MOVEMENT FOR DEMOCRATIC CHANGE
**versus**
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
and
THE DELIMITATION COMMISSION
and
THE ELECTORAL SUPERVISORY COMMISSION
and
THE ZIMBABWE ELECTORAL COMMISSION
and
THE MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE, 11 October 2006 and 9 May 2007

**OPPOSED APPLICATION**

Mr *B Elliot*, for the applicant
Mrs *V Mabhiza*, for 1st and 5th respondents
Mr *G Chikumbirike*, for 2nd, 3rd and 4th respondents

MAKARAU JP: In August 2004, at the summit of the Southern Africa Development Community held in Mauritius, certain principles and guidelines governing democratic elections for the member countries were adopted. These shall be referred to in this judgment as "the SADC Principles and Guidelines". The first respondent, acting on behalf of the Republic of Zimbabwe approved of the guidelines and gave Zimbabwe's assent thereto.

Subsequent to and following the summit, the Zimbabwean government initiated and piloted through Parliament, two specific pieces of legislations aimed at regulating the conduct of elections in Zimbabwe in accordance with the SADC Principles and Guidelines. These were the Zimbabwe Electoral Commission Act [*Chapter 2:12*] and the Electoral Act [*Chapter 2:13*].

As part of the domestic law at the time of the enactment of the two acts, were the Public Order and Security Act [*Chapter 11:17*]; the Access to Information and Protection of Privacy Act [*Chapter 10:27*]

and the Broadcasting Act [*Chapter 12:06*] among other pieces of legislation.

In the application before me, some provisions of these Acts were attacked as being inconsistent with the fundamental principles set out in the SADC Principles and Guidelines. I shall deal with this aspect of the matter in due course.

On 13 January 2005, the first respondent caused the publication of Proclamation 1 of 2005 as S.I. 3A/2005. In the proclamation, the second respondent made its findings known for the purposes of the general elections that were to be held on 31 March 2005. As a result of these findings, the second respondent had reduced the number of parliamentary seats in Harare, Bulawayo and Matebeland South and in turn, had increased the seats in Manicaland, Mashonaland East and West provinces.

This exercise of statutory power by the second respondent has also been challenged before me as having been unfounded as the second respondent allegedly had no good cause for altering the number of parliamentary seats in the affected provinces as it did.

Prior to the enactment of the Zimbabwe Electoral Commission Act, the Constitution of Zimbabwe mandated the third respondent to supervise the conduct of elections in Zimbabwe. The composition of the third respondent was provided for in the Constitution.

It was contended on behalf of the applicant that the third respondent was improperly constituted at the time of the filing of the application.

It is common cause that the Commission was abolished by an amendment to the constitution on 14 September 2005 and was no longer in existence at the hearing of this matter. Whether it was competent for me at the hearing of the application to deal with the allegations leveled against the third respondent in view of its lawful

demise was debated at the hearing. Again I shall revert to this point in due course.

On 1 February 2005, the fourth respondent came into being. Prior to 14 September 2005, it was a statutory body created by the provisions of the Zimbabwe Electoral Commission Act. On 14 September 2005, in the amendment to the Constitution that saw the demise of the third respondent, the fourth respondent became a constitutionally created body.

On 31 March 2005, general elections were held in Zimbabwe. The applicant participated in the general elections and fielded candidates in all the 120 constituencies making up the then unicameral Parliament of Zimbabwe. The elections held on 31 March 2005 were held in terms of the provisions of the newly promulgated Zimbabwe Electoral Commission and the Electoral Acts, among other existing and relevant legislation.

During the election, the applicant emerged as the majority opposition party in parliament.

THE APPLICATION

On 15 March 2005, 16 days shy of the general elections, this application was filed. In the application, the applicant sought the following orders:

"1. **IT IS DECLARED** that the provisions of the Electoral Act [*Chapter 2:13*] and the Zimbabwe Electoral Commission Act [*Chapter 2:12*] do not incorporate and make part of the laws of Zimbabwe clauses 2.1.1, 2.1.3, 2.1.5, 2.1.6, 2.1.8, 4.1.3, 4.1.4, 4.1.7, 7.2, 7.3, 7.4, 7.6, 7.7, 7.10, 7.11, and 7.12 of the Principles and Guidelines Governing Democratic Elections agreed to at the meeting of Heads of Governments of Southern African Development Community meeting in Mauritius in August 2004 and signed by His Excellency the President of Zimbabwe on behalf of Zimbabwe.

