

REPORTABLE (19)

MORGAN TSVANGIRAI

v

- (1) ROBERT GABRIEL MUGABE**
- (2) ZIMBABWE ELECTORAL COMMISSION**
- (3) RITA MAKARAU, N.O.**
- (4) CHIEF ELECTIONS OFFICER**

**CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA
GWAUNZA JA, GARWE JA, GOWORA JA,
HLATSHWAYO JA, CHIWESHE AJA & MAVANGIRA AJA
HARARE, AUGUST 19 & 20, 2013**

D S Mehta, for the applicant

T Hussein, for the first respondent

T M Kanengoni, for the second, third and fourth respondents

F Mutamangira, with him *G Mlotshwa* and *A Mambosasa*, appearing for the Attorney-General as
amici curiae

MALABA DCJ: Seven days after the declaration on 3 August 2013 of the results of the Presidential election (hereinafter referred to as “the election”) held on 31 July 2013, showing

Robert Gabriel Mugabe (hereinafter referred to as “the first respondent”) as the winner of the election, Morgan Tsvangirai (hereinafter referred to as “the petitioner”), who was one of the candidates contesting the election, lodged with the Constitutional Court (hereinafter referred to as “the Court”) a petition challenging the validity of the election under s 93(1) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (hereinafter referred to as “the Constitution”).

The petitioner used fourteen grounds for challenging the validity of the election which he alleged constituted corrupt practices committed by the first respondent through his agents or by third parties with his knowledge. He also alleged irregularities which he said were committed by the second and fourth respondents, who were responsible for conducting the election. It was the petitioner’s averment that the said acts, which were allegedly committed in violation of the provisions of the Electoral Act [*Chapter 2:13*] (hereinafter referred to as “the Electoral Law”), had materially affected the validity of the election. He prayed for an order declaring the election invalid and setting it aside and for a fresh Presidential election to be held within sixty days after the determination.

The respondents opposed the petition on the ground that the petitioner had lodged it when he had no evidence to prove the allegations of commission of corrupt practices and irregularities in the conduct alleged against them. They prayed for dismissal of the petition with costs.

The petition was set down for hearing at 10 am on 17 August 2013. At 17.25 hours on 16 August 2013 the petitioner filed with the Court a document titled “Notice of Withdrawal of

the Petition” (hereinafter referred to as “the notice of withdrawal”). The notice of withdrawal was accompanied by an affidavit in which the petitioner gave reasons for wanting to withdraw the petition. The reasons confirmed the accusations by the respondents that the petitioner had lodged the petition and made the allegations of commission by them of corrupt practices and irregularities in the election when there was no evidence to support them.

The relevant parts of the affidavit of the purported withdrawal read as follows:

“1. It is with deep regret and sadness that I find myself having to depose to this affidavit which I present for purposes of explaining the reasons behind the withdrawal of the Election Petition just filed by my legal practitioners at my specific instance.

2. It is common cause that I filed a petition challenging the outcome of the Presidential Election in terms of its processes and outcome.

3. In the petition various allegations regarding the conduct of the election by the second respondent were made, which allegations touch on the credibility and authenticity of the voting material which is currently under the control of the second and third respondents.

4. In order to gain access to voting material and other documents and information two urgent chamber applications were filed under case EC 27/13 and EC 28/13. Whilst arguments were advanced on the points *in limine* judgment was indefinitely reserved in the matter. The merits have not been heard.

5. – 6. ...

7. As at the time of deposing to this affidavit (15.43 hours on Friday 16th August 2013), the judgment(s) in the applications for the materials had not been delivered. This, in my view, seriously handicaps my prosecution of the petition and it has rendered it impracticable for me to proceed with same.

8. I draw attention to the fact that I had specifically indicated in my petition that such material would be needed for the purposes of prosecuting the petition. The fact that I still do not have the material means that I cannot meaningfully prosecute my petition.

9. – 11. ...

