REPORTABLE (21)

NELSON CHAMISA

v

(1) EMMERSON DAMBUDZO MNANGAGWA
(2) JOSEPH BUSHA (3) MELBAH DZAPASI (4) NKOSANA MOYO (5) NOAH MANYIKA (6) HARRY PETER WILSON (7) TAURAI MTEKI (8) THOKOZANI KHUPE (9) DIVINE MHAMBI (10) LOVEMORE MADHUKU (11) PETER MUNYANDURI
(12) AMBROSE MUTINHIRI
(13) TIMOTHY JOHANNES CHIGUVARE
(14) JOICE MUJURU (15) KWANELE HLABANGANA
(16) EVARISTO CHIKANGA (17) DANIEL SHUMBA
(18) VIOLET MARIYACHA
(19) BLESSING KASIYAMHURU (20) ELTON MANGOMA
(21) PETER GAVA (22) WILLARD MUGADZA (23) ZIMBABWE ELECTORAL COMMISSION
(24) THE CHAIRPERSON OF THE ZIMBABWE ELECTORAL COMMISSION
(25) THE CHIEF EXECUTIVE OFFICER OF THE ZIMBABWE ELECTORAL COMMISSION

CONSTITUTIONAL COURT OF ZIMBABWE
MALABA CJ, GWAUNZA DCJ, GARWE JCC,
MAKARAU JCC, HLATSHWAYO JCC, PATEL JCC,
BHUNU JCC, UCHENA JCC & MAKONI JCC
HARARE, AUGUST 22 & 24, 2018

T Mpofu, with him *S M Hashiti,* for the applicant

L Uriri, with him *T Magwaliba,* for the first respondent

No appearance for the second, the third and the fourth respondents

Ms R Mabwe, for the fifth respondent

M Ncube, for the sixth respondent

No appearance for the seventh to the sixteenth respondents

The seventeenth respondent in person

J Bamu, for the eighteenth respondent

No appearance for the nineteenth respondent

T S Manjengwa, with him *D Halimani,* for the twentieth respondent

No appearance for the twenty-first respondent

E Mandipa, with him *C Makwara,* for the twenty-second respondent

T M Kanengoni, with him *C Nyika,* for the twenty-third to the twenty-fifth respondents

FULL JUDGMENT

MALABA CJ: On 24 August 2018 the Constitutional Court ("the Court") handed down the abridged version of the judgment in the case in which the applicant challenged the validity of the Presidential election held on 30 July 2018. The order made was in these terms -

> The application ought to be dismissed.
>
> In the result, the following order is made –
>
> (1) The court application is dismissed with costs.
>
> (2) Emmerson Dambudzo Mnangagwa was duly elected as President of the Republic of Zimbabwe.

(3) In terms of section 93(4)(a) of the Constitution of Zimbabwe Emmerson Dambudzo Mnangagwa is declared the winner of the Presidential election held on 30 July 2018.

(4) The papers filed by the fifth, the sixth, the seventeenth, the eighteenth and the twentieth respondents are expunged from the record of proceedings with no order as to costs.

(5) The application for condonation of non-compliance with the procedural requirements of s 93(1) of the Constitution, as given effect to by r 23(2) as read with r 9(7) of the Rules, is granted.

The Court indicated that the full reasons would be issued in due course. These are they. The full judgment incorporates the reasons that formed the basis of the abridged version.

BACKGROUND

On 30 July 2018 the Republic of Zimbabwe held harmonised Parliamentary, Local Authority and Presidential elections. The applicant and the first respondent participated as candidates in the Presidential election together with twenty-one other candidates.

On 3 August 2018 the twenty-fourth respondent, acting in terms of s 110(3)(f)(ii) of the Electoral Act [*Chapter 2:13*] ("the Act"), declared the first respondent, as the candidate who had received more than half the number of votes cast, to be duly elected as President of the Republic of Zimbabwe, with effect from that date.

The applicant was aggrieved by the declaration of the first respondent as having been duly elected as President. He lodged a court application in terms of s 93(1) of the Constitution of Zimbabwe Amendment (No. 20) 2013 ("the Constitution"), challenging the validity of the election of the first respondent as President.

Section 93 of the Constitution provides in 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.

(2) The election of a Vice-President may be challenged only on the ground that he or she was not qualified for 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."

The applicant sought the following relief:

"1. A *declaratur* to the effect that -

(i) The Presidential election of 2018 was not conducted in accordance with the law and was not free and fair.

(ii) The election results announced by the Commissioners of the Zimbabwe Electoral Commission on the 3rd of August 2018 and the concomitant declaration of that same date by its chairperson to the effect that Emmerson Dambudzo Mnangagwa was to be regarded as the duly elected President of the Republic of Zimbabwe with effect from the 3rd of August 2018 is in terms of section 93(4)(b) of the Constitution of Zimbabwe as read together with section 111(2)(b) of the Electoral Act [*Chapter 2:13*] declared unlawful, of no force or effect and accordingly set aside.

(iii) The applicant, Nelson Chamisa, is in terms of section 93(4)(a) of the Constitution of Zimbabwe declared the winner of the presidential election held on the 30th of July 2018;

2. An order to the following effect –

(i) The twenty-fifth respondent shall publish in the *Government Gazette* this order and the declaration of the applicant to the office of the President of the Republic of Zimbabwe; alternatively -

(ii) In terms of section 93(4)(b) an election to the office of the President of the Republic of Zimbabwe shall be held within sixty days of this order; and

(iii) Costs of this application shall be borne by the Zimbabwe Electoral Commission and any such respondent as opposes it."

THE DECISION TO BROADCAST THE COURT PROCEEDINGS

Before considering the issues raised by the challenge to the validity of the Presidential election, it is necessary to explain the decision made to have the Court proceedings broadcast live on national television.

Ordinarily, court proceedings in Zimbabwe are not televised. Court sessions are, however, open to members of the public, save for cases in respect of which the law expressly requires that proceedings be conducted *in camera*. However, even where members of the public are allowed to attend court proceedings, video recording of the proceedings is prohibited.

Arguments have been advanced for and against live streaming through television of court proceedings. Those who support live broadcasting through television of court proceedings argue that it promotes transparency and public confidence in the justice system. They argue that fear of sensationalism is allayed through strict regulation of the broadcasting process so as to protect the dignity of the proceedings. The factors often referred to in argument in support of live streaming through television of court proceedings are transparency, accountability, responsiveness and justice.

In *New Brunswick Broadcasting Corporation* v *Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 CORY J provided a useful insight into the factors that may be taken into account in deciding whether court proceedings should be broadcast live or not through television. He said:

> "The television media constitute an integral part of the press. Reporting in all forms has evolved over the ages. Engraved stone tablets gave way to baked clay tablets impressed with the cuneiform writing of the Assyrians and the papyrus records of the Egyptians. It was not so long ago that the quill pen was the sole means of transcribing the written word. Surely today neither the taking of notes in shorthand nor the use of unobtrusive tape recording devices to ensure accuracy would be banned from the press gallery. Nor should the unobtrusive use of a video camera. The video camera provides the ultimate means of accurately and completely recording all that transpires. Not only the words spoken but the tone of voice, the nuances of verbal emphasis together with the gestures and facial expressions are recorded. It provides the nearest and closest substitute to the physical presence of an interested observer.
>
> So long as the camera is neither too pervasive nor too obtrusive, there can be no good reason for excluding it. How can it be said that greater accuracy and completeness of recording are to be discouraged? Perhaps more Canadians receive their news by way of television than by any other means. If there is to be an informed opinion in today's society, it will be informed in large part by television reporting. Nor should we jump to the conclusion that if the media are granted broader rights, those rights will be abused. Hand in hand with increased rights go increased responsibilities. The responsibility of the press is to report accurately, fairly and completely, that which is relevant and pertinent to public issues. It may be argued that the television media will only broadcast that which is sensational. That same argument could be advanced with regard to all forms of media. Yet no one would consider barring the print media from a public session of the Assembly on the grounds that they tended to be sensationalist. The public today is too intelligent, too discerning and too well informed to accept unfairly slanted or sensational reporting."

Others have advocated for the live streaming through television of court proceedings on the rights-based approach. It is argued that live streaming through television of court proceedings accommodates rights such as the right to freedom of expression and freedom of the media, the right of access to justice, and the right of access to information. When it comes to access to justice, it is accepted that any person can attend court proceedings, as long as the proceedings are not

required to be conducted *in camera*. It is argued, however, that it is one thing to allow access to justice; it is another to allow easy access to justice. Televising court proceedings is thus said to facilitate easy access to justice.

Proponents of live broadcasting through television of court proceedings argue that televising the proceedings allows the public to know what happens during the exercise of judicial power, which is derived from the people. The public have an opportunity to see for themselves and learn how courts function in the process of hearing and determining disputes between citizens on the one hand and citizens and the State on the other.

The most important rider to the rights-based approach is that live streaming through television of court proceedings must take into account the principle that the individual litigants have a right to a fair trial. See *South African Broadcasting Corporation Limited* v *The National Director of Public Prosecutions and Ors* 2007 (1) SA 523 (CC). It is universally accepted that no one fundamental human right is superior to the other. There must be a balance between public interest, and the interests of the litigants and their legal representatives, and respect for the court's decorum when administering justice.

In *South African Broadcasting Corporation Limited v Thatcher and Others*, [2005] 4 All SA 353 (C) at para [63], the Constitutional Court of South Africa quoted a statement by Lord Falconer of Throroton, the Lord Chancellor of England and Wales. In the foreword to the United Kingdom Consultation Paper 28/04, which was the basis of the "Broadcasting Courts Seminar" held in the United Kingdom in 2005, the Lord Chancellor said:

> "Justice must be done and justice must be seen to be done. That notion exactly catches the argument about television and the courts.

> The justice system exists to do justice. If it does not do justice in public it risks slipping into unacceptable behaviour, and losing public confidence. With a few exceptions, our courts are open to the public, but very few people who are not involved in cases ever go near a court. Most people's knowledge and perception of what goes on in court comes from court reporting and from fictionalised accounts of trials. The medium which gives most access to most people, television, is not allowed in our courts.
>
> Should that change? Is there a public interest in allowing people through television to see what actually happens in our courts in their name? In a modern, televised age, I think there is a case to be considered here."

In *Scott* v *Scott* [1913] AC 417 (HL) at 447 the House of Lords quoted with approval a statement by Jeremy Bentham, an English philosopher and jurist, to the effect that:

> "Publicity is the very soul of justice. It is the keenest spur to exertion and surety of all guards against improbity."

On 26 September 2018 the Supreme Court of India decided that proceedings of "constitutional importance having an impact on the public at large or a large number of people" should be live streamed in a manner that is easily accessible for public viewing. The Supreme Court of India made the decision in a hearing concerning four consolidated matters. The cases were *Tripathi* v *Supreme Court of India* Writ Petition (Civil) No. 1232 of 2017; *Jaising* v *Secretary General and Ors* Writ Petition (Civil) No. 66 of 2018; *Nedumpara and Ors* v *Supreme Court of India and Ors* Writ Petition (Civil) No. 861 of 2018; and *Center for Accountability and Systemic Change and Ors* v *Secretary General and Ors* Writ Petition (Civil) No. 892 of 2018. In delivering the main judgment A M KHANWILKAR J alluded in paras 8 and 9 to the benefits of live streaming through television of court proceedings. HIS LORDSHIP said:

> "8. Indubitably, live streaming of Court proceedings has the potential of throwing up an option to the public to witness live court proceedings which they otherwise could not have due to logistical issues and infrastructural restrictions of Courts; and would also provide them with a more direct sense of what has transpired. Thus, technological solutions can be a tool to facilitate actualisation of the right of access to justice bestowed on all and the litigants in particular, to provide them virtual entry in the Court precincts and more

> particularly in Court rooms. In the process, a large segment of persons, be it entrants in the legal profession, journalists, civil society activists, academicians or students of law will be able to view live proceedings *in propria persona* on real time basis. There is unanimity between all the protagonists that live streaming of Supreme Court proceedings at least in respect of cases of Constitutional and national importance, having an impact on the public at large or on a large number of people in India, may be a good beginning, as is suggested across the Bar.
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> 9. Live streaming of Court proceedings is feasible due to the advent of technology and, in fact, has been adopted in other jurisdictions across the world. Live streaming of Court proceedings, in one sense, with the use of technology is to 'virtually' expand the Court room area beyond the physical four walls of the Court rooms. Technology is evolving with increasing swiftness whereas the law and the courts are evolving at a much more measured pace. This Court cannot be oblivious to the reality that technology has the potential to usher in tangible and intangible benefits which can consummate the aspirations of the stakeholders and litigants in particular. It can epitomise transparency, good governance and accountability and, more importantly, open the vista of the Court rooms, transcending the four walls of the rooms to accommodate a large number of viewers to witness the live Court proceedings. Introducing and integrating such technology into the Court rooms would give the viewing public a virtual presence in the Court room and also educate them about the working of the Court."

The main arguments against live streaming through television of court proceedings have ranged from the expressed fear that televising court proceedings sensationalises and degrades the justice system, resulting in reduced public respect for the courts, to fears that trials would be turned into media circuses, with the result that Judges may end up making populist decisions which are not grounded in justice and the law.

Fears have also been expressed of the possibility that the actors in the court proceedings may be too distracted by the live streaming media presence, taking away their utmost attentiveness to the court proceedings. Some also argue that televising court proceedings may expose a litigant to the public eye, thereby violating the litigant's right to a fair trial and the protection of the witnesses.

The first point to note is that live streaming of court proceedings through television is not a universal principle. Whether or not to have court proceedings streamed live will depend on the laws of a particular jurisdiction. It is a matter that is dependent on the manner in which each jurisdiction decides to manage and regulate its own proceedings, taking into account various circumstances of the case. The overriding consideration is the principle of transparency. There is an acceptance of the principle that each case has to be considered on the basis of its own circumstances.

The decision to broadcast live on national television the proceedings in this case was made by the Court on the basis of consideration of the interests of justice. The Court took into account the fact that the matters in the Presidential election dispute at the centre of the proceedings were of constitutional and national importance, impacting on the interests of the public at large. The Court also considered the fact that it has under the Constitution inherent power to protect and regulate its own process, taking into account the interests of justice.

Section 176 of the Constitution provides for the inherent power of the Court to protect and regulate its own process. It provides:

> **"176 Inherent powers of Constitutional Court, Supreme Court and High Court**
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> The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution."

Openness of justice, embodied in the principle that justice must be seen to be done, is not limited to ensuring that the whole country is afforded the opportunity to watch court proceedings as they unfold. The common law principle is subject to limitations imposed by the demands of the

application of the principle that every case must depend on its own facts and circumstances. See *Assistant Commissioner Michael James Condon* v *Pompano (Pty) Ltd* [2013] HCA 7. This explains the differences in the exercise of discretion by courts in deciding whether or not to permit live streaming through television of the proceedings.

In *Tripathi* v *Supreme Court of India Writ Petition (Civil) supra* in para 5, CHANDRACHUD J commented on the concept of open justice in the context of a request for live streaming of court proceedings through television relating to matters of constitutional importance. HIS LORDSHIP said:

> "5. Legal scholars indicate that the principle of open justice encompasses several aspects that are central to the fair administration of justice and the rule of law. It has both procedural and substantive dimensions, which are equally important. Open justice comprises of several precepts:
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> i. The entitlement of an interested person to attend court as a spectator;
>
> ii. The promotion of full, fair and accurate reporting of court proceedings;
>
> iii. The duty of judges to give reasoned decisions; and
>
> iv. Public access to judgments of courts.
>
> The principle of an open court is a significant procedural dimension of the broader concept of open justice. Open courts allow the public to view courtroom proceedings."

The factor that the Court took into account in arriving at the decision to permit live streaming of the proceedings through television was the extraordinary nature of the proceedings before it. An application lodged in terms of s 93(1) of the Constitution is a *sui generis* procedure. The remarks of the Court in *Tsvangirai* v *Mugabe* and *Ors* CCZ 20/17 at pp 10-11 of the cyclostyled judgment in that regard are apposite. The Court said:

> "Section 93(1) of the Constitution is based on a presumption of validity of the election of the President forming the subject of the petition or application lodged with the Court. Challenging the validity of the election of a President in terms of s 93(1) of the Constitution is as much an act of democratic self-government as acting in accordance with the Constitution and the Electoral Law to ensure free, fair and credible 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." (the underlining is for emphasis)

Section 93(1) of the Constitution limits the *locus standi* to challenge the validity of the Presidential election to aggrieved candidates who participated in the Presidential election. The limitation of *locus standi* is not indicative of just the personal interest on the part of an aggrieved candidate who files a Presidential election petition or application under s 93(1) of the Constitution.

In *Tsvangirai* v *Mugabe and Ors supra*, the following remarks at pp 13-14 of the cyclostyled judgment, on the meaning of s 93 of the Constitution, are worth quoting to contextualise the decision to allow the live streaming of the Court proceedings through television by the public broadcaster. The Court said:

> "The right of petition or application is conferred on an aggrieved candidate and protected under s 93 of the Constitution as a legal remedy for the protection of the right guaranteed to every citizen under s 67(1) of the Constitution to free, fair and regular elections for any elective public office established in terms of the Constitution or any other law and exercised in accordance with the provisions of the Electoral Law. The office of President is an elective public office established by the Constitution. Every Zimbabwean citizen, regardless of voting status, has a fundamental right to a free, fair and credible Presidential election. In other words, he or she has a right to a valid election of a President held in accordance with the relevant provisions of the law governing the conduct of the election.
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> An aggrieved candidate is a registered voter who shares with all other Zimbabwean citizens the right to a free, fair and credible election of a President. It is the alleged commission by the respondents in the election of corrupt practices and/or irregularities prohibited under the provisions of the Electoral Law which materially affects the validity of the election in violation of the fundamental right of every Zimbabwean citizen to a free, fair and credible election of a President that constitutes the subject-matter of the petition or application lodged with the Court under s 93(1) of the Constitution.
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> … The Court is enjoined in the discharge of its duties under s 93(3) of the Constitution to hold firmly in its mind, and act in accordance with, the value fundamental to any democratic society, that the basis of authority of a representative government to govern is free, fair and regular elections."

Once it is accepted that the proceedings before the Court were not only limited to the parties' interests but extended to those of all citizens to a free, fair and credible Presidential election, it is clear that it was in the interests of justice to allow the live streaming through national television of the proceedings. Members of the public had an interest in having knowledge of the evidence produced by the disputants. They had an interest in witnessing how the Court handled the matter and what decision it reached. They had an interest in deciding whether, in their own objective assessment, the decision of the Court was fair and just.

THE COURT APPLICATION

The court application was opposed by the first, the fifth, the sixth, the seventeenth, the eighteenth, the twentieth, the twenty-third, the twenty-fourth and the twenty-fifth respondents.

EXPUNGING OF PAPERS FILED BY THE FIFTH, THE SIXTH, THE SEVENTEENTH, THE EIGHTEENTH AND THE TWENTIETH RESPONDENTS FROM THE RECORD

On the date of the hearing, the Court ruled that the papers filed by the fifth, the sixth, the seventeenth, the eighteenth and the twentieth respondents were -

i) not properly before the Court, and

ii) should be expunged from the record with no order as to costs.

The sixth and the eighteenth respondents indicated that they would abide by the decision of the Court.

The following are the reasons why the Court ordered that the papers filed by the fifth, the sixth, the seventeenth, the eighteenth and the twentieth respondents be expunged from the record.

In terms of s 93(1) of the Constitution, any aggrieved candidate may challenge the validity of an election of a President by lodging a petition or application with the Court within seven days after the date of the declaration of the result of the Presidential election. The section means that grounds on the basis of which an aggrieved candidate challenges the validity of the Presidential election result must be placed before the Court within seven days of the declaration of the result. Once the seven-day period has lapsed, the ground cannot be entertained by the Court. In addition, the grounds on which the validity of a Presidential election result is challenged must be placed before the Court in the form of a petition or application. They cannot be placed before the Court under the guise of the procedure prescribed for opposition to the petition or application lodged in terms of s 93(1) of the Constitution.

The process for lodging an application for relief based on a complaint of an undue return or undue election of a person to the Office of President by reason of irregularity or any other cause whatsoever is prescribed by r 23 of the Constitutional Court Rules, S.I. 161 of 2016 ("the Rules"). Rule 23(1) of the Rules provides that an application in which the election of a President is in dispute shall be by way of court application. The use of the peremptory word "shall" is of significance. A "court application", as a process for instituting court proceedings, has prescribed requirements, failure to comply with which attracts legal consequences. The word "petition", as used in s 93(1) of the Constitution, must be construed to mean "court application".

It is important to note that r 16(1) of the Rules provides that, save where otherwise provided, in any matter in which an application is necessary for any purpose, such application shall be by way of a court application in Form CCZ1, which shall be served on the other parties. Rule 16(3) provides that a court application shall be supported by an affidavit deposed to by a person who can swear positively to the facts, which details the facts and the basis on which the

applicant seeks relief, together with any supporting documents which are relevant. The affidavit contains the facts the applicant would need to prove to be entitled to the relief sought and the evidence required to prove the allegation made against the respondent.

Rule 16(3)(d) provides that a court application shall request the respondent to file and serve his or her notice of opposition within ten days of being served with the application. Rule 17(1) of the Rules provides that the respondent shall, within the time stipulated in the application, file with the Registrar and serve on the other parties a notice of opposition in Form CCZ2. Rule 17(2) provides that the notice of opposition shall be supported by an affidavit deposed by a person who can swear positively to the facts, which details the facts and the basis on which the respondent opposes the application, together with any supporting documents which are relevant.

The Court noted that the fifth, the seventeenth and the twentieth respondents failed to comply with the law by filing papers as respondents that supported the court application. More particularly, the twentieth respondent went on to seek his own relief, which was substantially different from that sought by the applicant, although he effectively supported parts of the allegations that were made in the court application. Being of the view that the procedure adopted was improper, the Court invited the fifth, the seventeenth and the twentieth respondents to make submissions on whether their papers were properly before it. They had to satisfy the Court of their right to be heard on the basis of their papers.

ARGUMENTS BY THE FIFTH, THE SEVENTEENTH AND THE TWENTIETH RESPONDENTS ON THE PROPRIETY OF THEIR NOTICES OF OPPOSITION

<u>The Arguments of the Fifth Respondent</u>

Ms Mabwe argued that the fifth respondent had a real and substantial interest in the application before the Court because he was a candidate in the Presidential election. She said the fifth respondent had a right to respond to the application before the Court.

In Ms *Mabwe's* view, s 93(1) of the Constitution only indicates that, unless there is provision to the contrary, any aggrieved candidate can file a petition with the Court. She argued that what was before the Court was a challenge to the validity of the Presidential election and the fifth respondent had participated in the Presidential election as a candidate. The mere participation in the Presidential election as a candidate, according to *Ms Mabwe*, endowed the fifth respondent with *locus standi* to appear as a respondent and make submissions on the issues raised before the Court. According to Ms *Mabwe*, it mattered not whether the response to the court application was in his favour or not. She further argued that the fifth respondent had a right to file a notice of opposition, notwithstanding the fact that what he averred in the affidavit was in support of the court application filed by the applicant and the relief sought.

Ms *Mabwe* urged the Court to avoid adopting a "strict interpretation" of s 93(1) of the Constitution and Form CCZ2 of the Rules in favour of a purposive approach. This was regardless of the purpose of a notice of opposition itself which is to oppose an application made in terms of s 93(1) of the Constitution.

