

NELSON CHAMISA

Applicant

and

EMMERSON DAMBUDZO MNANGAGWA

First Respondent

JOSEPH BUSHA

Second Respondent

MELBAH DZAPASI

Third Respondent

NKOSANA MOYO

Fourth Respondent

NOAH MANYIKA

Fifth Respondent

HARRY PETER WILSON

Sixth Respondent

TAURAI MTEKI

Seventh Respondent

THOKOZANI KHUPE

Eighth Respondent

DIVINE MHAMBI

Ninth Respondent

LOVEMORE MADHUKU

Tenth Respondent

PETER MUNYANDURI

Eleventh Respondent

AMBROSE MUTINHIRI

Twelfth Respondent

TIMOTHY JOHANNES CHIGUVARE

Thirteenth Respondent

JOICE MUJURU

Fourteenth Respondent

KWANELE HLABANGANA

Fifteenth Respondent

EVARISTO CHIKANGA

Sixteenth Respondent

DANIEL SHUMBA

Seventeenth Respondent

VIOLET MARIYACHA

Eighteenth Respondent

BLESSING KASIYAMHURU

Nineteenth Respondent

ELTON MANGOMA

Twentieth Respondent

PETER GAVA

Twenty-first Respondent

WILLARD MUGADZA

Twenty-second Respondent

ZIMBABWE ELECTORAL COMMISSION

Twenty-third Respondent

THE CHAIRPERSON OF THE ZIMBABWE

ELECTORAL COMMISSION

Twenty-fourth Respondent

THE CHIEF EXECUTIVE OFFICER OF THE

ZIMBABWE ELECTORAL COMMISSION

Twenty-fifth Respondent

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DECISION

MALABA CJ: This is the unanimous judgment of the Court. It must be noted that it, however, does not contain the full reasons thereof. These will be issued in due course.

On 30 July 2018 the Republic of Zimbabwe held harmonised Parliamentary, Local Government and Presidential elections. The applicant and the first respondent participated as Presidential candidates along with twenty-one others.

On 3 August 2018 the twenty-fourth respondent, acting in terms of section 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 the 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 the President of the Republic of Zimbabwe. He lodged an application in terms of section 93(1) of the Constitution of Zimbabwe Amendment (No. 20) 2013 (“the Constitution”), challenging the validity of the election of the first respondent as the President of the Republic of Zimbabwe. Section 93 provides 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 seeks 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 2nd 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 2nd 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) 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 application was opposed by the first, fifth, sixth, seventeenth, eighteenth, twentieth, twenty-third, twenty-fourth and twenty-fifth respondents. For reasons that will be set out in the full judgment, the court ruled that the opposing papers filed by the fifth, sixth, seventeenth and twentieth respondents were –

1. not properly before the Court, and
2. should be expunged from the record with no order as to costs.

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

Whether the application is properly before the Court

The respondents took several points *in limine* including that the application filed by the applicant was not properly before the Court. This was because, although filed within seven days, as is stipulated by section 93 of the Constitution, the application was served on the

respondents on the eighth day in violation of rule 23(2) of the Rules of the Constitutional Court 2016 (“the Rules”).

The Constitution does not refer to week days 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 Constitutional Court Rules, 2016, the application **shall** be lodged with the Registrar and shall be served on the respondent **within seven (7) days of the declaration of the result of that election.**

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

The applicant appears to have been cognizant of the reckoning of days and time limitations prescribed by the Constitution and waited until the last day to file his application shortly before close of the Constitutional Court Registry on 10 August 2018. He was entitled by law to do so.

Having done so, the applicant was then faced with a further obligation to serve the process on all the respondents on the same day. The applicant could only do so through the Sheriff of Zimbabwe in terms of **r 9(7) of the Constitutional Court Rules.**

The applicant indicates that he did so. The Sheriff had until 10 pm that same evening to effect service in compliance with the Rules. The affidavits submitted by the respondents show that the applicant had in fact attempted service in his own capacity and without assistance of the Sheriff on 10 August 2018.