**2. IT IS DECLARED** that the SADC Principles and Guideline referred to in paragraph 1 above are incompatible with the following provisions:

(a) Part IV of the Public Order and Security Act [*Chapter 11:17*];
(b) Parts XI and XII of the Access to Information and Protection of Privacy Act [*Chapter 10:27*]; and
(c) Parts III and IV of the Broadcasting Act [*Chapter 12:06*]; and that the said provisions taken with the manner of their application by the regulatory authority of those statutory provisions are contrary to and in breach of the said section 3 of the Electoral Act [*Chapter 2:13*] for the holding of democratic elections in Zimbabwe.

3. It is **ORDERED** that the findings of the Delimitation Commission as set out in Proclamation 1 of 2005 (S I 3A/2005 be and are hereby set aside.
4. It is **ORDERED** that the Electoral Supervisory Commission is not properly constituted in terms of section 61 of the Constitution of Zimbabwe and is therefore unlawful and of no force and effect.
5. **IT IS DECLARED** that the Zimbabwe Electoral Commission has failed to undertake the following functions, and thus is in default of its role and obligations in terms of the Zimbabwe Electoral Commission Act [*Chapter 2:12*];
   a. it failed to direct and control the registration of voters for the purposes of
   the general election to be held on 31 March 2005;
   b. it failed to compile the voters' rolls and registers for the purpose of the general b. election to beheld on 31 March 2005;
   c. it failed to have copies of the compiled voters' rolls available for purchase by members of the public
   d. it failed to keep the public informed of the matters set out in paragraph (h) of section(4) (1) of the Zimbabwe Electoral Commission Act [*Chapter 2.12*].
6. The respondents shall pay the costs of this suit."

The application was opposed by all the respondents. The first and fifth respondents denied that the SADC Principles and Guidelines were legally enforceable in a domestic court of law. They further denied the allegation by the applicant that Zimbabwe had failed to incorporate into domestic law the essential provisions of the guidelines.

The second respondent averred that it had carried out its functions in terms of the Constitution and had taken into account the factors listed in section 60 (4) of the Constitution before delimiting

the country into constituencies. It was further contended on behalf of the second respondent that the applicant had failed in its application to aver that the second respondent had overshot the parameters set by the constitution and had thus incorrectly exercised the discretion vested in it by the Constitution.

The third respondent in turn denied that it was improperly constituted at the time of the filing of the application.

The fourth respondent denied that it had failed to carry out its functions as stated in the Zimbabwe Electoral Commission Act. It was pointed out in the opposing affidavit filed on behalf of the fourth respondent that the body only came into existence on 4 February 2005, and prior to that, some of its functions had been carried out by other bodies including the office of the Registrar-General and the Electoral Supervisory Commission.

While the application was ready for hearing as early as April 2005, the parties by consent declined an earlier set down date and were only ready to argue the matter on 11 October 2006.

I now turn to deal with each of the five substantive orders that the applicant seeks. For convenience, I shall deal with the first two orders together as in my view, a determination of these two involves an examination and application of the same legal principles.

THE PLACE OF THE SADC PRINCIPLES AND GUIDELINES IN DOMESTIC LAW

The applicant has asked me to declare firstly, that the Zimbabwe Electoral Commission Act and the Zimbabwe Electoral Act do not incorporate certain specified sections of the SADC Principles and Guidelines adopted in Mauritius in 2004. Secondly, the applicant requires me to declare that certain specified sections of the Public Order and Security Act, the Access to Information and Protection of Privacy Act and the Broadcasting Act are incompatible with the

provisions of the guidelines and principles referred to in the first order.