Ms *Mabwe* contended that the Court should not close the door on the fifth respondent, on the ground that he ought to have challenged the validity of the Presidential election result as an aggrieved candidate, rather than appear before the Court as a "respondent".

Ms *Mabwe* further contended that s 93(1) of the Constitution invites a candidate aggrieved by the Presidential election result to file a petition and then invites all other candidates to file their

papers. She argued that s 93(1) of the Constitution uses the word "may", meaning that there is a discretion to be exercised by an aggrieved candidate in filing the application. In her view, "may", as used in s 93(1) of the Constitution, means that an aggrieved candidate is not obliged to file a petition or application in terms of that section. In the event that another equally aggrieved candidate files his or her own application, the inactive aggrieved candidate can then file any papers, whether he or she supports or opposes the application.

The Arguments of the Seventeenth Respondent

The seventeenth respondent appeared in person. He submitted that, as a party served with papers, he had an obligation to respond to the papers served on him. He argued that he was a candidate in the Presidential election and remained so until the Court made a determination on the validity of the Presidential election result.

The seventeenth respondent accepted that his papers were not properly before the Court. He, however, argued that the issue before the Court was of national importance. According to him, it was necessary that every Presidential candidate be heard by the Court. He contended that it was important that he and other respondents in his position be heard as they would enrich the broad issues, making sure that no information was hidden from the Court. He submitted that the information in his "opposing papers" had the potential of assisting the Court to arrive at a fair and just decision.

The Arguments of the Twentieth Respondent

Mr Manjengwa argued that the notice of opposition filed was properly before the Court. He submitted that, although he was in support of certain aspects of the applicant's case, the twentieth respondent was seeking an alternative relief, which was different from that sought by the

applicant. He argued that the twentieth respondent opposed the relief sought by the applicant on the basis that he did not get enough votes to be declared the winner of the Presidential election. He wanted the Presidential election result announced by the twenty-third respondent ("the Commission") audited by independent qualified auditors. He added that the Court was enjoined to consider the contents of the opposing affidavit.

SUBMISSIONS IN RESPONSE BY THE APPLICANT, THE FIRST, THE TWENTY-THIRD, THE TWENTY-FOURTH AND THE TWENTY-FIFTH RESPONDENTS

The Applicant's Response

Mr Mpofu invited the Court to consider that the essential question before it was whether a respondent in a s 93 application was confined to opposing an application. He argued that an application deals with interested parties. This means that they can all be heard. He expressed disagreement with the position of the first respondent, the Commission, the twenty-fourth and the twenty-fifth respondents. He argued that r 235 of the High Court Rules allows a respondent to seek leave to file any document. The argument was that those respondents who had filed papers in support of the applicant had a right to be heard.

The First Respondent's Response

Mr Uriri argued that the purpose of a notice of opposition is to oppose an application, not to support it. He further contended that substantive relief could not attach to a notice of opposition, as had been done by some of the respondents. He relied on the case of *Indium Investments (Pvt) Ltd* v *Kingshaven (Pvt) Ltd and Ors* 2015 (2) ZLR 40 (S) for this proposition of law. He took the argument further and said that a plea is a shield and not a weapon. He argued that the fifth, the sixth, the seventeenth, the eighteenth and the twentieth respondents were in essence aggrieved

candidates who did not file court applications within the seven days prescribed by s 93(1) of the Constitution.

Mr Uriri contended that the answer to the question whether a respondent is entitled to agree with the application in a notice of opposition is to be found in r 17(2) of the Rules. He submitted that r 17(2) of the Rules calls upon the respondents to oppose the application. He argued that if the respondents wished to challenge the Presidential election result they should have done so through s 93(1) of the Constitution rather than support the applicant's application under the guise of a notice of opposition filed in terms of Form CCZ2.

The Twenty-Third, The Twenty-Fourth and The Twenty-Fifth Respondents

Mr Kanengoni argued that the papers filed by the fifth, the sixth, the seventeenth, the eighteenth and the twentieth respondents should be expunged from the record, as they were not opposing affidavits at law. He referred to Forms CCZ1 and CCZ2. He argued that Form CCZ1 calls upon a respondent to oppose the application. He submitted that Form CCZ2 is given particularity by r 17(2) of the Rules. He submitted that if the fifth, the seventeenth and the twentieth respondents wished to be heard on the arguments they placed before the Court, they ought to have filed their own court applications in terms of s 93(1) of the Constitution.

Mr Kanengoni submitted that the twentieth respondent's draft order made it clear that he was making a counter-application under the guise of a notice of opposition. He contended that the fifth, the seventeenth and the twentieth respondents could have joined the applicant in filing the application, as any other papers that they filed were essentially counter-applications. He argued further that r 235 of the High Court Rules, referred to by *Mr Mpofu*, related to filing of papers after the filing of the answering affidavit. Against this background, *Mr Kanengoni* argued that the fifth,

the sixth, the seventeenth, the eighteenth and the twentieth respondents could not relate to each other *inter-se*, as suggested by the argument that all the other respondents could file additional papers to answer the allegations made in support of the application.

THE LAW ON THE NATURE OF A NOTICE OF OPPOSITION

In resolving the legal question that arose from the fifth, the sixth, the seventeenth, the eighteenth and the twentieth respondents' papers, the Rules are instructive. The starting point is r 23, which governs disputes relating to the election to the Office of President. It prescribes the process and progression of a Presidential election petition or court application filed in terms of s 93(1) of the Constitution.

Rule 23(3) of the Rules prescribes two important requirements. The first is that a person cited as a respondent by the applicant in a court application filed in terms of s 93(1) of the Constitution is under an obligation to show that he or she intends to oppose the application. Secondly, the respondent must comply with the procedural and substantive requirements of defending himself or herself against the allegations made against him or her in the founding affidavit filed in support of the court application. The respondent has to file with the Registrar a notice of opposition and serve it on the applicant within three days of service of the application upon him or her, failing which he or she shall be barred. Under r 23(3) of the Rules, a respondent is the person against whom allegations of irregularity or electoral malpractices, on the basis of the occurrence of which the validity of the Presidential election is challenged, are made.

At the time a court application is served on a respondent he or she is notified of the relief that the applicant seeks and that should he or she intend to oppose the application, he or she should file a notice of opposition, supported by an affidavit setting out details of the facts on which he or

she opposes the application. He or she is not afforded the opportunity to depose to an affidavit setting out detailed facts on the basis of which he or she supports the application. This is clear when one considers that even the one who intends to do so but does not oppose the application within the prescribed time-frame becomes barred from filing such opposition. The bar places him or her in the position of any other person who does not oppose the granting of the relief sought in the application.

The preamble to Form CCZ1 directs the respondent on the contents that a notice of opposition and the opposing affidavit must contain. The preamble reads:

> "TAKE notice that the applicant intends to apply to the Constitutional Court for the Order in terms of the Draft annexed to this notice and that the accompanying affidavits and documents will be used in support of the application.
>
> If you intend to oppose this application you will have to file a Notice of Opposition in Form CCZ2, together with one or more of the opposing affidavits, with the Registrar of the Constitutional Court at … within … days after the date on which this notice was served upon you. … Your affidavits may have annexed to them documents verifying the facts set out in the affidavits. …" (the underlining is for emphasis)

Rule 17(2) of the Rules clearly states that the notice of opposition shall be supported by an affidavit, deposed to by a person who can swear positively to the facts, which details the facts and the basis on which the respondent opposes the application, together with any supporting documents which are relevant. The Rules require that a notice of opposition be in terms of Form CCZ2. The preamble to Form CCZ2 is an extension of r 17(2). It states as follows:

> "TAKE NOTICE THAT the Respondent intends to oppose the application on the grounds set out in the supporting affidavit and supporting documents attached hereto …".

A reading of the preamble shows that the contents of the supporting affidavit must oppose the relief that is sought by the applicant. The intended respondent is warned in advance as to the

objective of filing the opposing papers. The object of an opposing affidavit is to oppose the relief sought by an applicant. The respondent's position in the opposing affidavit must be clear that he or she is opposing the relief that is sought by the applicant. Once the opposing affidavit supports the relief sought by the applicant, then it ceases to be an opposing affidavit.

The face of Form CCZ2 expressly states that the respondent filing the form has the intention to oppose the application. It does not provide for an intention to support the application. It is, as the name implies, a notice of opposition and its contents have to be in opposition to the application, as the Rules provide.

Rules 16, 17 and 23 of the Rules have to be considered in the context of s 93(1) of the Constitution. Section 93(1) of the Constitution provides that any aggrieved candidate has to lodge a petition or application within seven days of the date of the declaration of the Presidential election result. There is an opportunity for any of the aggrieved candidates to file such an application within the prescribed time limit.

CONTENTS OF THE AFFIDAVITS OF THE FIFTH, THE SEVENTEENTH AND THE TWENTIETH RESPONDENTS

The applicant called upon any of the respondents who intended to oppose the court application to do so by filing a notice of opposition in Form CCZ2.

The fifth respondent's affidavit

The fifth respondent's notice of opposition reads as follows:

> "TAKE NOTICE that the fifth respondent intends to oppose this application on the grounds set out in the Affidavit annexed to this notice, …"**.**

The facts detailed by the affidavit attached to the notice of opposition tell a different story. The fifth respondent was in fact supporting the applicant, contrary to the notice of opposition. The affidavit contains the following:

"1-3 …

INTRODUCTION

4 *While I am cited as a respondent, I support Mr Chamisa's application to invalidate the recent presidential elections.* The purpose of this affidavit is briefly to set out the basis for my support of this application.

5 …

6 … *my contribution will primarily take the form of advancing legal submissions in support of the applicant, both in heads of argument and at the hearing.* I will advance three propositions:

6.1 First, the validity of a presidential election depends on whether it was free and fair at all stages of the process.

6.2 Second, the presidential election was not free or fair on the basis that:

6.2.1 There is clear evidence that the Zimbabwe Electoral Commission manipulated the election results.

6.2.2 There was a pattern of irregularities and unlawful conduct during the election campaign and on voting day.

6.3 Third, the just and appropriate remedy is to declare that the elections were not free and fair, to invalidate the presidential elections, and to order fresh elections. These fresh elections must be subject to a structural interdict to ensure that the ZEC delivers a truly free and fair presidential election on its second attempt. (italics added for emphasis)

7-82 …

JUST AND APPROPRIATE REMEDY

83 *I substantially support the relief set out in the draft order submitted by the applicant.*

84 First, I support the declaratory order that the presidential elections were not free and fair.

84.1 This declaration is necessary to vindicate the constitutional and statutory rights to a free and fair election which have been unjustifiably infringed.

84.2 It is just and equitable 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 and to provide proper guidance for the conduct of future elections.

85 Second, *I also support an order invalidating the presidential elections under section 93(4)(b) of the Constitution and/or section 117 of the Electoral Act.*

85.1 *This order is the just and appropriate remedy under section 93(4)(b) of the Constitution as the irregularities in the election process resulted in an election that was not free and fair. I submit that the absence of a free and fair process is sufficient to establish grounds for invalidation.*

85.2 This order is also justified under section 177 of the Electoral Act as the irregularities in the election process were in breach of the principles underlying the Electoral Act and affected the result of the election. But for these irregularities, Mr Mnangagwa would not have won the election.

85.3 Any difference between the two tests for invalidation under section 93(4)(b) of the Constitution and section 177 of the Electoral Act will be addressed in argument.

86 Third, *I further support the order directing a new presidential election within 60 days. This order follows as a matter of course from an order invalidating the election under s 93(4)(b) of the Constitution.*

86.1 *I submit that this election should take the form of a run-off election between the applicant and Mr Mnangagwa.*

86.2 *Alternatively, there should be an entirely new presidential election, if it is found that the election results are too compromised to allow for any accurate identification of the candidates for a run-off.*

87 Finally, I submit that it would be just and appropriate for this Court to exercise its broad remedial discretion to grant a structural interdict directing the ZEC to take appropriate steps to ensure that the fresh election is truly free and fair and to report to this Court on its progress. I submit that there are ample grounds for this structural interdict on the basis that:

87.1-87.2 …

87.3 There is clear evidence that the presidential elections were not free and fair …". (italics added for emphasis)

The seventeenth respondent's affidavit

The seventeenth respondent's affidavit captured his position as follows:

"1-1.1 …

1.2. I have read the founding affidavit of **NELSON CHAMISA**, the applicant in this matter.

1.3. *In the main I agree with the application, but I do wish to be involved in these proceedings and would want my views to be considered by this Honourable Court.*

1.4.-1.7. …

(b) **NATURE OF THE APPLICATION**

Ad paragraph 3.8

1.8. It is admitted that this application is a challenge of the Presidential election which announcement the applicant deems to have been irregular and illegal. *I concur with the applicant's averment that the announcement by the twenty-third and twenty-fourth respondents was ultra vires the prescripts of the Electoral Act and the Constitution.*

1.9. *To the extent that the announcement of the election results was irregular, I wish to associate myself and my party with the second relief sought that the declaration by the twenty-third respondent and that the first respondent is the duly elected Presidential Candidate falls to be challenged as well* …". (italics added for emphasis)

The twentieth respondent's affidavit

The twentieth respondent went further to make a specific prayer in the affidavit he filed together with the notice of opposition. The relevant part of the affidavit reads as follows:

"1. …

2. To start with I do confirm that I duly received a copy of the petition filed on behalf of the applicant. The petition consists of the application and a bundle of documents. I have carefully and diligently read the contents thereof and wish to state that I am opposed to the granting of part 2 of the relief sought for the reasons that will more fully appear in the body of my opposing affidavit. Given the gross irregularities and the margin that was wrongly attributed to the first respondent it is improper to declare either the applicant or the first respondent the winner without a full audit by independent qualified auditors. I wish to place it on record that I did not file a

> petition of my own because I believe that I did not earn reasonably sufficient votes to warrant making a petition. But this is not to say I am in agreement with the manner in which the elections were conducted by the twenty-third respondent. Far from it. I therefore wish to make the following averments to enable this Court to make an informed determination of this important matter whose implications will be felt by everyone for the next five years. …
>
> 3. The elections were not conducted by the twenty-third respondent in accordance with the principles of fairness set out in the Electoral Act and the Constitution. The election was also not free from gross electoral malpractices, which tainted the whole process to such an extent that the election cannot be deemed credible. Basically the results announced by the twenty-third respondent are not accurate, verifiable, secure and transparent as contemplated in the Constitution as I will demonstrate below." (the underlining is for emphasis)

In the same affidavit, the twentieth respondent also challenged the Presidential election result, by alleging that some votes that were counted in favour of the first respondent were from non-existent polling stations. He claimed that there was bias by the State media towards the first respondent's campaign, contrary to the Act. His substantive relief was couched as follows:

> "I accordingly pray as follows:
>
> (a) The Presidential election of 2018 was not conducted in accordance with the laws of Zimbabwe and was not credible and fair;
>
> (b) In terms of section 93(4)(b) an election to the office of the President of the Republic of Zimbabwe shall be held within sixty (60) days of this order.
>
> (c) The twenty-third, twenty-fourth and twenty-fifth respondents be ordered to pay costs of the petition on a higher scale."

As already indicated, the twentieth respondent had the right to approach the Court in terms of s 93(1) of the Constitution. The term "aggrieved candidate" is not qualified by the number of votes the aggrieved candidate received in the Presidential election. There is no merit in the twentieth respondent's submission that he could not have lodged his own court application because

he did not earn sufficient votes to warrant making the application. The misconception does not validate the procedure he adopted.

When a person acts as a respondent in terms of r 17(2) of the Rules, he or she does so for the specific purpose of opposing the granting of the relief sought by the applicant and challenging the veracity of the grounds on which the application is based. He or she must meet the procedural and substantive requirements, compliance with which confers on a respondent the right to appear before the Court and be heard in his or her own cause.

It is plain that the Rules adequately provide for the procedure to be followed when filing a notice of opposition.

The fifth, the sixth, the seventeenth, the eighteenth and the twentieth "respondents" were not respondents within the meaning of rules 16(3)(d), 17(1), 17(2), 23(2) and 23(3) of the Rules.

DISPOSITION ON THE EXPUNGING OF THE OPPOSING PAPERS OF THE FIFTH, THE SIXTH, THE SEVENTEENTH, THE EIGHTEENTH AND THE TWENTIETH RESPONDENTS

The fifth, the sixth, the seventeenth, the eighteenth and the twentieth respondents failed to comply with the requirements of the law relating to the substance of an opposing affidavit. They had no *locus standi* and the papers they purported to file were not properly before the Court. An order that the papers filed by the fifth, the sixth, the seventeenth, the eighteenth and the twentieth respondents be expunged from the record of proceedings was accordingly made by the Court.

WHETHER THE APPLICATION IS PROPERLY BEFORE THE COURT

THE LODGING OF THE COURT APPLICATION

The first respondent, the Commission, the twenty-fourth and the twenty-fifth respondents took points *in limine*. One of the points *in limine* was that the court application was not properly before the Court. Although filed within seven days, as is stipulated by s 93(1) of the Constitution, the court application was served on the respondents on the eighth day, in violation of r 23(2) of the Rules. In addition, the applicant served the application only on the first respondent on his own, rather than through the Sheriff as required by the Rules.

The first respondent was declared to be duly elected as President of the Republic of Zimbabwe on 3 August 2018. In terms of s 93(1) of the Constitution, as read with r 23(2) of the Rules, the applicant had until 10 August 2018 to file and serve the court application on the respondents.

The applicant appears to have been cognisant of the reckoning of days and times prescribed by the Constitution. He waited until the last day before filing the court application with the Registrar shortly before close of business on 10 August 2018. He was entitled by law to do so.

Having filed the court application with the Registrar, the applicant was required by r 23(2) of the Rules to serve the court application on all the respondents within the prescribed period. Rule 9(7) of the Rules required the court application, as process initiating litigation in the Court, to be served by the Sheriff within the period prescribed for the service of the process. The respondents submitted that the applicant instructed the Sheriff to serve the court application outside the period prescribed for service of process.

The contention advanced on behalf of the applicant was that the Sheriff was given the instruction to serve the documents on the respondents eight hours before the expiry of the prescribed period. The allegation was made that the Sheriff executed service of the court

application and the supporting documents on the respondents outside the prescribed period. The applicant put the blame for failure to serve the respondents timeously on the Sheriff. The affidavits submitted by the respondents show that the applicant had attempted to effect service of the court application and the supporting documents without the involvement of the Sheriff on 10 August 2018.

It is common cause that the court application was eventually served on the respondents on 11 August 2018, outside the period prescribed by the Rules. Service was outside the period of seven days prescribed in s 93(1) of the Constitution as the period within which a petition or application by an aggrieved candidate challenging the validity of a Presidential election had to be lodged.

The notices of opposition would have been due within three days from that date, being 14 August 2018.

In terms of s 336(2) of the Constitution:

> "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."

The *dies induciae* having expired on 14 August 2018, which was a public holiday in Zimbabwe, the notices of opposition had to be filed on the next business day, being 15 August 2018. They were duly and properly filed with the Registrar on that date.

WHETHER THE COURT APPLICATION WAS FILED OUT OF TIME

Mr Uriri and *Mr Magwaliba* submitted that the court application was filed out of time. The submission was that to successfully lodge an application in terms of s 93(1) of the Constitution, as read with r 23(2) of the Rules, it was imperative to file and serve the court application on the interested parties within seven days of the declaration of the Presidential election result. The first respondent also argued that the seven-day period as contemplated by the Constitution included weekends.

Mr Uriri argued that the purpose of s 93(1) of the Constitution was to afford an aggrieved candidate an opportunity to challenge the validity of the Presidential election at the earliest time possible, bearing in mind the importance of the Office of President.

Mr Kanengoni also submitted that the court application was served out of time. It was his position that "lodge", as contemplated by s 93(1) of the Constitution, meant that the court application had to be filed and served on all the respondents within seven days. He submitted that, for service of the court application to be effective, it had to be executed by the Sheriff.

According to the applicant, the word "lodge", as used in s 93(1) of the Constitution, means to file the court application with the Registrar.

Counsel for the applicant sought to rely on s 169 of the Act to support the contention that the court application was timeously filed and served on the respondents. Section 169 of the Act sets out the time-frame for service of election petitions presented to the Electoral Court where one complains of an undue return or an election of a Member of Parliament by reason of want of qualification, disqualification, electoral malpractice, irregularities, or any other cause. In terms of s 169 of the Act, the petition shall be served on the respondents within ten days after the

presentation of the petition, either personally or by leaving the same at his or her usual or last known dwelling or place of business.

Mr Uriri submitted that s 169 of the Act was of no relevance to the construction of s 93(1) of the Constitution, which begins with the words "Subject to this section". The effect of the use of the words "Subject to this section" is that any provision on time limits within which anything is required to be done which is contrary to what is prescribed under s 93(1) of the Constitution would have to be subservient to the provisions of s 93(1) of the Constitution.

THE LAW GOVERNING THE FILING AND SERVICE OF A COURT APPLICATION MADE IN TERMS OF SECTION 93(1) OF THE CONSTITUTION

Section 93(1) of the Constitution provides that any aggrieved candidate may challenge the validity of an election of a President by lodging a petition or application with the Court within seven days after the date of the declaration of the result of the Presidential election. Subsection (3) of s 93 enjoins the Court to hear and determine the petition or application lodged in terms of subs (1) within fourteen days after the application is lodged.

The meaning of the word "lodge" was the point of departure for the parties. The applicant's view was that it meant simply filing the application with the Registrar. The respondents, on the other hand, contended that "lodge" means to file the application with the Registrar and serve it on the respondent within seven days after the date of the declaration of the result of the Presidential election.

It is not possible to find the true meaning of "lodge", as used in s 93(1) of the Constitution, without having regard to the relevant provisions of the Rules. The general principle is that when one interprets a constitutional provision, any law that is subsidiary to the Constitution must be read

together with the constitutional provision in question. The subsidiary law must be given effect as long as it is constitutionally valid. It is common cause that the constitutionality of the Rules was not questioned. They are valid and fully applicable.

Section 93(1) of the Constitution simply states that an aggrieved candidate may lodge an application within seven days after the date of the declaration of the Presidential election result. If he or she decides to do so, the lodgment of the petition or application must be effected within seven days of the declaration of the Presidential election result. The finer details of how the petition or application is effectively lodged are left to be prescribed by the Rules.

Section 93(1) of the Constitution confers on an aggrieved candidate the right to challenge the validity of a Presidential election. It confers on the aggrieved candidate the right of access to the Court. Where there is a right, there is a remedy. The remedy is the provision for the institution of proceedings in the Court by way of a petition or application to vindicate the right to challenge the validity of a Presidential election. The right to the remedy is conditional upon the petition or application being lodged with the Court within seven days of the declaration of the Presidential election result. Section 93(1) of the Constitution makes provision for both substantive and procedural rights. The question of filing and serving process is a question of procedure which falls within the purview of the Rules.

