the constitutionally mandated test is whether an election was free and fair.

44 In ***Kham v IEC***, the Court noted that the impact of irregularities on results was not determinative, as such an assessment "*involves speculation*"²³ and it is "*always difficult to predict what would have occurred had those electoral irregularities been absent.*"²⁴

45 The Court contrasted its approach with those jurisdictions that favour a results-based test. Ultimately the Court held that a test based on the right to free and fair elections was most consistent with the scheme of the South African Constitution:

"In many countries, where elections are conducted on a constituency basis the only ground for setting aside an election is proof that the exclusion of votes tainted by irregularity would mean that the result of the election could have been different. That was the basis upon which electoral petitions were disposed of under the pre-democratic dispensation, drawing upon precedents in electoral law from England. The Court's sole task was to determine whether the irregularities would have affected the result of the election. In doing so it would examine

²² *Odinga v IEBC* at para 398, citing *Ponnala Lakshmaiah v. Kommuri Pratap Reddy & Others*, Civil Appeal No. 4993 of 2012 arising out of S.L.P. (C) No. 20013 of 2010.

²³ *Kham v IEC* at para 88.

²⁴ *Kham v IEC* at para 100.

and rule on disputed votes and then re-count the votes to see whether the outcome would have been any different. It is the basis for what is referred to in Canada as the “magic number” test, that being the number of irregular votes that a claimant must prove were admitted in order to have the result of an election set aside. But in South Africa that cannot be the sole determinant of just and equitable relief, where the elections conducted by the IEC were not free and fair and the constitutional right to participate in and contest those elections was infringed. In any event it is always difficult to predict what would have occurred had those electoral irregularities been absent.” (Emphasis added)

- 46 The Kenyan and South African tests resonate with Zimbabwe’s Constitution. All three countries have Constitutions that contain a right to free and fair elections that is framed in substantially similar terms. Zimbabwe would be out of step with its peers were it to adopt a different test.

The statutory test for invalidation: section 177 of the Electoral Act

- 47 The constitutional test guides the interpretation of section 177 of the Electoral Act, which also stipulates a test for the invalidation of elections.²⁵

- 48 Section 177 provides:

*“177. When non-compliance with this Act invalidates election
An election shall be set aside by the Electoral Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the Electoral Court that—
(a) the election was not conducted in accordance with the principles laid down in this Act; and
(b) such mistake or non-compliance did affect the result of the election.”*

²⁵ Section 46(2) of the Constitution mandates that the interpretation of all legislation must “be guided by the spirit and objectives” of the Declaration of Rights.

- 49 There are two limbs to the section 177 test, divided by an “and”:
- 50 Sub-section (a) addresses irregularities that result in non-compliance with the principles laid down in the Act, which would include the principle of free and fair elections under section 3.
- 51 Sub-section (b) addresses irregularities that may affect the result of the election, even if the election is otherwise in accordance with the principles underpinning the Act.
- 52 While “*and*” is generally used in a conjunctive sense and “*or*” is used in a disjunctive sense, it is trite that these words can also have the opposite meaning where there are good grounds. This is affirmed by a long line of cases, dating back more than a century.²⁶
- 53 Properly interpreted, the “and” between sub-paragraphs (a) and (b) of section 177 does not mean that both limbs must be satisfied in order to invalidate an election. Instead, these sub-paragraphs must be read disjunctively, as separate grounds for invalidation.
- 54 That interpretative approach was adopted by Lord Denning in the famous English Court of Appeals judgment in ***Morgan v Simpson***.²⁷

²⁶ See Gubbay J in *S v Ncube* 1987 (2) ZLR 246 (S) at 265, citing *Colonial Treasurer v Eastern Collieries Ltd* 1904 TS 716 at 719; *Barlin v Licencing Court for the Cape* 1924 AD 472 at 478. *Hayward, Young and Co (Pty) Ltd v Port Elizabeth Municipality* 1965 (2) SA 825 (AD) at 829B; *Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board* 1982 (4) SA 427 (AD) at 444C-D;

²⁷ *Morgan v Simpson* [1974] 3 All ER 722.

55 The Court of Appeals was asked to interpret section 37 of the Representation of People Act (1949), a provision cast in substantially similar terms to section 177 of the Electoral Act. That provision provided

*“No local Government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the elections or otherwise of the local election rules if it appears to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections **and** that the act or omission did not affect the result.” (Emphasis added)*

56 Lord Denning and Lord Stephenson held that despite the word “and”, the two parts of this test had to be applied disjunctively. Lord Denning distilled the following principles:

“1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected.

2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or mistake at the polls-provided that the breach or mistake did not affect the result of the election.”

57 Similarly, in Uganda, in **Besigye v Attorney-General**,²⁸ the concurring judgment of Justice Ekirikubinza held that despite the use of the word “and” in a similar electoral provision, the requirements had to be interpreted disjunctively. Justice Ekirikubinza held as follows:

"Annulling of Presidential election results is a case by case analysis of the evidence adduced before the Court. Although validity is not equivalent to perfection, if there is evidence of such substantial departure from constitutional imperatives that the process could be said to have been devoid of merit and rightly be described as a spurious imitation of what elections should be, the court should annul the outcome. The Courts in exercise of judicial independence and

²⁸ Col DR Kizza Besigye v. Attorney General Constitutional Petition Number 13 of 2009.

discretion are at liberty to annul the outcome of a sham election, for such is not in fact an election."

- 58 In the Zimbabwean context, there even is stronger reason to interpret section 177 disjunctively: this interpretation is necessary to give effect to constitutional right to free and fair elections.
- 59 A conjunctive reading of section 177, as a combined requirement, would mean that virtually no presidential election could be overturned, no matter how much of a sham it may be.
- 60 The burden of proving that an election result would have been different, but for the irregularities, would generally involve an impossible degree of speculation. Even if it were capable of proof, the tight deadline for launching and deciding an election petitions means that most petitioners would not be able to gather the complex evidence and statistical analysis in time. In most cases, that evidence would be in the hands of the ZEC, which could easily stymie a successful petition by refusing to release the required information in time.
- 61 Therefore, a conjunctive test would require this Court to uphold presidential elections as being valid, despite clear evidence that the elections were in violation of the constitutional right to free and fair elections.
- 62 Such an interpretation would not only compromise this right, but it would also be inconsistent with the courts' constitutional mandate to "*be paramount in safeguarding human rights and freedoms and the rule of law.*"²⁹

²⁹ Constitution, section 165(1)(c).

63 In *Odinga v IEBC*, the Kenyan Constitutional Court treated the right to free and fair elections as being decisive in interpreting a similar statutory test under the Kenyan Elections Act.

64 Section 83 of the Kenyan Elections Act provides that:

"No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election."

65 The Kenyan Court was swayed by the constitutionally entrenched right to free and fair elections and the principles of democracy and openness that underpin the Kenyan Constitution. It held that a disjunctive reading would better promote those rights and principles.³⁰

66 On that basis, the Kenyan Court concluded that the provision had to be read as follows:

"[T]he two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election."³¹

³⁰ *Odinga v IEBC* paras 196 - 201)

³¹ *Odinga v IEBC* at para 211.

Summary of key principles

67 In light of the above, a presidential election may be invalidated under section 93 of the Constitution, read with section 177(a) of the Electoral Act, if two conditions are satisfied:

68 There was an irregularity, involving a mistake or non-compliance with the law; and

69 The irregularity materially affected the validity of the election, meaning that it deprived citizens of a free and fair election.

- i. This test does not require, in all cases, that a petitioner must prove:
- ii. That the irregularity changed the result of the elections (although that may provide a separate ground for invalidity under section 177(b) of the Electoral Act);
- iii. That the irregularity was deliberate or mala fide;
- iv. That the petitioner would have won the election if the irregularity had not occurred.

70 Mr Mnangagwa and the ZEC are therefore mistaken in claiming that the presidential election could only be invalidated if the results would have been different. Their interpretation fails to give proper effect to the right to free and fair elections.

71 In any event, we submit that the irregularities in the 2018 presidential elections are so glaring that the elections fall to be invalidated irrespective of which test is applied. We now turn to address these irregularities.