It is pertinent to note that the applicant merely seeks the declaratory orders without seeking any consequential relief.

The applicant appears to me to have elevated the SADC Principles and Guidelines to a law and has then placed that law in a position superior to domestic law. The applicant requires me in the declaratory orders to test some pieces of domestic legislation for compliance against the principles and to hold that others do not fully incorporate the guidelines.

I know of no legal principle that makes a regional instrument in the nature of the SADC Principles and Guidelines binding on member states. To me, the principles and guidelines are no more than guiding principles. They set forth the principles and guidelines upon which election legislation is to be modeled by member countries. Being a model, the document has no binding nature and cannot be enforced in its format.

It is common cause that the SADC Principles and Guidelines have not been incorporated as a document, into domestic law and are thus not enforceable by this court in that form. This is a trite position at law.

In my view, the fact that the SADC Principles and Guidelines are not a source of domestic law should mark the end of the inquiry as far as the first two orders are concerned. However, Mr *Elliot* for the applicant was of the view that I could use the doctrine of legitimate expectation to hold that the provisions of the guidelines are relevant and applicable in this court. In this regard he referred me to the Australian case of *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* FC No95/013 HCA 20. In that case, the Family Division of the Australian High Court had occasion to consider the place in

Australian law of the United Nations Convention on the Rights of the Child.

It was argued in the *Teoh* case that the ratification by the Australian Commonwealth Government of the convention was a statement to the national and international community that Australia recognized and accepted the principles of the Convention. It was further argued that although the Convention was not part of municipal law, the children in that case had a legitimate expectation that their father's case (for a residence permit), would be treated in a manner consistent with the terms of the Convention safeguarding the best interest of children in all actions concerning children.

In rejecting the arguments advanced on behalf of *Teoh,* the court held that a treaty that had not been incorporated into municipal law cannot operate as a direct source of individual rights and obligations under Australian law.

I am in total agreement with the above sentiments and am of the view that they hold true of the Zimbabwean legal situation. The agreement entered into by the first respondent and his counterparts in Mauritius in 2004 setting out principles and guidelines for the holding of democratic elections is not a direct source of rights and obligations under our law. While the signing of the agreement by the first respondent acts to indicate to the national and to the international community that his government ascribes to the minimum standards set out in the guidelines, in my view, it does not give the applicant or any other citizen of Zimbabwe a cause of action that is enforceable in a domestic law court based on the guidelines.

Further, I have not been able to come across a case in this jurisdiction where legitimate expectation as a legal principle, was used to found a cause of action. It would appear to me that the principle is primarily used in administrative law to protect procedural fairness before an administrative action is taken. (See *Gauteng*

*Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA) at page 78).

On the basis of the foregoing, I would dismiss the first two orders sought by the applicant.

THE DELIMITATION OF CONSTITUENCIES

I now turn to the third order sought by the applicant. In the order, the applicant requires me to set aside the findings of the second respondent as contained in Proclamation 1 of 2005. In other words, the applicant would want me to set aside the delimitations upon which the March 2005 elections were held and all subsequent by-elections have since been held.

As the basis for the above relief, the applicant, in the founding affidavit deposed to by its president, alleges that the figures referred to by the second respondent in its report are inaccurate and thus the second respondent had no good cause for altering the number of constituencies in the affected provinces.

The applicant makes various factual allegations in support of position that the second respondent based its delimitations on incorrect data. It has attached a schedule showing the voter population in each province as at 2000 and has sought to compare this with the report of the second respondent for the 2005 elections. In addition, it has attached a copy of a table complied by the National Census conducted in 2002, showing that the population of Harare had grown. It was argued that the population of Harare had thus grown instead of reducing and the number of constituencies in Harare should not have been decreased.

With respect, the evidence proffered by the applicant is insufficient for one to come to the conclusions reached. The growth of a population does not automatically translate into the growth of registered voters by the same rate. That is commonsense. Equally,

the number of registered voters as at 2000 cannot be used to challenge the findings of the second respondent as at 2005.