In *Tsvangirai v Mugabe & Ors supra* the Court held that s 93 of the Constitution must be considered as one whole. All other provisions which have a bearing on its true meaning must be considered so as to enforce the spirit and underlying values of the Constitution. At p 14 of the cyclostyled judgment the Court said:

"What is not to be overlooked when interpreting the provisions of s 93 of the Constitution is the fact that they set up a procedural mechanism, the purpose of which is the protection of the fundamental right of every Zimbabwean citizen to a free, fair and credible election for the public office of President. It is a procedural mechanism, the implementation of which is intended to uphold the fundamental principle of the rule of law on which Zimbabwe is founded." (the underlining is for emphasis)

Rule 23 of the Rules provides in relevant part as follows:

"**23. Dispute relating to the election to the office of President or Vice President**

(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 seven days of the date of the declaration of the result of the election." (the underlining is for emphasis)

Rule 23(2) of the Rules explains the meaning of the word "lodge", as contemplated by s 93(1) of the Constitution. In terms of the subrule, to "lodge" means to file and serve the application made in terms of s 93(1) of the Constitution within seven days of the declaration of the Presidential election result.

There is no merit in the applicant's contention that "lodge", as used in s 93(1) of the Constitution, means to place the application in the Registrar's office. That interpretation would negate the effect of the intended relationship between the constitutional provisions and the Rules that are intended to give effect to them.

Section 93(1) of the Constitution cannot stand on its own because it sets up a general procedural mechanism, the specifics of which are grounded in the Rules. The law, as sanctioned by the Constitution itself, requires that the application be filed and served within seven days of the declaration of the Presidential election result.

THE APPLICABILITY OF SECTION 169 OF THE ACT

It is also important to highlight that s 169 of the Act does not apply to a court application that is brought to the Court in terms of s 93(1) of the Constitution. This is so because s 169 of the Act applies to election petitions presented to the Electoral Court. More importantly, the Act itself recognises the distinction between petitions presented to the Electoral Court in terms of the Act and petitions brought to the Court in terms of s 93(1) of the Constitution. Section 111 of the Act specifically provides for election petitions in respect of the election to the Office of President. Consistent with s 93(1) of the Constitution, s 111(1) of the Act provides as follows:

> "(1) An election petition complaining of an undue return or an undue election of a person to the office of President, by reason of irregularity or any other cause whatsoever, may be presented to the Constitutional Court within seven days of the declaration of the result of the election in respect of which the petition is presented, by any person —
>
> (a) claiming to have had a right to be elected at that election; or
>
> (b) alleging himself or herself to have been a candidate at such election." (the underlining is for emphasis)

In the light of the provisions of s 111(1) of the Act, there was no merit in *Mr Mpofu*'s attempt to persuade the Court to apply s 169 of the Act to purge the applicant's non-compliance with the requirements of s 93(1) of the Constitution. The applicant had to file and serve the application on all the respondents within seven days of the declaration of the Presidential election result by the twenty-fourth respondent.

COMPUTATION OF DAYS

There was also no merit in the applicant's computation of days. The Constitution does not refer to weekdays but days. This is to be taken to mean seven calendar days and includes Saturdays

and Sundays. In terms of r 23(2) of the Rules, the court application shall be lodged with the Registrar and shall be served on the respondent within seven days of the declaration of the result of the Presidential election.

The applicant's interpretation of s 93(1) of the Constitution does not accord with the importance that is attached to the declaration of a Presidential election result, and the need for certainty as to who is the President soon after the Presidential election result is declared. The intention behind s 93 of the Constitution is that the Office of President be filled immediately after a declaration of the Presidential election result. In the event that the validity of the Presidential election is challenged, it is the will of the people, as expressed in s 93(3) of the Constitution, as read with r 23(7) of the Rules, that the challenge be determined within fourteen days after the application is lodged.

The importance of the Office of President and the reason why the determination of who holds that office should be finalised as soon as possible after a declaration of the Presidential election result were highlighted by the Court in *Tsvangirai* v *Mugabe and Ors supra* at pp 24-26 of the cyclostyled judgment. The Court said:

> "Every constitutional democracy sets great value on the office of President in the distribution of the powers of the State. By the Constitution, the people in the exercise of their sovereign authority designated the office of President as one of the most important offices. They assigned to the office of President powers by the lawful exercise of which they committed themselves to be governed in accordance with the conditions they prescribed. An election of a President is therefore a central institution for securing democratic self-government. By the election, the people choose the person who will exercise the powers of self-government for their benefit. …
>
> An election of a President in Zimbabwe is a popular affair, in that every citizen registered on a voters roll at ward and constituency level countrywide is eligible to vote for a President. … Once chosen in a free, fair and credible election, a President assumes an

> office with enormous powers which he or she is required to exercise in accordance with the Constitution or any other law. …
>
> An election of a President is bound to generate profound public interest, not necessarily measured by the number of votes cast in the election. Stakes are very high and political tensions may rise to levels that threaten public order and national security. The election of a President is not just about finding an answer to the question who of the candidates should be the leader of the Government. It is about choosing a leader who will have the interests of all Zimbabwean citizens at heart and has the intellectual ability to exercise the powers of the office in accordance with the fundamental principles and values on which a democratic society is based to change the lives of the people for the better.
>
> By the very nature of the circumstances in which it arises, a petition or application challenging the validity of an election of a President alleging that the President-elect stole the election requires effective and urgent determination on the merits. It is indicative of simmering political tension and potential disturbance of public peace and tranquility. The cause is the very fact that those who would have voluntarily taken part in the electoral process, convinced that the rules by which they act guarantee the validity of the electoral outcome, challenge it as losers." (the underlining is for emphasis)

It is because of the essential nature of the Office of President and the emotions surrounding a Presidential election that the requirement to file and serve a challenge to the election result must be strictly honoured. It is after the filing and service of the application within seven days of the declaration of the Presidential election result that all other procedures for the filing of opposition papers and heads of argument in the matter start to kick in. The time-frames set out in r 23 of the Rules are computed from the day that the court application is filed and served. From that day, the Court, the opposing parties as cited in the application, and the nation at large, begin to prepare themselves for the hearing and determination of the question whether the Presidential election was free, fair and credible.

It follows from all of the foregoing that, although the application *in casu* was filed within the prescribed seven-day period, it was not served on the respondents within that time-frame.

Accordingly, it cannot be held to have been duly lodged in accordance with the applicable provisions of the Constitution and the Rules.

APPLICATION FOR CONDONATION FOR NON-COMPLIANCE

An application for condonation of non-compliance with the procedural requirements prescribed by s 93(1) of the Constitution, albeit opposed by the respondents, was made by the applicant. *Mr Magwaliba* specifically argued that non-compliance with the Constitution could not be condoned.

Despite opposition to the application for condonation, the Court was prepared to, and did, grant the application. It considered the importance of the matter in dispute and the public interest involved. The detailed reasons for granting condonation are as follows.

LEGAL FRAMEWORK FOR DEPARTURE FROM THE RULES

The Court is imbued with a wide discretion when deciding a constitutional matter within its jurisdiction. The wide discretion includes the power to condone a departure from the Rules.

The question whether the Court has power to condone non-compliance with procedural requirements prescribed by a constitutional provision given effect to by the Rules of the Court is a constitutional matter. Non-compliance with the Rules in relation to a procedural matter provided for under the Constitution is non-compliance with the relevant procedural requirements prescribed by the Constitution.

In *Grootboom* v *National Prosecuting Authority and Anor* 2014 (2) SA 68 (CC) at paras [20] and [35], the Constitutional Court of South Africa had occasion to consider the question of the power to condone non-compliance with court rules. It said:

> "[20] … It is axiomatic that condoning a party's non-compliance with the rules of court or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation.
> …
> [35] … the granting or refusal of condonation is a matter of judicial discretion. It involves a value judgment by the court seized with a matter based on the facts of that particular case."

In terms of s 175(6)(b) of the Constitution, the Court, in deciding a constitutional matter within its jurisdiction, has a general power to "make any order that is just and equitable". Consideration of what is in the interests of justice is paramount. A court exists to do justice. It also exists to act fairly. Ordinarily, once a court finds that it is just and equitable to allow a matter to be brought to it outside the procedural requirements, it follows that it would be in the interests of justice to allow the matter to be heard. *Minister of Justice* v *Ntuli* 1997 (3) SA 772 (CC) para [31]. If justice and fairness would best be served or advanced by the employment of an available remedy, then it ought to prevail as a constitutionally sanctioned solution to the procedural issue. The Court must not lose sight of the substantive values in the light of which procedural requirements are made.

Where the Court considers that it is in the interests of justice to condone a departure from the procedural requirements, it is entitled to remedy non-compliance by giving an indulgence to the defaulting party. The order granting condonation is itself a form of a just and equitable remedy that the Court can grant in terms of s 176(5)(b) of the Constitution.

The consideration of what is "just and equitable" and what is in the "interests of justice" involves giving effect to the values of procedural justice and fairness. It is for this reason that s 176 of the Constitution provides that the Court has inherent power to protect and regulate its own

process. Allowing a departure from the Rules is a form of the exercise of the Court's constitutional power to regulate its own process to give effect to and achieve justice.

Rule 5 of the Rules provides as follows:

"**5. Departure from rules and directions as to procedure**

(1) The Court or a Judge may, in relation to any particular case before it or him or her, as the case may be —

(*a*) direct, authorise or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he or she, as the case may be, is satisfied that the departure is required in the interests of justice;

(*b*) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him or her, as the case may be, to be just and expedient.

(2) The Court or the Chief Justice or a Judge may —

(*a*) of its, his or her own accord or on application and on sufficient cause shown, extend or reduce any time period prescribed in these rules and may condone non-compliance with these rules;

(*b*) give such directions in relation to matters of practice or procedure or the disposal of any appeal, application or other matter as the Court or the Chief Justice or Judge may consider just and expedient." (the underlining is for emphasis)

Rules deal with procedural matters only. Procedural matters prescribed in s 93(1) of the Constitution are embodied in the Rules. They can be the subject of the exercise by the Court of the discretionary power provided for under r 5 of the Rules.

In *Marco Ltd* v *Newfoundland Processing Ltd* (1995) 130 Nfld. & P.E.I.R. 308, as referred to in *Duhaime's Law Dictionary*, the Supreme Court of Newfoundland and Labrador, Trial Division, said:

> "The Rules of Court … set out procedural pathways or guidelines for the conduct of litigation. The court, in the exercise of its inherent jurisdiction to control its own process and under the Rules themselves, may modify the strictures of particular procedural requirements to meet the exigencies of a specific case provided always, of course, any such modification can be done without encroaching on the rights of other parties to a fair and proper hearing." (the underlining is for emphasis)

In *Mukaddam* v *Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC), the Constitutional Court of South Africa relied on the same principle. In para [39] it said:

> "[39] Flexibility in applying requirements of procedure is common in our courts. Even where enacted rules of court are involved, our courts reserve for themselves the power to condone non-compliance if the interests of justice require them to do so. Rigidity has no place in the operation of court procedures. Recently in *PFE International and Others* v *Industrial Department Corporation of South Africa Ltd* [2013 (1) SA 1 (CC)] this Court reaffirmed the principle that rules of procedure must be applied flexibly. There this Court said:
>
> > 'Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their own processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules.'"

It is on the basis of the principle behind the purpose of the inherent power of the Court to control its own process provided for in s 176 of the Constitution that *Mr Magwaliba*'s submission, that non-compliance with a requirement of a rule giving effect to a constitutional provision cannot be condoned, must fail. Once a procedural matter is made the subject of a rule of court, and there

is a general rule giving the Court the power to condone non-compliance with the procedural requirements when it is in the interests of justice to do so, the fact that the procedural matter has its origin in the Constitution is no bar to the Court exercising its discretionary power in terms of the Rules.

The one-day delay in serving the application on the respondents through the Sheriff was not inordinate. The respondents did not allege any prejudice arising from the applicant's non-compliance with the procedural requirements of r 23(2), as read with r 9(7), of the Rules. The national importance of the dispute cannot be overlooked. It has been held that where the delay is relatively short and no prejudice is suffered, the court is likely to grant condonation of non-compliance with procedural requirements. See *Oriani-Ambrosini MP* v *Sisulu MP, Speaker of the National Assembly* 2012 (6) SA 588 (CC) at paras 15 and 17-19.

THE EFFECT OF GRANTING CONDONATION

THE INTRODUCTION OF NEW DOCUMENTS BY THE APPLICANT AFTER SERVICE OF THE COURT APPLICATION ON THE RESPONDENTS

Having been granted condonation for failure to file and serve the court application on time, the applicant sought to produce a new set of documents. It was common cause that the new set of documents had not been filed and served on all the respondents within the seven-day period as required by s 93(1) of the Constitution. Previously the applicant had attempted to file the new set of documents which were not part of the application with the Registrar. The applicant knew that he was barred from doing so, having failed to have the documents as part of the application. The Court declined to allow the introduction of the new set of documents on the date of the hearing for the following reasons.

Section 93(1) of the Constitution requires a complete case to be made at the time the court application is lodged. In *Tsvangirai* v *Mugabe and Ors supra*, the Court made it clear that the application must be complete at the time it is lodged. The application must contain all the necessary documents supporting the grounds on which the challenge to the validity of the Presidential election is based.

In *Hove* v *Gumbo (Mberengwa West Election Petition Appeal*) 2005 (2) ZLR 5 (S), the Supreme Court held that an election petition must be complete at the time of presentation. At 92F-G it said:

> "For a court to set aside an election the cause of the complaint should have been pleaded in the petition at the time of its presentation and established by evidence … . The duty of the court is to determine whether the petitioner has by evidence adduced established the cause of his complaint against the election result. The effect of s 132 of the Act is that a petitioner complaining of an undue election must state the nature of the cause of his or her complaint. The cause of complaint must be clearly and concisely stated at the time of presentation of the petition … .
>
> The respondent is entitled to know the reason why his or her election is being challenged so that he or she can be able to answer the case."

The aggrieved candidate is the best person to know what it is that the respondent did during the Presidential election which has given him or her the cause of action to challenge the validity of the Presidential election. He or she cannot expect to be given an opportunity to build a case against the respondent at the hearing. The respondent must receive and have knowledge of the case he or she must answer at the time the court application, the founding affidavit and all the supporting documents are served on him or her.

The Court granted the applicant condonation for failure to file and serve the court application and all the documents that he had at the time the *dies induciae* expired. The Court did

not grant the applicant condonation to place documents before it which were not part of his case at the time that he should have filed and served the court application together with the supporting evidence.

No application for condonation and upliftment of the bar in respect of the documents that were not part of the court application was ever made by the applicant. He could not seek to produce and rely on documents which had not been part of the court application at the time it ought to have been filed and served.

As a court application is the process by which proceedings in terms of s 93(1) of the Constitution must be instituted, its procedural and substantive requirements ensure that there should be a complete and clearly defined cause of action at the time the application is lodged with the Court. The evidence of the allegations made against the respondent in the form of the founding affidavit and supporting documents must be filed and served on all the other parties at the time the court application is lodged with the Court.

A proper interpretation of the provisions of r 14(4) of the Rules confirms the principle that an application stands or falls on the facts or averments set out in the founding affidavit at the time the application is filed and served. The subrule makes it clear that only documents which verify the facts or averments set out in the founding affidavit shall accompany the affidavit. As the documents verify the facts or averments set out in the founding affidavit, they form part of the founding affidavit. The founding affidavit must be construed as including all such documents.

An aggrieved candidate challenging the validity of a Presidential election should not make serious allegations of commission of irregularities or electoral malpractices against a respondent when he or she has no evidence to prove the allegations.

Section 93(3) of the Constitution requires the Court to hear and determine the application lodged in terms of s 93(1) within fourteen days of its lodgement. The Court must deal with the applicant's case, as revealed in the court application at the time it is lodged.

SUBPOENA DUCES TECUM

It is necessary to deal with the issue of the *subpoena duces tecum* the applicant sought from a Judge in chambers.

A *subpoena duces tecum* is a subpoena issued under an order of a court compelling a person to produce documents which the court is satisfied are relevant evidence of a matter under determination. A court must first decide whether or not the documents sought to be produced under the force of a *subpoena duces tecum* are relevant as proof of the matter in issue. See *Poli* v *Minister of Finance and Economic Development and Anor* 1987 (2) ZLR 302 (SC); *NetOne Cellular (Pvt) Ltd and Anor* v *Econet Wireless (Pvt) Ltd and Anor* SC 47/18.

On 20 August 2018 the applicant's legal practitioners sent copies of a *subpoena duces tecum* to the Registrar, with an accompanying written request that it be issued. The subpoena sought to compel the Commission to produce its server at the hearing of the court application. The request that the subpoena be issued by the Registrar was placed before the Chief Justice. He gave the following direction:

> "The decision whether or not the subpoena is to be issued is for the full Court to make after weighing the issue of relevance of the evidence to be produced."

The decision was communicated to the applicant's legal practitioners by the Registrar by an accompanying letter on 21 August 2018 and received on the same day at 11.05 am.

The evidence showed that the applicant believed that the Commission had a server into which polling station returns (the V11 Forms) were electronically transmitted and stored. On 02 August 2018 the applicant's legal practitioner and his chief election agent met with the Chief Elections Officer on the issue of the alleged existence of the server. They were advised that the Commission had no server for the transmission of election results. The law of elections does not have a provision requiring the electronic transmission of polling station returns to, and storage in, a server.

The applicant intended to use the process of the *subpoena duces tecum* for a purpose for which it was not designed. It appears that the applicant intended to use the subpoena for the purpose of searching for evidence.

In the *NetOne Cellular (Pvt) Ltd* case *supra* at p 13 of the cyclostyled judgment, the Supreme Court said:

> "It is trite that any document may be made the subject of a *subpoena duces tecum* if it is or may be relevant to the conduct of the litigation by the party seeking its production. That said, a *subpoena duces tecum* must have a legitimate purpose. (The unreported judgment of MARAIS J in the *WLD Wachsberger* v *Wachsberger* on 8 May 1990 in case No 8963/90 and the unreported judgment of PLEWMAN J in the WLD on 6 October 1993 in the case of *Lincoln* v *Lapperman Diamond Cutting Works (Pty) Ltd* 17411/93.)
>
> What can be gleaned from the above remarks is that a court should not permit a *subpoena duces tecum* to be used to pursue a motive other than the securing of evidence by the party requiring it which is important to advance its case. In other words, the party seeking to issue a *subpoena duces tecum* should show that it has a legitimate purpose."

The question of legitimacy of the subpoena sought was never determined by the Court. It remains unanswered, as no application for the subpoena was made to the Court to determine the matter, despite the applicant having been notified that this was required.

No-one knows what, in the circumstances, the decision of the Court would have been had the application been made for the *subpoena duces tecum* to be issued compelling the Commission to produce its server at the hearing of the application. No-one knows what the responses of the respondents would have been to such an application had it been made, considering the requirements of ss 93(1) and 93(3) of the Constitution.

The applicant would have been required to show that he was not on a "fishing expedition". Only specific documents relevant to the case would have been requested.

In the *NetOne Cellular (Pvt) Ltd* case *supra* at pp 15-16 of the cyclostyled judgment, the Supreme Court said:

> "A s*ubpoena duces tecum* cannot be used indiscriminately, as though one was on a 'fishing expedition'. Only specific documents relevant to the case can be requested. General, sweeping requests are improper and this is one such request. As the Second District Court of Appeal in America said in *Walter* V. *Page*, 638 So.2d 1030 (Fla. 2d DCA 1994):
>
> > 'We agree with the appellant that the *subpoena duces tecum* was too broad. The rule authorising a *subpoena duces tecum* requires some degree of specificity, and the documents or papers sought should be designated with sufficient particularity to suggest their existence and materiality. *Palmer* v. *Servis*, 393 So.2d 653 (Fla. 5th DCA 1981); Fla.R.Civ.P. 1.350(a). The subpoena in the instant case was too broad in seeking virtually all of appellant's personal financial documents. The *subpoena duces tecum* is not the equivalent of a search warrant, and should not be used as a fishing expedition to require a witness to produce broad categories of documents which the party can search to find what may be wanted.'
>
> These remarks are apposite. A court should be wary of permitting litigants to use the machinery of a *subpoena duces tecum* to request large amounts of information in the hopes that some of it may prove useful. An order for the production of documents under such subpoena should not be given unless the court is of the opinion that the documents are necessary for disposing fairly of the cause or matter."

SUMMARY OF THE APPLICANT'S CASE

The issues for determination in this segment of the judgment relate to the following matters –

(a) The case as pleaded and presented;

(b) The *locus* of the burden of proof;

(c) The standard of proof;

(d) The kind of evidence required for proof; and

(e) The discharge of the burden of proof.

There was evidence of ambivalence in the applicant's mind as to the grounds on which he wanted the Court to determine the question of the validity of the Presidential election. The substance of the relief sought in para 1(i) of the order sought shows that the case the applicant was alleging, and on the proof of which the order would be granted, was the failure by the Commission to deliver free, fair and credible harmonised elections, including the Presidential election. The ground was that the harmonised elections were not conducted in accordance with the law.

The applicant alleged, and would have had to prove, that the Commission through its officers had committed irregularities, or the Commission had failed to act against the commission of electoral malpractices by others where it was under the duty to act. The allegation was that as a result of the commission of irregularities or the omission to act against the commission of electoral malpractices by others the Commission failed to deliver free, fair and credible harmonised elections. The appropriate relief upon a finding of the facts alleged by the applicant would have been a declaration of invalidity of the whole election process and the setting aside of the Presidential election result.

Paragraph 1(ii) of the order sought by the applicant reveals a case based on a different allegation. The allegation, on the proof of which relief was sought to be granted by way of para 1(ii) of the order, was that the applicant won the Presidential election. The allegation was that officers of the Commission corruptly manipulated the Presidential election result in such a manner that the first respondent's win was rigged. The allegation was that the officers of the Commission awarded the first respondent fictitious votes. The allegation was not that the Commission had by commission of irregularities failed to deliver a free, fair and credible Presidential election. The allegation was that the electorate voted freely and delivered a win to the applicant.

It followed logically that the appropriate relief that would have been granted by the Court upon proof by the applicant of the allegation that he won the Presidential election would have been a declaration that the Presidential election result announced by the Commission was an undue result. The Court, upon a finding of the due result as contended for by the applicant, would declare him the winner. On the basis of the allegation that he won the Presidential election, the applicant's case could not be that the harmonised election was not free and fair. It would be ironic to claim to be the winner of an election which is claimed to be not free and fair in terms of the law of elections.

Whichever case the applicant sought to be put before the Court, it had to be evidence-based. Although *Mr Mpofu* indicated that the case presented to the Court was not based on the allegation of malpractices before the declaration of the results, it is necessary to refer to the allegation that the Commission failed to deliver a free, fair and credible Presidential election.

The alleged violations said to have been committed by the Commission and the twenty-fourth respondent, directly or as a result of failure to enforce the relevant provisions of the Act in the conduct of the harmonised elections, are now referred to.

The High Court of Zimbabwe was seized with and determined some of the allegations, on the basis of which the ability of the Commission to conduct a free, fair and credible harmonised election was impugned. The issues related to the following matters -

i) The conduct of postal voting;

ii) The design of the Presidential ballot;

iii) The release of voters rolls with voters' photographs to the parties; and

iv) The Commission's obligation to facilitate voting by civil servants engaged in election duties on election day.

The High Court held in favour of the Commission in respect of the matters raised against it. No appeal was made against these decisions. They remain extant. The Court will address the applicant's contentions in respect of these issues to show general lack of seriousness in the allegations made against the respondents.