12. I am also aware that the first respondent addressed crowds at the National Heroes Acre during the Heroes Day celebration on 12 August 2013. I am further aware that he made further unsavoury comments in which he criticised my decision to approach this Court. The fact that the CHIEF JUSTICE was in attendance on the day and the fact that he is expected to preside over my petition does very little to inspire my confidence in the possibility of my enjoyment of the constitutional right to a fair hearing. In this regard I make no imputation gratuitous or otherwise about the integrity of the honourable CHIEF JUSTICE. My concern is with the conduct of the first respondent.”

The question that arose from the proposed withdrawal of the petition was whether or not s 93 of the Constitution, which is a complete Code on matters relating to a petition or application challenging the validity of an election of a President lodged with the Court under subs (1), provided for withdrawal of the petition or application as a right. In the notice of withdrawal and the affidavit accompanying it, the petitioner made no reference to a provision of the Constitution under which a right to withdraw a petition or application lodged with the Court under subs (1) of s 93 of the Constitution is conferred.

The parties were directed to appear before the Court at 10 am on 19 August 2013 to argue the question whether s 93 of the Constitution provides for withdrawal of a petition or application lodged with the Court under subs (1).

Mr *Mehta* appeared on that day representing the petitioner. He at once dissociated himself and all legal practitioners who dealt with the petition from any insinuation by the petitioner in the affidavit of the proposed withdrawal of the petition that the Court would not accord him a fair hearing. He said those were the petitioner’s personal views.

Mr *Mehta* argued that s 178(1) of the Electoral Law provides a right to withdraw at any time an election petition presented by a candidate to the Electoral Court complaining of an undue election or an undue return. He argued that the provisions of s 178(1) of the Electoral Law were applicable to a petition lodged with the Court under s 93 of the Constitution.

The legal practitioners for the respondents and the Attorney-General argued on a constitutional principle that every act claimed as a right under the Constitution must be traceable to a particular provision of the Constitution. The only section of the Constitution in terms of the provisions of which a right to withdraw a petition lodged with the Court would have been given to a petitioner is s 93. The contention was that as s 178 of the Electoral Law concerned election petitions presented to the Electoral Court its provisions were not applicable to a petition or application lodged with the Court under s 93(1) of the Constitution. The argument was that the use of the words “subject to this section” at the beginning of s 93 of the Constitution makes the provisions thereof exclusive and overriding in effect on subject-matters relating to the preparation, lodgment, hearing and disposition of a petition or application lodged with the Court under subs (1).

At the end of the hearing of the parties on the question of the legality of the proposed withdrawal of the petition, the Court agreed with the respondents that the Constitution contained no provision for withdrawal of a petition or application lodged with it under s 93(1) of the Constitution. It held that the petitioner had no right to withdraw the petition.

The hearing of the petition then commenced. Mr *Mehta* indicated that he had no meaningful submissions to make on the merits of the petition. He said his instructions were not to prosecute the petition any further than what was contained in the papers filed of record.

Mr *Hussein*, for the first respondent, argued that the petition was the weakest document ever lodged with the courts in the country challenging the validity of an election. Advancing the position taken by the first respondent in the opposing affidavit, he argued that the petitioner knew at the time of preparation and lodgment of the petition that he had no evidence to prove the serious allegations of commission of corrupt practices he made against the first respondent. He adhered to the written heads of argument which addressed each of the allegations of commission of corrupt practices made against the first respondent.

Mr *Kanengoni*, for the second, third and fourth respondents, made reference to the contents of the opposing affidavit deposed to by the third respondent on behalf of the second respondent and supporting documents filed of record to show that the accusations of commission of irregularities in the conduct of the election by the second, third and fourth respondents were unfounded.

Mr *Mutamangira*, for the Attorney-General, advanced the same argument as the respondents, to the effect that the petition was lodged without any evidence to support the allegations on which the validity of the election of the first respondent as President of Zimbabwe was being challenged.

After hearing submissions from the respondents' legal representatives, the petitioner having indicated through his legal representative that he had no meaningful submissions to make on the merits of the petition, and having evaluated and assessed all the evidence presented and contained in the papers, the Court came to the conclusion that the petition had no merit.

