MOVEMENT FOR DEMOCRATIC CHANGE
and
MORGAN TSVANGIRAI
versus
THE CHAIRPERSON OF THE
ZIMBABWE ELECTORAL COMMISSION
and
THE CHIEF ELECTIONS OFFICER
ZIMBABWE ELECTORAL COMMISSION

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 5, 6, 7, 8, 9 and 14 April 2008

Urgent Chamber Application

A Muchadehama, for the applicants
G Chikumbirike, for the respondents

UCHENA J: The first applicant the Movement for Democratic Change is a political party, commonly known as the ("MDC"). It will be referred to as the first applicant. The second applicant Mr Morgan Tsvangirai is its president. He was the first applicant's presidential candidate in the just ended harmonized elections held on 29 March 2008. He will be referred to as the second applicant.

The first respondent is the Chairman of the Zimbabwe Electoral Commission, a Commission established in terms of s 61 (1) of the Constitution of Zimbabwe. He was appointed in terms of s 61 (1)(a) of the Constitution. He will be referred to as the first respondent. The Commission is commonly known as ("ZEC"), in reference to the abbreviation of its name. It will be referred to as ZEC in this judgment. The second respondent is ZEC's Chief Elections Officer appointed in terms of s 11 of the Zimbabwe Electoral Commission Act [*Cap 12:12*], hereinafter called the Zimbabwe Electoral Commission Act. He will be referred to as the second respondent.

The Facts

The first respondent through ZEC, conducted harmonised elections which were held on 29 March 2008. The elections were contested by candidates aspiring for the following

positions, Councilors of local authorities, Members of the House of Assembly and the Senate, and President of the Republic of Zimbabwe. It is common cause that the contestants of the first three positions now know the results of their elections. The results were announced at the Ward Constituency, House of Assembly and Senatorial constituency levels. The winners were declared by the respective Ward and Constituency Elections Officers. House of Assembly and Senatorial results have also been announced by the National Collation Centre presided over by the second respondent. It is conceded by the respondents that this was merely for the benefit of the general public as the legal requirements had been satisfied at constituency level.

The applicants who have an interest in presidential election results, filed an urgent application seeking this court's provisional order, compelling the respondents to announce the results.

The respondents while conceding that presidential results have not yet been announced contented that they will announce them when they are ready. They contented, in *limine* that, they are not subject to the jurisdiction of this court.

After the court's ruling on the issue of jurisdiction Mr *Muchadehama* for the applicants submitted that the application was urgent and outlined the facts establishing the urgency. In response, Mr *Chikumbirike*, for the respondents, submitted that the application is not urgent, and should have been brought by way of ordinary application.

Jurisdiction

On 6 April 2008, before this case could be heard on the merits Mr *Chikumbirike* for the respondents submitted that this court did not have jurisdiction to hear the applicant's application. He relied on the provisions of s 61 (5) of the Constitution which provides as follows:

> "(5) The Zimbabwe Electoral Commission shall not, in the exercise of its functions in terms of subs (4), be subject to the direction or control of any person or authority."

The provisions of subs (4) which are relevant to this application are found in subs (4) (1)(a). They provide as follows:

> "(4) The Zimbabwe Electoral Commission shall have the following functions -
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> (a) to prepare for, conduct and supervise –
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> i) elections to the office of President and to Parliament; and

ii) elections to the governing bodies of local authorities; and
iii) referendums; and

to ensure that those elections and referendums are conducted efficiently, freely, fairly, transparently and in accordance with the law".

Mr *Chikumbirike* submitted that this court has no jurisdiction to hear the applicant's complaint, and should therefore dismiss the application with costs.

Mr *Muchadehama* for the applicants submitted that the respondents are subject to the jurisdiction of this court and that, is why s 18 of the Zimbabwe Electoral Commission Act provides for the citing of the first respondent, as a nominal citee. He further submitted that the court has jurisdiction to inquire into any complaint against the Zimbabwe Electoral Commission provided that it observes ZEC's independence if it is complying with the provisions of the law. He further submitted that this court can intervene if the respondents stray from the provisions of the law. I agree with Mr *Muchadehama*'s submissions as it could never have been intended by the legislature, that ZEC could conduct itself outside the provisions of the law including the provisions of s 61 (4) of the Constitution itself, and still remain outside the jurisdiction of this court.