In the abridged version of the judgment, the Court did not address the totality of the allegations made by the applicant, as listed above, reserving them for the main judgment. In order to deal with them now, the Court will first outline the applicant's case as pleaded in the founding affidavit and thereafter set out the responses by the respondents. It will then set out the arguments that were made by the applicant, the first respondent, the Commission, the twenty-fourth and the twenty-fifth respondents on the day of the hearing of the application. There will then be an

assessment of the evidence to determine the question whether the allegations against the respondents have been proved and, if so, what impact the conduct had on the Presidential election or result.

The dynamics of the case, as pleaded by the applicant, involved making as many allegations against the respondents as possible without regard to the probabilities. Every unnecessary allegation of irregularity or electoral malpractices made against a respondent in an election petition subtracts cogency from the grounds on which relief is sought.

THE APPLICANT'S CASE IN DETAIL

1. Lack of independence of the Commission

The applicant alleged that the conduct of the Commission showed that it lacked independence, especially through the conduct of its Chairperson. He alleged that the lack of independence, transparency and accountability of the Commission was meant to and did benefit the first respondent.

2. Failure of the State-owned media to comply with s 61(4) of the Constitution

The applicant alleged that, although s 64(1) of the Constitution requires the State media to be impartial and objective, the Zimbabwe Broadcasting Corporation ("ZBC"), *The Herald* and *The Chronicle* were media for propaganda on behalf of the first respondent during the entire duration of the Presidential election campaign. He contended that 60% of the electorate in the rural areas only receive information from the ZBC. The applicant alleged that the ZBC had a profound effect on the electorate's outlook and information on the first respondent's opponents in the

Presidential election. The applicant alleged that the Commission failed to bring the State media to book, thereby failing to ensure an impartial and fair coverage of the harmonised elections.

3. Conduct of traditional leaders and rogue security elements

The applicant alleged that he had evidence to show that traditional leaders were involved in the electoral process as election agents on behalf of the first respondent. He contended that there were people who identified themselves as security officers. They went about campaigning on behalf of the first respondent. He alleged that these people were threatening villagers. The allegation was that the Commission failed to condemn the conduct of the traditional leaders and the rogue security agents.

4. Failure to abide by general principles affecting the conducting of elections

The applicant said the Act gives every political party the right to have reasonable access to all material and information for it to participate in an election. He alleged that only the first respondent's political party obtained access to the unique combination of voters' ward details and cellphone numbers of registered voters. Thereafter, the first respondent is said to have sent out messages to members of the electorate, encouraging them to vote for his political party. Cellular network providers denied the allegation that they had given out the cellphone numbers to the first respondent's political party. The applicant concluded that it was the Commission that gave the information to the first respondent's political party.

5. The Commission's failure to compile a Voters Roll

The applicant stated that the Commission has the duty to compile the roll of registered voters in terms of the Constitution and the Act. According to the applicant, audits that were carried out showed that 11% of voters on the voters roll could not be found. The applicant alleged that the

11% amounts to some 625 000 voters. He said additional audits done by civic organisations found serious discrepancies, including duplicate voters, false ID numbers and false surnames. He alleged that the Commission permitted persons to vote who were not registered voters.

6. Wearing of partisan clothing

The applicant alleged that the twenty-fourth respondent wore the first respondent's campaign regalia in the form of a scarf after her appointment as the Commission Chairperson and was photographed wearing the regalia. According to the applicant, the conduct showed that the twenty-fourth respondent was tainted as the umpire in the harmonised elections.

7. Failure by the Commission to provide a complete Voters Roll

The applicant stated that the voters roll that he was furnished with did not contain biometric data, such as photographs and fingerprints. According to him, this was a violation of s 20(2)(c) of the Act by the Commission. Section 20(2)(c) of the Act states that the voters roll shall specify other information as may be prescribed or as the Commission considers appropriate.

8. Voter education

The applicant alleged that the ZANU-PF political party ("ZANU-PF"), of which the first respondent is a member, was allowed to use sample ballot papers to engage in its own voter education. He said the sample ballot papers were widely distributed to ZANU-PF Members of Parliament in breach of the law. According to the applicant, the use of the material provided fertile ground for rigging through ballot swapping and stuffing.

9. Design of the ballot paper

The applicant alleged that the ballot paper was designed in a manner that favoured the first respondent. Section 3(1) of the Electoral Regulations provides for horizontal segments to equate to the number of candidates on the form. He alleged that the Commission produced a Presidential election ballot paper that was not equally balanced according to the number of candidates on the vertical columns. This was allegedly done to afford the first respondent a material advantage.

10. Fixing of polling station returns (V11 Forms) on the outside of polling stations

In terms of s 64(1) of the Act, after counting of ballot papers is conducted, the presiding officer at a polling station shall without delay, in the presence of such candidates and their election agents as are present, record on the polling station return (the V11 Form) the votes obtained by each candidate and the number of rejected ballot papers in such a manner that the results of the count for each ballot box are shown on the return. The presiding officer is obliged to display the completed polling station return to those present and to afford each candidate or his or her election agent the opportunity to subscribe their signatures thereto. He or she must provide each candidate or his or her election agent with a copy of the completed polling station return. The presiding officer must affix a copy of the polling station return on the outside of the polling station so that it is visible to the public and ensure that it remains there so that all members of the public may inspect it and record its contents.

The applicant alleged that at 21% of the polling stations no V11 Forms were affixed on the outside as prescribed by law. It was contended that this was done to assist the Commission in rigging the Presidential election result in favour of the first respondent.

11. Postal ballots

The applicant alleged that the postal ballot was not cast in secret, as required by the law. According to him, members of the police were summoned by their commanding officers and ordered to vote. He stated that the Commission transmitted the ballots to the commanding officers and not to the applicants for postal ballots. A total of 7 500 ballots were said to have been processed in this manner. It was alleged that the effect was to invalidate the entire postal vote.

12. Counting of Presidential ballots

The applicant stated that the collation and verification of the constituency returns was done at the national command centre. He alleged that the manner in which the returns were collated and verified was in breach of the law. He contended that his chief election agent was not notified of the date and place of verification and that he was not given an opportunity to record the proceedings. He alleged that the entire process of the collation and verification of the constituency returns at the national command centre was done under a cloud of secrecy.

13. Threats to voters of injury, damage, harm or loss

The applicant alleged that, throughout the campaign, soldiers and ZANU-PF operatives threatened rural inhabitants with injury or loss of their property or withdrawal of food aid if their communities did not vote for the first respondent. He alleged that the Commission took no action against such acts. Relying on these allegations, the applicant said the right to vote freely and voluntarily was not protected.

14. Bribery, provision of seed and fertiliser packs

According to the applicant, the first respondent and ZANU-PF candidates distributed seed and fertiliser packs, allegedly purchased with public funds, to rural communities. He said the intention was to induce the electorate to vote for the first respondent and his political party. The

applicant contended that the alleged conduct violated s 136(1)(c) of the Act, which prohibits the making of a gift to any person in order to induce such person to vote for a candidate at an election.

15. Failure by the Commission to deliver a free, fair and credible harmonised election

All in all, the applicant contended that the Commission failed to adhere to or follow the procedures prescribed by the law for conducting a free, fair and credible election. He said the alleged failures by the Commission to act against those who committed the malpractices prohibited by the law of elections had the effect of undermining the legitimacy of the entire harmonised elections, including the Presidential election.

16. Stopping of counting of the Presidential election ballots

The applicant alleged that as copies of the V11 Forms (the completed polling station returns) were being affixed on the outside of various polling stations across the country they showed that he was winning the Presidential election. He alleged that the information alarmed the first respondent and the V11 Forms ended up not being completed on the day of the election. He said the exercise of completing the V11 Forms was done on 31 July 2018.

17. Verification of the Presidential election result

The applicant complained about the delay in the announcement of the Presidential election result. He alleged that the process of the verification of constituency returns and adding together the number of the votes received by each Presidential candidate took over two days to complete. He said that the number of votes received by each Presidential candidate was arrived at in the absence of his chief election agent. He alleged that, after the number of votes received by each Presidential candidate had been ascertained through the procedure he said was irregular, the

Commissioners and not the Chairperson of the Commission announced them. The applicant, however, did not dispute the fact that it was the Chairperson of the Commission who declared the first respondent to be duly elected as President of the Republic of Zimbabwe.

18. Other general allegations made by the applicant

The applicant also alleged that wrong results were announced. He said the figures announced by the Commission did not tally with the number of registered voters. The allegation was that the Commission deflated the number of votes he received.

The applicant contended that about 40 000 teachers were not allowed by the Commission to vote. He alleged that there were irregularities in the manner in which illiterate or physically handicapped voters were assisted. The applicant alleged that the first respondent had 5 396 votes from what he called "ghost polling stations" credited to him. According to him, there were unusual voting patterns which resulted in 352 897 votes being added to the first respondent's number of votes as announced by the Commission. He alleged that there were pre-signed V11 Forms which did not have any information on them.

SUBMISSIONS AT THE HEARING

THE APPLICANT

Mr Mpofu indicated that the applicant's case did not depend on what was alleged to have happened before the events surrounding the announcement of the Presidential election result. The argument by counsel was directed at showing that the number of votes counted by the Commission as having been received by the first respondent, and on the basis of which he was declared to be duly elected as President of the Republic of Zimbabwe, was not accurate. The contention was that the first respondent was declared the winner of the Presidential election on an undue return.

Mr Mpofu relied on a report that was compiled by the Commission after the addition of the number of votes received by each Presidential candidate and the declaration of the first respondent as the winner of the Presidential election. He argued that the Commission admitted making errors in the presentation of the number of votes it said were received by the first respondent and the applicant.

In analysing the Presidential election result as announced by the Commission, *Mr Mpofu* aimed at proving that 0.8% of the votes credited to the first respondent had not been won by him. *Mr Mpofu* sought to advance the proposition that the first respondent benefitted from fictitious votes, on the basis of a number of allegations. The first allegation was that the Commission had admitted in the report it compiled after the declaration of the first respondent as the winner of the Presidential election that 4 491 votes had been taken from the applicant and 4 453 votes irregularly counted as having been won by the first respondent. According to him, there was a difference of 8 944 votes.

Mr Mpofu also informed the Court of the existence of a report by a journalist on national television, to the effect that about 900 people had voted in Norton yet the same town had about 600 registered voters. Without producing proof of the veracity of the report, he argued that the inconsistency in that regard was sufficient to show that the Presidential election result was undue.

Mr Mpofu also asked the Court to take note of a television report made on the polling day, to the effect that in Mashonaland Central Province about 300 000 people had voted in a space of one-and-a-half hours. According to him, the report was sufficient to show that the Presidential election result was not correct. He informed the Court of reports of the voter turnout patterns in Masvingo, which he alleged were clear evidence of anomalies in the Presidential election result. According to *Mr Mpofu*, it was impossible for a voter turnout of 6% at 6 am to escalate to 84% at

the close of the polling station. *Mr Mpofu* urged the Court to disregard a 24% voter turnout in an hour in Masvingo.

Mr Mpofu also alleged that about 40 000 teachers who were involved in the election process were not allowed to vote by the Commission. According to him, the Commission had an obligation to ensure that all the 40 000 teachers cast their vote, in terms of a High Court order which directed that all those who were involved in the voting process be allowed to vote. In his view, the figure of 40 000 teachers who did not cast their votes potentially had an effect of reducing the first respondent's win. Questioned on whether the failure to vote by the 40 000 teachers automatically meant that those votes would translate to the applicant's votes, *Mr Mpofu* submitted that the 40 000 votes were evidence that the Presidential election result could have been materially affected.

Mr Mpofu made reference to the involvement of traditional leaders, who allegedly threatened some members of the electorate to vote for the first respondent. He alleged duress as an element that questioned the validity of the first respondent's win. In the same breath, it was alleged that there were instances where there had been undue influence and bribery of the electorate by the distribution of "freebies" to them, which resulted in an unfair advantage to the first respondent and worked to the disadvantage of the applicant, thus impacting on the Presidential election result.

Mr Hashiti referred the Court to its decision in *Tsvangirai* v *Mugabe and Ors supra* in support of the argument that the test for setting aside a Presidential election result is not that the result was materially affected but that the election process was materially flawed. He argued that the Commission had not recanted the flaws in the election process. Its failure to do so was sufficient to have the Presidential election result set aside.

THE FAILURE BY THE APPLICANT TO REQUEST THE RE-OPENING OF THE BALLOT BOXES AND THE SEALED PACKETS

The Court questioned *Mr Mpofu* on why the applicant had sought to prove the alleged invalidity of the Presidential election result using secondary evidence when primary evidence, in the form of used ballot papers and duly completed V11 Forms, was available. The Court referred *Mr Mpofu* to the provisions of s 67A of the Act, which allows an aggrieved candidate to request the Commission to conduct a recount of votes in one or more of the polling stations when he or she believes that there was a miscount of votes which would have affected the result of the Presidential election.

The Court further asked *Mr Mpofu* to explain why the applicant had not sought an order from the Electoral Court in terms of s 70(4) of the Act to have the closed and sealed ballot boxes containing used ballot papers, the separate sealed packets containing the unused and spoilt ballot papers and the counterfoils of the unused ballot papers, the separate and sealed packets containing the counterfoils of the used ballot papers, the separate and sealed packets containing all the postal ballot papers cast in the harmonised elections, and a separate sealed packet containing the register of assisted voters, re-opened. This is particularly the case in the light of the specific provision that the packets referred to, containing primary evidence of matters relating to the conduct of the Presidential election by the Commission, must be opened for the purpose of a petition questioning an election or return upon an order by the Electoral Court.

Mr Mpofu's argument was that the primary evidence in the sealed ballot boxes and sealed packets could not be used because the containers were "poisoned chalices". According to him, the procedure under s 67A of the Act did not offer an effective remedy because there had allegedly been doctoring of the ballot papers and the V11 Forms. He based his argument on allegations that

some V11 Forms had been tampered with, and that some had not been signed and stamped after the ballot papers had been counted.

Mr Mpofu could not explain how it could be argued that the Commission had tampered with real evidence of the procedure of conducting the election contained in the closed and sealed ballot boxes and the sealed packets, when the procedure of closing and sealing the ballot boxes and the sealing of the packets is taken into account. He could not explain how the Commission could be accused of manipulating the contents of the closed and sealed ballot boxes and the sealed packets considering the procedure of conducting the election prescribed in ss 56(2), 56(3), 56(4), 57, 59, 61, 63 and 64 of the Act.

Mr Mpofu was also questioned on what percentage of the Presidential election result the V11 Forms placed before the Court would constitute. Counsel was unable to answer the question. He said that the seven days within which the court application had to be lodged in terms of s 93(1) of the Constitution did not give the applicant enough time to fully collect relevant evidence that related to the validity of the Presidential election result that was declared.

THE FIRST RESPONDENT'S ARGUMENT

Mr Uriri submitted that had the applicant invoked the remedy prescribed by s 67A of the Act he would have been able to establish by real and reliable evidence the inconsistencies, if any, between the actual votes cast in favour of both the applicant and the first respondent and the number of votes announced by the Commission as having been received by each candidate. The contention by *Mr Uriri* was that what carries the day in an application of this nature is the adduction of credible evidence to prove the allegations made.

Mr Uriri argued that the applicant bore the *onus* of proving the criminal allegations that he levelled against the first respondent. In his view, bald allegations were not enough to impugn the validity of the Presidential election result. He referred to the Court's decision in *Tsvangirai* v *Mugabe and Ors supra* as authority for the proposition that sufficient and clear evidence had to be placed before the Court in order to properly prove the applicant's case. He argued that there was a presumption that the Commission had acted in terms of the law when it declared the first respondent to be duly elected as President of the Republic of Zimbabwe. The presumption had to be rebutted by clear and credible evidence which, so his argument went, the applicant had failed to place before the Court.

Mr Uriri took issue with the fact that the applicant's case, as argued before the Court, was premised on a report which was contained in a set of documents that had not been placed before the Court. The report had not been served on the first respondent within seven days of the declaration of the result of the Presidential election in respect of which the application was presented in terms of s 93(1) of the Constitution. In that regard, *Mr Uriri* submitted that the application had to stand on its founding affidavit. It failed to do so.

It was *Mr Uriri*'s argument that the applicant's challenge to the validity of the Presidential election result should have been pleaded with specificity and particularity. It had to be pleaded on the basis of all relevant and admissible evidence that would have been placed before the Court within the seven days stipulated by s 93(1) of the Constitution.

Mr Uriri went on to submit that the applicant's case failed on the best evidence rule. He argued that, since the best evidence rule excludes reliance on secondary evidence where primary evidence is available, the applicant ought to have proved his case by way of physical evidence

which would show the commission of the irregularities or malpractices he alleged. He argued that primary evidence in the form of the actual used ballot papers, the original completed polling station returns (the V11 Forms) and other residue ought to have been produced if the applicant's case was to be successful. He submitted that that evidence was preserved by operation of law. It had been available to the applicant, but he deliberately chose not to rely on it to prove his case.

Mr Uriri challenged the reliability of a report prepared by one Dr Otumba, which was submitted on the applicant's behalf to show inconsistencies in the Presidential election result as declared by the twenty-fourth respondent. In that report, Dr Otumba analysed the Presidential election result and concluded that they were irregular. According to *Mr Uriri's* submission, that document was inadmissible. He said the integrity of the document by Dr Otumba was highly questionable as it was created and based on V11 and V23 forms which were collected by the applicant's political party only, thereby being a product of evidence of an interested party.

Mr Uriri referred the Court to the judgment of the Supreme Court of the United States of America in *Bush v Gore* 531 U.S. 98 (2000) as authority for the proposition that, unless it is shown that the alleged irregularities had the effect of changing the will of the people, the Court should not declare the Presidential election result undue. He also relied on that decision to support the submission that the change in the Presidential election result figures would not invalidate the declaration of the first respondent to be duly elected as the President of the Republic of Zimbabwe. The contention was that, notwithstanding the revision of the figures reflecting the results, the number of votes received by the first respondent remained more than half the number of votes cast in the Presidential election.

Mr Magwaliba submitted that the applicant had failed to prove his case. He submitted that the applicant failed to present his case in a manner that would have enabled the Court to make an informed decision in his favour. In light of the criminal allegations that were made against the first respondent, it was incumbent upon the applicant to prove the allegations beyond a reasonable doubt. *Mr Magwaliba* further submitted that the applicant's case had been premised on bare and bald allegations, which were insufficient to set aside the Presidential election result.

THE TWENTY-THIRD, THE TWENTY-FOURTH AND THE TWENTY-FIFTH RESPONDENTS' ARGUMENT

Mr Kanengoni submitted that the applicant's case ought to have been pleaded with sufficient clarity based on primary evidence. He argued that the applicant could not rely on responses from the Commission, the twenty-fourth and the twenty-fifth respondents to argue his case on the date of the hearing. He stressed the principle that an application stands or falls on its founding affidavit. *Mr Kanengoni* also took issue with the fact that the applicant's case, as argued on the day of the hearing, was based on the Commission's report, which was placed in a set of documents that had not been served on all the parties within the stipulated time-frame.

Mr Kanengoni argued that the applicant had mischaracterised the Commission's report as being evidence of inconsistencies in the Presidential election result that declared the first respondent as the winner of the 2018 Presidential election. Contrary to the applicant's submissions, *Mr Kanengoni* submitted that the errors in the figures were then shown to amount to an insignificant 0.1% error margin, which was insufficient to justify a decision to set aside the Presidential election result, as prayed for by the applicant.

According to *Mr Kanengoni*, the allegation that 40 000 teachers were allegedly not allowed to vote by the Commission did not in any way add to the irregular returns that were indicated in its report. He further submitted that the affidavits that were filed by the applicant to substantiate the figure of 40 000 did not have any empirical basis. The affidavits did not state whether the 40 000 teachers were registered to vote or not. If they were registered to vote, it was not shown how many of those teachers' votes would have been for the applicant. *Mr Kanengoni* argued that the affidavits used by the applicant did not in any way prove that the Commission had formed a systematic policy to disenfranchise the teachers. He argued that, if anything, the Commission did everything it could to facilitate voting by the civil servants in question.

Mr Kanengoni further submitted that the applicant's allegations relating to what was said to be 700 000 votes unaccounted for resulted from an analysis based on a wrong voter turnout. *Mr Kanengoni* submitted that, contrary to the applicant's allegations, the 700 000 votes were fully accounted for by the Commission. He also submitted that there was no proof of over-voting. The bald allegations of over-voting were not substantiated. He further submitted that the applicant failed to meet the standard of proof of the allegation of rigging, especially having regard to the fact that the allegation was not in any way linked to the actual ballot papers.

Mr Kanengoni submitted that if the applicant was genuinely unhappy with the Presidential election result he ought to have requested a recount of the votes in terms of s 67A of the Act. He could have applied to the Electoral Court for an order directing the unsealing and re-opening of the closed and sealed ballot boxes and the sealed packets to have access to primary evidence for the purpose of the application.

Mr Kanengoni submitted that the applicant did not place sufficient evidence before the Court to challenge the validity of the Presidential election result announced by the twenty-fourth respondent in terms of the law.

ISSUE ARISING FOR DETERMINATION

The only issue arising for determination was whether the applicant produced sufficient and clear evidence to prove his case.

Where the grounds for challenging the validity of an election result are allegations of irregularities committed by officers of the body charged with the responsibility of conducting the election or electoral malpractices committed by others who took part in the election process, the duty of a court is to satisfy itself by sufficient and clear evidence produced by the party bearing the *onus* of proof of the allegation that the alleged acts occurred.

If a court finds as a matter of fact that the irregularities or electoral malpractices occurred, it must go further. It must make a finding on the question whether the irregularities or electoral malpractices were of such a nature and effect that they substantially undermined the ability of the electoral body to deliver a free, fair and credible election.

Section 177 of the Act provides that, where the ground for seeking invalidation of an election is commission of a mistake or non-compliance with the provisions of the Act, it must appear to the court, after proof of the mistake or non-compliance, that as a result thereof the election was not conducted in accordance with the principles laid down in the Act and that such mistake or non-compliance did affect the result of the election.

It must follow that in the discharge of its duty, and in the interests of fairness and justice, a court must insist upon the production by the party alleging commission of irregularities against the electoral body, or electoral malpractices against any other participant, of primary evidence of proof of the allegations made.

There has to be a reasonable and acceptable explanation for resorting to the use of secondary evidence when primary evidence is available and accessible. A court must be conscious of the detailed requirements of the provisions of the Electoral Law allegedly breached, because compliance with the requirements is the guarantee of a free, fair and credible election. The court must be in a position to hold not only the officers of the electoral body to account to the law of elections. It must be able to hold the challenger of the validity of the election or election result to account to the requirements of the law of elections as well. The challenger must show that he or she or his or her chief election agent or election agents acted in accordance with the standard of behaviour prescribed by the relevant provisions of the law of elections.

Elections are the foundation of a system of democratic government. The principles forming the basis of representative democracy are given effect to by the provisions of the law and the conduct of elections. They demand that those participating in the election must at all times before, during and after the election, act in good faith.

The reason why a court hearing and determining an application challenging the validity of an election result must adhere to the principles of cogency of proof of the allegations levelled against the respondent is that it is under a duty of impartiality. A genuine challenge to the validity of an election result must comply with well-known legal standards.

Before the reasons for the resolution of the issue for determination are given, it is important to set out the legal requirements governing the conduct of an election. Reference is made particularly to the voting process; vote counting at polling stations; verification of constituency returns; adding together of the number of votes received by each Presidential candidate; and the declaration of the winner to be duly elected as President of the Republic of Zimbabwe. The exercise will provide the basis for a better appreciation of the fact that the Court dismissed the application for lack of sufficient and clear evidence of the allegations made against the respondents.