Consequently, the petition was dismissed and an order made on 20 August 2013 in the following terms:

“IT IS DECLARED:

1. THAT the Zimbabwe Presidential election held on 31 July 2013 was in accordance with the laws of Zimbabwe and in particular with the Constitution of Zimbabwe and the Electoral Act [*Chapter 2:13*];
2. THAT the said election was free, fair and credible. Consequently, the result of that election is a true reflection of the free will of the people of Zimbabwe who voted; and
3. THAT Robert Gabriel Mugabe was duly elected President of the Republic of Zimbabwe and is hereby declared the winner of the said election.”

It was indicated at the time that reasons for the decision that s 93 of the Constitution does not provide for a right of withdrawal of a petition or application lodged with the Court under subs (1) challenging the validity of an election of a President and for the order made on 20 August 2013 would be given in due course. These are the reasons.

To put the reasons for the decision on the question of the legality of the proposed withdrawal of the petition into proper context, it is necessary to set out the provisions of the relevant sections of the Constitution.

Section 167(2)(b) of the Constitution provides:

“167 Jurisdiction of Constitutional Court

(1) ...

(2) Subject to this Constitution, only the Constitutional Court may —

(a) ... ;

(b) hear and determine disputes relating to election to the office of President;
...”.

Section 93 provides:

“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 is or 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.

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

(a) declare a winner;

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

(c) make any other order it considers just and appropriate.

(5) If, in a petition or application under subsection (1) —

(a) the Constitutional Court sets aside the election of a President, the election of the President’s two Vice-Presidents is automatically nullified;

- (b) the Constitutional Court sets aside the election of either or both Vice-Presidents, the President must without delay appoint a qualified person or qualified persons, as the case may be, to be Vice-President or Vice-Presidents.”

Section 94 provides:

“94 Assumption of office by President and Vice-Presidents

(1) Persons elected as President and Vice-Presidents assume office when they take, before the Chief Justice or the next most senior judge available, the oaths of President and Vice-President respectively in the forms set out in the Third Schedule, which oaths they must take —

- (a) on the ninth day after they are declared to be elected; or
- (c) in the event of a challenge to the validity of their election, within forty-eight hours after the Constitutional Court has declared them to be the winners.”

Zimbabwe is a constitutional democracy practising a representative system of government. By the exercise of their sovereign authority, the people of Zimbabwe made the Constitution in terms of which they established elective public offices. They vested the offices with powers of government, to be exercised in accordance with the Constitution or any other law on their behalf and for their benefit.

Under the Constitution, an election to an elective public office is regarded as a central institution in a democratic society practising a representative form of government. It is by an election that is freely and fairly held in accordance with the tenets of the Constitution and the provisions of the Electoral Law that Zimbabwean citizens can directly or indirectly through freely chosen representatives take part in the government of their affairs.

An electoral system based on free, fair and regular elections to elective public offices established by the Constitution or any other law is one of the principles of good governance which bind the State and all institutions of government at every level. Under s 67(3) of the Constitution, every Zimbabwean citizen who is of or over eighteen years of age is, subject to the Constitution, guaranteed a right to vote in all elections and referendums to which the Constitution or any other law applies. Section 67(1)(a) of the Constitution confers on every Zimbabwean citizen, without any reservation and regardless of voting status, the right to free, fair and regular elections for any elective public office established in terms of the Constitution or any other law.

It is when all measures have been taken by public officials responsible for conducting an election in accordance with the Electoral Law to ensure that the election is violence free and all the necessary mechanisms for voters to cast their vote freely in secret have been put in place, that the right of every Zimbabwean citizen to a free, fair and credible election is secured and the person elected has the right to hold office. So a free, fair and credible election for any elective public office is an essence of democratic self-government.