IRREGULARITIES IN THE VOTING RESULTS

72 Numbers do not lie. At a minimum, free and fair elections should be supported by election results that make numerical sense. Discrepancies in election numbers are a sure symptom of elections that are not free and not fair. They are also a sure sign of a failure of the right to free and fair elections and the foundational principle of one-person, one-vote.

73 These election results are no different. A catalogue of inexplicable discrepancies show that this was not a free and fair election.

74 I elaborate each in turn, but first provide a snapshot of these irregularities and discrepancies. Mnangagwa fell far short of the 50%+1 votes required to avoid a run-off. That means, on the ZEC's published results, Mnangagwa avoided a run-off by a mere **31,830** votes.

- i. The **ZEC admits** it did not verify or otherwise check the Excel spreadsheet that it used to capture, store and calculate the election results generated by more than 10,900 individual polling stations. Its own experts readily confirm that this spreadsheet was riddled with errors.
- ii. At least **7,730** of these votes must be excluded due to double-counting of polling stations. The **ZEC admits** this discrepancy.

- ii. There is a discrepancy of **8,944** votes between the official election results announced by the ZEC on live television on 3 August 2018 and the results that were subsequently published by the ZEC.³² The ZEC **does not deny** this discrepancy.³³ Its own experts confirm it.
- iii. A further **9,592** votes for Mnangagwa at “ghost polling stations” also fall to be disregarded. The **ZEC does not raise a genuine dispute of fact** on this score.
- iv. At least **10,343** votes for Mr Mnangagwa must also be excluded as they do not correlate with the sample of V11 forms. The V11 forms are in the ZEC’s control. It has refused to release them for public scrutiny. In light of the ZEC’s refusal to do so, the **ZEC does not raise a genuine dispute of fact** on this score.
- v. A further **40,717** votes are invalid in view of the disparity between the number of votes cast in the presidential and parliamentary elections. The **matter is squarely governed by law**.
- vi. Based on a sample of V11 and V23a forms, The ZEC’s published results inflated Mnangagwa’s total votes by at least **10,343 votes**. In light of the ZEC’s obstructive attitude to releasing these forms, the **ZEC does not raise a genuine dispute of fact** on this score.
- vii. The number of votes cast in the presidential election does not square with the voter turnout claimed by the ZEC. The ZEC does not adequately

³² See Annexure D, Record p 138.

³³ ZEC answering affidavit; para 46.1.

explain a discrepancy of **70,000** votes, meaning the ZEC **does not raise a genuine dispute of fact.**

The ZEC's admitted failure to verify the election results and its calculation source documents

- 75 The ZEC admits that it never verified the final Excel database against V11 and V23 forms.³⁴ The ZEC also makes no attempt to show that any other checks were done to ensure the accuracy of the data stored on its final Excel spreadsheet before announcing the election results. It admits these complete failures of verification despite now admitting to a number of glaring errors in its final spreadsheet.
- 76 The ZEC was under a duty to verify the results it captured on its Excel spreadsheet. It admits that it used the spreadsheet as a “tool for addition of totals.”³⁵ Despite admitting it used the spreadsheet for that critical purpose, the ZEC then claims that it was under no duty to verify the accuracy of the spreadsheet.³⁶
77. ZEC tries to base this argument on section 10(3)(d) of the Election Act, which imposes a duty to verify V11 forms. While it's correct that section 10(3)(d) is silent on verifying Excel spreadsheets and data storage, the ZEC has an overriding constitutional duty to ensure that voting is "accurate, verifiable, secure and transparent" and that there are "appropriate systems and mechanisms in place

³⁴ ZEC answering affidavit; para 34.6.

³⁵ ZEC answering affidavit; para 40.3.

³⁶ ZEC answering affidavit; paras 34.6 and 40.3

... to eliminate ... electoral malpractices". At any rate, ZEC had no business dealing with v11's at the National Command Centre.

78 It follows then that the Excel spreadsheet, which collates and calculates the data, must be subjected to stringent checks to ensure that it accurately reflects the votes and has not been tampered with between the time of inputting data and the time of announcing results.

79 Yet the ZEC admits that it did not checks of the data contained in the final Excel spreadsheet and it does not offer any meaningful response to the claim that "*Excel [spreadsheets are] the most insecure document that that can deployed in elections. Its contents can be so easily manipulated and changed by the person making the entries or at a later time once the entries are made.*"³⁷

80 Alone, the ZEC's admitted failure to verify its Excel spreadsheet—its primary calculation tool for the election—is a fundamental flaw.

81 The proper calculation and verification of election results is essential to the right to a free and fair election. As the Kenyan Constitutional Court put it "*the numbers must just add up.*"³⁸

Failures to disclose V11 and V23 forms and disputes of fact

³⁷ Founding affidavit; p 31, para 6.2.3.

³⁸ Odinga v IECB at para 296.

82 Before examining these discrepancies in more detail, we note that Mnangagwa's and the ZEC's answering affidavits repeatedly emphasise the importance of V11 and V23 forms to a numerical assessment of the election results.³⁹ Given that acknowledgment, the ZEC's obstructive stance towards disclosing the V11 and V23 forms is particularly unfortunate.

83 The ZEC is the constitutional and statutory custodian of elections. It is an organ of state with heightened constitutional duties of candour and disclosure. Despite these duties, the ZEC still refuses to make the V11 forms publicly available. The MDC outlines in detail its attempts to obtain original V11 and V23 forms. They are not publicly available. The ZEC has refused to make them publicly available, and has still not explained its obstructive attitude towards public disclosure. The ZEC admits it has the original forms; there is no reason why they should not be made available to the public.

84 The ZEC also badly denies many of the MDC's allegations about discrepancies in the election results. These are canvassed in full below. For now, I point out that the ZEC's bald denials and evasive responses are particularly inappropriate for an organ of state with specific knowledge about the facts and the allegations made by the MDC.

85 None of the ZEC's denials establish a real dispute of fact under the *Plascon-Evans* test,⁴⁰ as endorsed by Zimbabwean courts.⁴¹

³⁹ See, for example, Mnangagwa answering affidavit; p 24, para 45; p 42, para 109; p 52, para 40. ZEC's answering affidavit; para 27.

⁴⁰ *Plascon -Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634H – 635B.

⁴¹ *Savanhu v Marere NO & Ors* 2009 (1) ZLR 320 (S) at 324D-E.

- 86 The courts have endorsed a robust approach to disputes of fact, in which bald and uncreditworthy denials stand to be rejected.⁴²
- 87 On this approach, “*if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers*”.⁴³
- 88 In addition to these bald denials, the ZEC has also failed to take this court into their confidence by disclosing facts that are within its knowledge. It is well established that where a party has knowledge of a fact or access to the information, a mere denial does not suffice. That party is obliged to set out their facts and the supporting information to trigger a real dispute of fact.⁴⁴
- 89 Moreover, the ZEC’s reticence is also in breach of its special duties of candour and transparency that are imposed on organs of state in constitutional litigation:
- 90 In terms of section 164(2)(b) of the Constitution, organs of state, such as the ZEC, have a duty to ensure the effectiveness of the courts, which requires heightened duties of candour in matters of such great importance.

⁴² *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (S) at 339 ; *Francis R Fernandes & Sons v Mudzingwa & Ors* 2014 (1) ZLR 29 (H) at 33 (“ it is not enough for a respondent just to make bare denials in the hope of creating a dispute of fact. He must produce *positive* evidence to the contrary.”)

⁴³ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 26.

⁴⁴ *Wightman t/a JW Construction v Headfour (Pty) Ltd* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at para 13.

91 This is supported by this Court's judgment in *Tsvangirai v Mugabe*, where this Court held that it requires "full knowledge of the facts" in order to make a final and binding determination in a presidential petition.

"Considering that the Court, which is the final court in the land, has been given original and exclusive jurisdiction on all matters relating to an inquiry into the validity of an election of a President brought to it by means of a petition or application, it makes sense to require it to acquire full knowledge of the facts before making a final and binding decision on the validity or invalidity of the election of a President.

92 The ZEC also has explicit constitutional duties to ensure that the election process is transparent, which requires it to disclose to this Court the material facts required to assess whether the elections are free and fair.