THE VOTING PROCESS

Section 157(1) of the Constitution provides that an Act of Parliament must provide for the conduct of elections to which the Constitution applies. The Electoral Act [*Chapter 2:13*] is the Act enacted by Parliament to provide for the conduct of the harmonised elections. It is the Act that sets out how the electorate exercises the right to vote. The voting process becomes a juristic act, the conduct of which is measured against the provisions of the Act which give effect to the Constitution.

The Act provides for remedies to be adopted in the event of a candidate being aggrieved by the manner the election has been conducted affecting the validity of the electoral process or the results. The appropriate remedies are set out in the Act for purposes of effectively guaranteeing the right to free, fair and credible elections.

The right to free, fair and credible elections for any public office established in terms of the Constitution or any other law is a fundamental right guaranteed to every Zimbabwean citizen. The connection between elections and the fundamental human right of everyone to take part in the

Government of his or her country, directly or through freely chosen representatives, underscores the obligation on the Court to ensure that the elections are conducted in accordance with the principles that guarantee free, fair and credible elections.

Sections 54 to 70 of the Act contain measures that give effect to the principles that govern the conduct of elections in Zimbabwe. In terms of s 155 of the Constitution, elections must be peaceful, free and fair. They must be conducted by secret ballot and based on universal adult suffrage and equality of votes. As a matter of principle, the elections must also be free from violence and other electoral malpractices. Electoral malpractices include corrupt practices, illegal practices, intimidatory practices, and other offences under the Act.

Transparency of the election process lies at the heart of its credibility. Section 54 of the Act requires that a presiding officer must ensure, not more than thirty minutes before the commencement of the poll at any polling station on the day of the vote, that the ballot box is empty. The check must be carried out in full view of other election officers present for the performance of their official duties, the candidates, the election agents and accredited observers. The ballot box itself is required to be translucent, a measure that is aimed at ensuring transparency in the voting process. The presiding officer is nonetheless required to show the interior of the ballot box to the persons present before sealing it, leaving open the aperture for the purpose of dropping the marked and folded ballot papers into the ballot box.

The voting process starts with a prospective voter entering a polling station and approaching the presiding officer to apply for the ballot paper. Section 56(2) of the Act gives the presiding officer a discretionary power to put to an applicant for a ballot paper such questions as

he or she considers necessary to ascertain whether or not the applicant is registered as a voter on the voters roll for the ward in which the polling station is situated.

The presiding officer is obliged to require an applicant for a ballot paper to produce his or her voter's registration certificate or proof of identity. If the applicant is registered as a voter on the voters roll for the ward, and there is no indication that he or she has previously received a ballot paper or postal ballot paper for the election, the presiding officer is required to mark or otherwise deal with the certificate or proof of identify in a manner prescribed by the Chief Elections Officer. After that, the presiding officer must hand the applicant a ballot paper for the Presidential Election, the Parliamentary Election and the Local Authority Election.

Before handing an applicant a ballot paper, a presiding officer is obliged to require the applicant to submit to an examination specified by the Chief Elections Officer to ascertain whether or not he or she has previously received a ballot paper at that election. If the applicant refuses to submit to such examination or if such examination shows that the applicant has previously received such a ballot paper, the presiding officer shall not hand him or her the ballot paper.

After handing an applicant a ballot paper, the presiding officer is required to mark him or her in the manner specified by the Commission. The applicant would usually be required to dip his or her index finger in indelible ink. Before the ballot paper is handed to the applicant, the presiding officer is required to mark the ballot paper with the official mark.

The interaction between the applicant for a ballot paper and the presiding officer from the time he or she enters the polling station is under the observation of the candidate if he or she is present, the election agent, accredited observers, police officers and other electoral officers present for the performance of their official duties in the polling station.

When the person claiming the vote has received the ballot paper, he or she is required to take the ballot paper to the compartment provided for the purpose ("the booth"). The booth is designed to ensure that the voter can vote in secret. Once alone in the booth, the voter is free to signify the candidate for whom he or she votes by secretly placing a cross in the rectangle opposite the name of the candidate on the ballot paper. After voting, the voter is required to fold the ballot paper so that the official mark is visible but the names of the candidates and the cross made by him or her are not visible. He or she is required to drop the ballot paper in the translucent box placed in front of the presiding officer.

Section 59 of the Act recognises the needs of registered voters who may be unable to cast votes on their own. These include illiterate persons or physically handicapped voters. A presiding officer may allow these persons to be assisted in exercising their right to vote through another person of their choice. In terms of s 59(2) (a) and (b), a person permitted to assist a voter need not be a registered voter, but shall not be a minor, electoral officer, accredited observer, chief election agent, election agent or a candidate in the election.

The person providing assistance to a voter is required to identify himself or herself to the presiding officer by producing proof of identity. In the event that the voter concerned does not have a person to assist him or her, the presiding officer shall assist the voter to exercise his or her right to vote in the presence of two other electoral officers or employees of the Commission and a police officer on duty.

The person assisting another to vote shall there and then mark the ballot paper in accordance with the voter's wishes and place the ballot paper in the ballot box. In the event that the wishes of the voter as to the manner in which the vote is to be marked on the ballot paper are

not sufficiently clear to enable the vote to be so marked, the presiding officer may cause such questions to be put to the voter as, in his or her opinion, are necessary to clarify the voter's intentions.

The presiding officer must keep a special register in which shall be recorded the name of every person whom the presiding officer permits to assist a voter, relevant particulars of the proof of identity produced by that person, and the name of the voter assisted by that person. The presiding officer shall also cause the name of every voter who has been assisted, and the reason why that voter has been assisted, to be entered on a list.

It is important to emphasise the fact that all that the presiding officer is required to do in terms of the procedure of voting by illiterate or physically handicapped members of society is done in the full view and observation of the candidates present, the election agents, accredited observers, and other electoral officers present for the performance of their official duties.

Not only does the system ensure that the voting process is transparent and fair, the presence of the persons who have an interest in the election and its outcome ensures that the electoral officers adhere to the highest standards of accountability for what they do.

It is imperative that the vote be cast in a clear manner. This is to avoid the rejection of ballot papers that are improperly marked with the voter's choice in terms of s 63(3) of the Act. In terms of the subsection, a presiding officer shall reject and not count any ballot paper which does not bear his or her official mark, which is not marked by the voter, or which does not indicate with certainty the candidate for whom the voter intended to vote.

COUNTING, VERIFICATION AND COLLATION OF THE VOTES AND DECLARATION OF THE ELECTION RESULTS

Immediately after the close of the poll, the presiding officer shall, in the presence of such candidates and their chief election agents or election agents as are present, close and seal the aperture in the ballot box. He or she shall thereafter make up into separate packets sealed with his or her own seal and with the seals of those candidates and election agents, if any, who desire to affix their seals -

(i) the unused and spoilt ballot papers and counterfoils of the unused ballot papers placed together;

(ii) the counterfoils of the used ballot papers, including the counterfoils of the spoilt ballot papers;

(iii) the register of assisted voters.

As soon as the last packet is sealed, the presiding officer shall open and unseal the ballot boxes and begin to count the votes. The ballot papers in each ballot box shall be counted separately. At the time of counting the votes, the presiding officer shall also open each sealed packet containing the unused and spoilt ballot papers and the register of assisted voters.

The count is done in the presence of the following persons -

(i) the presiding officer and such polling officers as he or she may consider necessary and not more than the prescribed number of monitors and observers;

(ii) the candidates, and every chief election agent and election agent of each candidate or, in certain circumstances, of each political party who, at the time of the

commencement of the counting, is present within the polling station or in the immediate vicinity of the polling station. A candidate or his or her chief election agent or election agent need not be present at the counting of the votes at an election for which that candidate was not nominated; and

(iii) any roving political party election agent who, at the time of the commencement of the counting, is present within the polling station or in the immediate vicinity of the polling station.

As indicated earlier, a presiding officer is entitled to reject as invalid a ballot paper for one reason or another. Where he or she does so, s 63(7) of the Act requires that he or she shall endorse the word "Rejected" on the ballot paper. He or she shall add to the endorsement the words "Rejection Objected To" if an objection to his or her decision is made by a candidate or his or her chief election agent or election agent. All ballot papers rejected as invalid shall be placed together in an envelope within the packet containing the rejected ballot papers.

If the presiding officer accepts as valid a ballot paper, he or she shall endorse the words "Acceptance Objected To" on the ballot paper if an objection to his or her decision is made by a candidate or his or her chief election agent or election agent. All such endorsed ballot papers shall be placed together in an envelope within the packet containing the accepted ballot papers. All this is done during the counting exercise.

Section 64 of the Act clearly articulates the procedure after the counting of votes at a polling station. The section provides:

"(1) After the counting is completed the presiding officer shall without delay, in the presence of such candidates and their election agents as are present —

(a) close and seal the aperture in the ballot box; and

(b) make up into separate packets sealed with his or her own seal and with the seals of those candidates and election agents, if any, who desire to affix their seals —

(i) the unused and spoilt ballot papers and counterfoils of the unused ballot papers placed together;

(ii) the counterfoils of the used ballot papers, including the counterfoils of the spoilt ballot papers;

(iii) the register of assisted voters; and

(c) record on the polling-station return the votes obtained by each candidate and the number of rejected ballot papers in such a manner that the results of the count for each ballot box are shown on the return; and

(d) display the completed polling-station return to those present and afford each candidate or his or her election agent the opportunity to subscribe their signatures thereto; and

(d1) provide each candidate or his or her election agent with a copy of the completed polling-station return; and

(e) affix a copy of the polling-station return on the outside of the polling station so that it is visible to the public and shall ensure that it remains there so that all members of the public who wish to do so may inspect it and record its contents.

(2) Immediately after affixing a polling station return on the outside of the polling station in terms of subsection (1)(e), the presiding officer shall personally transmit to the ward elections officer for the ward in which the polling station is situated —

(a) the ballot box and packets referred to in subsection (1)(a) and (b), accompanied by a statement made by the presiding officer showing the number of ballot papers entrusted to him or her and accounting for them under the heads of used ballot papers, excluding spoilt ballot papers, unused ballot papers and spoilt ballot papers; and

(b) the polling-station return certified by himself or herself to be correct:

> Provided that if, by reason of death, injury or illness, the presiding officer is unable personally to transmit the ballot box, packets, statement and polling station return under this subsection, a polling officer who was on duty at the polling station shall personally transmit these, and in that event any statement or certification required to be made by the presiding officer for the purposes of this section may be made by the polling officer concerned."

After receiving the polling station returns, the ward elections officer is required to verify and collate the polling station returns at the ward centre and count the postal votes. Verification and collation of the returns is done upon giving reasonable notice in writing to each candidate or his or her chief election agent, each political party whose party-list candidates are contesting the election in the ward, and such observers as can readily be contacted, of the time that the process will be done. The ward elections officer displays each polling station return to those present and thereafter verifies each polling station return by ensuring that it is duly certified by the presiding officer of the polling station concerned. The ward elections officer may, upon request, allow any candidate, election agent or accredited observer to make notes of the contents of any polling station return.

Section 65(3) of the Act provides that when the ward elections officer has displayed and verified the polling station returns, he or she shall add together the number of votes received by each candidate as shown in each polling station return and record the result on a ward return. Having recorded the results of the polling station returns, the ward elections officer, in the presence of such candidates, election agents and observers as are present, shall verify the postal ballots if they have not already been verified, count the postal votes and record separately on the ward return the number of such votes received by each candidate. He or she must enter on the ward return the

total number of votes received by each candidate, including postal votes and then close and seal the aperture in the postal ballot box.

The ward elections officer is then enjoined to provide a copy of the completed ward return to every candidate, election agent and observer who requests one. He or she must also ensure that a copy of the ward return is displayed prominently outside the ward centre, so that all members of the public who wish to do so may inspect it and record its contents. Immediately after causing a copy of the ward return to be displayed outside the ward centre, the ward elections officer must cause the return, certified by himself or herself to be correct, to be transmitted to the constituency centre for the constituency in which the ward is situated.

Any reference to a constituency centre or a constituency elections officer shall be construed in respect of the Presidential election as reference to a Presidential constituency centre or a Presidential constituency elections officer.

In relation to the Presidential election, the number of votes received by each candidate as shown in each polling station return is added together and the resultant figure added to the number of postal votes received by each candidate. The constituency elections officer shall forthwith record on the constituency return the votes obtained by each candidate and the number of rejected ballot papers in such a manner that the results of the count for each polling station are shown on the return. He or she is required to display the completed constituency return to those present and afford each candidate or his or her election agent the opportunity to subscribe their signatures thereto. He or she must then transmit to the Chief Elections Officer by hand through a messenger the constituency return or a copy thereof, certified by the constituency elections officer to be correct.

Immediately after arranging for the constituency return to be transmitted to the Chief Elections Officer, the constituency elections officer is required to affix a copy of the constituency return on the outside of the constituency centre so that it is visible to the public.

Immediately after receiving all the constituency returns transmitted to him or her, the Chief Elections Officer is required to verify them, having given reasonable notice to each candidate or to his or her chief election agent of the time and place at which the returns are to be verified.

At the time and place notified for the verification of the constituency returns, and in the presence of such candidates, their chief election agents and such accredited observers as are present, the Chief Elections Officer shall display each constituency return to those present. He or she shall, upon request, allow a candidate or the chief election agent of a candidate to make notes of the contents of each constituency return.

When the Chief Elections Officer has completed the verification of the constituency returns, he or she shall, in the presence of the candidates or their chief election agents and such accredited observers as are present, add together the number of votes received by each candidate as shown in each constituency return.

After the number of votes received by each candidate as shown in each constituency return has been added together, the Chairperson of the Commission or, in his or her absence, the Deputy Chairperson or, in his or her absence, a Commissioner designated by the Chairperson shall, where there are two or more candidates, forthwith declare the candidate who has received more than half the number of votes cast to be duly elected as President of the Republic of Zimbabwe with effect from the date of such declaration.

A declaration of a candidate who has received more than half the number of votes cast to be duly elected as President of the Republic of Zimbabwe shall be made not later than five days after the polling day or the last polling day, as the case may be, in the Presidential election concerned. Where a recount has been ordered in terms of s 67A of the Act, the declaration must be made not later than five days after completion of the recount. The Electoral Court, on application by the Commission for good cause, shall extend the ten-day period.

A declaration of the candidate who received more than half the number of votes cast where there are more than two candidates to be duly elected as President of the Republic of Zimbabwe is final. The finality of the declaration is subject to reversal on application to the Court by an order that such declaration be set aside or that the proceedings relating to the Presidential election are void.

Section 67A of the Act makes provision for the recounting of votes in one or more of the polling stations in a constituency. Any political party or candidate that contested the election in a ward or constituency may request the Commission in writing to conduct a recount of votes. The request must state specifically the number of votes believed to have been miscounted. If possible, the request should show how the miscount may have occurred. It must state how the result of the election has been affected by the alleged miscount. The Commission is required to immediately notify all the other political parties and candidates that contested the election of the nature of the request and of the date and time on which it was received by the Commission.

If the Commission considers that there are reasonable grounds for believing that the alleged miscount of votes occurred and that, if it did occur, it would have affected the result of the election, it shall order a recount of votes in the polling station or polling stations concerned.

It is important to note that the Commission may, on its own initiative, order a recount of votes in any polling stations if it considers that there are reasonable grounds for believing that the votes were miscounted and that, if they were, the miscount would have affected the result of the election.

Where the Commission orders a recount of votes, it shall specify the polling station or polling stations whose votes are to be recounted and, where appropriate, the votes that are to be recounted. The Commission must also specify the date on which, and the place and time at which, the recount is to take place. The procedure to be adopted for the recount must be specified.

The Commission is required to take all necessary steps to inform accredited observers and all political parties and candidates that contested the election of its decision and of the date, time and place of the recount. Accredited observers and representatives of candidates and political parties that contested the election are entitled to be present at any recount ordered by the Commission.

The Commission is required to ensure that any recount of votes is completed within five days after the announcement of the last result in the Presidential election and that the result of the recount is announced within twenty-four hours of its completion. As indicated, under s 110(3)(4)(ii) of the Act where a recount has been ordered in terms of s 67A of the Act, a declaration of a candidate who has received more than half the number of votes cast to be duly elected as President of the Republic of Zimbabwe shall be made not later than five days after the completion of the recount.

Section 70 of the Act provides for the custody of ballot papers and other papers. Upon receiving such material, the constituency elections officer is not allowed to open any closed and

sealed ballot box or sealed packets prepared by a presiding officer in terms of s 64(1) (a) and (b) of the Act. He or she is not allowed to open any sealed packet containing all the postal ballot papers cast in the election. The constituency elections officer may not open all unopened ballot paper envelopes which have been endorsed "vote rejected", and all unopened ballot paper envelopes which have been endorsed "vote rejected" but whose rejection has been objected to, while such ballot boxes and packets remain in his or her custody.

All the closed and sealed ballot boxes and packets referred to above must be transmitted to the places designated by the Chief Elections Officer by the constituency elections officer soon after he or she has received them into his or her custody. He or she shall also endorse on each packet a description of its contents and the date of the election to which it relates.

Where an election petition or application is not lodged in relation to the ward or constituency concerned, the Chief Elections Officer shall cause to be destroyed all the documents relating to the ward or constituency not earlier than the fourteenth day after the end of the election period. If an election petition is lodged in relation to any constituency within fourteen days after the end of the election period to which the election relates, he or she must retain for six months all the materials relating to that ward or constituency and then, unless otherwise directed by an order of the Electoral Court, shall cause them to be destroyed.

In terms of s 70(4) of the Act, all sealed ballot boxes and sealed packets cannot be opened except in terms of an order of the Electoral Court. The order may be granted when the Electoral Court is satisfied that the inspection or production of the contents of a sealed ballot box or a sealed packet is required for the purpose of a petition or application questioning an election or return.

Section 70(3)(a) of the Act ensures that the evidence which is sealed and safely kept in terms of the Act is available for the purposes of conducting a recount of the election votes forty-eight hours after the declaration of the election result in terms of s 67A(1) of the Act. Section 70(4) of the Act, however, requires that an application be made to the Electoral Court for an order to have the closed and sealed ballot boxes opened. The Electoral Court may also order that the separately sealed packets that contain the unused and spoilt ballot papers and counterfoils of the unused ballot papers, the counterfoils of the used ballot papers, including the counterfoils of the spoilt ballot papers, and the register of assisted voters, be opened for purposes of a recount.

WHETHER THE APPLICANT PRODUCED SATISFACTORY EVIDENCE TO PROVE HIS CASE

THE BURDEN OF PROOF IN ELECTION PETITIONS

In order to determine the issue before the Court, it is necessary to first determine who between the applicant and the respondents bore the burden of proving the allegations that were made by the applicant in this matter. According to the applicant, the Commission bore the burden to disprove the allegations made by him. He argued that it was the Commission which came up with the disputed number of votes cast for the first respondent after it counted the votes. On the other hand, the respondents argued that the applicant bore the *onus* of proving his case beyond a reasonable doubt. The reason given for the standard of proof was that the allegations that the applicant levelled against the first respondent were mainly criminal in nature.

The declaration of the result of a Presidential election in terms of s 110(3)(f)(ii) of the Act gives rise to a presumption of validity of the election result. An election is presumed to have been

regularly conducted. The burden of proof of the allegations on which the relief sought was based lay with the applicant. It is standard procedure that the one who alleges a fact on the basis of which his or her cause of action depends bears the *onus* of proving that fact.

It was for the applicant to prove to the satisfaction of the Court that the irregularities he alleged were committed by the Commission and its officers in the conduct of the election were as a matter of fact committed. It was for the applicant to produce sufficient and clear evidence to establish the grounds of the application to entitle him to the granting of the relief sought.

It would not have been enough, for the purposes of the discharge of the *onus* on the applicant, to prove the commission of the alleged irregularities by the Commission. He had to show that the irregularities were of such a nature and effect that they either substantially undermined the electoral process, thereby disabling the Commission from delivering a free, fair and credible Presidential election, or materially affected the result.

In *Abubakar* v *Yar'Adua* [2009] All FWLR (Pt. 457) 1 S.C, the Supreme Court of Nigeria held that the burden is on the petitioner to prove non-compliance with electoral law, and to show that the non-compliance affected the results of the election.

In *Buhari* v *Obasanjo* (2005) CLR 7 (k) (SC) the Supreme Court of Nigeria decided the question of who bears the burden of proof in election petitions. It said:

> "He who asserts is required to prove such fact by adducing credible evidence. If the party fails to do so its case will fail. On the other hand, if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result in the Court giving judgment in favour of the party."

The same position was adopted by the Supreme Court of Kenya in *Raila Odinga and Five Ors v Independent Electoral and Boundaries Commission and Three Ors* (Petition 5,3 and 4 of 2013) [2013] eKLR where the court explained as follows at paras [195] and [196]:

> "[195] There is, apparently, a common thread in the foregoing comparative jurisprudence on *burden of proof* in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the *legal burden* rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the *evidential burden* keeps shifting. Ultimately, of course, it falls to the Court to determine whether a *firm* and *unanswered* case has been made.
>
> [196] We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been *non-compliance with the law,* but that such failure of compliance *did affect the validity of the elections.* It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta:* all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."

In *Amama Mbabazi v Museveni and Ors* (Presidential Election Petition No. 01 of 2016) [2016] UGSC 3 the Supreme Court of Uganda said at p 6:

> "An electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner to place **credible** evidence before the court which will satisfy the court that the allegations made by the petitioner are true. The burden is on the petitioner to prove … non-compliance with election law but also that the non-compliance affected the result of the election in a substantial manner. Once credible evidence is brought before the court, the burden shifts to the respondent and it becomes the respondent's responsibility to show either that there was no failure to comply with the law or if there was any non-compliance, whether that non-compliance was so substantial as to result in the nullification of the election."

The same position was later adopted in *Apolot* v *Amongin* (Election Petition Appeal No. 0060 of 2016) [2018] UGCA 18 where, speaking generally on the evidence required in election petitions, the Ugandan Court of Appeal held at pp 11-12:

> "It is now trite law in election petitions that the petitioner must adduce cogent evidence to prove his or her case to the satisfaction of the Court. In *Masiko Winifred Komuhangi* v *Babihuga J. Winnie* Election Petition Appeal No. 9 of 2002, JUSTICE MUKASA-KIKONYOGO DCJ, (as she then was) held in her lead judgment that:
>
> > 'As I have already stated above, the decision of Court should be based on the cogency of evidence adduced by the party who seeks judgment in his or her favour. It must be that kind of evidence that is free from contradictions, truthful so as to convince a reasonable tribunal to give judgment in a party's favour.'" (the underlining is for emphasis)

The above authorities present a clear trend that in an election petition it is the petitioner or the applicant who bears the *onus* of proving his or her case first. It is the petitioner or the applicant who seeks to have the election result annulled.

It was incorrect for the applicant to suggest that since the Commission came up with the figures that were announced as the Presidential election result, the Commission bore the *onus* of proving that the figures were indeed correct. That position is unsustainable, most fundamentally in the light of the presumption in favour of the validity of the Presidential election.

THE STANDARD OF PROOF IN ELECTION PETITIONS

The general rule is that an election is not declared invalid by reason of any act or omission by a returning officer or any other person in breach of his or her official duty in connection with the election. It, however, has to appear to a court that the election was conducted in accordance with the law governing elections and that the act or omission did not affect the result.