While the point was not argued before me, the applicant should in my view, have made reference to the voters' rolls used by the second respondent to delimit the boundaries of constituencies and should have been able to point out errors in these. Without showing any errors in the rolls, the applicant's argument was bound to belly flop as the compiling of voters rolls and their inspection for errors are specific and significant procedures provided for in the law and whose integrity is protected by law.

In my view, for the applicant to sustain its allegation that the findings of the second respondent as to the voter population in each province were inaccurate, it had to proffer more evidence than it did.

Further and more to the point in my view, a basis for my interfering with the discretion of the second respondent has not been properly established in this application. It is not sufficient to simply show that the figures it used may have been incorrect. A basis or ground for review, recognized at law had to be established before the court could interfere with the discretion of the second respondent. The applicant had to show that the findings of the second respondent were tainted by illegality, irregularity or were irrational. No such basis has been laid out in the application before me.

Apart from making the general averment that the population of Harare must have grown since 2000, the applicant has not made any specific averment that the second respondent deviated from any of the considerations that it is mandated to take into account in delimiting constituencies. As argued by Mr *Chikumbirike*, nowhere in its papers has the applicant alleged and proved that the second respondent overshot the 20% margin of error that is permissible at law. In the absence of such allegations and proof, there is no basis

upon which I see myself setting aside the findings of the second respondent as sought.

THE ELECTORAL SUPERVISORY COMMISSION

In the fourth order, the applicant seeks an order that the third respondent was not properly constituted in terms of section 61 of the Constitution and that it was unlawful and of no force and effect.

It is common cause that the third respondent was abolished on 14 September 2005. At the hearing of the matter, I requested counsel to address me on whether in view of the abolishment of the third respondent, it was competent for me to issue the order that the applicant was seeking. Mr *Elliot* for the applicant was of the view that it was necessary that I pronounce on the composition of the third respondent even though it is no longer in existence.

I think not.

Firstly, the validity of the acts done by the third respondent during its lifetime can still be attacked in an appropriate action citing its successor in title. Secondly, it has not been averred before me that the order sought will be of any practical value to the applicant who did not challenge the composition of the third respondent at the relevant time but participated in the general elections partly supervised by an allegedly improperly constituted body. As correctly submitted by Mr *Elliot*, all I can do now is to issue a declaratory order for which no consequential relief is being sought.

Below, I deal in detail on the nature of the discretion vested in the court in issuing declaratory orders generally. The one point that emerges from the authorities I refer to below is that a declaratory order only relates to legal rights and not to factual issues.

It appears clear to me that what the applicant seeks under this order is a declaration as to a factual situation and not as to its rights against the respondents. The applicant requires me to declare the

fact of the composition of the third respondent and to hold that this was improper in terms of the law. That to me is a declaration as to a fact and not a declaration as to any right that the applicant may have against the third respondent or its successor in title.

For this reason, I decline to issue such a declaratory order.

THE POWER OF THE COURT TO ISSUE DECLARATORY ORDERS

I now turn to the fifth order that the applicant is seeking. In this order, the applicant requires me to declare that the fourth respondent failed to undertake certain of its functions as set in the Act. In determining whether to issue this declarator, I will discuss generally the power of the court to issue declarators and the remarks I make in this respect relate to all the declarators sought in this application.

The power of this court to issue declaratory orders is not in dispute. It is one of the inherent powers that this court has as a Superior Court and which inherent power has been put beyond doubt by provisions of section 14 of the High Court Act [*Chapter 7:06*].

The approach that the court must take when faced with an application for a declaratory order appears to me to be settled.

In *RK Footwear Manufactures (Pvt) Ltd v Boka Booksales (Pvt) Ltd* 1986 (2) ZLR 209 (HC), SANDURA JP (as he then was) was required to issue a declaratory order involving the rights of a lessor to evict a tenant at a future date. After making reference to section 14 of the High Court Act, the learned judge set out two considerations that he had to take into account in determining whether to issue the declarator. These were whether the applicant was an interested person in an existing future or contingent right or obligation and secondly, whether the case was a proper one for him to exercise his discretion. The learned judge came to the conclusion that the matter

before him was not a proper one for him to exercise his discretion as at the time of the hearing of the matter there was no good and sufficient cause for requiring the order.