93 In **Kalil NO v Mangaung Metropolitan Municipality 2014 (5) SA 123 (SCA) para 30**, the South African Supreme Court of Appeal dealt with the special duties of organs of state in litigation:

"The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance." (Emphasis added)

94 The ZEC's silences and bald denials fall far short of these duties.

95 Bald denials and incomplete versions aside, even on the limited information in the public domain, there are clear irregularities and discrepancies in the election results. These irregularities can be grouped into two categories:

Irregularities that appear from the ZEC's own published voting results;

Irregularities that are revealed by comparing the ZEC's published results with the results of individual polling stations and constituencies, captured in the V11 and V23a forms.

Irregularities in the ZEC's own results

96 The ZEC tallied the election results using Excel spreadsheets, which is subsequently published on its website. Even a cursory examination of the spreadsheets reveals no less than seven significant discrepancies that indicate deliberate manipulation of results.

97 Recall that according to the ZEC's published results, Mnangagwa avoided a run-off by a mere **31,830** votes. The ZEC does not seriously dispute this figure, and so it should be taken as undisputed.⁴⁵

Discrepancy one: Difference between announced results and published results

98 The official results announced by the ZEC on live television on 3 August 2018 differ markedly from the result that were subsequently published by the ZEC.⁴⁶

99 The ZEC's published results show that Mnangagwa had **4,904** votes less than the announced results and Chamisa's tally deflated. In addition, the ZEC's published results also claimed that there was a greater number of valid votes

⁴⁵ Founding affidavit; p 32, para 64. ZEC affidavit; para 44.

⁴⁶ See Annexure D, Record p 138.

cast, which would have further reduced Mnangagwa's percentage of the vote.

The differences in Mnangagwa's results are reflected in the following table:

	Valid votes cast	Mnangagwa's votes	% of votes	Votes over 50%+1 threshold
ZEC TV results	4,846,312	2,460,463	50.7698%	37,306
ZEC published results	4,847,457	2,455,559	50.6566%	31,830
DIFFERENCE	+1,145	-4,904	-0.1132	-5476.5

100 The ZEC **does not deny** this discrepancy.⁴⁷ Instead, it adopts a makes-no-difference approach, arguing that the discrepancy “does not affect the outcome of the election”.⁴⁸ As discussed above, that is not the sole test. A discrepancy of over 4,000 votes—based on the ZEC's own data—undermines the legitimacy and credibility of the election process and is not in keeping with a free and fair election. The discrepancy becomes bigger when one factors in applicant's votes which had been deflated. The maths yields the sum of 8,934.

Discrepancy two: Double-counting of polling stations

101 The ZEC's results also demonstrate that several polling stations were double-counted in computing the results. The MDC provides expert evidence to support this.⁴⁹ As a result of the double-counting of these polling stations, Mnangagwa secured an additional **7,703** votes.

⁴⁷ ZEC answering affidavit; para 46.1.

⁴⁸ ZEC answering affidavit; para 46.1.

⁴⁹ Record pp 49 – 50.

102 The ZEC **admits** this discrepancy.⁵⁰ Its own expert largely confirms the instances of double-counting.⁵¹ The ZEC euphemistically describes double-counting as a “data capture error”.⁵² But elections are all about capturing data: that, after all, is how votes are tallied. Given Mnangagwa’s narrow margin above 50% of votes, these vote-tallying errors do affect the outcome of the election. They should not be dismissed as mere arithmetic mistakes. Rather, they represent a failure to facilitate a free and fair election based on the principle of one-person, one-vote.

Discrepancy three: Polling stations with identical results

103 The ZEC’s published results show duplicated results for at least 28 pairs of polling stations (56 polling stations in total).⁵³

104 Of these polling stations, 8 pairs of polling stations (16 stations in total) registered identical results across all 23 candidates in the presidential elections, including the identical number of spoiled ballots.

105 The applicant’s expert, Dr Ouko, confirms that this type of duplication of voting results is statistically “near-to-impossible” and provides clear evidence of “tampering” by the ZEC to achieve the desired result.⁵⁴

⁵⁰ ZEC answering affidavit; para 57.

⁵¹ Statistical Analysis Report, para 1.6.4.

⁵² ZEC answering affidavit; para 57.

⁵³ Founding affidavit; annexure “N”, p 169.

⁵⁴ Record p 50.

- 106 Polling stations with identical results accounted for a total of 16,199 votes, which gave Mnanagwa an additional **9,592** votes.
- 107 The ZEC does **not deny** this discrepancy. Its only response is to refer to its own data that confirms several polling stations returned identical results.⁵⁵ The applicant's expert evidence applies all the same: this type of duplication of voting results is statistically "near-to-impossible".⁵⁶

Discrepancy four: "Ghost" polling stations

- 108 The applicant's affidavit canvasses evidence of "ghost polling stations"—polling stations that did not appear on any published list of polling stations before the election.
- 109 Two examples of these ghost polling stations appear as 1HRDC and 4HRDC at Annexure M to the founding affidavit.⁵⁷ These two polling stations alone accounted for a further **5,396** in favour of Manangagwa.
- 110 The ZEC's explanation is that these are not polling stations but voting wards. But the ZEC does not explain whether the 5,396 votes for Mnanagwa recorded at those wards (or stations, whichever they may be) are legitimate votes. In the face of the applicant's specific allegation that they are illegitimate, the ZEC's failure to fully explain this fact means there is no legitimate dispute of fact on

⁵⁵ ZEC answering affidavit; para 60.1.

⁵⁶ Record p 50.

⁵⁷ Record pp 164 – 166.

this score. These 'ghost' votes should be accepted as illegitimate and disregarded.

Discrepancy five: More votes than registered voters at polling stations

111 Section 20 of the Act requires the ZEC to keep and maintain a voters' roll for each polling station "containing the names of all registered voters who may vote in that area." Under section 56 of the Act, a voter "shall not be entitled to vote otherwise than at a polling station located in a ward for which he or she is registered as a voter on the ward's voters roll."

112 Taken together, these statutory provisions mean that the number of votes cast at a polling station cannot exceed the number of voters registered to vote at that station. In other words, there cannot be more votes than registered voters.

113 That is exactly what the ZEC's own data shows: there were more votes cast than there were voters registered at those polling stations.⁵⁸ Some of the more glaring examples include:

- i. The Dalny 1 Primary School polling station in the Chakari constituency: only 667 voters registered to vote, but 2800 votes were cast (meaning that there were **2,133 more votes than registered voters**).
- ii. The Copley Primary School polling station in the Mazowe West constituency: only 661 voters registered to vote, but 1875 votes were cast (meaning that there were **1,214 more votes than registered voters**).

⁵⁸ Record pp 152 – 154.

- iii. The Chinhoyi Primary School polling station in the Chinhoyi constituency: only 190 voters registered to vote, but 1366 votes were cast (meaning that there were **1,176 more votes than registered voters**).
 - iv. The St Bernards Nyatsambo Primary School polling station in the Mhondoro-Ngezi constituency: only 766 voters registered to vote, but 1855 votes were cast (meaning that there were **1,089 more votes than registered voters**).
 - v. There are many more.⁵⁹ In total, the number of excess votes from all of these polling stations—that is, the total number of votes that exceeded the total number of voters registered at these polling stations—is **31,204 votes**.
- 114 In response, the ZEC claims that the applicant's data is false and that "[t]here are no polling stations where more people voted than appear on the voters' roll for that polling station."⁶⁰ The ZEC attempts to support this version with reference to V11 forms from each polling station—the same V11 forms that it withheld from public scrutiny. This however, is false. ZEC admits that this occurred at Belvedere. It admits that this similarly occurred in Norton and there is video confirmation of that fact. Its protestations are self serving.
- 115 The ZEC's only response to these allegations is a bald denial.⁶¹

⁵⁹ Record pp 152 – 154.

⁶⁰ ZEC answering affidavit, para 49.

⁶¹ ZEC answering affidavit; para 49.2.

Discrepancy six: More votes in the Presidential elections than in the Parliamentary elections

116 According to the applicant's founding affidavit, at each polling station, each voter was given three ballot forms: one for the presidential elections, and two for the parliamentary elections (one for the Senate, and one for the House of Assembly).

117 Because each voter was given three forms, and because each voter had to place each form in its corresponding ballot box, the number of votes cast for the presidential election should equal the number of votes cast for the parliamentary election (that is, the number of votes cast for the presidential election should be the same as the number of votes cast for the Senate election, which should also be the same as the number of votes cast for the House of Assembly election).