The exception to the general rule is that a court will declare an election void when it is satisfied from the evidence provided by an applicant that the legal trespasses are of such a magnitude that they have resulted in substantial non-compliance with the existing electoral laws. Additionally, a court must be satisfied that the breach has affected the result of the election. In

other words, an applicant must prove that the entire election process is so fundamentally flawed and so poorly conducted that it cannot be said to have been conducted in compliance with the law. Additionally, an election result which has been obtained through fraud would necessarily be invalidated.

The Supreme Court has had occasion to set out the relevant principles in *Moyo and Ors* v *Zvoma N.O. and Anor* 2011 (1) ZLR 345 (S). It was held at 385E-F as follows:

> "The general rule is that a declaration of nullity must be confined to the conduct in respect of a particular vote or class of votes, the invalidity of which has been established, unless the non-observance of the requirements of the law governing the specific duty is of a character which is contrary to the principle of an election by a secret ballot and is so great that it might have permeated the process and affected the result of the election: *Phillips v Goff* (1886) 17 QB 805. There are numerous cases in which courts have struck off the invalid votes and declared conduct in respect of them void without affecting the election." (emphasis added)

The essence of the principle that a Presidential election result will only be set aside when the irregularity is so great that it goes to the heart of the authenticity of the result was set out in the dissenting judgment at 386A-C. It was said:

> "The purpose of voting is not only the differentiation of the electorate and the expression of the will of the individual voters but also the ability to accept such decisions based on the will of the majority.
>
> In my view, the principle of majority rule, on the basis of which results of democratic elections are determined, requires that courts should refrain from interfering with the will of the majority of voters expressed in accordance with the requirements of the law, on the ground that the official entrusted with the responsibility of conducting the election by a secret ballot unlawfully counted non secret ballots as secret ballots, especially where there would be no confusion at all as to who is the winner following the discounting of the invalid votes. An election may be set aside if it is not clear upon determination of the conduct forming the ground on which the validity of the election is impugned who was the winner. In this case there is clear evidence of the election of the Speaker of the House in accordance with the mode of voting prescribed by the law governing the election concerned." (the underlining is for emphasis)

At 386D-387A the judgment in the *Moyo and Ors* case *supra* quoted a passage from *Woodward* v *Sarsons* (1875) LR 10 CP 733, where LORD COLERIDGE CJ said:

> "As to the first point, we are of opinion that the true statement is that an election is to be declared void by the Common Law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to void it is satisfied, as matter of fact, either that there was no real *electing* at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i.e., that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation or to be prevented from voting by want of the machinery necessary for so voting, as by polling stations being demolished, or not open or by other of the means of voting according to law not being supplied, or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes or false declaration of numbers by a Returning Officer, or by other such acts or mishaps. And we think the same result should follow if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors *may have been* prevented from electing the candidate they preferred. But, if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void …".

The dissenting judgment in the *Moyo and Ors* case *supra* at 387G-388B went on to state as follows:

> "It would, in my view, be contrary to fairness and justice to say as a matter of principle that the Legislature intended that the election of the Speaker conducted by a secret ballot in terms of the law be nullified on account of, say, a single invalid vote counted by the official conducting the election as a secret ballot. The intention of the Legislature must be that only irregularities which undermined the achievement of the object or purpose of the legislation of ensuring an election of the Speaker based on universal, equal, direct and personal vote freely expressed by a secret ballot should vitiate the election.
>
> In the exercise of review powers, the court *a quo* came to the conclusion that the improper counting of invalid votes as secret ballots was not an irregularity of the class the Legislature intended would vitiate the election. The conclusion is, in my view, not evidence of a misdirection on the part of the court *a quo*. It is when the irregularity affected the actual discharge of the positive duty to conduct the election by a secret ballot and not by any other

type of vote that it may be used as a ground for challenging the validity of the election by a secret ballot." (the underlining is for emphasis)

The position is the same in a number of other African jurisdictions.

Ghana

In Re Election of First President – Appiah v *The Attorney General*, reported at pp 1423-1436 "*A Sourcebook of Constitutional Law of Ghana*", 1970, BANNERMAN ACJ, citing *Medhurst* v *Lough Casquet* [1901] 17 LTR 210 per KENNEDY J, stated at p 230 as follows:

"'An election ought not to be held void by reason of transgression of the law committed without any corrupt motive by the returning officer or his subordinate in the conduct of the election where the court is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, that is the success of the one candidate over the other, could not have been affected by those transgressions. If on the other hand the transgressions of law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it was open to reasonable doubt whether these transgressions may not have affected the result and it [was] uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void. It appears to us that this is the view of the law which has generally been recognised and acted upon by the tribunals which have dealt with election matters.'" (the underlining is for emphasis)

In *Nana Addo Dankwa Akufo-Addo and Ors* v *John Dramani Mahama & Ors* [2013] (J1/6/2013) GHASC, the petitioners claimed -

(1) that the election had been marred by irregularities and electoral improprieties such as over-voting, lack of signatures on the declaration forms by the presiding officers, lack of biometric verification of voters, duplicate serial numbers, unknown polling stations and duplicate polling station codes;

(2) that the said malpractices were alleged to have affected the election. They contended that the irregularities vitiated the Presidential results in eleven thousand nine hundred and sixteen (11,916) polling stations by four million six hundred and seventy thousand five hundred and four votes (4,670,504); and

(3) that if these votes were to be annulled, the first petitioner would receive three million seven hundred and seventy-five thousand five hundred and fifty-two votes representing 59.69% of votes cast, while the first respondent would receive two million four hundred and seventy-three thousand one hundred and seventy-one votes representing 39.1% of votes cast.

The Supreme Court of Ghana at p 98 of the judgment held as follows:

> "… a petitioner is not entitled to an order quashing election results merely upon establishing some form of non-compliance with the rules governing the poll; the non-compliance must further either be of a substantial proportion or the non-compliance must produce a different outcome in the election, namely, result in some person emerging victor who would but for the non-compliance not secure such victory."

In the words of the majority of the panel, compliance failures do not automatically void an election, unless explicit statutory language specifies the election is voided because of the failure. It was also held by a majority of 5 to 4 that if the elections were conducted substantially in accordance with the principles laid down in the Constitution and all governing laws, and there was no breach of law such as to affect the results of the elections, the elections would have reflected the will of the Ghanaian people.

The Supreme Court of Ghana at p 40 of its judgment further held that the Judiciary in Ghana, just like its counterparts in other jurisdictions, does not readily invalidate a public election but often strives, in the public interest, to sustain it. At p 42 of the same judgment, it went on to

find that, in deciding whether to disturb the outcome of the Presidential election, the broad test to guide the court was whether the petitioner clearly and decisively had shown the conduct of the election to have been so devoid of merit as not to reflect the expression of the people's electoral intent.

The Supreme Court of Ghana also relied on *Halsbury's Laws of England* 4 Ed Vol 15 (4) at para 670, where it is stated as follows:

> "No election is to be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate elections rules if it appears to the tribunal having cognizance of the question that the election was conducted substantially in accordance with the law as to the elections, and that the act or omission did not affect the result. The function of the court in exercising this jurisdiction is not assisted by consideration of the standard of proof but, having regard to the consequences of declaring an election void, there must be a preponderance of evidence supporting any conclusion that the rule was affected."

Kenya

Headnote 13 of the *Raila Odinga* case *supra* reads as follows:

> "13. The conduct of the presidential election was not perfect, even though the election had been of the greatest interest to the Kenyan people who had voluntarily voted. Although there were many irregularities in the data and information captured during the registration process, they were not so substantial as to affect the credibility of the electoral process and besides, no credible evidence had been adduced to show that such irregularities were premeditated and introduced by the first respondent, for the purpose of causing prejudice to any particular candidate."

Uganda

The Supreme Court of Uganda, in *Col. Dr Kizza Besigye* v *The Attorney-General* (Constitutional Petition No. 13 of 2009) [2016] UGCC 1, considered the question whether the 2006 Ugandan Presidential election could be annulled for irregularities and malpractices proved to have occurred. According to ODOKI CJ, to annul an election on the basis that some irregularities

had occurred, without considering the impact of the irregularities, would be tantamount to the court usurping the will of the people in their determination of who their leader should be.

The Supreme Court of Uganda unanimously found that in the conduct of the Presidential election there was non-compliance with the provisions of the Constitution, the Presidential Elections Act and the Electoral Commission Act. It was the unanimous finding of the court that some voters had been disenfranchised by the deletion of their names from the voters register and that the counting, and at some polling stations the tallying, of results had been marred by irregularities. Further, the court made a unanimous finding that in some areas of the country the principle of free and fair elections had been compromised by incidents of bribery and intimidation and that in some areas the principle of equal suffrage, transparency of the vote, and the secrecy of the ballot were undermined by multiple voting and vote stuffing.

Nevertheless, the Supreme Court of Uganda held by a majority of 4 to 3 that it had not been proved by the petitioner that the failure to comply with the provisions of the law governing the Presidential election had affected the results of the election in a substantial manner. It held that although the conduct of the election could not be said to have been perfect, the broad test that guided the court in deciding whether it should "disturb" the outcome of the election was: "Did the petitioner clearly and decisively show the conduct of the election to have been so devoid of merit as not to reflect the expression of the people's electoral intent?".

The Supreme Court of Uganda opined that, in a democracy, the election of a leader is the preserve of the voting public and that a court should not tamper with results which reflect the expression of the population's electoral intent. Inherent in the judgment is the philosophy that the fundamental consideration in an application challenging the validity of an election should be

whether the will of the people has been affected by the irregularities or non-compliance with the provisions of the law governing the conduct of the election. It said at p 27:

> "In a democratic system constituted strictly on the basis of majoritarian expression through the popular vote, the essence of an election is that the people should be governed by individuals of their choice. It is the individual preferred by the majority that has the legitimacy to be in leadership. The constitution gives power to voters to choose who is to govern them …".

At p 29 of the judgment, it went on to hold 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 discretion are at liberty to annul the outcome of a sham election, for such is not in fact an election. Although *Morgan and Others* v *Simpson and Another (supra)* was not a presidential election petition, but rather a challenge to the validity of results of a local government election, I am persuaded by the principle enunciated in the words of STEPHENSON LJ which I will adopt. HIS LORDSHIP said:
>
> > 'For an election to be conducted substantially in accordance with the law *there must be a real election … and no such substantial departure from the procedure laid down by parliament as to make the ordinary man condemn the election as a sham or a travesty of an election*.'"

Nigeria

In *Muhammadu Buhari* v *Independent National Election Commission and Four Ors* (2008) 12 SC (Part I) 1 the Supreme Court of Nigeria at p 75 quoted with approval the following remarks of BELGORE JSC in *Buhari* v *Obasanjo* (2005) 13 NWLR (Part 941) 1:

> "It is manifest that an election by virtue of section 235(1) of the Act shall not be invalidated by mere reason that it was not conducted substantially in accordance with the provisions of the Act. It must be shown clearly by evidence that the non-compliance has affected the result of the election. Election and its victory is like soccer and goals scored. The Petitioner must not only show substantial non-compliance but also the figures, i.e. votes that the compliance attracted or omitted." (the underlining is for emphasis)

England

In *Morgan and Others* v *Simpson and Anor* [1975] Q.B. 151 it was held as follows at p 164E-G:

> "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 or not … [that is, for example, where two out of 19 polling stations were closed all day].
>
> 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 a mistake at the polls – provided that it did not affect the results of the election.
>
> 3. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it *did affect* the results – then the election is vitiated."

Canada

In *Ted Opitz* v *Borys Wrzesnewskyj* 2012 SCC 55, [2012] 3 S.C.R. 76 at para 46, the Supreme Court of Canada held in an election petition that:

> "The practical realities of election administration are such that imperfections in the conduct of elections are inevitable. As recognised in *Camsell* v *Rabesca*, [1987] N.W.T.R. 186 (S.C.), it is clear that 'in every election *a fortiori*, those in urban ridings, with large numbers of polls, irregularities will virtually always occur in one form or another' (p 198). A federal election is only possible with the work of tens of thousands of Canadians who are hired across the country for a period of a few days or, in many cases, a single 14-hour day. These workers perform many detailed tasks under difficult conditions. They are required to apply multiple rules in a setting that is unfamiliar. Because elections are not everyday occurrences, it is difficult to see how workers could get practical, on-the-job experience.'"

One of the headnotes in the judgment reads:

> "Lower courts have taken two approaches to determine whether votes should be invalidated on account of irregularities. Under the strict procedural approach, a vote is invalid if an official fails to follow any one of the procedures aimed at establishing entitlement. Under the substantive approach, an election official's failure to follow a procedural safeguard is not determinative. Only votes cast by persons not entitled to vote are invalid. The

substantive approach should be adopted, as it effectuates the underlying right to vote, not merely the procedures used to facilitate that right.

The substantive approach has two steps under s 524(1)(b). First, an applicant must demonstrate that there was a breach of a statutory provision designed to establish the elector's entitlement to vote. Second the applicant must demonstrate that someone not entitled to vote, voted. He may do so using circumstantial evidence. This second step establishes that the 'irregularity affected the result' of the election. Under this approach an applicant who has led evidence from which an 'irregularity' could be found will have met his *prima facie* evidentiary burden. At that point the respondent can point to evidence from which it may be reasonably inferred that no 'irregularity' occurred or that, despite the 'irregularity', the voter was in fact entitled to vote. After-the-fact evidence of entitlement is admissible. If the two steps are established, a vote is invalid. Finally, although a more realistic test may be developed in the future, the 'magic number test' is used for the purposes of this application. It provides that an election should be annulled if the number of invalid votes is equal to or greater than the successful candidate's plurality." (the underlining is for emphasis)

From the above persuasive foreign decisions, a court will only invalidate a Presidential election in the following circumstances -

1. Upon proof of commission of electoral malpractices of such a nature and scale as to make it impossible for the court to hold that the result of an election represents the will of the electorate.

2. The Presidential election was so poorly conducted that it could not be said to have been conducted in accordance with the principles for conducting a free, fair and credible election prescribed by the Constitution and the law of elections.

3. The proved irregularities, whilst showing non-compliance with particular provisions of the law of elections, are of such a nature and effect that they affected the result of the Presidential election.

It was for the applicant to prove to the satisfaction of the Court the commission of the alleged irregularities by the officers of the Commission and that the irregularities affected the Presidential election result.

There is a controversy on whether the standard of proof to be applied in election petitions should be the civil standard of balance of probabilities or the criminal standard requiring proof beyond a reasonable doubt. This is based on the fact that often the allegations relating to electoral malpractices include criminal and quasi-criminal allegations, such as bribery, fraud, corruption and violence.

In the decision of the Supreme Court of Kenya in *Odinga and Anor* v *Independent Electoral and Boundaries Commission and Ors* Presidential Election Petition No. 1 of 2017 [2017] eKLR, the court struck a balance between the criminal and civil standard of proof. It said at para [148]:

> "… where no allegations of a criminal or quasi-criminal nature are made in an electoral petition, an 'intermediate standard of proof', one beyond the ordinary civil litigation standard of proof on a 'balance of probabilities', but below the criminal standard of proof 'beyond reasonable doubt is applied'."

The purpose of election laws is to obtain a correct expression of the will of the voters. Where the allegations of electoral malpractices do not contain allegations of commission of acts requiring proof of a criminal intent, such as fraud, corruption, violence, intimidation and bribery, the standard of proof remains that of a balance of probabilities. In allegations that relate to commission of acts that require proof of criminal intent, the criminal standard of proof beyond reasonable doubt would apply. There is no basis for departing from settled principles of standards of proof to hold a petitioner to a higher standard of proof in electoral petition cases simply by

reason of their *sui generis* nature. In the view of the Court, there is no justification for an "intermediate standard of proof" to be applied in election petitions.

THE NEED FOR THE APPLICANT TO HAVE PRODUCED PRIMARY EVIDENCE

A significant part of the applicant's challenge related to the results and the figures announced by the Commission. Allegations were made that the results announced were incorrect and did not reflect the true will of the people of Zimbabwe.

In so doing, the applicant alleged irregularities relating to voter patterns, polling station returns, inflation of votes, over-voting and ghost-voting, among other infractions, which will be dealt with. In short, it was alleged that there was rigging of the Presidential election result.

The applicant made general allegations against the first respondent. No direct allegations of personal manipulation of the process were made against the first respondent. All allegations were made without particularity and specificity. Evidence would have been required to prove allegations of complicity with the Commission by the winner of the Presidential election, alleged to be the deliberate beneficiary of the allegedly improper Presidential election.

Nevertheless, if the applicant had proved that the Commission committed irregularities and had met the legal requirements of such a petition as to the requisite standard of proof, this alone would have been sufficient to invalidate the Presidential election even in the absence of direct involvement by the first respondent.

PRIMARY EVIDENCE RULE

It is important at this juncture to discuss the primary evidence rule to clearly show that the applicant's failure to resort to s 67A, as read with s 70(4), of the Act was detrimental to his case. The primary evidence was required to be produced in order to prove that the Presidential election result had indeed been rigged. The evidence was to be found in the sealed ballot boxes and the sealed packets.

The earliest statement of the primary evidence rule was in *Ford* v *Hopkins* (1700) 1 Salk. 283, 91 E.R. 250, as referred to in *Duhaime's Law Dictionary*, where it was stated that "the best proof that the nature of the thing will afford is only required".

In *Omychund* v *Barker* (1745) 1 Atk 21 at 48, as referred to in *Duhaime's Law Dictionary*, it was said:

> "The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow."

The primary evidence rule disallows the use of evidence other than the primary evidence where that evidence is in existence. This was stated in *Doe D Gilbert* v *Ross* (1840) 7 M. & W. 102 at 106, as referred to in *Duhaime's Law Dictionary*, as follows:

> "The law does not permit a man to give evidence which from its very nature shows that there is better evidence within his reach, which he does not produce."

The reason behind the primary evidence rule was explained in 1754 by Gilbert "*The Law of Evidence"* (1st ed 1754). In that textbook, the author stated at pp 3-4 that:

> "The first therefore, and most signal rule, in relation to evidence, is this, that a man must have the utmost evidence, the nature of the fact is capable of; for the design of the law is to come to rigid demonstration in matters of right, and there can be no demonstration of a fact without the best evidence that the nature of the thing is capable of; less evidence doth

> create but opinion and surmise, and does not leave a man the entire satisfaction, that arises from demonstration." (the underlining is for emphasis)

As stated by Gilbert in "*The Law of Evidence*" *supra,* the duty of a court in a matter where factual issues are heavily disputed is to establish the truth. The court becomes a trier of fact. The dispute is, however, between the parties who have the duty to place evidence before the court in order for the truth to be established.

It has already been established that the duty lay on the applicant to prove the factual allegations that he made regarding the authenticity of the Presidential election result that was declared in favour of the first respondent. He had the *onus* of providing evidence that would best facilitate the central task of accurately resolving the disputed Presidential election result. The applicant ought to have gone to the used ballot papers in terms of s 67A of the Act and sought the truth of the matter. The truth sought lay in the determination of the question whether or not the votes as declared by the twenty-fourth respondent tallied with what was contained in the ballot boxes.

Section 67A of the Act was enacted upon the realisation that it is only the used ballot papers themselves that are clear, sufficient, direct and credible evidence of what actually transpired when the electorate made their choices in a Presidential election. The counterfoils from which the ballot papers are torn are the evidence of residue. They remain sealed in separate packets at the end of the poll. They are the evidence of residue of what actually transpired as to the number of persons that participated during the vote.

The purpose of the remedies provided for under ss 67A and 70(4) of the Act is to ensure that a decision to embark on unnecessary litigation challenging the validity of a Presidential election is not made. The remedies also ensure that a litigant who embarks on litigation has the

necessary evidence with which to establish his or her case. In that way, any doubt as to whether or not the Presidential election itself was properly conducted, and whether the true expression of the will of the voters was announced, would have been addressed by the parties before the court application was lodged.

The remedies provided for by the Electoral Law do not only protect the right of an aggrieved candidate to information, they direct him or her to the source of the kind of evidence that would be required to prove the allegations of irregularities committed by the Commission in the conduct of the Presidential election. These are not remedies for the respondent's benefit. They are meant to protect the rights of those who are aggrieved by the result of a Presidential election.

When the Presidential election result was declared in the early hours of 3 August 2018 the applicant knew he was an aggrieved candidate. He may not have known the exact or precise reason why he was aggrieved, but the law-makers in their wisdom created an avenue for the applicant to ensure that he had all the evidence necessary to prove his case if he wished to exercise his right to challenge the result. Time was on his side to obtain such evidence from the Presidential election residue.

The applicant did not exercise his right in terms of s 70(4) of the Act as an aggrieved candidate in the Presidential election. His main reason for not resorting to s 70(4) of the Act was that "he could not drink from a poisoned chalice". One wonders how he knew that the chalice was poisoned without establishing if indeed it was poisoned. It was the Court that needed to be satisfied from real evidence that the sealed ballot boxes and the sealed packets were indeed "poisoned chalices".

There was no evidence that the closed and sealed ballot boxes and the sealed packets had been tampered with, save for the assumption by the applicant that the ballot boxes were "poisoned chalices". Evidence of the contents of the ballot boxes compared to the announcements by the Commission and the evidence within the applicant's knowledge would have given the Court a clear picture of any electoral irregularities or malpractices if any had occurred. No such proof was adduced by the applicant to support his allegations.

Without the primary evidence, the applicant did not have proof of the reality of what actually transpired on the day of the vote. He did not have the evidence that is required by the law as cogent evidence for challenging the validity of a Presidential election result. In order to prove fraud, collusion, lack of secrecy, and failure to properly conduct assisted voting, the applicant ought to have gone to the sealed ballot boxes and the sealed packets. The applicant's election agents would have lodged complaints as the irregularities occurred. They were entitled to do so by the law. The applicant's election agents signed the V11 Forms to indicate that they agreed with what was contained therein.

Armed with the evidence, either from a recount where the figures are alleged to be incorrect, or an examination of the contents of the sealed boxes and the sealed packets, the applicant would have had a clear picture of the true result of the Presidential election. He would have been clear as to whether allegations of any malpractices and irregularities regarding the actual votes cast and the results announced would be substantiated.

An applicant for a declaration of invalidity of a Presidential election result is, of course, not bound to resort to the remedies for accessing the real evidence contained in the closed and sealed ballot boxes and the sealed packets for the purpose of the court application he or she intends

to lodge with the Court. He or she is free to decide how to plead the case and choose what evidence to adduce to prove the allegations on the basis of which the application is made.

In the *Raila Odinga* (2017) case *supra*, the Supreme Court of Kenya nullified the Presidential election result, among other reasons, on the allegation by the petitioners that the electronic server used to transmit and store the results had been hacked or deliberately tampered with in favour of the winner of the presidential election. It had been argued by the petitioners that s 39(1C) of the Elections Act, which provided for simultaneous electronic transmission of results from the polling stations to the Constituency Tallying Centre (CTC) and the National Tallying Centre (NTC) immediately after the counting process at the polling station, had been violated.