The office of President is an elective public office established by the Constitution. Executive powers are assigned to the office to be held in the interest of Zimbabwean citizens and used for their benefit. By virtue of s 67(1) of the Constitution, every Zimbabwean citizen has the right, to a free, fair and credible election of a President, expressing the will of the people. By virtue of s 67(1) of the Constitution, every Zimbabwean citizen who is of or over eighteen years of age has a right to vote in an election of a President and to do so in secret.

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 meaning of s 93(3) of the Constitution is that the Court must inquire into and establish whether the alleged acts of corrupt practices, irregularities or acts, on which the validity of the election is impugned, happened. If acts are found to have happened, the Court must inquire into the question whether they materially affected the validity of the election. The finding of the truth or falsity of the allegations of fact on which the petition or application is based would require the hearing of evidence, and evaluation and assessment of it in accordance with the competent rules of analysis.

The question for determination is whether or not the provisions of s 93 of the Constitution include a right to withdraw a petition or application lodged with the Court challenging the validity of an election of a President.

The Court holds that a right of withdrawal of a petition or application lodged with it under subs (1) is not expressly provided for under s 93 of the Constitution and cannot be implied from the terms of those provisions. There is no other provision of the Constitution or the Electoral Law which gives a petitioner or applicant who challenges the validity of an election of a President in terms of s 93(1) of the Constitution the right to withdraw the petition or application once lodged with the Court. The reasons for this decision are these.

The exercise of the right of petition or application provided for under s 93(1) of the Constitution is limited. *Locus standi in judicio* for the exercise of the right is limited to an aggrieved candidate. No other person has a right under s 93(1) of the Constitution to lodge a petition or application with the Court challenging the validity of an election of a President. The exercise of the right is also restricted as to the subject matter the petition or application can address. It can only be based on grounds which materially affect the validity of the election. There is a presumption of the validity of the election. For that reason, the grounds on which the petition or application is based must be clearly and precisely pleaded to bring out the alleged invalidity of the election and its basis.

The requirement that the petition or application must be based on grounds which challenge the validity of the election of a President imposes a vital limit to the exercise of judicial authority under s 93(3) of the Constitution. The Court is not to concern itself with isolated grievances which have no effect on the validity of the election. This is because the Constitution's design has left the election of a President to the people. It is only when an aggrieved candidate challenges by a petition or application the validity of the election and raises

a legal question of exceptional public importance that it becomes the “unsought responsibility” (to borrow the phrase from *Bush v Gore* 531 US 2000) of the Court to provide an effective and urgent resolution of the dispute it would have been forced to confront. Section 93 of the Constitution enacts the principle that an election can only be declared invalid and set aside upon clear proof of facts of commission of prohibited conduct which materially affect the validity of an election.

It is also a limitation on the exercise of the right of petition or application under s 93(1) of the Constitution that the petition or application must be lodged with the Court within seven days after the date of the declaration of the results of the election. It is of note that so far only the positive acts connected with the preparation, definition of subject-matter and the lodgment of the petition or application are provided for. What is guaranteed is the right of access by the aggrieved candidate who meets the prescribed requirements to the Court to seek redress of his or her grievances.

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.

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.

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 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.

There are, of course, many factors, the consideration of which point to the conclusion that a right to withdraw a petition or application lodged with the Court under subs (1) of s 93 of the

Constitution challenging the validity of an election of a President is not provided for under s 93 of the Constitution.

The preferred rule of interpretation is that all relevant provisions having a bearing on the subject for interpretation must be considered together as a whole in order to give effect to the objective of the Constitution, taking into account the nature and scope of the rights, interests and duties forming the subject-matter of the provisions.

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

The provisions of s 93 of the Constitution are designed so as to embody a structural and functional connection between the subject-matters of the rights and obligations provided for and those provisions of the Electoral Law which prohibit corrupt practices and irregularities in the election which materially affect the validity of the election. As a result, the subject-matters of the procedural rights and obligations provided for under s 93 of the Constitution are an enforcement of the provisions of the Electoral Law which proscribe corrupt practices and/or irregularities, the commission of which materially affects the validity of an election of a President.