118 The law is clear on what should happen if a voter rejects one or more of the ballot papers. Section 56(3a) of the Electoral Act provides as follows;

"If polling in two or more elections is being conducted simultaneously at the polling station and an applicant declines to accept a ballot paper for any one or more of those elections, the presiding officer shall not hand the applicant a ballot paper for that election and shall record in such manner as may be prescribed or directed by the commission that the applicant did not, at his or her request, receive the ballot paper"

119 ZEC had through its Handbook directed thus:

“If a voter declines to accept a ballot paper for anyone or more of the Elections, this must be brought to the attention of the Presiding Officer. The Presiding Officer shall not hand the applicant a ballot paper for that election and shall record the details on this person on form PE2005/AA [Electoral Act Section 56(3a)]”

- 120 For many polling stations, based on the ZEC’s own results, the number of votes cast for the presidential election exceeded the number of votes cast for each parliamentary election.⁶² ZEC has however, not produced returns on form PE2005/AA showing that those voters declined to participate in parliamentary elections. It seeks to rely instead on speculation.
- 121 Expert evidence concludes that “the total number of the National Assembly votes was 4,734,161 against a total of 4,774,878 for the Presidential election.”⁶³ Expert evidence concludes that there were, inexplicably, more than **40,717 more votes** in the presidential election than the parliamentary election.⁶⁴ This figure is not disputed by ZEC.
- 122 ZEC does not explain the discrepancy between voter turnout percentages in the presidential and parliamentary elections. Even if the ZEC were correct that voters did not have to accept all three ballot forms, and even if no record had to be made when a voter refused a ballot paper, the voter turnout figures should be the same for both elections. A voter is marked as having voted for purposes

⁶² Record pp 139 – 142.

⁶³ Record p 45.

⁶⁴ Record 45.

of calculating voter turnout regardless of how many elections he or she votes in.

123 The voter turnout figures do not match. The applicant's expert confirms that voter turnout for the presidential election was higher than the parliamentary election.⁶⁵ The ZEC does not explain this discrepancy.

Discrepancy seven: The ZEC's results do not tally

124 There are even discrepancies between the data published on the ZEC's website and the official election results declared by the ZEC. That is, even on the ZEC's own voter data, the official results are unsupported by the voting numbers.

125 There are two main discrepancies in the ZEC's own data: first, the total votes for each candidate do not total with the valid votes cast; and second, the voter turnout figures announced by the ZEC do not tally with the number of votes announced.

126 As for the second, based on the ZEC's answering affidavit:⁶⁶

- i. The total voter population was 5,695,936;
- ii. The final voter turnout for the presidential election was 85.1%;
- iii. The ZEC's data shows that the total valid votes cast in the presidential election was 4,774,878.

⁶⁵ Record 46.

⁶⁶ ZEC answering affidavit; para 45.

- iv. The number of votes cast in the presidential election does not square with the voter turnout claimed by the ZEC. If we apply the voter turnout to the voter population (85.1% of 5,695,936), we get 4,847,233. Yet the total valid votes announced by the ZEC is lower, at 4,774,878. The ZEC suggests an explanation: that the former includes invalid votes. But the ZEC does not fully explain how this discrepancy of more than **70,000** votes arises.

Discrepancies between the ZEC's results and the V11 and V23a forms

- 127 The V11 and V23a forms are meant to provide a transparent and reliable means of checking the final election results published by the ZEC. V11 forms reflect the results at each individual polling station while V23a forms reflect the combined tally of results at all polling stations in a particular constituency. The results reflected in these forms should then tally with the overall results announced by the ZEC.
- 128 The ZEC has failed to make the full set of V11s and V23s publicly available. Nevertheless, the applicant has succeeded in securing a sample of original V11 and V23a forms from across the country. A comparison between these forms and the ZEC's published results highlights extensive discrepancies.
- 129 The applicant's affidavit and the expert affidavit of Dr Nyandoro provide an analysis of a small sample of some 1200 V11 forms.⁶⁷ This comparison reveals V11s that:

⁶⁷ Record; pp 143-150.

- i. The ZEC's published results inflated Mnangagwa's total votes by at least **10,343 votes**,⁶⁸
- ii. More than 19 722 votes for the applicant were entirely disregarded in the ZEC's election results.⁶⁹
- iii. The ZEC does not genuinely dispute this discrepancy.⁷⁰ Moreover, the ZEC has steadfastly refused to release the V11s for public scrutiny. It offers no explanation for this failure.

Summary of the evidence

130 These discrepancies provide clear evidence of systematic manipulation of the voting results. The results are not a fair or accurate reflection of the votes cast. On this basis alone the presidential elections must be set aside.

131 It is clear that Mnangagwa fell far short of the 50%+1 votes required to avoid a run-off. On the ZEC's published results, Mr Mnangagwa avoided a run-off by a mere **31,830** votes. However, the evidence presented above shows that:

- i. At least **7,730** of these votes must be excluded due to double-counting of polling stations;
- ii. A further **8,944** has been removed from the tally by ZEC.

⁶⁸ Annexure F1, pp 143 – 146.

⁶⁹ Annexure F2, pp 147 – 150.

⁷⁰ ZEC answering affidavit; para 48.

- iii. A further **9 592** votes for Mnangagwa at “ghost polling stations” also fall to be disregarded.
- iv. At least **10,343** votes for Mr Mnangagwa must also be excluded as they do not correlate with the sample of V11 forms. A full sample will likely reveal many more inflated results.
- v. No less than **31 204** votes are also invalid due to votes exceeding the number of registered voters at polling stations.
- vi. A further **40,717** votes are cast in doubt to the disparity between the number of votes cast in the presidential and parliamentary elections.

132 These are but a small sample of the discrepancies and irregularities. Even on this small sample, it is clear that the irregularities affected the outcome of the elections. At the very least, Mnangagwa would have faced a run-off if the results had been calculated correctly.

IRREGULARITIES IN THE ELECTION PROCESS

133 The ZEC's manipulation of the election results was not an isolated event. It occurred in the context of a political climate that was skewed in favour of the ruling ZANU-PF and the incumbent, Mr Mnangagwa.

134 In its preliminary report, the European Union Election Observation Mission (EU Observers) confirmed that there was no level playing field in the election campaign. The preliminary report noted that:

"[T]he misuse of state resources, instances of coercion and intimidation, partisan behaviour by traditional leaders and overt bias in state media, all in favour of the ruling party, meant that a truly level playing field was not achieved, which negatively impacted on the democratic character of the electoral environment."⁷¹

135 The International Republican Institute (IRI) and National Democratic Institute (NDI) Observation Mission noted similar irregularities. In doing so, it noted that any minor improvements over past elections were not sufficient to render these elections free and fair:

"If a solely relativistic approach is applied, simply acknowledging improvements over a history of deeply marred elections could suffice. However, relative improvements are not the same as meeting Zimbabwe's constitutional principles for democratic electoral participation.

...

Unfortunately, campaign freedom was significantly offset by: numerous incidents of distributing food and agricultural assistance in politically partisan manners that favored the ruling party (ZANU-PF) and other overt uses of state resources for electoral advantage; partisan activities by some traditional leaders in contravention of constitutional requirements for their political neutrality; and extreme bias in state media, including television and radio (which is the main

⁷¹ Supplementary bundle p 160.

source by which Zimbabweans get political news). As a consequence, the campaign playing field was unfairly balanced."⁷²

136 The founding papers have highlighted numerous respects in which the election campaign failed to ensure a level playing field. We highlight two examples.

Coercion, intimidation and the misuse of state resources

137 Coercion, intimidation and violence were widespread both before, during and after election day.⁷³ This is confirmed by a series of supporting affidavits deposed to by MDC members and supporters who were victims of this violence.⁷⁴ Many were forced to depose to affidavits from places of hiding.

138 State resources, including food aid and agricultural equipment, were used to induce voters to support Mr Mnangagwa and the ZANU-PF.⁷⁵ This is confirmed in a series of supporting affidavits deposed to by MDC members. For instance:

139 One member of the MDC relates the following:

"On the 24th of July 2018, lorries with agricultural inputs came and delivered seed and fertilizers at the points marked as polling stations. On the 26th of July, the District Administrator moved around calling all headmen and village heads and all villagers. We went to Zhomba Primary school where we were gathered together into groups and shown the seed and fertilizers but were told that it would only be distributed after the elections and depending on how we had voted."⁷⁶

140 Another MDC member describes the following incident:

⁷² Supplementary Bundle pp 295 – 296.