The considerations that a court has to take into account before issuing a declarator were in my view further expanded and explained in *Family Benefit Friendly Society v Commissioner for Inland Revenue and Another* 1995 (4) SA 120 (T) where in six comprehensive paragraphs, VAN DIJKHORST J sets out the legal principles applicable when a declarator is sought and the mental steps that a court must follow in determining whether to issue the declarator. The applicant or plaintiff must show that:

1. it is an interested person;
2. there is a right or obligation which becomes the object of the inquiry;
3. it is not approaching the court for what amounts to a legal opinion upon an abstract or academic matter;
4. there must be interested parties upon which the declaration will be binding; and
5. considerations of public policy favour the issuance of the declarator.

The criteria set out by VAN DIJKHORST J above was cited with approval and applied in Eagles *Landing Body Corporate v Molewa NO and Others* 2003 (1) SA 412 (T).

In view of the fact that the wording of section 14 of the High Court Act is similar to that of section 19(1)(a)(iii) of the Supreme Act, 1959 of South Africa which was referred to in the above two cases, I am persuaded to follow the reasoning process set out in the two South African cases. This process appears to me to be simply an expansion of the two considerations that SANDURA JP (as he then was) set out in the *RK Footwear Manufactures* case.

Firstly, I note that there was no dispute before me as to the *locus standi* or interest of the applicant to bring this application. I shall therefore proceed on the basis that the applicant has *locus standi* to bring this application.

Regarding the second consideration, I must be satisfied that there is a right, the subject matter of the inquiry. In dealing with the nature of the right that an applicant for a declarator must show, NICHOLAS J in *Electrical Contractors' Association (South Africa) and Another v Building Industries Federation (South Africa) (2*) 1980 (2) SA 516 (T) had this to say at page 519 H- 520B:

> "'A person seeking a declaration of rights must set forth his contention as to what the alleged right is. (See *O'Neill v Kruger's Executrix and Others*) 1906 TS 342 at 344-5; *Smit v Roussow and Others* 1913 CPD 436 at 441)."

The learned judge then cited with approval the remarks by WATERMEYER CJ in *Durban City Council v Association of Building Societies* 1942 AD 27 to the effect that the interest of the applicant must be a real one, not merely an abstract intellectual interest.

In determining the matter before him NICHOLAS J held that the applicant had not asserted in any of its papers that it had any rights as against the respondent and did not seek any declaration of rights against the respondent. All it sought was a declaration that the circular in issue contained false statements. The learned judge was of the view that the declaration sought was a declaration as to fact and not as to a right.

The same reasoning was applied in C*aluza v Independent Electoral Commission and Another* 2004 (1) SA 631 (Tk) by LE ROUX AJ to hold that the application before him did not relate to a right but bore mainly to a factual situation, *viz,* that the applicant took a decision and crossed the floor of the Municipal Council Chamber from one political party to another. The applicant had sought a declaratory

order to the effect that her 'purported' floor crossing from a certain political party to another be declared null and void and of no effect, and an order compelling the first respondent to make the necessary rectification in its records regarding her 'purported' floor crossing.

It appears to me from a reading of the above authorities that what is required to be contended is a legal right and not the factual basis upon which a right may then be founded.

*In casu*, all the declaratory orders sought do not relate to a right. Nowhere has the applicant, as a political party with the majority of opposition seats in parliament, contended that its rights are in issue and what those rights are.

I would therefore hold that the declarators sought in this application are incompetent as they relate to a factual situation and not to any rights, existing or future, that the applicant has or may have. As has been stated in the authorities, the applicant must set forth its contention as to what the alleged right is. This, the applicant has failed to do. It is not for me to speculate as to what that right is or may be.