What had transpired in the *Raila Odinga* (2017) case *supra* was that, contrary to the mandatory provisions of s 39(1c) of the Elections Act, after polling stations were closed on 8 August, 2017 the Independent Electoral and Boundaries Commission ("IEBC") inordinately delayed in the transmission of the results. It is reported that on 17 August 2017 (nine days after the elections) the IEBC's Chief Executive Officer, allegedly admitted that IEBC had not received all scanned Forms 34A and 34B (which contained results from the polling stations). The court concluded at paras [262] to [265] of the majority judgment that s 39(1C) was mandatory and provided the imperative for electronic transmission of results from the polling station to the National Tallying Centre.

Section 39(1c) of the Elections Act of Kenya reads:

"For purposes of a presidential election the Commission shall -

(a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;

(b) tally and verify the results received at the national tallying centre; and

(c) publish the polling result forms on an online public portal maintained by the Commission."

The delay by the IEBC to avail the scanned copies of the Forms 34A and 34B formed the basis for a conclusion that the security of the electronic system had been compromised, thus exposing it to unlawful interference and manipulation of results by third parties. This rendered the presidential election a sham.

The *Raila Odinga* (2017) case *supra* is distinguishable from the present matter on two grounds.

First, s 39(1C) of the Elections Act of Kenya provided for simultaneous electronic transmission of results from the polling stations to the Constituency Tallying Centre ("CTC") and the National Tallying Centre ("NTC") immediately after the counting process at the polling station. It meant that whoever required access to the presidential election results or copies of the polling station logs would have to access the IEBC server upon request. The IEBC server was, by operation of the law, the repository of the primary evidence the petitioners needed for proof of the allegations they made against the respondents.

In Zimbabwe the counting and transmission of the results is wholly manual. The process involves counting of all the ballots at the polling station in the presence of election agents of candidates who participated in the election. A polling station return, the V11 Form, is completed and countersigned by the election agents. The import of ss 64-65B of the Act is that they lay down the processes and procedures for the counting of votes, securing of the voting material and transmission of the polling station returns together with the election residue.

The results obtained at the polling station, together with the election residue, are transmitted physically to the ward centre, where a similar process of collating all the results from different polling stations is repeated. The results from the ward centre are then transmitted to the constituency centre. A similar process is repeated, culminating in the collated results for the constituency again being physically transmitted to the constituency centre and, finally, to the National Command Centre.

This distinction in the processes is important, in that it brings to the fore the fact that in the Kenyan system election results, together with the residue thereof, are to be transmitted electronically and received almost instantaneously from the polling station to both the constituency tallying centre and the national tallying centre.

Second, and even more importantly, the IEBC had been requested to provide access to its server where the election results and residue were stored electronically. It refused, neglected or failed to provide the access to the petitioners. Further, an order of the court compelling the IEBC to allow the petitioners access to the requested material had not been complied with. On account of this failure to comply with the requests and order of the court, the Supreme Court of Kenya concluded at paras [279] and [280] that the IEBC had denied the petitioners access to primary evidence which could have debunked their claims. It said:

> "[279] It is clear from the above that IEBC in particular failed to allow access to two critical areas of their servers: its logs which would have proved or disproved the petitioners' claim of hacking into the system and altering the presidential election results and its servers with Forms 34A and 34B electronically transmitted from polling stations and CTCs. It should never be lost sight of the fact that these are the Forms that Section 39(1C) specifically required to be scanned and electronically transmitted to the CTCs and the NTC. In other words, our Order of scrutiny was a golden opportunity for IEBC to place before Court evidence to debunk the petitioners' said claims. If IEBC had nothing to hide, even before the Order was made, it would have itself readily provided access to its ICT logs and servers

> to disprove the petitioners' claims. But what did IEBC do with it? It contumaciously disobeyed the Order in the critical areas.
>
> [280] Where does this leave us" (?) It is trite law that failure to comply with a lawful demand, leave alone a specific Court Order, leaves the Court with no option but to draw an adverse inference against the party refusing to comply. In this case, IEBC's contumacious disobedience of this Court's Order of 28th August, 2017 in critical areas leaves us with no option but to accept the petitioners' claims that either IEBC's IT system was infiltrated and compromised and the data therein interfered with or IEBC's officials themselves interfered with the data or simply refused to accept that it had bungled the whole transmission system and were unable to verify the data."

In terms of the Electoral Law of Zimbabwe, if a Presidential candidate requires that a recount of votes in a Presidential election be conducted by the Commission, he or she must make a written request for the recount to the Commission within forty-eight hours of the announcement and before the declaration of the winner. The applicant had the opportunity to do so but consciously took a decision not to follow the law and make such a request. He was also free to apply to the Electoral Court in terms of s 70(4) of the Act for an order which would have given him the right of access to the primary evidence contained in the closed and sealed ballot boxes and the sealed packets. As a result, unlike in Kenya, there was no basis for the Court to conclude that the sealed residue contained different results from those announced by the Commission or that such ballots had been tampered with in favour of the first respondent.

The ground on which the application challenging the validity of the Presidential election was premised was the allegation that officers of the body responsible for conducting and managing the election acted unlawfully and rigged the election result. It was said that the officers did so by crediting the first respondent, who was declared to be duly elected as President of the Republic of Zimbabwe, with votes not generated from the polling stations officially designated.

It would defeat the purpose of s 70(4) of the Act if the Court failed to hold to account an applicant who lodges a court application challenging the validity of a Presidential election, on the

allegation that the Commission rigged the election result, for failure to use primary evidence to prove the alleged rigging of the election result. The reason is that the purpose of the requirements of the provisions of ss 56 and 57 (on the verification of the identity of the voters and the manner of voting), s 59 (on the procedure for voting by illiterate or physically handicapped voters), s 63 (the counting and rejection of votes), s 64 (the procedure after counting of votes at polling stations) and s 110 (the verification of constituency returns by the Chief Elections Officer and the declaration of the result of election to the Office of President), is to ensure that cases of rigging of the election result do not occur.

The Legislature made provision for strict compliance with the procedures of voting, counting of votes and verification of the constituency returns to guarantee transparency of the actions of the officers of the Commission at every stage of involvement in the processes. The intention was that the products of the processes should constitute real and credible evidence of compliance with the law and a guarantee of the credibility of the election result.

The persons the applicant accused of rigging the Presidential election result are the same that the relevant provisions of the Electoral Law subject to rigorous rules of conduct during the voting process, the counting and rejection of votes, the verification of the constituency returns, and the declaration of the result. The demand of strict compliance with the relevant provisions of the Act under circumstances of transparency and accountability ensures the fairness and credibility of the processes concerned.

Transparency and accountability in the performance of duties by officers of a body responsible for conducting an election are essential elements of a credible election. Public officials performing their official duties under a high degree of scrutiny and observation, as prescribed by

the provisions of the Act set out in this judgment, are unlikely to slip into the unacceptable behaviour of rigging the election results.

The applicant did not allege specifically that officers of the Commission, who were under the obligation to act in accordance with the requirements of the provisions of the statute referred to, did not so act.

If the applicant had placed before the Court the V11 Forms from all the polling stations where he had election agents, a simple analysis of those V11 Forms and comparison with the V11 Forms from the sealed packets would easily have achieved a number of positive results. The exercise would have resulted in the following benefits -

(a) It would have disposed of any questions regarding the number of votes for any given polling station or constituency;

(b) It would have addressed any question of over-voting;

(c) It would have debunked allegations of upsurges of voters after a particular time, as for instance what is alleged to have happened in Mashonaland Central Province;

(d) It would have addressed issues of differences in voting patterns and numbers of votes for Parliamentary and Presidential elections;

(e) It would also have addressed issues of improbability of similar and identical results at polling stations; and

(f) It would have addressed questions regarding the accuracy of the results and data provided by the Commission.

The entire challenge to the correctness of the figures relating to the result of the Presidential election would have been easily resolved. If there was any irregularity, it would have been easily detectable.

Assuming the applicant did not have election agents at every polling station, a sample constituency could have been used. If there were instances where for one reason or another the V11 Forms were not recorded as they should have been, specific evidence detailing the gaps or discrepancies would have had to be produced to the Court. Such evidence could then have been used to support the allegations of irregular conduct levelled against the Commission. Whether the evidence adduced was sufficient proof of the allegations of irregular conduct made against the Commission would have become a separate question for determination.

AN ANALYSIS OF THE CASE PRESENTED BY THE APPLICANT ON ALLEGED IRREGULARITIES

It is important to state at this stage that the Commission was not alleged to have failed to conduct peaceful harmonised elections. The Commission put in place measures which ensured that the harmonised elections were conducted in a peaceful environment before and during voting. The peaceful environment in the period before voting ensured that candidates and political parties enjoyed freedom of association, assembly and expression. They were able to campaign freely.

Ensuring that an election is held in a peaceful manner is one of the fundamental principles of good governance. Acting in accordance with the principle of ensuring that there is peace during the period preceding the polling day as well as on the polling day and after the polling day is an important factor in the determination of the question whether an election was free and fair.

The applicant made several generalised allegations of irregularities against the Commission. He made a startling submission that these generalised allegations would suffice to prove the case without having recourse to the primary source evidence. The Commission nonetheless took time to analyse the allegations against it and produced clear evidence to refute the allegations, making it incumbent on the applicant to discharge the *onus* which was on him. The *onus* to prove the case is not on the person accused. The accused person does not have to prove his or her innocence. The respondents in this case needed only to respond.

Signed and unannotated V11 Forms

The Commission proved through the V11 Forms produced that the allegations that some forms had been signed and not populated was false. There appeared to have been a deliberate fabrication of evidence with an intent to mislead the Court. Without access to the sealed ballot boxes residue, this allegation simply remained as refuted.

Disenfranchisement of 40 000 teachers

The applicant alleged that some 40 000 teachers were denied the right to vote on the election day and that this had a direct effect on the result. The allegation was very general and unsubstantiated. It is not evident how the figure of 40 000 was calculated. There was no evidence from the teachers themselves that they were registered voters who wanted to exercise their right to vote and were posted to other constituencies against their will. On the contrary, it was shown by the Commission that some teachers had deliberately opted not to vote in favour of being posted to stations where such right could not be exercised.

The letter dated 17 July 2018, addressed to the Amalgamated Rural Teachers' Union of Zimbabwe by the Chief Elections Officer, is telling. It shows that, contrary to the allegations made by the applicant, the Commission put in place measures to allow civil servants seconded to it during the harmonised elections to cast their votes. The letter advises the leadership of the organisation of the measures put in place by the Commission to ensure that civil servants voted on the polling day. The measures included posting them to polling stations where they were registered to vote. If that was not possible, an officer was deployed to wards with the polling stations where he or she was registered to vote. If that was also not possible, the officer was deployed to a constituency with the polling station where he or she was registered to vote. In the case of officers deployed to wards or constituencies, the Commission provided them with transport on the polling day to go and cast their votes and return to their duties.

The Commission produced affidavits by members of the Civil Service, confirming that the exercise of their right to vote was in fact facilitated by the Commission. The Commission also produced declarations by members of the Civil Service seconded to it, signifying that they were forfeiting their votes in preference to being posted as polling officers.

The allegations made by the applicant were too bald and general to form the basis for the relief sought.

The Constitution gives every Zimbabwean citizen who is eligible to vote a right to vote. It is not an obligation under the Constitution to vote. There was no evidence of how many of these teachers were registered voters. There was no evidence of the effect the allegation, even if it were proved, would have had on the result. There was no guarantee that every teacher would have voted for the applicant.

Ghost polling stations

The allegations relating to ghost polling stations and polling stations created at the time of voting lacked specificity and particularity. They were in any case disproved by the evidence adduced for the Commission and the twenty-fourth respondent. These are the kind of allegations that would have been easily proved by the evidence in the closed and sealed ballot boxes and the sealed packets.

The allegation by the applicant that some polling stations disappeared was unfounded. For one to allege disappearance of polling stations, one should have had first-hand knowledge of the places where the polling stations were located before they were dismantled. The applicant did not state the names of the polling stations that he alleged disappeared on the polling day. It would have been easy to identify the polling stations, as they would have formed part of the list of polling stations officially made public by the Commission.

The applicant sought to present misleading evidence to prove the allegation that polling stations were created on the polling day. He pointed to what are referred to as "1HRDC" and "2HRDC" as examples of created polling stations. It turned out that these were in fact not polling stations. They were Ward 1 Hurungwe Rural District Council and Ward 2 Hurungwe Rural District Council.

The applicant sought to rely on a document titled "Collation of ward returns in respect of National Assembly constituency election". It is not clear why he would seek to present the document as a return showing polling stations.

To the extent that the allegation that polling stations were created was based on false information, it remained an unfounded allegation.

Bribery of rural voters

The allegations made by the applicant in relation to voters in the rural areas are unfortunate. In an effort to show that the harmonised elections were not free, fair and credible, the applicant rehashed the allegation which has had pride of place in previous applications challenging the validity of elections in the country. The essence of the allegation is that voters in the rural areas vote for food aid or grain they receive from Government. If they are not voting for food aid, they are voting under the undue influence of traditional leaders who allegedly ensure that they vote for ZANU-PF.

Rural voters are not respected as independent human beings capable of rationalising about the use of the vote to protect and advance their own social, economic and political interests. Whether living in rural or urban areas, Zimbabweans are educated people who are capable of understanding the meaning and use of the right to vote.

The bald and unsubstantiated allegation that rural voters cast votes for food aid distributed by Government or voted under the undue influence of traditional leaders to vote for ZANU-PF was made without reference to any developmental programme the applicant and the political party that sponsored his Presidential candidature put to the rural populace to persuade them to vote for him. The applicant campaigned freely in the rural areas. One must assume that he was able to put to the rural people the promises of his programme of development on the basis that they were rational people capable of deciding who to vote for in the privacy of the booth designed to guarantee and protect the secrecy of the ballot.

The standard of measures prescribed by the Commission and the law of elections is that there be a vote of equal weight to any other signified on a ballot paper by a registered voter in the secrecy of a compartment designed for the purpose of expressing the preference of the candidate of the voter's free choice. Nowhere does the law require that the voter and the ballot be described as "rural". If the vote is the product of strict compliance by the officers of the body tasked with the responsibility of conducting the election with the procedures of processing the applications for ballot papers prescribed by the law to ensure transparency and accountability, it deserves equality of treatment.

No evidence was produced by the applicant of specific occasions where there was distribution of food or agricultural inputs geared at inducing the electorate to vote for a particular political party or candidate.

The influence of traditional leaders

The influence traditional leaders were alleged to have exerted on voters in rural areas to vote for the first respondent is not borne out by the facts. The allegation of involvement of traditional leaders was not linked to any other relevant information.

If traditional leaders had the influence the applicant alleged they had over voters in the rural areas during the harmonised elections, the number of votes received by a candidate in the Parliamentary election sponsored by ZANU-PF would tally with the number of votes received by the ZANU-PF Presidential candidate at every polling station situated in a rural area.

It was common cause that there were many polling stations situated in rural areas where the Parliamentary candidate sponsored by ZANU-PF received far more votes than the first respondent received. The difference between the Parliamentary and the Presidential votes in rural

areas demonstrates the exercise by voters in these polling stations of the freedom of choice of candidates by secret ballot.

The closeness of the votes received by the applicant and the first respondent testifies to the enjoyment by the voters of the right to freely exercise the right to vote. The high number of Presidential candidates meant that the voters in rural areas were free to vote for a Presidential candidate of their choice.

It is also possible that some voters exercised the right conferred on a voter by s 56(3a) of the Act. The subsection provides that, if polling in two or more elections is being conducted simultaneously at the polling station, an applicant for a ballot paper may decline to accept a ballot paper for any one or more of those elections. If an applicant declines to accept a ballot paper for an election the presiding officer is required not to hand the applicant a ballot paper for the election. He must, however, 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 or ballot papers.

All this evidence would have assisted the Court in determining the truth of the allegation about the influence traditional leaders had on voters in rural areas. The evidence formed part of the sealed packets.

The Commission indicated that the applicant did not complain to it in terms of s 239(k) of the Constitution about specific cases of traditional leaders actively influencing their subjects to vote for a particular political party. Section 281 of the Constitution imposes a duty on a traditional leader not to be a member of any political party or in any way participate in partisan politics. He or she must not act in a partisan manner or further the interests of any political party or cause.

Accusations of undue influence made against traditional leaders have their basis in the personal behaviour of individual traditional leaders. The allegations had to be specific and particular. The applicant remained content with making bald and generalised allegations against traditional leaders.

Lack of independence of the Commission

The allegation that the Commission lacked independence was without foundation. It was made for the sake of making it. It must have been known to the applicant that the Commission is one of the Independent Commissions established under *Chapter 12* of the Constitution.

One of the general objectives for which Independent Commissions were established is to support and entrench human rights and democracy.

Apart from the Chairperson of the Commission, who is appointed by the President after consultation with the Judicial Service Commission, the other members of the Commission are appointed by the President from a list of not fewer than twelve nominees submitted by the Committee on Standing Rules and Orders. Needless to say, the Committee on Standing Rules and Orders includes Members of Parliament from the applicant's political party.

One of the specific functions of the Commission under s 239 of the Constitution is to prepare for, conduct, and supervise elections to the Office of President and to Parliament. The Commission is under a duty to ensure that the elections are conducted efficiently, freely, fairly, transparently and in accordance with the law.

The Constitution makes it clear that the Commission is independent. It is not subject to the direction or control of anyone. It must exercise its functions without fear, favour or prejudice. The

only control over the exercise of its functions is that it must act in accordance with the Constitution. In fact, no person may interfere with the functioning of the Commission.

Members of the Commission are required to be non-political. They are not to act in a partisan manner. They are not to further the interests of any political party or cause.

Wearing of partisan clothing

The applicant took issue with the fact that the Chairperson of the Commission appeared in a photograph with a scarf containing colours of the national flag hanging over her shoulders. He alleged that she supported the first respondent, who usually wears a similar scarf. To then suggest, without more, that because the Chairperson of the Commission had the scarf over her shoulders when a single photograph was taken of her she would be biased towards the first respondent and influence the whole electoral process to be conducted in favour of the first respondent is not to take the Court seriously. The applicant ought to have known that a challenge to the validity of a Presidential election could not be successfully mounted on flimsy allegations of this nature.

The facts show why the applicant ought not to have made the allegations of bias against the Chairperson of the Commission based on the incident of the photograph depicting her wearing the scarf. The Chairperson of the Commission was photographed wearing the scarf bearing the colours of the national flag on 05 February 2018. The nomination court for the harmonised elections sat on 14 June 2018. The photograph was taken during the pre-election period. There was no connection at the time with any Presidential election campaign.

It is in the public domain, and is a matter of fact, that the scarf first appeared when it was being worn by all members of the Zimbabwe delegation at the World Economic Forum in Davos, Switzerland, held from 23 to 26 January 2018. At that time, it was not a partisan but a national

symbol. It could not have morphed from being a symbol of national pride to a symbol of a Presidential election campaign within ten days to the time the photograph was taken.

It was baseless to assert that the wearing of the scarf by the Chairperson of the Commission in the circumstances is evidence of bias on her part in favour of the first respondent.

Failure of the State-owned media to comply with s 61(4) of the Constitution

The applicant alleged that the State-owned media followed the ruling political party and by extension the first respondent in its programmes. That is all he could say. It was a bald and general allegation.

There was no attempt at all to show any connection between the alleged favouritism extended to the first respondent in the programmes and the outcome of the Presidential election. The applicant did not, however, deny that he and the MDC-Alliance were given access to the State-owned media.

Section 61(4) of the Constitution imposes on the State-owned media the duty to afford fair opportunity for the presentation of divergent views and dissenting opinions without compromising the independence to freely determine the editorial content of their broadcasts or other communications.

Acceptable evidence produced by the Commission showed that the applicant and the MDC-Alliance were free to buy airtime from the ZBC. During the period extending from 02 July to 09 July 2018 political parties and candidates contesting the harmonised elections were invited to take up advertising airtime on the ZBC platforms.

The applicant and the MDC-Alliance bought advertising time on 14 July 2018. After having advertising material flighted on 14, 16, 24 and 28 July 2018 on radio, no more advertising material was forwarded to the ZBC because the applicant and the MDC-Alliance could no longer afford to pay for the advertising airtime on the ZBC platforms.

The evidence produced by the respondents showed that the applicant and the MDC-Alliance had their manifesto and programmes recorded and transmitted through the ZBC-TV. The applicant and the MDC-Alliance also took part in political debates on national radio.

Evidence produced by the respondents showed that the applicant and the MDC-Alliance were invited to place advertisements in Zimpapers newspapers. They indicated willingness to place advertisements in the newspapers in the last week of July 2018. They did not fulfil the promise.

In terms of s 10 of the Zimbabwe Electoral Commission (Media Coverage of Elections) Regulations SI 33 of 2008 ("the Regulations"), remedies are provided to participants in an election who allege malpractices or breach of the law by the State-owned media.

It was open to the applicant in terms of the Regulations to lodge an appeal with the Commission against any decision of any State-owned media institution that he considered to be outside the parameters of the law. This included any questions of bias, as alleged by the applicant.

A further right to appeal to the Electoral Court from any decision of the Commission on the issue is afforded. All the remedies are provided in the interest of speedy and effective resolution of any grievances that may arise during an election period relating to media coverage.

It was common cause that the Commission did not receive any appeal from the applicant with respect to media coverage during the electoral period in terms of the Regulations.

Threats to voters of injury, damage, harm or loss

On the allegations of the presence of "rogue elements", who identified themselves as being from the security sector, who went about "campaigning and threatening villagers", nothing more was provided. It remained a bald allegation. There was no indication as to where this happened, when it happened, or which of the candidates in the harmonised elections the alleged "rogue elements" were campaigning for. There was no indication in the founding affidavit whether a report was made to the police. There was no attempt to show the relevance of the allegation to the court application challenging the validity of the Presidential election.

The averment lacked particularity in an application seeking relief declaring an election or the result invalid. There was need to have specific incidents of actions of the alleged rogue elements referenced. Affidavits by the affected people ought to have been furnished. This was important as there was no guarantee that the people concerned were members of the security sector. Investigations would have had to be carried out to establish the true identity of the people vaguely described as "rogue elements". All that was presented to the Court were bald averments.

Failure by the Commission to provide a complete Voters Roll

It was not easy to understand why the applicant found it necessary to make the allegation that he received a voters roll that did not contain any biometric data on it, such as photographs and fingerprints. Photographs are not biometric data. It is not clear why a candidate in an election would seek to have a voters roll in his or her possession containing the fingerprints of all the registered voters.

The MDC-Alliance had been a party to the case of *Mpezeni* v *ZEC and Ors* HH-475-18. The High Court granted an order interdicting the Commission from publishing photographs of

voters in the voters roll. It was held that doing so would violate the voter's right to privacy, as protected in the Constitution. The applicant would have been well aware, before the election, that the voters roll which he was going to receive would not contain photographs. He could not blame the Commission for acting in terms of the law.

There is a court order which was not appealed against. The contents of the order remain extant. The effect of the order was to dispose of the issue of publication of photographs in the voters roll. For some reason the applicant brought the matter before the Court as if it was a fresh issue to be decided upon.

Discrepancies in the Voters Roll

The applicant made bald and unsubstantiated allegations that the Commission produced a voters roll riddled with discrepancies. He alleged that reports indicated that 625 000 voters were missing from the voters roll. The reports that formed the source of the allegation were not named.

On 10 June 2018 the Commission called on stakeholders who wished to conduct independent audits of the voters roll to do so. They were asked to share their findings with the Commission. The Zimbabwe Election Support Network ("ZESN") conducted an independent audit of the voters roll. It gave a positive assessment of the voters roll prepared by the Commission.

