CITIZENS COALITION FOR CHANGE
and
IAN MAKONE
versus
ZIMBABWE ELECTORAL COMMISSION
and
CHAIRPERSON, ZIMBABWE ELECTORAL COMMISSION
and
CHIEF ELECTIONS OFFICER, ZEC

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 16, 18 & 21 August 2023

Urgent Application – Electoral Court

D Coltart with Adv T Mpofu, for the applicants
T Kanengoni with C Nyika, for the respondents

KATIYO J: The first applicant is a political party known as **Citizens Coalition for Change** abbreviated as (**CCC)**. The second applicant is the secretary general of the first applicant. The second applicant who says he is a registered voter avers that he makes this application on behalf of all the candidates for the first applicant competing in the forthcoming harmonized elections. The first respondent is the **Zimbabwe Electoral Commission (ZEC)** an independent commission established by the Constitution of Zimbabwe and mandated to oversee the elections in Zimbabwe. The second respondent is the chairperson of **ZEC** cited in her official capacity. The third respondent is the **Chief Elections officer of ZEC.**

Brief Background

The applicants were provided with electronic copy of the voters roll on 10 July 2023. The voters roll is annexed to this application as flash drive marked Annexure FD. According to the applicants they wrote two letters, on 14 July 2023 and on 2 August 2023 raising concerns about the voters roll. The two letters are attached as annexure **A and B.** The second

applicant avers that he did not get any response. He further contends that on 2 August 2023 ZEC published a list of preliminary polling stations implying that they were still subject to change. The list published is the one attached as Annexure FD as above. On 8 August 2023 the applicant says he wrote another letter raising concerns about the preliminary list of polling stations including the fact that the list is not final and that it was missing crucial information. The letter is marked Annexure C. Again ZEC did not respond to that letter according to the applicants. On 8 August the applicants received electronic copies of list of polling stations for each of the ten provinces which no longer included the word "**Preliminary"** in the title. The applicant then assumed that this was the final list to be used in the elections but was not published in a newspaper in the same manner the preliminary list was. All these are in the flash drive marked Annexure FD.

On 10 August 2023 the applicant's legal practitioners wrote an urgent letter of demand to the first and third respondents raising concerns and demanding similar relief to that which is being sought in this application.

The relief being sought is as follows: **It is ordered that:**

1. The respondents be and are hereby directed to immediately provide the applicants with an up to date copy of the voters roll which is compliant with peremptory provisions of s 21 of the Electoral Act in that it should:
    1.1. Show all polling stations that will be used in the 2023 harmonised elections and have the same number of polling stations as the number in the final list of polling stations published by ZEC;
    1.2. Use the same names of polling stations as the names of the polling stations that will be used during the 2023 harmonised election and show the full and complete name of each polling station;
    1.3. Use the same ward and constituency boundaries as those that will be used during the 2023 harmonised elections;
    1.4. Be fully searchable and analysable and in a format such as CSV, Excel or access files.
2. The respondents be and are hereby directed to immediately publish a final list of

polling stations which includes:

2.1. Polling station codes

2.2. The voter population for each polling station.

Arguments

The applicants argue that the voters roll provided to the applicants is not the voters roll which will be used in the elections and is not compliant with s 21 of the Electoral Act which mandates ZEC to provide a copy of the voters roll to be used in the election….i.e. s 21(4) and (5).

They give an example of Matebeleland North Victoria Falls City Council Ward 11, the polling stations appearing on the voters roll are as follows:-

Kings Primary School A

Kings Primary School B

St Josephine Bhakita Primary School

By contrast they argue that the list of polling stations includes the following polling stations for the same Ward:

Kings Primary School A

Kings primary School BA

Kings Primary School BB etc

They then argue that the polling stations on the voters roll and the polling stations published are therefore not the same. Neither Kings Primary School B nor the St Josephine Bhakita Primary School exist at all on the list of polling stations. They argue that they have identified at least 2150 polling stations on the voters roll whose names do not match the names of the polling stations published on 8 August 2023 affecting about 1,8 million voters.

They further argue this could also be due to the format in which the voters roll was provided to the applicants. As a PDF document, certain information is not accessible, searchable or analyzable. They thus argue that it does not comply with the provisions of

s 21(7) of the Electoral Act. They further argue that wards have been moved between constituencies e.g. Pfura Rural District Council, Ward 6 Mt Darwin East Constituency on the voters roll provided to the applicants (contrary to the boundaries in the delimitation report).

On the list of polling stations Pfura RDC, Ward 6 appears in Mt Darwin West Constituency. They aver that there are other several wards with these anomalies.

- It is further argued that the number of polling stations has changed from 11501 to 12370. It is further argued that their analysis shows that 10787 are unique polling centres and none of these numbers match the number of polling stations in the voters roll provided by the applicants which is approximately 11000 of which 9483 are unique polling centres. Further that the list of polling stations is not final or complete. To this they say they are not sure as to whether the final list of polling stations has been published in a newspaper as required by s 51(3) of the Electoral Act as the only list Published in a newspaper was called preliminary list. There are no station codes and the voters population of each polling station argued that codes are for openness and transparency. It was therefore argued that because the elections are on the 23 of August the matter is extremely urgent as it is now a matter of day. It was argued that this violates ss **155 as read with 156 of The Constitution of Zimbabwe** in that applicants have a clear right to have reasonable access to all material and information necessary for them to participate effectively in the elections.