The essential elements of a petition or application lodged under s 93 of the Constitution do not only provide a basis of the vital link between the procedural rights and obligations under

the fundamental law and the provisions of the Electoral Law, they also define the scope, content and effect of the subject-matters of those rights and obligations.

The right of petition or application is given to an aggrieved candidate to enable him or her to take the grievance to the only court that has the power to hear him or her on the matter. Implicit in s 93 of the Constitution is a rule that a petition or application lodged with the Court under subs (1) is a legal document which meets all the requirements of validity and triggers the imposition of the obligation on the Court and other parties to the proceedings. The lodgment of the petition or application under s 93(1) of the Constitution does not only commence proceedings, it gives the petitioner or applicant the right to be heard by the Court in his or her cause. It imposes on the Court the reciprocal obligation to hear and determine the petition or application.

In the absence of an express provision for a right of withdrawal of the petition or application, the immediacy of the direct connection between the right to be heard and the corresponding obligation on the Court to hear and determine the petition or application lodged with it under s 93(1) of the Constitution excludes the right of withdrawal of the petition or application from the application of the provisions of s 93(3) of the Constitution.

The direct connection between the right of the petitioner or applicant to be heard following the lodgment of the petition or application and the corresponding obligation on the Court to hear and determine the petition or application is not established by construction taking into account the provisions for the jurisdiction of the Court under s 167(2)(b) of the Constitution.

It is expressly provided for by s 93(3) of the Constitution, which imposes on the Court an obligatory duty to hear and determine the petition or application.

Section 93(3) of the Constitution provides that the Court “must hear and determine the petition or application lodged under subsection (1) within fourteen days after the date of lodgment”. The word “must” is not used to mark only the obligation in respect of the time limit within which the acts designating the duty imposed must be carried out. The word is also used to indicate to the Court that it is under an obligation to treat the petition or application in the manner prescribed and not in any other way. What is imposed is a duty to obey the order first.

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

Considering that the Court, which is the final court in the land, has been given original and exclusive jurisdiction on all matters relating to an inquiry into the validity of an election of a

President brought to it by means of a petition or application, it makes sense to require it to acquire full knowledge of the facts before making a final and binding decision on the validity or invalidity of the election of a President. The intention was obviously to reduce the risk of an erroneous decision to a more tolerable minimum. Hence the requirement that all nine Judges of the Court must sit to hear and determine a petition or application challenging the validity of an election of a President.

The Court would have no choice but to “hear and determine” the petition or application lodged with it under s 93(1) of the Constitution. It cannot put itself, or let itself be put, in a position in which it is unable to hear and determine the petition or application. A petition or application can be heard and determined when it is extant at the time of hearing. When exercised, the right to withdraw the petition or application would have the effect of removing the petition or application from the exercise by the Court of its jurisdiction. That would prevent the Court from discharging the obligatory duty imposed by s 93(3) of the Constitution. The Court would be in breach of the Constitution.

The purpose of the procedural mechanism provided for under s 93 of the Constitution is to secure a just, fair, final and binding decision by the highest court in the land on the merits of the question of the validity or invalidity of an election of a President, raised in a petition or application lodged under subs (1) within fourteen days after the lodgment.

It is clear that the final and binding decision on the validity or invalidity of the election of a President is required to be based on the merits of the case.

Section 93(3) of the Constitution is based on the principle of natural justice that he who hears a cause or matter must determine it. The mandatory hearing and determination of the petition or application on the merits is the means required to be used to produce the final and binding decision on the validity or invalidity of the election of a President. A finding that withdrawal of the petition or application is in the circumstances a right provided for under s 93 of the Constitution would be contrary to the rule of interpretation requiring that effect be given to the purpose of the provisions under construction.

Adherence to the requirements of the procedure provided for under s 93(3) of the Constitution by the Court in the exercise of the powers vested in it is made a fundamental matter. The primary purpose of the method of processing the petition or application lodged under s 93(1) of the Constitution, as provided for under s 93(3), is the establishment of the truth or falsity of the allegations of commission of corrupt practices and/or irregularities made against the respondents.