The clear intention of the Legislature in s 61 (5) of the Constitution was to ensure ZEC's independence provided it was operating within the law. It has to exercise its functions as provided by subs (4) for it to enjoy that immunity. It can not for example conduct elections unfairly, outside the law, and which are not free and fair, but on being sued insist that the courts have no jurisdiction over it. The court would in such circumstances have jurisdiction to hear and determine complaints against ZEC.

It was for these reasons that I ruled that this court has jurisdiction to hear the applicant's application.

Urgency

After the ruling on the issue of jurisdiction, Mr *Muchadehama* made submissions on the urgency of the application. He submitted that s 110 (3) of the Electoral Act [*Cap 12:13*] hereinafter called the Electoral Act, provides, for a re-run within 21 days after the previous election in the event of no candidate obtaining a clear majority in the election. This he submitted means a delay in announcing the election results will deprive candidates of

sufficient time to prepare for the re-run. He also submitted that the respondents would not have enough time to prepare for the re-run.

Mr *Chikumbirike* for the applicants submitted that there was no urgency in the applicant's application because its cause of action was based on the announcement of the results of the presidential poll. He argued, that those results where not due, as the provisions of the second schedule have not yet been complied with. He therefore reasoned that the cause of action would arise when the provisions of the second schedule of the Electoral Act would have been complied with. He summed up by submitting that the applicant's cause of action as stated in Tendai Biti's founding affidavit has not yet arisen hence the absence of urgency in the application.

Mr *Muchadehama* in response disputed Mr *Chikumbirike*'s submission that the cause of action had not yet risen. He submitted that Tendai Biti's affidavit complaints of delays and the respondent's wasting time on already declared election results instead of doing what they are mandated to do, that is the collation and verification of presidential results and their announcement.

A reading of Tendai Biti's founding affidavit confirms that though he in some paragraphs emphasised the announcement of results he clearly brought out a case against the general delay. That was in fact the theme of the applicants' complaint in paragraphs 5, 11, 12, 13, 14, 16, 17, 24, 26 and 27. I am therefore satisfied that the applicants' application is premised on delays and the respondents' wasting time doing everything else other than what they should have been doing. Therefore the cause of action has arisen though the wording of the provisional draft order seeks the announcement of results within four hours of the service of it on the respondents. This can be corrected by a variation in terms of r 246 (2) of the High Court Rules 1971 which provides as follows:

> "(2) Where in an application for a provisional order, the judge is satisfied that the papers establish a prima facie case he shall grant a provisional order either in terms of the draft filed or as varied".

This means an application for a provisional order which has been *prima facie* proved can not be dismissed because of a poorly drafted order. The court can vary it and grant a correctly formulated provisional order consistent with the *prima facie* case proved. In fact on being

granted the order becomes the court's order. The court must therefore be satisfied by its formulation before granting it.

It was for these reasons that I, found, the application was urgent and proceeded to hear it on the merits.

Procedural Issues

In response to Mr *Muchadehama*'s submissions on the merits, Mr *Chikumbirike* for the respondents raised several procedural issues which he should have raised as preliminary issues. He in his first procedural issue contented that the applicant's application was not made in the correct form. He submitted that it should have been in form 29 with appropriate modifications. Mr *Muchadehama* for the applicants in reply submitted that the applicants' application was made in the correct form and that even if it was not in the correct form, r 229C provides that such failure shall not in itself be a ground for dismissing the application. The court can however dismiss such an application, if it has caused prejudice to the other party which can not be cured by directions for service of the application on the other party with or without an order of costs. An examination of the applicant's application reveals that it is in form 29B when it should be in form 29 with relevant modifications as provided by the proviso to r 241 (2). The applicants have however, not suffered any prejudice. They were served with the application and they took no issue until during their counsel's response on the merits. Even though the issue was raised no prejudice was alleged. I am satisfied that nothing turns on this as either r 229C or r 4C could be resorted to, to condone the application's failure to strictly comply with the proviso to r 241 (2).