⁷³ FA pp 25 - 26, para 4.5.34-35.

⁷⁴ See Supporting Bundle pp 1 - 33, Items 1 - 17.

⁷⁵ FA 4.5.36 - 39, p 26.

⁷⁶ Supporting Bundle p 6.

“[T]he day before elections and on the day of elections, trucks carrying foodstuffs and agricultural inputs moved around delivering to villagers. These trucks were branded COITCO and came from the COITCO depots. One ZANMU PF official called Isheunesu Hove and a politburo member called Chiherere would move around gathering villagers and threatening them with death.

We were told that COTTCO would not buy cotton from anyone who had voted MDC and we would not get any inputs come the rainy season. Cottco workers would move around with ZANU PF leaders and recorded everyone's names.”⁷⁷

141 In response, Mr Mnangagwa denies any violence, intimidation, or abuse of state resources.⁷⁸ He further claims that “every report by all the observer missions ... confirmed that the pre-election and election time had been characterised by a peaceful atmosphere”.⁷⁹ The EU Observers said precisely the opposite:

“Observers widely reported on efforts to undermine the free expression of the will of electors, through inducements, pressure and coercion against prospective voters to try to ensure a vote in favour of the ruling party. Such practices also included direct threats of violence, pressure on people to attend rallies, partisan actions by traditional leaders, collection of voter registration slips and other measures to undermine confidence in the secrecy of the vote, manipulation of food aid and agricultural programmes and other misuses of state resources.”⁸⁰

142 These circumstances were in clear breach of the Electoral Act. Section 134(1) of the Electoral Act expressly prohibits any person from making use of threats or threatening any “*injury, damage, harm or loss*” in relation to the election process.

143 Section 136(1)(c) of the Electoral Act further makes it an offence for any person who, directly or indirectly, by himself or herself or by any other person makes

⁷⁷ Supporting Bundle, pp 17.

⁷⁸ Mnangagwa AA para p 41 para 105 – 107.

⁷⁹ Mnangagwa AA p 41 para 106.

⁸⁰ EU Observers’ Preliminary Report, Supplementary Bundle p 161.

“any gift” to any person in order “to induce such person to procure the return of a candidate in the election or the vote of a voter at an election”.

144 Such violations are fundamentally inconsistent with the right to free and fair elections.

Bias in the state-owned media

145 It can hardly be disputed that the state-owned media holds a dominant position in Zimbabwe. There are no other television stations in the country apart from the ZBC. In addition, a large proportion of the electorate in rural areas receive their information from the ZBC radio. The largest newspapers are also state-owned.⁸¹

146 In the build-up to the election, the state-owned media was heavily skewed in favour of the ZANU-PF and Mr Mnangagwa.⁸²

147 Mr Mnangagwa again denies these claims.⁸³ However, his denials are contradicted by the very same international observer reports that he attaches to his papers in his defence. The African Union Observers’ preliminary report, attached to Mr Mnangagwa’s papers as Annexure N, reported as follows:

“Although the AUEOM has recommended in the past for measures to be undertaken to guarantee equal access to the State Broadcaster to all contestants during election period and for the full implementation of the Broadcasting Service Act to ensure balanced and pluralistic media, these recommendation were not implemented.”⁸⁴

⁸¹ FA p 20 paras 4.5.1 – 4.5.3.

⁸²

⁸³ Mnangagwa AA p 31 para 71.

⁸⁴ Mnangagwa AA, Annexure N, pp 179 – 180.

148 The AU preliminary report singled out the ZEC for particular criticism for failing to ensure balanced reporting:

“While the electoral law mandates ZEC to regulate the media during elections through the establishment of a Media Monitoring Committee, it has been unable to effectively operationalise this Committee, leading to a media environment that has operated without any systematic regulation in the 2018 election period. As a result of the foregoing, both private and state-owned media houses have exhibited a noticeable degree of polarisation characterised by biased reporting and inequitable coverage of political parties and candidates contesting the elections.”⁸⁵

149 The SADC Parliamentary Forum’s preliminary report, again attached to Mr Mnangagwa’s papers, also raised concerns over pro-ZANU-PF bias in the state media:

“The [SADC] Mission expresses its concern regarding the continued trend of bias by the public media towards the ruling party in its coverage of election as was observed during the 2013 elections. The SADC PF Mission, therefore, urges for ethical and balanced reporting during elections.”⁸⁶

150 The EU Observers put these concerns in stronger terms:

“Based on EU EOM monitoring, the state broadcaster, the Zimbabwe Broadcasting Corporation (ZBC), failed to abide by its legal obligation to ensure equitable and fair treatment to all political parties and candidates. State-owned TV, radio and newspapers, which dominate the media landscape, were heavily biased in favour of the ruling party and incumbent president in their election-related coverage. Media operated in a generally free environment during the campaign and freedom of expression was respected. The legal framework for media, while providing for fundamental rights, needs further improvement to bring it into line with the Constitution.”⁸⁷

151 For its part, the ZEC denies that it committed any breaches of the Electoral Act by failing to monitor the state-owned media. I

⁸⁵ Mnangagwa AA, Annexure N, pp 179 – 180.

⁸⁶ Mnangagwa AA, Annexure O, p 181.

⁸⁷ Supplementary Bundle, p 161.

t does not dispute that it took no proactive steps to address bias in the state-owned media, but it merely alleges that the applicant ought to have lodged an appeal with the Electoral Commission against objectionable media coverage.⁸⁸

152 This response ignores the duty imposed on the ZEC, under section 160K of the Electoral Act, to take proactive steps to monitor the media for compliance with the Act. As the AU Observers noted, the ZEC had failed in that duty.

153 Balanced and equitable media coverage of parties and their candidates is another key component of the right to free and fair elections. This is reflected in the SADC Principles and Guidelines which provide, at article 4.1.6, that states parties must “[p]romote necessary conditions to foster transparency, freedom of the media; access to information by all citizens; and equal opportunities for all candidates and political parties to use the state media”. The bias in the state media during the 2018 presidential election campaign clearly undermined these principles.

⁸⁸ ZEC AA para 7.3.

JUST AND APPROPRIATE REMEDY

154 The applicant has shown that the outcome of the election results as announced by the ZEC is not a true reflection of the will of the Zimbabwean people as expressed on election day. The applicant has provided this Court with evidence that there was systematic manipulation of the voting results. Moreover, this has been enabled by a political climate in the elections process which was heavily skewed in favour of the ruling ZANU-PF and the incumbent, Mr Mnangagwa.

154.1 This Court has stated that in these circumstances, when faced with a petition in terms of section 93 of the Constitution it is its “*unsought responsibility*” to provide “*an effective and urgent resolution of the dispute [this Court has] been forced to confront.*”⁸⁹

154.2 Section 93(4) of the Constitution empowers this Court to make any of the following orders in determining a petition or application under subsection 93(1) of the Constitution -

“[T]he Constitutional Court may-

- a. declare a winner;*
- b. invalidate the election, in which case a fresh election must be held within sixty days after the determination; or*
- c. make any other order it considers just and appropriate.”*⁹⁰

154.3 Furthermore, in terms of section 175(6) of the Constitution this Court may when deciding a constitutional matter within its jurisdiction —

⁸⁹ Tsvangirai v R G Mugabe & Others (CCZ 20/17, Constitutional Application No. CCZ 71/13) [2017] ZWCC 20 (20 August 2013) citing *Bush v Gore* 531 US 2000.

⁹⁰ Section 93(4) of the Constitution.

- a. declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency;
- b. make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order suspending conditionally or unconditionally the declaration of invalidity for any period to allow the competent authority to correct the defect.

154.4 The applicant submits that in granting relief, it is incumbent on this Court to not only provide an “effective and urgent resolution” of the dispute and but that the relief must also be fundamentally “just and appropriate” as provided for in section 93(4) of the Constitution. This is in addition to this Court’s general power under section 175(6) which empowers this Court to declare any conduct that is invalid inconsistent with the Constitution and to make any order that is “just and equitable.”

154.5 In this regard, the applicant respectfully submits that the following relief must as a matter of justice and equity follow from this application:

First: A declaration that the Presidential election of 2018 was not conducted in accordance with the law and was not free and fair.