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

respect the judgment of the people and carry out the mandate in the manner prescribed to achieve the intended objective.

The hearing and determination of the petition or application which the Court is enjoined to undertake would involve receiving evidence on the facts in issue presented by the parties in affidavit form, hearing oral or written arguments by or on behalf of the parties, evaluating and assessing the evidence in accordance with the competent rules of analysis, and making findings on the truth or falsity of the facts in issue. Considering that the procedure provided for is the only one by which the jurisdiction of the Court can be exercised under s 93 of the Constitution and that it is the only way in which the petition or application lodged under subs (1) can be brought to an end, the final and binding decision envisaged under s 93(3) of the Constitution can only be one determining the petition or application on the merits.

It is a requirement under s 93(3) of the Constitution that the petition or application be brought to an end by a judgment of the Court as opposed to being brought to an end by means of a unilateral decision and actions of a petitioner or applicant to withdraw the petition or application. It is not a decision that would be based on the reason given by the petitioner or applicant for withdrawing the petition or application. It would be a decision based on the results of the evaluation or assessment by the Court itself of the evidence and arguments presented by the parties and findings of the facts in issue.

A final decision can only mean that all the issues raised by the petition or application have been determined or litigated on the merits. Determination of the petition or application can

only be by the Court. Withdrawal of the petition or application would determine nothing. It cannot be a judgment of the Court, which is the only means by which a petition or application lodged under s 93(1) of the Constitution is required to be brought to an end. In prescribing what the Court has to do to ensure the achievement of the objective pursued, the people would not have included acts the performance of which would in effect have prevented the achievement of the objective. In any case, one cannot withdraw what one has no control over.

Every right must be traceable to a particular provision of the Constitution or any other law. It is one of the principles of constitutional law that every right is conferred for protection by and, except in instances of private law, against the State. In a constitutional democracy Government is relevant to the extent that it uses the collective power the people entrusted it with to protect and promote their rights.

The use of the words “subject to this section” at the beginning of s 93 of the Constitution means that nothing should be done by the State in the exercise of the powers provided for to infringe the rights for the protection of which the procedural mechanism was set up.

Rights, like powers, can be provided for expressly or impliedly. If withdrawal of a petition or application lodged under s 93(1) of the Constitution was intended to form part of the rights protected under the provisions of s 93 of the Constitution, it would have been expressly provided for under that section as a separate and distinct right from the right to petition or apply for redress of grievances relating to the alleged invalidity of an election of a President. The right cannot be inferred from the concept of fundamental liberty, which is one of the fundamental

values on which a democratic society is based. The reason is that as a right it would have been conferred for protection by the State. It would be the subject of regulation by the Constitution.

The need for an express provision for a right to withdraw the petition or application is the more apparent when regard is had to the fact that conditions for the exercise of the right may vary from a provision that the withdrawal can be done at any time to a provision that it can only be done on the authority of the Court upon a special application. The latter requirements create conditions for a withdrawal not in conformity with the prescribed procedure. In this case, there is no withdrawal to talk about. There is nothingness.

As there is no express provision in s 93 of the Constitution for the right of withdrawal of a petition or application lodged under subs (1), there is no need to try and establish the right by necessary implication. A right to withdraw a petition or application would not form part of the right to petition or apply for redress of grievances. It cannot, for example, be implied as a part of the right to petition or apply for redress of grievances, as the right to food, the right to clothing, and the right to reasonable accommodation have been implied from the right to life. It would not even be necessary to seek to establish the right of the withdrawal of the petition or application by the application of the necessary implication rule. See *Ferrera v Levin N O and Ors* 1996 (1) SA 984 (CC) para 247. The rule is that where withdrawal of a petition or application for redress of grievances in which the public has an interest is not expressly provided for, the intention is to exclude it.

There is also the principle that every provision of a Constitution has an historical source to be taken into account. The historical root of the principle embodied in s 93 of the Constitution excluding the right to withdraw a petition or application lodged under subs (1) challenging the validity of an election of a President lies in the electoral laws that have governed the conduct of elections in the country.