In his second procedural issue Mr *Chikumbirike* raised the issue of the applicants not having filed an answering affidavit. He submitted that, that means the applicants have accepted the respondent's averments in the opposing affidavit. Mr *Muchadehama*'s response was that most of the issues had already been put in contention by the applicant's founding affidavit deposed to by Tendai Biti. That may be so in respect of the delay and aspects related to it. It is however not correct in respect of the reason for the delay averred to in CHIWESHE J's opposing affidavit CHIWESHE J said the delay is due to ZEC having received complaints about miscounting and is considering the evidence for it to decide whether or not to order a recount of the presidential votes before announcing the results. The failure to file an answering

affidavit disputing that fact means the fact that complains have been received is not in dispute. However the legality of the recount can still be challenged as it is a matter of law.

Mr *Chikumbirike* in his third procedural issue raised the issue of the second applicant not having filed any affidavit. He submitted that he should have filed a founding affidavit or at least a supporting affidavit verifying the averments made on his behalf by the first applicant's deponent. Mr *Muchadehama* in response submitted that the averment by Tendai Biti that he was authorized to depose to the founding affidavit by the second applicant, is sufficient. He relied on r 227 (4) (a) which provides as follows:

> "(4) An affidavit filed with a written application –
>
> (a) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out in therein".

There is no dispute that Tendai Biti is the Secretary General of the first applicant and can swear positively to issues involving the first and second applicants as regards events which took place in connection with the announcement of presidential results. The issues in this case are purely party matters and the second applicant being the first applicant's presidential candidate is merely joined not because he has issues for which he has separate and distinct information which the first applicant's Secretary General is not privy to. I would therefore find that nothing turns on this issue. The affidavit filed by Tendai Biti satisfies the requirements of r 227 (4).

Mr *Chikumbirike*'s fourth procedural issue was on para (1) of the draft provisional order seeking the same relief, as is sought in para (1) of the final order. Mr *Muchadehama* conceded the error and sought a variation of the provisional order so that it grants a relief different from that sought in the final order. This issue has already been dealt with in my ruling on the issue of urgency.

Mr *Chikumbirike*'s final procedural issue was on what he alleged was an improper joinder of the first and second respondents. He submitted that the first respondent plays no roll in the processing and announcement of presidential results, and should therefore not have been joined with the second respondent in these proceedings.

Mr *Muchadehama* in his response correctly submitted that the first respondent was correctly cited in his nominal capacity as the Chairman of ZEC. Section 18 of the Zimbabwe

Electoral Commission Act provides for his being a nominal citee, just as the Minister of Home Affairs would be cited together with a Constable who would have committed a delict during the course of his duties. I find no merit in Mr *Chikumbirike*'s submission on this issue, especially in view of CHIWESHE J's concession that there was no issue on the citation of the parties. The respondents' in their opposing affidavit said the Commission received complaints about miscounting of the presidential votes which it is considering with a view to ordering a recount before those results are announced. This clearly confirms the importance of citing the first respondent as a party as it is the commission which is considering the complaints. The second respondent can not deal with that issue, and can not process and announce presidential results until that issue is resolved. The first respondent has therefore been correctly cited as a party in these proceedings.

The Merits

On the merits the applicants, contented through Tendai Biti's founding affidavit dated 3 April 2008, that there has been an unreasonable delay in the processing and announcement of presidential results. They submitted that the harmonised elections having been held on 29 March 2008, the results for the presidential poll should have been announced. They accused the respondents of employing delaying tactics by announcing the already declared results for the House of Assembly and the Senate. They submitted that the respondents were thereby avoiding their primary responsibility. They explained the procedure laid down in ss 64, 65 and the second schedule of the Electoral Act which should have been followed and said it should not have taken long to collate, verify and announce the results. They submitted that the procedure to be followed signifies the Legislature's intention that the results of the poll must be processed and be announced without any undue delays.