It is common cause that the application was eventually served on the respondents on 11 August 2018, outside of the timeframes stipulated in the Constitution and contrary to the provisions of the Constitutional Court Rules.

The same limitation applied to the respondents, who were served with the application on Saturday 11 August 2018. 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 of Zimbabwe:**

“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, a public holiday in Zimbabwe, the notices of opposition both had to be filed on the next business day thereafter, being 15 August 2018. They were duly and properly lodged with the Registrar in terms of the law.

The applicant clearly breached the Rules of the Court, and filed a defective application. However, due to the importance of the matter and the public interest, the Court has the power to condone the non-compliance with the Rules in the interests of justice.

An application for condonation of this non-compliance, *albeit* opposed by the respondents, was made for the applicant. This Court is prepared to, and does, grant the application due to the importance of the matter and the public interest involved.

The other points *in limine* raised by the respondents will be fully addressed in the main judgment.

On the merits, the applicant alleges that the first respondent did not win the election due to the fact that, in the run up to the elections, the twenty-third and twenty-fourth respondents were involved in a litany of constitutional and electoral law violations, all of which had the effect of undermining the just conduct of the elections. Some of the alleged violations related to –

- Lack of independence of the Zimbabwe Electoral Commission;
- 2 Failure of State owned media to comply with s 61(4) of the Constitution;
 - 3 Conduct of traditional leaders and rogue security elements;
 - Failure to abide by general principles affecting conduct of elections;
 - ZEC's responsibility to compile voter's rolls;
 - 6 Wearing of partisan clothing;
 - Failure to provide a complete Voters' Roll;
 - Voter Education;
 - Design of Presidential ballot paper;
 - 10 Fixing of polling station returns (V11 forms) on the outside of polling stations;
 - 11 Postal Ballots;
 - 12 Counting of Presidential Ballots;
 - 13 Undue influence, threats, injury, damage, harm or loss to voters; and
 - 14 Bribery, provision of seed and fertiliser packs.

The Court notes that the High Court of Zimbabwe was in recent months seized with and determined issues pertaining to –

1. The conduct of postal voting;
 2. The design of the Presidential ballot;
- The release of voters' rolls with voters' photographs to the parties; and

1. the twenty-third respondent's obligation to facilitate voting by civil servants engaged in election duties on election day.

These judgments are extant and the Court will therefore not, at this juncture, address the applicant's contentions in respect of those issues.

The Court will also not, in this abridged version of its judgment, address the totality of the allegations made by the applicant, as listed above. This will be done in the main judgment.

The standard of proof in election petitions

In terms of authorities of this and other Courts, the declaration of results in terms of s 110(3)(f)(ii) of the Act creates a presumption of validity of that declaration.

The *onus* and burden of proof in this application therefore rests with the applicant and it is for him to prove to the satisfaction of the Court that there were irregularities in the conduct of the election that warrant the relief sought.

The general position of the law is that no election is declared to be invalid by reason of any act or omission by a returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate electoral rules if it appears to the Court that the election was conducted substantially in accordance with the law governing elections and that the act or omission did not affect the result.

As an exception to this general position, the 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, the Court must be satisfied that this breach has affected the results 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 substantial compliance with the law. Additionally, an election result which has been obtained through fraud would necessarily be invalidated.

From the foregoing, the Court will only invalidate a presidential election in very limited and specific circumstances, if:

1. The results are a product of fraud.
2. The elections were so poorly conducted that they could not be said to have been in substantial compliance with the law.

It is for the applicant to prove to the satisfaction of the Court that the election was conducted in a manner which fell substantially below the statutory requirements of a valid election and that the result was materially affected warranting a nullification of the result or invalidation of the election.

THE NEED FOR THE APPLICANT TO HAVE PRODUCED SOURCE EVIDENCE

A significant part of the applicant's challenge related to the result and figures announced by the Electoral 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 is alleged that there was rigging.

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. This would have been required to prove allegations of complicity with the Zimbabwe Electoral Commission by the winner of the election, alleged to be the deliberate beneficiary of the allegedly improper election.