Immediately before the Constitution came into effect on 22 May 2013, it was a longstanding principle of law in the jurisprudence of this country that a petition presented to an Electoral Court complaining of an undue election or an undue return to the office of President was not subject to a right of withdrawal. The principle was the basis of the provisions of s 111(4) of the Electoral Law and its predecessors.

Mr *Mehta* sought to rely on s 178(1) of the Electoral Law to support the argument that a petition or application lodged under s 93(1) of the Constitution is subject to a right of withdrawal. Section 178(1) of the Electoral Law provided that an election petition presented to an Electoral Court complaining of an undue election or an undue return of a person elected to a public office may be withdrawn at any time. Section 111 of the Electoral Law made provision for presentation to the Electoral Court of an election petition complaining of undue election or an undue return of a person to the office of President. Section 111(4) of the Electoral Law made it clear that the provisions of s 178(1) were not applicable to an election petition presented to the Electoral Court under s 111(1). This exclusionary formula had been applied by similar provisions of successive Electoral Acts in this country for many years. The provision was conformable to the former Constitution.

The effect of exclusion of the right of withdrawal of a petition or application challenging the validity of an election of a President is greater protection to that election than is provided for an election the petition or application challenging the validity of which is subject to a right of withdrawal. Both methods are essences of democratic self-government.

The manner in which the provisions of s 93 of the Constitution are drafted demonstrates that the framers of the Constitution were aware of the existence of the principle on which s 111(4) of the Electoral Law was based. They elevated that principle to a constitutional principle on the understanding that it excluded from the rights conferred and protected by s 93 of the Constitution the right to withdraw a petition or application lodged with the Court under subs (1).

The rationale for excluding a right of withdrawal of a petition or application lodged with the Court under subs (1) of the provisions of s 93 of the Constitution lies in the strength of the public interest in an election of a President which may be harmed by the withdrawal of the petition or application. The public interest in the establishment of the truth or falsity of allegations of invalidity of an election of a President was given primary recognition and effect at the expense of the individual right of the petitioner or applicant to withdraw the petition or application at any time.

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.

Under the Constitution, executive authority is vested in the President. He or she exercises the powers, subject to the Constitution, through a Cabinet of Ministers made up of women and men of his or her own choice. The person elected to the office of President becomes the Head of State and Government and Commander-in-Chief of the Defence Forces. The President is not just the leader of the Government in power.

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. A Presidential candidate is required to receive at least half plus one vote (51% threshold) of all the valid votes cast in the election, to be entitled to a declaration as the winner. 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. He or she is under a duty to represent every Zimbabwean citizen regardless of whether or not he or she voted him or her into power.

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 framers of the Constitution understood that in this world of men and women there are those unscrupulous enough and skillful enough to use falsehood disguised as a genuine challenge of the validity of an election of a President as an effective political tool to undo an otherwise free, fair and credible election.

A petition or application challenging the validity of an election of a President may be a predatory action aimed at preventing ascendancy into power by the winner. The use of a known lie as a tool for political ends to undo the outcome of an otherwise valid election is at once at

odds with the premises of democratic government and the orderly manner in which political change is effected. See *Mcdonald v Smith* 472 US 479 (1985) at 488.

The framers of the Constitution were also aware of the provision of the Electoral Law prohibiting corrupt practices and irregularities in an election for public office which materially affect the validity of the election. They were conscious of the fact that elections can be stolen. They were acutely aware of the possibility that a candidate who cries foul after losing an election may after all have the truth on his or her side. The people decided that an uninterrupted judicial investigation of the merits of the alleged invalidity of an election of a President would produce results that are consonant with public peace and tranquility.

CHIDYAUSIKU CJ: I agree

ZIYAMBI JA: I agree

GWAUNZA JA: I agree

GARWE JA: I agree

GOWORA JA: I agree

HLATSHWAYO JA: I agree

CHIWESHE AJA: I agree

MAVANGIRA AJA: I agree

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