On the issue of delays Mr *Chikumbirike* for the respondents submitted that, the respondents had not strayed from what the electoral laws require them to do. They
can therefore, not be compelled to release the results when they were operating within the law. He submitted that, there was no provision in the Electoral Act requiring the respondents to collate, verify and announce the results in a specified period. He therefore argued that the respondents were entitled to act at their own discretion, but in terms of the electoral laws.

Provisions of the electoral laws and their interpretation

The question of whether or not the respondents are operating within the law can only be determined after an analysis of provisions of the Electoral Act which deal with the transmission of presidential results from polling stations through constituency centres to the Chief Elections Officer.

Section 64 (2) of the Electoral Act provides for the transmission of polling station return as follows:

> "(2) Immediately after affixing a polling station return on the outside of the polling station in terms of subs (1) (e), the presiding officer shall personally transmit to the constituency elections officer for the constituency to which the polling station belongs –
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> (a) …
> (b) the poling-station return certified by himself or herself to be correct:
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> provided that if, by reason of death, injury or illness, the presiding officer is unable personally to transmit the ballot box, packets, statement and polling station return under this subsection , a polling officer who was on duty at the polling station shall personally transmit these". …

It is clear from the provisions of this section that polling station-returns and other election results material must be urgently, and under the personal care of the presiding officer. be send to the constituency elections officer. Even the death, injury or illness of the presiding officer is not allowed to delay the transmission of the polling station-returns and other election result materials to the constituency elections officer. In the event of death, injury or illness a polling officer must take over and deliver them with the same urgency the presiding officer should have done. The presidential polling station-return is part of the material to be urgently transmitted.

The second schedule to the Electoral Act in para 1 (1) and (2) provides for the further handling and transmission of presidential results. It provides:

> "(1) After the number of votes received by each candidate as shown in each polling-station return has been added together in terms of subpara (1) of subs (3) of s 65 and the resulting figure added to the number of postal votes received by each candidate, the constituency elections officer shall forthwith-
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> (a) record on the constituency return the votes obtained by each candidate and the number of rejected ballot papers in such a manner that the results of the count for each polling station are shown on the return;

(b) display the completed constituency return to those present and afford each candidate or his or her election agent the opportunity to subscribe their signature thereto; and

(c) transmit to the Chief Elections Officer by hand through a messenger the constituency return or a copy thereof certified by the constituency elections officer to be correct.

(2) Immediately after arranging for the constituency return to be transmitted in terms of paragraph (c) of subpara (1), the constituency elections officer shall affix a copy of the constituency return on the outside of the constituency centre so that it is visible to the public".

The provisions of paragraph 1 of the second schedule clearly express the urgency with which the constituency return has to be transmitted to the ("second respondent") the Chief Elections Officer. A reading of subpara (1)(c) and subpara (2) reveals the urgency through the use of the word "immediately" and the fact that the affixing of the constituency return outside the constituency centre can only be attended to after the Constituency Elections Officer has arranged for the transmission of the constituency return to the Chief Elections Officer.

The question that has to be answered is why should these returns be urgently transmitted from polling stations and constituency centres, if the legislature did not expect the Chief Elections Officer to equally attend to them without delay? The inquiry must be taken to the next and subsequent stages of the process.

Paragraph 2 (1) of the second schedule provides:-

"(1) The Chief Elections Officer shall give reasonable notice in writing to each candidate or his or her chief election agent of the time and place where the Chief Elections Officer will verify and collate all the constituency returns".

Mr *Chikumbirike* seems to rely on this paragraph for the absolute discretion he claims for the respondents. It is true no time within which the notice shall be given is specified, but does it mean the second respondent was intended to take whatever time he deemed necessary before inviting the candidates for the collation and verification of the constituency returns. An analysis of para 2 (1) seems to reveal that the apparent relaxation of the urgency previously insisted on in the preceding sections and paragraphs could be for the benefit of the invitees. The Chief Elections Officer must await their arrival before the collation and verification starts.