Second: An order invalidating, declaring unlawful and of no force or effect the election results announced by the ZEC on 2 August 2018 which declared Mr Mnangagwa as the duly elected President of Zimbabwe.

Third: A declaration that Nelson Chamisa is declared the winner of the Presidential election.

Fourth: In the alternative to the third prayer, in terms of section 93(4)(b) an election to election to the office of the President will be held within sixty days.

A declaration that the elections were not free and fair

156 At the outset, the applicant seeks an order that “*the Presidential election of 2018 was not conducted in accordance with the law and was not free and fair.*”⁹¹ This declaration is necessary to vindicate the constitutional and statutory rights to a free and fair election which have been unjustifiably infringed. It is just and appropriate for this Court to grant this declaration to ensure that the ZEC and other implicated respondents are under no illusions as to the unlawful nature of their conduct, as a disciplining measure and to provide proper guidance for the conduct of future elections. The factual basis for this order is set out and discussed above.

157 In ***Movement for Democratic Change v The President of the Republic of Zimbabwe***⁹² (“MDC”) it was stated that the power to issue a declaratory order “*is not in dispute*”. It is one of the inherent powers of this Court as a Superior Court to make declaratory orders.

158 The considerations that have to be taken into account before issuing a declarator were discussed in the MDC case where the Court cited with approval the following six principle set out in ***Family Benefit Friendly Society v Commissioner for Inland Revenue and Another***⁹³ -

- i. Is the applicant an interested person;

⁹¹ FA para 1 p 217.

⁹² *Movement for Democratic Change v President of The Republic of Zimbabwe and Others* (HC 1291/05) [2007] ZWHHC 28 (08 MAY 2007)

⁹³1995 (4) SA 120 (T). The court found that the criteria set out by van Dijkhorst J merely expanded the two considerations that Sandura JP (as he then was) set out in *RK Footware Manufactures v Boka Booksales (Pvt) Ltd* 1986 (2) ZLR 209 (HC):

- ii. Is there a right or obligation in question;
- iii. Is the applicant approaching the court for what amounts to a legal opinion upon an abstract or academic matter;
- iv. Are there interested parties upon which the declaration will be binding;
and
- v. Whether considerations of public policy favour the issuance of the declarator.

159 While these principles are no doubt helpful, this Court must not lose sight of the nature of the Constitutional obligation in question in this application. The applicant therefore submits that in determining whether to make the declaratory order sought in this case the Court must consider all the relevant circumstances and the nature of the constitutional obligation.

160 A declaratory order is a powerful tool in the hands of a court, it enables the court to clarify the legal and constitutional obligations in furtherance of the values underpinning the Constitution. In **Rail Commuters Action Group v Transnet Ltd t/a Metrorail**⁹⁴ the Constitutional Court of South Africa held that:

“It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the executive and the legislature, the decision as to how best the law, once stated, should be observed.”⁹⁵

⁹⁴2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (26 November 2004).

⁹⁵ Id at para 108.

161 It is evident from the applicable legal principles that a declaratory order would be appropriate in this case.

- a. Evidently, the applicant is an interested party. It is a political party and it has an interest in the declaratory relief sought for the purposes of this election and future elections to come. The applicant is also seeking the declaratory order on behalf of the millions of Zimbabweans that exercised their right to vote in the fundamental belief that “*We, the people of Zimbabwe*” shall govern.
- b. Section 67(1)(a) of the Constitution confers on every Zimbabwean citizen, the right to free, fair and regular elections for any elective public office established in terms of the Constitution or any other law. Under s 67(3) of the Constitution, every Zimbabwean citizen who is of or over eighteen years of age is, subject to the Constitution, guaranteed a right to vote in all elections and referendums to which the Constitution or any other law applies.
- c. The declaratory order sought in this matter would have a real and practical effect and would not amount to a legal opinion on abstract legal facts given that the declaratory order is sought in respect of the most recent presidential elections. In **MDC**, the court declined to grant a number of declaratory orders against the Zimbabwe Electoral Commission pertaining to the 2005 elections on the basis, *inter alia*, that the elections “*had come and gone*”.⁹⁶ In that case, the application was brought and heard approximately two years after the elections. The court found that

⁹⁶ MDC at p 14.

the question of whether the elections were free and fair had become “*abstract and academic with the passage of time.*”⁹⁷ This is completely distinguishable from the present case. As required by the court, the applicant is now timeously prosecuting its challenges. It has brought its challenge within the timeframes provided by the Constitution.

- d. In the previous instance where this Court was called upon to decide a challenge in terms of section 93 of the Constitution it noted the disruptive and unsettling nature of these challenges. This Court noted that “*it is indicative of simmering political tension and political disturbance of public peace and tranquillity.*”⁹⁸ Given the climate, the applicant submits that it is incumbent on this Court to grasp the nettle and make a definitive pronouncement on whether the elections were free and fair and whether the ZEC acted in accordance with its legal and constitutional obligation. This is consistent with this Court’s obligation to engage “*the merits*” and “*produce results that are consonant with public peace and tranquillity.*”⁹⁹
- e. The declaratory order sought will be binding on the ZEC and will be “*res judicata*” against it. It will underscore the unlawful conduct and will symbolise the drawing of a line indicating, this far and no further! The declaratory order sought will inevitably have a disciplining effect on the ZEC and thereby ensuring that it executes its constitutional mandate effectively.

⁹⁷ MDC at p 14 and 15.

⁹⁸ Tsvangirai v Mugabe at p 25.

⁹⁹ Tsvangirai v Mugabe at p 26.

- f. Finally public policy favours the issuing of this declarator. The ZEC is no ordinary body, it is the specially mandated agent of the Constitution which facilitates the right to free and fair elections. Whether in fact the ZEC followed a proper and lawful process is inextricably linked to the determination of whether the elections were free and fair.

162 This declarator will be relief that vindicates the rule of law. In ***Electoral Commission v Mhlope and Others***¹⁰⁰ the Constitutional Court of South Africa held that:

“To this end, no court should be loath to declare conduct that either has no legal basis or constitutes a disregard for the law, as inconsistent with legality and the foundational value of the rule of law. Courts are obliged to do so. To shy away from this duty would require a sound jurisprudential basis. Since none exists in this matter, it is only proper that we do the inevitable.”

163 Under the circumstances, the applicant submits that this Court must make a decisive and unequivocal pronouncement that vindicates the rule of law for the Zimbabwean people, so that there can be no doubt that the elections were not free and fair. The applicant respectfully submits that it is only proper for this Court to do the inevitable.

An order invalidating and declaring unlawful the election

164 The following two orders flow naturally and consequentially from the “inevitable” declaration that the elections were not in accordance with the law and therefore not free and fair.

¹⁰⁰ 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC).

165 Where a public act is declared invalid, the ordinary rule is that subsequent acts that depend on the invalid act for their legality should also be set aside. As the South African Supreme Court of Appeal stated in ***Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*** “the proper enquiry in each case — at least at first — is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts.”¹⁰¹

166 As a point of departure, elections must be free and fair, that is the initial act on which the substantive validity of the entire electoral process is dependent. It is evident from this application that to allow the election results to stand in the face of undeniable evidence that goes to the heart of whether the elections were free, and fair would be an injustice to the Zimbabwean people. Moreover, it would delegitimise the electoral process and the appoint of Mr Mnangagwa.

167 Furthermore, there is clear evidence that show that the irregularities did, in fact, materially affect the election result. But for these irregularities, Mr Mnangagwa would have fallen far short of the 50%+1 threshold. This provides a separate basis to set aside the election.

168 The applicant submits that this the just and appropriate remedy is to invalidate the elections.

¹⁰¹ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA) para 31.

An order declaring Nelson Chamisa the winner or to order a fresh election

169 It is evident that despite the fact that the election process was skewed heavily in favour of ZANU-PF, on a true and honest reflection of the election results, the people of Zimbabwe elected Mr Nelson Chamisa as the winner.

170 This Court was empowered by the drafters of the Constitution in section 93(4)(a) to declare a winner. This Court must therefore not shy away from exercising the power that it has been granted by the drafter of the Constitution. Furthermore, this Court in *Tsvangirai v Mugabe* emphasised the need for it to provide an “urgent and effective” remedy. A declaration that Mr Chamisa is the winner will not be a decisive and immediate remedy, it will vindicate the will of the Zimbabwean people.