Assuming I have erred in my assessment of what the applicant is seeking in the declarators, I still would have dismissed the application after considering the third principle listed above. In my view, the applicant is approaching the court for what amounts to a legal opinion upon an abstract or academic matter. The 2005 election have come and gone. Mixed views have been expressed on whether the elections were free and fair. The topic has now become abstract and academic with the passage of time. It appears to me from a reading of the papers and from arguments advanced by Mr *Elliot* that what is being sought in the declarators is an imprimatur by the court that the general elections of 2005 were conducted in an atmosphere where the playing field was uneven in the manner detailed in the founding affidavit. These all relate to the factual

situation on the ground as perceived by the applicant. No legal argument has been raised. No rights of the applicant have been contended as needing definition in the application. It is almost as if the applicant is inviting the court to participate in idle chatter on the 2005 elections and give its opinion on the state of the playing field before the 2005 elections.

While it is trite that the court will not give a futile and academic opinion, in my view, the court will also not give an opinion on matters where there is no dispute between the parties no matter how topical that issue is. It is not the place or the function of the court to participate in public debates and give opinions on such bedates. The court has no opinion other than on the law and on a dispute referred to it. (See *Kaunda and Others v President of the Republic of South Africa and Others* 2004 (5) SA 191 (T) and *Eagles Landing Body Corporate v Molewa NO and Others* (*supra*)).

Again on this basis alone, I would have dismissed all the declaratory orders sought.

It has been held that before a declarator is issued, the court must be satisfied that there are interested parties upon which the declaration will be binding. By binding is meant that the decision of the court operates as *res judicata* between the parties. I am not satisfied that the declarators sought in this application will have the effect of finally deciding the question of the 2005 elections as between the applicant and all interested parties. In my view, the other interested parties in the form of the serving legislators have not been sufficiently identified in the application and have not been afforded a chance to be heard before I pronounce on issues that may affect the validity of their tenure in parliament.

Finally, I turn to the last consideration listed above.

I must now consider whether public policy favours the issuance of the declarators sought.

It is my view that since the 2005 elections have been held, the opinions sought from the court by the applicant are not in the interests of public policy considerations. Some legislators have been elected and would want to keep their seats. Candidates who lost during the elections challenged the results under the law. In view of the developments that have taken place since 31 March 2005, it is in my view not necessary that declarators about what the situation was like be issued as they serve no practical value. (See *Member of the Executive Council for Local Government Mpumalanga v Independent Municipal And Allied Trade Union and Others* 2002 (1) SA 76 (SCA). If the applicant is of the view that it would want the situation improved before other elections are held, then, in my view, it should not seek the declarators that it seeks in this application but proceed to challenge the situation as it exists before each election and timeously prosecute its challenges. Further, the applicant must always contend and set forth the rights that it alleges are involved in the declarators and must not approach the court for what I term idle charter on matters political.

I decline to abuse the authority vested in me to issue orders of no practical value to the parties before me. The court in my view is a forum for the settling of real disputes between real parties and for issuing practical orders that will declare the rights of the parties and guide the parties in their present and future legal relationships. Academic opinions are best sought from law professors and advocates. As was stated by GREENBERG J in Ex parte Ginsberg, 1936 TPD 115 at 157 in limiting the discretion of the court to issue declaratory orders:

> "The Legislature must have been aware of the fact that there is no dearth of advocates and attorneys competent to advise upon legal problems and there is no reason to think that it intended to set up the Courts as consultative or advisory bodies……"

On the basis of the foregoing, I fail to find merit in the application, which in my view amounts to an abuse of the court. I am fortified in my view that the application is merely meant to abuse the court by the delay it has taken the applicant to prosecute this application to finality. The application was filed in March 2005 and efforts to have it set down for hearing early were in vain as both parties agreed to have the matter postponed. It therefore appears to me that the application was not meant to procure any practical relief from the court. Had costs been asked for on the higher scale against the applicant, I would have found ample justification for awarding such.

In the result, I make the following order:

1. The application is dismissed.

2. The applicant is to pay the costs of the application.

*Coghlan, Welsh & Guest,* applicant's legal practitioners.

*Civil Division, Attorney-General's Office,* 1st & 5th respondents' legal practitioners.

*Chikumbirike & Associates, 2nd,* 3rd & 4th respondents' legal practitioners.