Even if that was the intention of the legislature he could have been required to invite them forthwith or immediately. It must be noted that these returns will be transmitted by hand from all constituencies scattered throughout the country. The distance between each constituency centre and the National Collation Centre determines the arrival of each return. The legislature could in those circumstances have provided for urgency soon after the receipt of the last return. The fact that it did not leaves its intention unclear. However in the construction of statutes the intention of the legislature can be ascertained from the context within which the provision in question is found. This part of the second schedule should therefore be construed in conformity with the whole schedule and other provisions of the Electoral Act. The inquiry must therefore move on to the remaining provisions under paragraph 2.

Paragraph 2 (2) and (3) provides as follows:

> "(2) At the time and place notified for the verification and collation of the constituency returns referred to in subpara (1) and in the presence of such candidates, their chief elections agents and observers as are present, the Chief Elections Officer shall display each constituency return to those present and shall, on request, allow a candidate or chief election agent of a candidate to make notes of the contents of each constituency return".

This paragraph establishes that at the time notified the collation and verification should start and continue irrespective of the absence of other candidates. The words "as are present" are instructive. The urgency which seems to have been abandoned in subpara (1) seems to have been resumed. In para 2 (3) the legislature provided:

> "(3) When the Chief Elections Officer has completed the verification of the constituency returns under subpara (2) the Chief Elections Officer shall, in the presence of such persons referred to in subpara (2) as are present, add together the number of votes received by each candidate as shown in each constituency return".

This means once the invitees referred to in subpara (1) arrive verification and collation shall continue in their presence. We move on to para 3 (1) which provides:

> "3 (1) Subject to subpara (2), after the number of votes received by each candidate as shown in each constituency return has been added together in terms of subpara (3) of para 2, the Chief Elections Officer shall forthwith declare the candidate who has received (the qualifying votes in terms of (a) and (b)) to be duly

> elected as President of the Republic of Zimbabwe with effect from the day of that declaration".

This means once the verification and collation starts it continues until the winning candidate is forthwith declared the president of Zimbabwe if the result produces a winner with a majority of the votes cast. This clearly proves urgency is resumed from the time the invitees come till the declaration of the winner. This means from the transmission of the polling and constituency returns the legislature intended that officials must urgently forward returns to the Chief Elections Officer who must from the arrival of invited candidates or their agents urgently collate and verify and declare the result of the presidential poll.

Mr *Muchadehama* submitted that s 110 (3) of the Electoral Act must be factored in, in ascertaining the legislature's intention on whether or not the respondents were intended to act with urgency. The section provides as follows:

> "Where two or more candidates for President are nominated, and after a poll taken in terms of subs (2) no candidate receives a majority of the total votes cast, a second election shall be held within twenty-one days after the previous election in accordance with this Act."

He further submitted that the possibility of a second election within twenty-one days is consistent with the urgency expressed in the sections and paragraphs already discussed above. He said the time for the second election is fast approaching and according to his calculation the second election must be held on 19 April 2008. He submitted that the legislature being aware of the possibility of a re-run could not have intended para 2 (1) of the second schedule to give the second respondent a wide discretion as to when he should collate and verify constituency returns. The limited period between the first and second election suggests that the first election's results must be processed with urgency to avoid prejudicing candidates who will be contesting the second election. The processing of presidential results must in my view be given priority when compared to the announcement by the National Collation Centre of other elections which have no possibility of a re-run. I am therefore satisfied that the legislature intended that presidential election results should be processed without any undue delay.

It is however not in dispute that the legislature did not specify the period within which presidential results should be collated, verified and announced. Mr *Muchadehama* said it must

be within a reasonable time and relied on the provisions of s 3 (1) (b) of the Administrative Justice Act [*Cap 10:28*] hereinafter called the Administrative Justice Act. It provides as follows:

> "(1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall –
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> (a) act lawfully, reasonably and in a fair manner; and
> (b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned".