171 In the alternative, the applicant prays that this Court orders fresh elections within sixty days as provided for in the Constitution. An order requiring fresh elections will afford the ZEC the opportunity to facilitate a process of free and fair elections in order to determine the winner of the Presidential election.

172 In the circumstances, the applicant submits that it has made out a case for the relief that it seeks in its draft order.

RESPONSES TO TECHNICAL OBJECTIONS

173 Quite distastefully both ZEC and the first respondent have taken a false preliminary point arguing that there is no application before the court. Whilst they take a false point, the fact that they connive to do so must provoke the

heavy displeasure of this court. It is unacceptable that first respondent would want to govern the country for five years on the strength of a technical objection. It is deeply regrettable that ZEC would rather the court did not enquire into the irregularities raised and seeks to achieve that outcome by raising curtains of subterfuge. The point taken is however, clearly not available to the respondents concerned and must be dismissed with costs.

174 The correct factual position is that applicant did everything to effect service but was obstructed by the official who must effect such service. The Sheriff who obstructed him is not even his own agent but is the executive of the law- **Doelcam (Pvt) Ltd v Pichanick & Ors 1999 (1) ZLR 390 (HC)**. He cannot be saddled with the Sheriff's refusal to effect process particularly when such refusal was procured for the benefit of first respondent and ZEC, who now join each other in chorus in taking this cowardly point.

175 The evidence before the court shows that applicant instructed the Sheriff at around 16:00hrs after he had paid the charges raised by the Sheriff himself. The evidence shows that the Sheriff still had sufficient time to effect service. The evidence shows that though the Sheriff committed to effecting service, he was then instructed not to do so. In the event he refused to comply with a lawful instruction.

176 Rule 45 of the Constitutional Court Rules provides as follows;
"In any matter not dealt with in these rules. the practice and procedure of the Court shall, subject to any direction to the contrary by the Court or a Judge, follow, as near as may be, the practice and procedure of the Supreme Court or, where the rules of the Supreme Court are silent, of the High Court."

177 Rule 38 of the High Court Rules provides;

*"Service of process shall not be valid if served **between 10 p.m. and 6 a.m.:***

Provided that—

(a) process for the arrest of any person; and
 (b) process served by post, telegraph, telefacsimile or courier;
 shall be valid whenever it is served.”

- 178 Assuming the application to be ordinary process as the Sheriff later claimed, he had up until 10:00PM to effect service. Applicant had accordingly done the needful. The application is however, an urgent one by Constitutional command so the Sheriff had up to 00:00 A:M to effect service. He had more than ample time. The fact that the Sheriff connived with these respondents or took a position for their benefit does not assist those who have taken the point. It is axiomatic in terms of our law that one cannot make their better by their own misdeed- **Standard Chartered Bank Zimbabwe Ltd v Matsika 1997 (2) ZLR 389 (SC)**¹⁰².
- 179 In case the respondents try to argue that they did not instruct the Sheriff to abdicate, that would still not take them anyway for the following reasons.
- a. First, the connivance is patent and that argument would itself be false.
 - b. Second, on their own computation of days, the respondents filed out of time because the Registry, so they say was closed. If they were obstructed by a court official and do not want to suffer the penalty, why must applicant suffer for similar obstruction? What is good for the goose is also good for the gander.
 - c. Third, it does not matter by law that they did not directly instruct the Sheriff. What the Sheriff did was for their benefit and against the interests of the applicant. They are saddled with that indiscretion to the extent that they now want to seek to place reliance thereon. This was the position of the court in **Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd 1998 (1) ZLR 149 (HC)** where a third party had taken a position on behalf of an entity without its instructions

¹⁰² It was held;

“A cardinal principle of the common law is expressed in the aphorism: "nemo ex proprio dolo consequitur actionem", which translates: no one maintains an action arising out of his own wrong. Complementary to this principle is another which stipulates: "nemo ex suo delicto meliorem suam conditionem facere potest", which means: no one can make his better by his own misdeed.”

but which position though of benefit to that entity was harmful to the interests of the applicant. The court said;

“Telecel does not deny that Mr Chiyangwa made the statement set out above. It submitted, however, that Mr Chiyangwa was not speaking on behalf of Telecel. However, Telecel does not say that it ever refuted the statement made by Mr Chiyangwa. With friends like him, who needs enemies?”

180 Purely on the facts, the point falls. It is however, a wrong point on the law.

181 Section 93(1) of the Constitution of Zimbabwe provides as follows;

“Subject to this section, any aggrieved candidate may challenge the validity of an election of a President or Vice-President by lodging a petition or application with the Constitutional Court within 7 days after the date of the declaration of the results of the election.”

182 The Constitution, whose effect cannot be attenuated by subsidiary legislation requires that the application be lodged within seven days. In **Black’s Law Dictionary- 8th Edition** the word lodge is said to be the same as the word file. File means to tender a document at the Registry.

183 What is required by the Constitution is to file the application within seven days. It is common cause that the application was filed within seven days. That is the end of the matter.

184 In **Zimbabwe Township Developers (Pvt) Ltd v Lou’s Shoes (Pvt) Ltd 1983 (2) ZLR 376 (S) at 382B-D; 1984 (2) SA 778 (ZS) at 783A-D**, to this effect:
“Clearly a litigant who asserts that an Act of Parliament or a Regulation is unconstitutional must show that it is. In such a case the judicial body charged with deciding that issue must interpret the Constitution and determine its meaning and thereafter interpret the challenged piece of legislation to arrive at a conclusion as to whether it falls within that meaning or it does not. The challenged piece of legislation may, however, be capable of more than one

*meaning. If that is the position then if one possible interpretation falls within the meaning of the Constitution and others do not, then the judicial body will presume that the law makers intended to act constitutionally and uphold the piece of legislation so interpreted. This is one of the senses in which a presumption of constitutionality can be said to arise. One does not interpret the Constitution in a restricted manner in order to accommodate the challenged legislation. The Constitution must be properly interpreted, adopting the approach accepted above. Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit into the framework of the Constitution.” See also **Minister of Home Affairs v Bickle & Ors 1983 (2) ZLR 431 (S) at 441E–H, 1984 (2) SA 39 (ZS) at 448F–G; S v A Juvenile 1989 (2) ZLR 61 (S) at 89C, 1990 (4) SA 151 (ZS) at 167G–H.***

185 The point to be made is that in constitutional interpretation one must interpret the constitution first. That is the approach adopted above. The constitution has been interpreted and its effect cannot be attenuated by subsidiary legislation. It is clear however, that the subsidiary legislation involved does not even attenuate the constitution.

186 It does not matter for the purposes of this application whether the days are court or calendar days. On either standard, the application was lodged on time.

187 Now, once the application has been lodged, the jurisdiction of the constitutional court is assumed. The jurisdiction of the constitutional court which is assumed is the jurisdiction to hear the matter on the merits. The position of the law is that the assumption of such jurisdiction cannot be negated by technical considerations.

188 In **Tsvangirai v Mugabe & Ors CCZ-20-17 MALABA DCJ** (as he then was) said;

“The lodgment of the petition or application under s 93(1) of the Constitution does not only commence proceedings, it gives the petitioner or applicant the right to be heard by the Court in his or her cause. It imposes on the Court the reciprocal obligation to hear and determine the petition or application.....

The direct connection between the right of the petitioner or applicant to be heard following the lodgment of the petition or application and the corresponding obligation on the Court to hear and determine the petition or application is not established by construction taking into account the provisions for the jurisdiction of the Court under s 167(2)(b) of the Constitution. It is expressly provided for by s 93(3) of the Constitution, which imposes on the Court an obligatory duty to hear and determine the petition or application. Section 93(3) of the Constitution provides that the Court “must hear and determine the petition or application lodged under subsection (1) within fourteen days after the date of lodgment”.

The word “must” is not used to mark only the obligation in respect of the time limit within which the acts designating the duty imposed must be carried out. The word is also used to indicate to the Court that it is under an obligation to treat the petition or application in the manner prescribed and not in any other way. What is imposed is a duty to obey the order first.