Section 28(1) of the Act gives the right to a voter to object, in writing to a voter registration officer, to the retention of any name on the voters roll of the constituency in which the objecting voter is registered. A voter may object to the removal of his or her name from a voters roll.

The applicant did not state whether, upon receiving the reports he referred to, he or the compilers of those reports availed himself or themselves of the remedies outlined in the Act to

redress the alleged anomalies. He did not say whether he or the compilers of the reports caused properly placed voters to take up such processes as are provided for under s 28 of the Act.

There was no connection shown by the applicant between the allegation of the 625 000 voters missing from the voters roll and the Presidential election result. The fact that the applicant did not attempt to show why such a large number of voters could have been allowed to vote without the system detecting the fact that they were missing from the voters roll proves that he knew that the allegations were baseless.

Voter education

The allegation by the applicant to the effect that the Commission allowed only ZANU-PF to conduct voter education using sample ballot papers for the purposes of rigging the harmonised elections was unfounded.

In terms of s 40C(1)(c) of the Act, political parties are permitted to conduct voter education. The twenty-fourth respondent averred that ZANU-PF requested that it be provided with a sample ballot paper relating to each ward or constituency under contestation in the harmonised elections. The request was refused.

All the political parties contesting the harmonised elections, including the MDC-Alliance, were given three sample ballot papers. One sample ballot paper was provided for each election. The sample ballot papers were given to each political party for the purpose of enabling it to conduct voter education in terms of the law of elections.

There was no evidence produced by the applicant for the bald and general allegation that the giving of the sample ballot papers to ZANU-PF "created fertile ground for rigging through ballot swapping and stuffing". The applicant did not say why the same allegation could not be

levelled against the MDC-Alliance. It had also received three sample ballot papers for the purpose of conducting voter education.

The Court understood that ballot swapping would involve marking sample ballot papers to signify votes for the first respondent. The marked sample ballot papers would be placed in the ballot boxes as substitutes for used ballot papers in favour of the applicant. The ballot papers in favour of the applicant would be removed from the ballot boxes. Stuffing would involve putting in ballot boxes sample ballot papers marked with votes for the first respondent.

A number of questions arise from these unsubstantiated allegations. The first relates to the fact that all the sample ballot papers were clearly endorsed "SAMPLE". The applicant did not have any evidence to show how such a sample ballot paper could be swapped and passed for the actual ballot paper used in the election. The applicant did not relate to the rigorous process of voting prescribed by the Act. He had to relate to the process to show the stage at which the ballot swapping or stuffing would have occurred. He did not do what was expected of him because he must have known that the allegations he was making were baseless.

The number of ballot papers received is recorded on the V11 Forms as well as the number of ballot papers used. The latter number is determined by counting the counterfoils of issued ballots. Once that number is ascertained, the ballot boxes are then opened and the actual ballots in the boxes counted. If there had been stuffing of ballots, as the applicant suggested, the number of ballots in the boxes would be more than the number of issued ballots according to the counterfoils.

If the applicant held a well-grounded fear that there could be ballot swapping or stuffing in the harmonised elections using the sample ballot papers, he had the opportunity to seek the

unsealing and re-opening of the election residue. The election residue would have been inspected for the presence, if any, of sample ballot papers.

Postal ballots

The applicant's premise that 7 500 police officers voted through the postal ballot system in the 2018 harmonised elections was not correct. Acceptable evidence produced by the Commission showed that the total number of people who were permitted to cast a postal ballot paper in the 2018 harmonised elections was 7 464. Police officers constituted 4 482 of the total number of postal ballot voters. It was misleading for the applicant to aver that 7 500 postal ballots for police officers were processed in the 2018 harmonised elections and ought to be invalidated.

The issue was still whether there was any evidence that the secrecy of the vote in respect of the 4 482 police officers who voted by postal ballot was not maintained.

The twenty-fourth respondent indicated in the opposing affidavit that the Commission did not receive complaints from any of the police officers who participated in the postal vote. No-one complained that he or she was not allowed to mark his or her ballot paper in secret and in the manner he or she wished in respect of choice of candidate.

The applicant did not place before the Court any affidavit from a police officer alleging that there was a coercive process by which postal voters were made to vote other than by secret ballot.

In *Movement for Democratic Change* v *Zimbabwe Electoral Commission and The Commissioner-General of Zimbabwe Republic Police* EC 01/18, a challenge to the validity of the postal voting process for the 2018 harmonised elections was lodged with the Electoral Court. The application was dismissed on the ground that the applicant had failed to put before the Electoral

Court any evidence in the form of affidavits by affected voters showing that the postal voting process had been compromised. There was no appeal against the decision of the Electoral Court.

The grounds for the dismissed application in the case before the Electoral Court were the same as those taken up by the applicant in the present application. There was still absence of evidence to prove the bald allegations made.

Design of the Presidential ballot paper

The allegation that the Commission designed a Presidential election ballot paper with the aim of affording the first respondent an advantage in respect to votes over other candidates had no legal or factual basis. It ought not to have been made, because the same allegation had been the subject of litigation in the Electoral Court.

In *People's Democratic Party* v *Chairperson of ZEC and Anor* EC 09/18, the design of the Presidential election ballot paper had been challenged on the same grounds on which the applicant's allegation is based. The Electoral Court found that the Presidential election ballot paper, as designed by the Commission, was in compliance with the law. There was no appeal against the decision of the Electoral Court.

The design of the Presidential election ballot paper having been found by the Electoral Court to be in accordance with the law, it could not give rise to a *bona fide* allegation of bias against the Commission.

A ballot paper designed in accordance with the law cannot be said to give an unfair advantage in respect of voters to one candidate over another. The applicant should have stopped to reflect on what the founding affidavit contained, lest he be accused of making frivolous and vexatious allegations against the Commission.

Allegation that 21% of polling stations had no V11 Forms affixed on the outsides

Common sense and caution required that before the applicant made the bald allegation that the Commission had failed to have affixed completed polling station returns on the outsides of 21% of the total polling stations on the polling day, he should have fact-checked the allegation. The mere making of the allegation would under normal circumstances mean that the maker has identified and counted the polling stations affected. The applicant did not indicate at which polling stations the V11 Forms were not affixed on the outside. He did not say whether he had election agents stationed at such polling stations. If the applicant had election agents at every polling station, as he should have had, he did not say why no affidavits were deposed to by such election agents attesting to the fact that no V11 Forms were affixed outside their polling stations.

The process of voting at a polling station involves a number of clearly defined procedures with which a presiding officer is bound to comply. Each procedure relates to specific duties, the contents of which are acts the presiding officer must perform. Section 64(1)(c) of the Act provides that, after the counting of the votes in accordance with the procedure prescribed in s 63(1) of the Act, the presiding officer shall start completing the V11 Form. He or she is required to record on the V11 Form the votes obtained by each candidate and the number of rejected ballot papers in such a manner that the count for each ballot box is shown on the return.

Section 64(1)(d) of the Act requires the presiding officer to display the completed V11 Form to those present and afford each candidate or his or her election agent the opportunity to subscribe their signatures thereto. The presiding officer is required to provide each candidate or his or her election agent with a copy of the completed V11 Form. Section 64(1)(e) of the Act then requires the presiding officer to affix a copy of the V11 Form on the outside of the polling station

so that it is visible to the public. He or she is required to ensure that the V11 Form remains there so that all members of the public who wish to do so may inspect it and record its contents.

A few minutes of reflection by the applicant on the nature, content and purpose of the duties imposed on the presiding officer by the procedures prescribed under ss 64(1) (c), (d) and (e) would have dissuaded him from making the rather outlandish allegations against the Commission under oath.

An applicant in motion proceedings ought to make out his or her full case in the founding papers. If he or she, as the applicant did, makes bald and unsubstantiated allegations his or her application cannot possibly succeed.

The applicant had election agents at the unidentified polling stations he alleged did not have completed V11 Forms affixed on the outside. The election agents would have been given completed V11 Forms.

The applicant did not present the completed V11 Forms given to his election agents. If he had done so, he would have been in a position to contend that the V11 Forms that the Commission had were different from the ones he had in his possession. If the applicant did not have election agents at the unidentified polling stations, how was he able to conclude that a failure to affix V11 Forms on the outside of polling stations occurred in 21% of the polling stations set up by the Commission in the harmonised elections? The claim is, with respect, outrageous.

Verification of the Presidential election result

The allegation by the applicant that his election agents were not present during the verification of the Presidential result is false.

An e-mail was sent by the Commission to all Presidential chief election agents, including that of the applicant, inviting them to come and take part in the verification of the Presidential election result. The twenty-fourth respondent averred in the opposing affidavit that she personally called, in a live ZBC broadcast, on all chief election agents for candidates in the Presidential election to come for the verification of the Presidential election result.

The acceptable evidence proved the fact that the applicant's election agents, Mr Morgan Komichi and Mr Jameson Timba, were present. Mr Komichi was the applicant's chief elections agent. Both men had full access to the room where verification of the result was conducted.

The twenty-fourth respondent stated that the two requested and were furnished with V11 and V23 Forms for them to check and verify any issues that they wished to verify during the verification process.

Over the two-day period of the verification of the Presidential election result, the applicant's election agents had unlimited access to all the original V11 and V23 Forms relating to the Presidential election. They had the opportunity at their own discretion to make notes from those V11 and V23 Forms. They had the opportunity to raise any queries with the Chief Elections Officer where they had problems with information that was on the V11 and V23 Forms being used by the Commission when compared with what they had collected from their election agents from various polling stations.

It was not correct to say that the verification of the Presidential election result was done under a cloud of secrecy. The applicant's chief election agent initially attended and observed the initial stages of the verification but later left and became unco-operative. He refused to sign the

form showing the number of votes received by each candidate. He disrupted the proceedings in which the Presidential election result was declared.

In para 5.1 of the founding affidavit, the applicant admitted that his chief elections agent and Mr Timba were invited to attend and witness the verification of the constituency results. He admitted that the two men attended and took part in the verification process that went on for two days.

It is clear from the evidence that the attitude of the applicant's chief election agent was that he would co-operate with the Chief Elections Officer only if the applicant won the Presidential election. The only reasonable inference to draw from the conduct of the applicant's chief election agent is that his deplorable behaviour was premeditated.

By withdrawing from the process of the verification of the Presidential election result when they realised that the applicant had lost the election, his election agents thought that the process would not continue to completion without their presence. They were wrong.

The provisions of s 110 of the Act are such that the absence of any candidate or his or her chief election agent does not stop the prescribed process from proceeding to its conclusion. An illustration can be found in the provisions of s 110(3(d) and s 110(3)(e) of the Act. The subsections require the Chief Elections Officer to act in the presence of those election agents as are present. Section 110 of the Act does not therefore mandate that a declaration in terms of s 110(3)(f) shall only be done where the candidates' election agents have signed off on the result of the Presidential election. The purpose is to ensure that the process outlined in s 110 of the Act is not susceptible to being taken hostage by any of the candidates contesting the Presidential election.

It was also misleading for the applicant to accuse the Commission of deliberately delaying the announcement of the Presidential election result when he knew that in terms of s 110(3)(h)(i) of the Act the Commission had five days within which to declare the Presidential election result. The voting ended on 30 July 2018. The Presidential election result was declared on 03 August 2018. The applicant must have known that the Commission had acted lawfully.

Stopping of counting of the Presidential election result

There was nothing placed before the Court to support the allegation by the applicant that the counting of votes at polling stations stopped in response to what he alleged were the results from polling stations showing him as leading in the Presidential election. Election agents did not file affidavits stating that the counting was stopped. No observer reports recording the occurrence of the event alleged by the applicant were made.

The only reasonable inference is that the counting of votes at polling stations across the country proceeded as prescribed by the Act, without any stoppages as alleged by the applicant.

Failure to produce V11 Forms

The applicant alleged that, at the close of voting at 19.00 hours on 30 July 2018, sample results in the form of completed V11 Forms were released. He said they were all over social media. According to the applicant, the results showed that he was well ahead of the first respondent in all the Provinces of the country. He said when it was realised that he was leading in the Presidential election, the polling station returns were not released until 31 July 2018. To buttress the allegation that the V11 Forms circulating in the social media showed him leading in the Presidential election, the applicant attached to the founding affidavit only five V11 Forms.

There was a total of 10 985 polling stations in operation during the 2108 harmonised elections. There are ten Provinces in Zimbabwe. That meant that at least five Provinces were not represented on the V11 Forms produced by the applicant. Five V11 Forms out of 10 985 polling stations was by no means representative of the pattern that the applicant alleged.

The samples of the V11 Forms produced by the applicant were meant to buttress the hypothetical postulation that he won the Presidential election. Where the actual data on the Presidential election was available and accessible, the hypothetical postulation was unnecessary. The fact that the V11 Forms were sourced from social media raised doubt about their authenticity.

Polling stations returns are obtainable in terms of the provisions of s 64(1)(d1) of the Act. The applicant ought to have produced authentic completed V11 Forms collected from his political party's election agents and compared what they established to the Presidential election result with the figures announced by the Commission. He did not do so.

Mashonaland Central voting

The applicant claimed that there were 200 000 votes created in Mashonaland Central Province. He said less than 200 000 people voted in the Province, yet the Commission announced votes in excess of 400 000. He said he based the conclusion that less than 200 000 people voted in Mashonaland Central Province on information emanating from a ZBC reporter, who said the Commission had announced that at 17.30 hours 105 000 people had cast their votes.

The applicant did not state where he got the figure of 200 000 as the number of people who voted in Mashonaland Central Province. The Commission proved that the Province has a total voter population of 531 984. With a voter turnout of 85.1% in the Presidential election, the number of votes cast in the Province would exceed 400 000.

The question whether more than 400 000 voters cast their votes in Mashonaland Central Province in the Presidential election could easily have been answered by consideration of the election residue. Without access to the evidence of the election residue, the applicant's allegations remained bald and unsubstantiated allegations.

Over-voting

The allegation by the applicant that there were more votes announced for some polling stations than the voters registered for the polling station was unsubstantiated.

Every V11 Form has a ballot paper account. Immediately before the unsealing of the ballot boxes and commencement of counting, the presiding officer at every polling station accounts for the ballot papers received at the beginning of the poll.

The applicant did not put before the Court V11 Forms that showed higher numbers of counted ballots to those issued at the polling station. He did not place before the Court any affidavits from his election agents stating whether at certain polling stations the count yielded a higher number of cast ballots than those issued.

The Commission proved that there were no polling stations where more people voted than appeared on the voters' roll for the polling station.

The allegation on over-voting was based on what the applicant described as G-series documents. The falsity of the nature of the information in the applicant's G-series was easy to expose.

The applicant's G-series alleged that a polling station at Mandara Primary School in Bikita West Constituency had 809 people who voted in the Presidential election out of a total registered

voter population of 447. Contrary to the applicant's assertions, the V11 Forms in respect of Mandara Primary School polling station recorded that 371 people voted in the Presidential election.

The applicant's G-series alleged that at a polling station at Bikita Minerals Primary School in Bikita West Constituency 831 people voted in the Presidential election when the voter population was 341. Contrary to the applicant's assertions, the V11 Form for Bikita Minerals Primary School polling station recorded that 309 people voted in the Presidential election.

The applicant's G-series alleged that at a polling station at Nharira Primary School in Gutu North Constituency 536 people voted in the Presidential election out of a voter population of 271. Contrary to the applicant's assertions, the V11 Forms for Nharira Primary School polling station recorded that 236 people voted in the Presidential election.

The trend was the same in respect of polling stations in the G-series, which was produced as proof of the allegations of over-voting.

The conclusion by the Court was that the information contained in the documents produced as G-series was false.

Identical votes

The allegation by the applicant to the effect that identical figures of results in respect of polling stations can only be explained in terms of manipulation of votes proves nothing. The actual returns from the polling stations concerned were available and accessible. They would have shown that identical results of votes cast at different polling stations were a real occurrence. In other words, there were polling stations that returned identical results.

To show that identical results do not have to be a result of manipulation, the Commission produced copies of two V11 Forms, one for Mapengula Tent polling station in Tsholotsho North and one for Mashala Top Butiti Pre-school polling station in Hwange East. Each V11 Form for the respective polling station was signed by election agents for the Presidential election candidates. The V11 Forms showed that at each polling station the applicant received 86 votes against the first respondent who received 52 votes. If the applicant's allegation of identical results being products of manipulation, the Commission would have manipulated the results of the Presidential election at the two polling stations in his favour.

THE PRESIDENTIAL ELECTION RESULT AND THE ADMISSION BY THE COMMISSION

On 3 August 2018 the Commission announced that the first respondent had received more than half of the votes cast in the Presidential election. The first respondent was declared to be duly elected as President of the Republic of Zimbabwe in terms of s 110(3)(f)(ii) of the Act.

The declaration, as set out in the relevant provisions of the law, is a legal event. It follows upon any candidate reaching the 50% plus one vote threshold. Whether a candidate has received 50% plus one vote of the number of votes cast in the Presidential election is a question of fact. The declaration can only be changed or altered by the Court in terms of s 110(3)(i) of the Act, which reads**:**

> "(i) a declaration by the Chairperson of the Commission (or, in his or her absence, the Deputy Chairperson or, in his or her absence, a Commissioner designated by the Chairperson) under paragraph (h) shall be final, subject to reversal on petition to the Electoral Court that such declaration be set aside or to the proceedings relating to that election being declared void; …".

The declaration itself is final subject to the requirements of reversal. The Commission made the admission that the figures initially announced had mathematical errors. Minor adjustments were made after data capturing errors were corrected. It was submitted that this affected the figures relating to the first respondent's win by 0.1% but did not affect the result of the Presidential election.

The applicant alleged that there were discrepancies between the Presidential election result as announced by the Commission and that arrived at by adding figures on the V11 and V23 Forms.

The calculations by the applicant were wrong. They were based on an incorrect figure of voter turnout. The total voter population for the purposes of the 2018 harmonised elections was 5 695 936. It was not 5 659 583 as indicated by the applicant.

The previously announced number on the polling day had been 5 695 706. The figure was adjusted by the addition of 230 voters who had been registered during a BVR registration exercise in Chegutu, Mashonaland West Province, prior to the cut-off date for the registration of voters for the 2018 harmonised elections. The number of 230 voters had not been uploaded into the database.

The final voter turnout in the Presidential election was 85.1%. When applied to the total voter population, it equated to 4 847 233. The results of the Presidential election announced by the Commission totalled 4 847 996. There was a variance of 763 votes from the actual 85.1%. The variance was accounted for by mathematical errors in the data capturing exercise.

The computation by the applicant was based on a voter turnout of 72%. This did not yield a correct result, reflective of what happened on the polling day. As a result of the use of 72% as

the final voter turnout in the Presidential election instead of the correct 85.1%, the applicant arrived at the figure of 700 000 votes that he alleged were unaccounted for.

Using 72% of the total voter population to calculate the voter turnout, the applicant arrived at the figure of 4 032 000. By necessary implication, the figure would include votes that would, during the counting process, be deemed to be invalid for one reason or another. The applicant then gave the figure of 4 775 640 as votes announced by the Commission.

The figures of 4 032 000 on the one hand and 4 775 640 on the other represented two different things. The former figure included all votes, whether valid or invalid. The latter figure would have represented valid votes only. The applicant proceeded to subtract in turn the elements of the latter category of votes from the former category of votes. As a result of the use of 72% as the final voter turnout in the Presidential election instead of the correct voter turnout of 85.1%, the applicant fell into error and made wrong conclusions on figures that he brought to Court as the basis of his argument. The error by the applicant in the computation of the total voter turnout, amongst other errors, would have caused him to come up with the variance of the figure of 700 000. He did not take into account in the computation the difference between the two sets of votes he had subtracted from each other.

The applicant's computation did not establish the 700 000 allegedly unaccounted for votes. In terms of the applicant's G-series documents, he identified a variation in the result of the Presidential election of 0.1%. That gave him 44.4% of the total votes cast. The first respondent received 50.7%. The variation did not affect the outcome of the Presidential election. The first respondent still passed the statutory threshold of 50% plus one vote.

Any mathematical error that may have occurred in the process of verification of the Presidential election result in terms of s 110 of the Act was not gross or sufficient to overturn the outcome of the election. It cannot be a ground for the vacation of the declaration made in terms of s 110(3)(f)(ii) of the Act.

It is important to understand what the result of the Presidential election is within the meaning of s 93(1) of the Constitution and s 110(3)(f)(ii) of the Act. The result of the Presidential election is the declaration of a winner having received more than half of the votes cast in the election. The winner only has to receive 50% plus one vote of the number of votes cast in the Presidential election. Any votes after that point have no bearing on the question whether or not one must be declared the winner of the Presidential election.

The correction of the mathematical errors in the number of the votes announced as having been received by the first respondent by the Commission had no effect at all on the result of the Presidential election and the declaration of the first respondent to be duly elected as President of the Republic of Zimbabwe.

An error in counting and amendment of figures is envisaged by the Act itself, which makes the provisions of s 110 subject to those of s 67A. Section 67A(4) provides that the Commission may, on its own initiative, order a recount of votes in any polling stations if it considers there are reasonable grounds for believing that the alleged miscount of votes occurred and that, if it did occur, it would have affected the result of the Presidential election. The law allows for the adjustment, where it is found necessary to do so. If the applicant was aggrieved by the verification, he should have utilised the remedies availed to him by statute to get the relevant evidence. The

applicant needed more evidence than just the mere admission by the Commission of the mathematical inaccuracy of the figures to show that the result was affected.

ESSENCE OF THE APPLICANT'S CASE

The applicant did not so much rely on the allegation that the Presidential election was not free, fair and credible on the basis of the generalised and unproved allegations he made against the Commission. The essence of the case was that the applicant was the winner of the Presidential election. That is the allegation he failed to prove.

CONCLUSION

In the final analysis, the Court found that the applicant failed to place before it clear, sufficient, direct and credible evidence to prove the irregularities he levelled against the Commission. He also failed to prove the allegation of electoral malpractices he levelled against the first respondent. The applicant did not prove the alleged irregularities as a matter of fact. It would be unnecessary in the circumstances to ask and answer the question whether the alleged irregularities affected the result of the Presidential election.

It is an internationally accepted principle of election disputes that an election is not set aside merely on the basis that an irregularity occurred. There is a presumption of validity of an election. This is so because as long as the election was conducted substantially in terms of the constitution and all laws governing the conduct of the elections it would have reflected the will of the people. An election can only be set aside if it is proved on a balance of probabilities that the irregularities shown by clear and credible evidence to have been committed by officers of the body charged with the duty to conduct the election in accordance with the law of elections affected the

result. It is not for a court to decide elections; it is the people who do so. It is the duty of the courts to strive in the public interest to sustain that which the people have expressed as their will.

GWAUNZA, DCJ: I agree

GARWE, JCC: I agree

MAKARAU, JCC: I agree

HLATSHWAYO, JCC: I agree

PATEL, JCC: I agree

BHUNU, JCC: I agree

UCHENA, JCC: I agree

MAKONI, JCC: I agree

Atherstone & Cook, applicant's legal practitioners

Dube, Manikai & Hwacha, first respondent's legal practitioners

Mafume Law Chambers, fifth respondent's legal practitioners

Ncube Attorneys, sixth respondent's legal practitioners

Mbidzo, Muchadehama & Makoni, eighteenth respondent's legal practitioners

Wintertons Legal Practitioners, twentieth respondent's legal practitioners

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