Mr *Chikumbirike* for the respondents contented that the Administrative Justice Act does not apply to the respondents as the Commission is not an administrative authority. Mr *Muchadehama* contented that it is and relied on its being created in terms of s 3 of the Zimbabwe Electoral Commission Act. Mr *Chikumbirike* submitted that s 3 of the Zimbabwe Electoral Commission Act has since been repealed and substituted. He is correct the provisions which created the Commission in the Zimbabwe Electoral Commission Act was repealed and substituted by one which provides for the procedure it shall follow and how it shall perform its functions. The Commission as it now stands was established in terms of s 61 (1) of the Constitution. Mr *Muchadehama* countered that in any event the second respondent remains within the meaning of "an administrative authority" as defined by s 2 of the Administrative Justice Act, as he is authorized by "an enactment to exercise or perform any administrative power or duty". I agree with Mr *Muchadehama*'s submission as the Chief Elections Officer is employed by ZEC in terms of s 11 of the Zimbabwe Electoral Commission Act, and his duties and functions are specified in that section. The remaining issue on that aspect is whether the establishment of ZEC by the Constitution excludes it from the definition of an "administrative authority".

Mr *Muchadehama* further submitted that ZEC remains an "administrative authority" by virtue of the provisions of Parts I and II of the schedule to the Administrative Justice Act. Mr *Chikumbirike* submitted that, that is not the correct way of determining whether or not ZEC is an administrative authority. Mr *Muchadehama*'s submission is premised on the fact that ZEC is not mentioned among the administrative authorities for which, the application of the

Administrative Justice Act is limited or excluded. It is true that ZEC is not mentioned in Parts I and II of the Schedule, but the limitation and exclusion must only apply to those who fall under the definition of "administrative authority". Those who do not fall within the definition need no limitation or exclusion from the application of the Act as they are already not affected by its application. I would therefore agree with Mr *Chikumbirike* that the fact that ZEC was not mentioned in Parts I and II does not assist in the determination of whether or not it is an "administrative authority."

Mr *Muchadehama* sought to establish the validity of the applicant's claim that ZEC had acted outside the law by proving that it as an "administrative authority" had not announced the presidential results within a reasonable time. In my view the conduct of ZEC should be measured against s 61 (4)(a) of the Constitution which provides as follows:

> "The Zimbabwe Electoral Commission shall have the following functions -
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> (a) to prepare for, conduct and supervise -
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> i) elections to the office of President and to Parliament;
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> ii) elections to the governing bodies of local authorities
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> iii) referendums; and
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> to ensure that those elections and referendums are conducted efficiently, freely, fairly, transparently and in accordance with the law".

The standard set by the legislature in the Constitution is for ZEC to perform any function required of it by the legislature through the Constitution, the Electoral Act or the Zimbabwe Electoral Commission Act, efficiently, freely, fairly, transparently and in accordance with the law. The use of the word "efficiently" when construed in conformity with the urgency provided for in the Electoral Act means ZEC must act accurately and timeously.

In this case the question to be answered is, did the respondents act efficiently, fairly, transparently and in accordance with the law towards the collation, verification and announcement of presidential results. If they did, that should be the end of the inquiry. If they did not the failure must be identified before this court can intervene and order compliance.

When the above criteria is applied to the facts of this case and the law as provided in the Electoral Act the applicants' allegations that there was delay seems to be justified by the legislature's intention that the election results must be processed without undue delay. This intention is revealed through the provisions which provide for the urgent transmission of polling station-returns and constituency returns to the Chief Elections Officer, and how he should conduct the collation, verification and declare the winning candidate. In the absence of an explanation the delay between 29 March 2008 and 4 April 2008 seems to be unjustified and points to a lack of efficiency. The period between the holding of the elections and the date of application is six days. Three other elections involving greater numbers of candidates were processed and finalized at their levels within two days of the date of the elections. The work to be done by the Chief Elections Officer is made simpler by the counting and collation done at polling stations and constituency levels. All he has to do is to verify and display the constituency returns and add the figures thereon to identify the winning candidate whom he should forthwith declare the President of Zimbabwe. This task should all things being equal not have taken the second respondent up to 4 April 2008 to announce the presidential results.

The explanation

The respondents explained the delay through CHIWESHE J's opposing affidavit. In paragraph 18 of his opposing affidavit he said:

> "In response to the letter of 2 April 2008 Annexure 'B' I had prior to receiving the application, which was served on me last night, prepared a press statement, which I intended to release, not only to inform the applicants of the Commission's position on these issues, but to the country and world at large. I attach a copy of the statement and request this honourable court to incorporate it as part of this affidavit. The statement relates extensively and accurately to the correct legal position. This statement is annexed as Annexure 'C'".