Obedience is doing that which is required by the law. In other words, the women and men exercising judicial authority must appreciate the meaning of the provisions to the effect that the Court with the power with which they are imbued “must hear and determine” the petition or application lodged with it. The word must surely mean more than that the Court has power to hear and determine the petition or application. The words speak to an obligatory duty to exercise the jurisdiction the Court has. The words state an obligation, the performance of which was a carefully chosen means to a particular end. For the Court to acquire full knowledge of the facts in issue, which is necessary if the final and binding decision required to result from the entire proceedings is to be made, taking into account the fundamental principles of justice, transparency and accountability, it has to hear and determine the petition or application.

The purpose of the procedural mechanism provided for under s 93 of the Constitution is to secure a just, fair, final and binding decision by the highest court in the land on the merits of the question of the validity or invalidity of an

election of a President, raised in a petition or application lodged under subs (1) within fourteen days after the lodgment.

It is the people who, in the exercise of their sovereign authority, decided that when a petition or application is lodged with the Court challenging the validity of an election of a President they are entitled to know the truth about the allegations on the basis of which the validity of the election is impugned. They decided in their wisdom that the most effective means of getting to the bottom of the allegations of electoral impropriety was a hearing and determination of the petition or application on the merits by the highest court in the land, which would produce a final decision binding on all Zimbabwean citizens. The Court is under a duty to respect the judgment of the people and carry out the mandate in the manner prescribed to achieve the intended objective.”

- 189 The position of the law is clear. Once the petition has been lodged and the jurisdiction of the court assumed, such jurisdiction must be discharged on the substance of the matter. That is what the court has said. That is the law. The matter is resolved.
- 190 It is however, not correct to argue as the respondents do that the seven days expired on the 10th of August 2018. They simply did not. The matter will be addressed at two levels.
- 191 First, the Constitution does not say in computing days, one must include weekends. Indeed when the nature of an application to challenge a presidential result is considered, a challenger must be given the necessary time to gather all the evidence from the 210 constituencies. That can only be achieved by construing the constitution in a sensible manner and one which protects the rights of the applicant and indeed the people he represents.
- 192 When one considers that section 93, which is a self contained code, does not limit days in the manner suggested, there can be no constitutional warrant for following the position agitated for by the respondents. Indeed section 336 of the Constitution of Zimbabwe enacts thus;

“(1) in this Constitution, whenever a period of days is expressed —

(a) to begin on or to be reckoned from a particular day, that day is not to be included in the period:

(b) to end on or to be reckoned to a particular day, that day is to be included in the period.

(2) Subject to this Constitution, whenever the time for doing anything in terms of this Constitution ends or falls on a Saturday, Sunday or public holiday, the time extends to and the thing may be done on the next day that is not a Saturday, Sunday or public holiday.

*(3) A reference in this Constitution to a month is to be construed as a reference to a **calendar month**, and a period of months is to be reckoned from the date when the period begins to the corresponding day of the month when the period ends.*

(4) A reference in this Constitution without qualification to a year is to be construed as a reference to a period of 12 months.”

193 No warrant exists in the definitions section for the argument advanced by the respondents. The court ought therefore to adopt a position which facilitates the hearing of the matter on the substance.

194 Second, respondents argue that the application should have been lodged and SERVED within seven days. They place reliance on rule 23 which provides as follows;

“(1) An application where the election of a President or Vice President is in dispute shall be by way of court application.

*(2) The application shall be filed with the Registrar and shall be served on the respondent **within 7 days** of the date of the declaration of the result of the election.”*

195 That rule must however, be read together with rule 3(2) of the same rules which provides as follows;

“In any other case, unless the contrary intention appears, where anything is required by these rules or in any order of the Court to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of such period.”

196 On respondent’s own argument, the application was to be served on the 16th of August 2018. The respondents cannot pick and choose rules, blow hot and cold as it were. If they found their argument on the rules, they must take those rules as a whole.

197 Indeed rules must not be regarded as an end in themselves. Rules are procedural tools, fashioned by the court to enable it to dispense justice. In **Profert Zimbabwe (Pvt) Ltd v Macdom Investments (Private) Ltd HB-83-16** it was held;

*“As was stated by VAN WINSEN AJA in **Federated Trust Ltd v Botha 1978 (3) SA 645 (A) at 654C – D**, albeit in different circumstances;*

“Rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts ...”

*I am persuaded by Mr de Bourbon’s argument that the point taken on behalf of the respondent “propounds no more than sterile formalism”. See **Jockey Club of South Africa v Forbes 1993 (1) SA 649 at 663** where the learned KRIEGLER AJA, stated:*

“This case is a good example of the stultification inherent in reading Rule 53 as a law of the Medes and Persians ...”

*The above position finds favour in the case of **Scottish Rhodesian Finance Ltd v Honiball 1973 (2) SA 747 (R) at p 748** where BECK J stated as follows:*

“The Rules of court are not laws of the Medes and Persians and in suitable cases the court will not suffer sensible arrangements between the parties to be sacrificed on the altar of slavish obedience to the letter of Rules.”

198 In **Smith & Anor v Acting Sheriff of Zimbabwe & Anor 1995 (1) ZLR 158 (SC)** it was pointed out that,

*“Two points must be made. First, as it has often been said, the rules are made for the court, not the court for the rules - see **Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) at 783A-B and Mynhardt v Mynhardt 1986 (1) SA 456 (T)**. And see generally **Harms Civil Procedure in the Supreme Court paras A5 and 6**. “The court has inherent jurisdiction to grant relief where insistence upon exact compliance with the rules of Court would result in substantial injustice to one of the parties”: per CORBETT J (as he then was) in **Munette Invstms v Admin, Cape Province 1973 (4) SA 491 (C) at 493F-G**, citing **Herbstein and van Winsen Superior Court Practice 2 ed p 20** with approval.”.*

See also **Central African Building Society v Kufa 1998 (1) ZLR 303 (HC)**, **Scotfin Ltd v Afri Trade Supplies (Pvt) Ltd 1993 (2) ZLR 170 (HC)**, **Sumbereru v Chirunda 1992 (1) ZLR 240 (HC)** and **Wilmot v Zimbabwe Owner Driver Organisation (Pvt) Ltd 1996 (1) LRZ 578 (SC)**.

199 Thus more than that rules cannot change the constitutional design, the fact of the matter is that when read together, the rules and the constitution make it clear that the computation of the time involved excludes weekends and public holidays. The matter is once again resolved.

200 For all these reasons, the objections taken are without merit and must be dismissed with costs.

Subpoena

201 There is the small issue of a subpoena. The subpoena has been taken in terms of the rules to deal with an important issue which ZEC seeks to shield from the court. The issue is that ZEC has results on its server which results it does not want to share with the court. Now ZEC denies the existence of a serve whose location has been identified. It is clear that it will not co-operate. It has not co-operated in replying to the letter.

202 It has already been observed that rules of the High Court apply to this court in those instances where the rules of this court are silent. The relevant rule is rule 430(3) which provides as follows;

“Where in proceedings on motion a person has refused to make an affidavit of facts within his knowledge, the party desiring such person’s evidence may sue out a subpoena compelling such person to appear on the day of the hearing to give evidence viva voce.”

203 At the hearing of the matter the subpoenaed official must appear before the court and give evidence on the issue. That is what the law provides for. The matter is once again resolved.

CONCLUSION

204 The 2018 presidential elections were not free or fair. The ZEC’s mishandling of the election results prevented the election from being a true expression of the will of the Zimbabwean people. The events that occurred during the election campaign further undermined the electoral process. On this basis, the election falls to be invalidated.

vi. The elections also fall to be invalidated on the separate basis that the irregularities materially affected the result. It is clear that Mr Mnangagwa would not have achieved the 50%+1 votes required to avoid a run-off election in the absence of the ZEC’s manipulation of the results.

vii. On this basis, the relief sought in the notice of motion is required to vindicate the right to free and fair elections.

DATED AT HARARE THIS 18TH DAY OF AUGUST 2018

THABANI MPOFU

SYLVESTER HASHITI

Instructed by

ATHERSTONE & COOK

Applicant's Legal Practitioners

119 J Chinamano Avenue

HARARE (Mr Mhike/ T. Chagonda)

TO THE REGISTRAR

Constitutional Court of Zimbabwe

HARARE

AND TO THE RESPONDENTS

(As set out in the attached schedule)

HARARE