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

The applicant also made several allegations of irregularities against the Zimbabwe Electoral Commission related to its failure to discharge its obligations in terms of the law. No proof or evidence was adduced by the applicant of these allegations.

The best evidence in this instance would have been the contents of the ballot boxes themselves. That is the primary source evidence. Evidence of the contents of the ballot boxes compared to the announcements by the Zimbabwe Electoral 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.

The electoral law is designed to protect the vote. The protection of the ballot cast by every citizen who participated in the election is fundamental. It is one that the Court should guard jealously.

The avenues available to an aggrieved candidate are meant to ensure that he or she has all the evidence available to him or her to assist the Court.

It follows that when the result was declared in the early hours of Friday 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 rights to challenge the result. Time was on his side to obtain such evidence from the election residue.

The applicant's remedies to access the ballot and election residue are in the Electoral Act under **ss 67A and 70**. Under s 67A he could have sought a recount of the votes within forty-eight hours; whilst under s 70 he could have approached the Electoral Court for an order for the unsealing of the ballots.

These remedies are designed to protect each aggrieved candidate. They ensure that a decision to embark on unnecessary litigation challenging the validity of an election is not made. They 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 election itself was properly conducted on the election day, and whether the true expression of the will of the voters was announced would have been addressed by the parties before the 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 Zimbabwe Electoral Commission in the conduct of the election. So these are remedies not for the respondents' benefit. They are meant to protect the rights of those who are aggrieved by the results of the Presidential election.

Armed with the evidence either from a recount where the figures are alleged to be incorrect, or analysis of the contents of the unsealed boxes, the applicant would have had a clear and indisputable picture of the outcome of the election. He would have been clear whether any malpractices and irregularities regarding the actual votes cast and results announced would be substantiated. He chose not to exercise this right.

The electoral law protects the voters and the candidate in the process involved. This is from the delivery of the ballot papers to the polling station, to the collection of the ballot paper, to voting in secret in the booth, to counting of the ballots, and the sealing of the ballot boxes at the end of the election.

The applicant was at large to have his polling agents at each and every polling station around the country. Observers were also free to participate in the process. The applicant's agents would have observed the voters arriving, being given the ballot papers as applicants for these papers before the presiding officers, going on to vote in secret in the booths, and having the votes counted in their presence if they were there. At the end of the counting all agents present would have signed the V11 forms if they so wished and given copies.

If the applicant had placed before the Court the V11 forms from all the polling stations where he could have had polling agents, a simple analysis of those V11 forms against the V11 forms in the ballot boxes would easily have done the following –

- (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, 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,
 - It would also have addressed issues of improbability of similar and identical results at polling stations.

- It would have addressed questions regarding the accuracy of the result and data provided by the Commission.

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

When pressed why the primary source evidence was not adduced, the applicant's practitioner gave a bald and unsubstantiated allegation that the election residue had been tampered with. It was argued by the applicant's counsel that the residue was a poisoned chalice. In other words, by the time you would have sought to have the ballot boxes unsealed they would already have been manipulated. It was argued that such an exercise would have been futile. The Zimbabwe Electoral Commission contends that the prescribed procedures were complied with.

Logic therefore dictates that if the applicant and his agents (or any other political candidate whose agent had the forms) had the V11 forms in their custody, they could easily have compared them against the residue and further compared them against the result declared.

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

In the second instance, the applicant argues that the crux of his case stands even without that primary evidence. It was argued that an attack on the accuracy and correctness of the figures produced by the Zimbabwe Electoral Commission itself would suffice to invalidate the election. The Zimbabwe Electoral Commission specifically and systematically explained and answered the allegations that were made against it.

ON THE CASE PRESENTED BY THE APPLICANT OF IRREGULARITIES

The applicant made several generalised allegations of electoral malpractices against the Zimbabwe Electoral Commission. He made a startling submission that these generalised allegations would suffice to prove the case without resort to the primary source evidence.

The Zimbabwe Electoral Commission nonetheless took time to analyse the allegations against it and produced clear and tangible 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 Zimbabwe Electoral Commission proved through the V11 forms produced that the allegations that some forms had been signed and not populated was false, as there appears 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 remains as refuted.