At pp 2 to3 of Annexure "C" he explained that ZEC had received several complains in terms of s 67A of the Electoral Act.

At p 2 of Annexure "C" he said "In this process, sight must not be lost of the provisions of s 67A(1) of the Electoral Act (Electoral Laws Amendment Act No 17/07) which provides as follows:

> "(1) Within 48 hours after a constituency elections officer has declared a candidate to be duly elected in terms of s 66 (1), any political party or candidate that contested the election in the ward or constituency concerned may request the Commission to conduct a recount of votes in one or more of the polling stations in the ward or constituency."

This is a right accorded to a candidate or a political party that contested an election for either of the House of Assembly. The same is also applicable to a presidential candidate, by virtue of the provisions of Part XVIII in s 112, which imports Part XIII of the Electoral Act (where s 67A is found). For the avoidance of doubt, I relate to this section below:

> "Subject to this Part, the provisions of Parts XIII, (other than ss 66, 67, and 68, for which the provisions of the second schedule are substituted), XIV, and XV, shall apply, with any changes that may be necessary, to an election to the office of President".

After explaining the effect of a miscounting, even by one vote could have on a presidential election, CHIWESHE J concluded at pp 3 - 4 by saying:

> "The Commission, it must be put on record, has received several complaints in terms of s 67A.
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> The Commission is in the process of considering the evidence submitted, to determine whether a recount should or should not be done? The question, as to whether to order a recount, or not, is entirely in the discretion of the Commission. This is provided in s 67A (7) which provides-
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> > 'The Commission's decision on whether or not to order a recount and, if it orders one, the, extend, of the recount shall not be subject to appeal'".

Interpretation of the Law applicable to the explanation

The prospect, of a recount, generated spirited legal arguments for and against it. Mr *Muchadehama* submitted that s 67A being part of s 67 was excluded from the sections which were imported into Part XVII by s 112. He further argued that s 67A does not apply to presidential elections, because it is not found in Part XVII where presidential elections are provided for.

Mr *Chikumbirike* for the respondents argued that section 67A is a section of the Electoral Act in its own right and was imported into Part XVII by virtue of its not having been mentioned among the sections excluded by s 112.

I agree with Mr *Chikumbirike*, because a section in a statute has its own separate existence even if it shares a section number with another section. It is distinguished from the preceding section by the letter added to the section number it shares with the preceding section. A section in a statute is constituted by the provisions after its section number up to the last subs under it. In this case s 67 ends with subs (3), and the next section which is s 67A follows. Section 67A was not in the original Electoral Act. It was introduced by s 48 of Act 17 of 2007. If the legislature intended to make it part of s 67 it would have introduced it into the Act as a subs of s 67. A new section is usually placed in the part of the statute where it fits into the scheme of the Act. In this case it was placed between s 67 which provides for the notification of the result of an election, and s 68 which provides for the publication of the names of elected candidates in the Gazette, because that is where a recount conveniently fits into the scheme of the Electoral Act. It determines the winning candidate whose name should be published. I am therefore satisfied that s 67A enjoys a separate existence from s 67. Therefore its exclusion from the sections of Part XIII, excluded by s 112 from importation into Part XVII, means it was imported into Part XVII.

Mr *Muchadehama* for the applicants summed up by submitting that even if s 67A is held to be part of Part XVII it does not apply to presidential elections because they have not yet been announced. He for that argument relied on s 67A (1)'s provision that the complaint by a party or candidate must be made within forty-eight hours after a candidate for that election has been declared duly elected. Mr *Chikumbirike* for the respondents submitted that the forty-eight hours within which the complaint must be raised after the winning candidate has been declared does not apply to presidential elections because s 112 provides for "necessary changes" in the importation of Parts XIII, XIV and XV into Part XVII.

Section 67A as already found is part of Part XVII, by virtue of its importation thereto by s 112. It therefore applies to presidential election results with the necessary changes referred to by s 112. I however do not agree with Mr *Chikumbirike* that the necessary changes extend to the substantive provisions of s 67A. Where in a statute a provision from one Part of a Statute is imported into another part of the same statute, to "apply, with any changes that may be necessary" the court interpreting that statute is not allowed to re-enact the relevant provision. It can only make necessary changes, to make the provisions, fit into the importing

Part. That power is limited to the names of officers who act in the importing Part, the sections empowering them to act, and the places where they are authorized to act etc. The substantive provisions can not be changed. They are infact the reason for the importation. They are intended to influence the provisions of the importing Part.

In this case s 67A (1), will after the necessary changes have been made read as follows:

> "(1) Within forty-eight hours after the Chief Elections Officer has declared a candidate to be duly elected in terms of s 110 (6), as read with the provisions of the second schedule, any political party or candidate that contested the election for the office of President, may request the Commission to conduct a recount of votes in one or more of the polling stations".

In its changed form s 67A (1) means a recount can only be requested within forty-eight hours after the declaration of the results of the presidential election. A recount before the announcement of the results, is in terms of s 67A (1) as imported into Part XVII, not provided for. If the request for a recount in terms of s 67A (1), is the reason for the delay in announcing the presidential results, the delay is based on an incorrect interpretation of s 67A (1). It would thus be an invalid reason for delaying the announcement of the presidential election results.

Mr *Chikumbirike* for the respondents, further submitted that even if the forty-eight hours apply ZEC, can on its own initiative order a recount in terms of s 67A (4) which provides as follows-

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

Mr *Muchadehama* for the applicants, submitted that s 67A (4) should not be read in isolation, but together with s 67A (1). He submitted that if read in the context of the whole section, it means any recount contemplated by it can only be done after the announcement of the results.

An analysis of s 67A (4) reveals that ZEC can act on its own initiative to order a recount. It does not state when it can do so as is specified in respect of subs (1). The information on which it may act can come from any source including a complaint as provided

in subs (1). It simply should have reasonable grounds for believing that votes were miscounted. If the legislature intended to restrict the first respondent to considering a recount after the announcement it could have made reference to subs (1) as is done in subs (3). The wide discretion given to the first respondent on this aspect is confirmed by the provisions of subs (7) of s 67A. It provides as follows:

> "(7) The Commission's decision on whether or not to order a recount and, if it orders one, the extent of the recount shall not be subject to appeal".

The fact that ZEC's decision to recount and the extent thereof is not subject to an appeal means that it was intended to act independently and that its decision would be final. The provision barring an appeal simply means ZEC has been given a very wide discretion as to whether or not to order a recount. The provision that ZEC's decision shall not be subjected to an appeal also means this court can not inquire into that decision. This should therefore be the end of the inquiry, as ZEC's conduct can only be open to the jurisdiction of this court when it strays from the law.

I should therefore find that the reason proffered by the respondents for their failure to timeously announce the presidential results is legally valid. It can, therefore justify the delay. The respondents have not strayed from the law. This court is therefore not entitled to intervene and order the respondents to announce the results on the basis of failure to comply with the law.

Mr *Chikumbirike* sought costs against the applicants' and their legal practitioners, on the higher scale. He submitted that the applicants' application was not necessary as the applicants could have sought for information from the respondents. He also relied on the fact that there are no time limits within which the respondents are required to act, a fact which the applicants should have known. Mr *Muchadehama* in response to the issue of costs said if any costs are to be ordered they should be on the ordinary scale. He disputed that the application could have been avoided as their letter of 2 April 2008 was not responded to. The issue of costs is in the court's discretion. That discretion must be exercised in a manner that does not discourage litigants from approaching the courts. Electoral matters are very important to candidates, political parties and the nation. In this case the whole nation is waiting for results. The applicants were anxious at the time they made their application. Their legal practitioners

wrote a letter expressing anxiety and demanding the results but did not get a reply till they resorted to this application. They should not be penalized by costs on the higher scale for making an application in circumstances were delay is conceded but has now been explained because of their application.

I would in the result dismiss the application with costs on the ordinary scale.

Mbidzo Muchadehama & Makoni, applicants' legal practitioners

Chikumbirike & Associates, respondents' legal practitioners