Disenfranchisement of 40,000 teachers

The applicant alleged that some 40,000 teachers were denied their 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 against their will. On the contrary, it was shown by the Zimbabwe Electoral 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 Constitution gives every Zimbabwean citizen who is eligible to vote a right to vote. It is not an obligation under our Constitution to vote. There was no evidence how many of these were registered voters. There was no evidence of the effect this allegation even if it were proven would have had on the result. There was no guarantee that every teacher would have voted for the applicant.

The allegations relating to ghost polling stations, or polling stations created at the time of voting, lacked specificity and particularity. They were in any case disproved by the evidence adduced for the twenty-third and twenty-fourth respondents. And these are the kind of allegations that would have been easily proved by the evidence in the sealed ballot boxes.

THE ELECTION RESULT AND THE ADMISSION BY ZEC

On 3 August 2018 the Zimbabwe Electoral Commission announced that Emmerson Dambudzo Mnangagwa, having achieved the required 50% plus one vote from the election, was declared to be the duly elected President of Zimbabwe. The declaration was made in terms of **section 110(3)(f)(ii)** of the **Electoral Act**, which reads:

“(f) subject to paragraph (h), after the number of votes received by each candidate as shown in each constituency return has been added together in terms of paragraph (e), 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 —

(i) where there are two candidates, forthwith declare the candidate who has received the greater number of votes to be duly elected as President of the Republic of Zimbabwe with effect from the day of such declaration; or

(ii) where there are more than two candidates, forthwith declare the candidate who has received more than half the number of votes to be duly elected as President of the Republic of Zimbabwe with effect from the day of such declaration; or

(iii) where there are more than two candidates, and no candidate has received more than half the number of votes, forthwith declare that a runoff presidential election shall be held on the date fixed by the President in terms of section 38(1)(a)(iii) (that is to say, a fixed date not less than twenty-eight and not more than forty-two days after the polling day or last polling day, the case may be, of the original election):

Provided that the Electoral Court, on the application of the Commission, may for good cause extend the period;

...”

The declaration as set out in these provisions of the law is the legal event. This is upon any candidate reaching the 50% plus one vote threshold. Whether a candidate has received 50% plus one vote of the total number of votes cast is a question of fact. The declaration can only be changed or altered by this Court in terms of s 110 (3)(i), 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 Zimbabwe Electoral Commission made a critical admission that the exact figures were incorrect and 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 election.

It is important to understand what the result of an election is. The result of the election is the declaration of a winner having reached the 50% plus one vote, no other thing. Any votes after that point have no bearing on the result of the election.

The amendment by the Zimbabwe Electoral Commission has no effect at all on the result of the election and the declaration as interpreted in this case. In fact, an error in counting and amendment of figures is envisaged in the Act itself, which makes the provisions of s 110 subject to those of s 67A. The law allows for the adjustment. If the applicant was aggrieved by the counting and figures availed, he should have utilised the remedies availed to him by statute to get the relevant evidence.

In this case, the applicant, in our view, needed more evidence than just the mere admission by the Zimbabwe Electoral Commission of the inaccuracy of the figures to show that the result was affected. If it was and there was in fact no winner having 50% + 1 vote, there would be grounds for a re-run or any other appropriate remedy. The applicant chose not to pursue this avenue.

CONCLUSION

In the final analysis, the Court finds that the applicant has failed to place before it clear, sufficient, direct and credible evidence that the irregularities that he alleges marred the election process materially existed. 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 irregularities materially affected the result of the election. As already indicated, it is an

internationally accepted principle of election disputes that an election is not set aside easily 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 governing laws it would have reflected the will of the people. It is not for the 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 their will in. Therefore, the application ought to be dismissed.

ORDER

In the result, the following order is made –

- (1) The application is dismissed with costs.
- (2) Emmerson Dambudzo Mnangagwa was duly elected President of the Republic of Zimbabwe.
- (4) In terms of section 93(4)(a) of the Constitution of Zimbabwe EMMERSON DAMBUDZO MNANGAGWA is duly declared the winner of the Presidential election held on the 30th of July 2018.

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