The respondents opposed the application both on urgency and on merit. The third respondent deposed to an affidavit as he is directly responsible for coordinating the elections as the Chief Elections Officer. He argues that the court has already deemed the matter not urgent therefore would not belabor that point. He argues that since this matter was brought under Electoral Act and described as a mandatory interdict as per para 7 of the founding affidavit there is no express jurisdiction in terms of the existing Supreme Court decisions, where it is enjoined that the Electoral Court enjoys jurisdiction only where the Electoral Act specifically furnishes it with that jurisdiction. Some school of thought had argued that as a Division of the High Court it enjoys inherent jurisdiction but that argument was rejected by

Supreme Court asserting that it is a creature of statute so the court enjoys a specialised jurisdiction that does not go beyond its stipulations of the Electoral Act. That if an application is pursued in the Electoral Court a co-relative provision must exist in the Electoral Act providing the right to launch such an application. The mandatory interdict by the applicants is not supported by any provision in terms of s 21 of the said act. There is also no existing provision in the whole act for such a relief. Argued that because of lack of such a provision this court lacks jurisdiction to deal with the matter. The respondents aver that contrary to the assertion that they have not been provided with list of polling stations they do accept this in para 11 of the founding affidavit. Also that they were provided voters roll as per para 12 of the same affidavit.

As regards the demand through the letter dated 10 August which was served at 1555 hours when most staff had left and the 12 hour period could therefore not be met.

The third respondent asserts that he was surprised by the second applicant's actions as he personally addressed all these issues he raised in a meeting involving all political parties participating in the election of 23 August 2023. The meeting was held on 11 August 2023 whose minutes are attached to the opposing affidavit as an annexure. The applicant did raise these issues and the third respondent personally addressed them and at no moment he ever showed dissatisfaction on the responses. So to say ZEC did not respond it is not true.

As for the issues like the Kings Primary School BA or BB are merely an administrative tool by the Commission to manage voting at any polling station such that not more than 1000 voters are being served by one set of polling officers. This is referred to as a composite polling station where the voter population exceeds 1000 and such the excess is catered for by splitting the voter population into batches of 1000 or part thereof. For example, if a voter at Kings Primary School arrives at the polling station on the polling day, then they will be ushered to polling officers that are administering voting for the batch of 1000 in which that voter has been designated. More simply if there are 3000 there will be three classrooms of 1000 each for expedience purposes. Their names will be displayed at that classroom. As for the voters roll, it is argued that it is searchable and analyzable no wonder why no any other political party has approached the Commission complaining of such. Argued that the

applicants case hinges on them having analyzed the voters roll and searched it. The respondents have urged this court to take judicial notice of that. They say the PDF format is searchable and it is incompetent for the court to direct ZEC on what format to use without violating the independence of the Commission.

The issue of Ward 6, Pfura RDC was raised by all stakeholders including the applicants. The Commission noted the matter and effected corrections which resulted in that Ward being correctly placed. As for the other issues, they are generalised such that the Commission does not know what is that is being complained of. The respondents aver that the list will again be published on the day of voting in line with the provisions of the Electoral Act. As for the names the Commission uses existing institution names to set up polling stations e.g. schools and the incidences of similar names throughout the country is unavoidable but no single ward you will find with same name. So every voter knows where to go.

Legal Arguments

The applicants argue that the relief they are seeking is competent and that by not finding the matter not to be urgent the court had already assumed jurisdiction. They cite the provision of s 161 of the Electoral Act which reads as follows:

> "**161 Establishment and jurisdiction of Electoral Court**
> (1) There is hereby established a court, to be known as the Electoral Court, which shall be a court of record.
> (2) The Electoral Court shall have exclusive jurisdiction—
> (a) to hear appeals, applications and petitions in terms of this Act; and
> (b) to review any decision of the Commission or any other person made or purporting to have been made under this Act;
> and shall have power to give such judgments, orders and directions in those matters as might be given by the High Court:
> Provided that the Electoral Court shall have no jurisdiction to try any criminal case.
> (3) Judgments, orders and directions of the Electoral Court shall be enforceable in the same way as judgments, orders and directions of the High Court."

They argue that the application is made in terms of s 21 of the Act. It is therefore covered in s 161(2)(a) of the same Act. Further argues that the court can grant this relief because it is a remedy and not cause of action in the Act. Further argues that in relation to remedies for causes of action in terms of the Act, the act in s 161(2) as provided above.

Also cited the case of *Mliswa* v *The Chairperson, ZEC & Ors* HH 586/15 it was held that:-

> "Mr Kanengoni for the first and second respondents raised a preliminary issue on whether or not this court has jurisdiction on it. He relying on the case of *Makone & Another* v *Chairperson (ZEC) & Anor* 2008 (1) ZLR 230 (H) submitted that this court can only exercise jurisdiction over cases where the Legislature specifically conferred jurisdiction on it.
>
> Mr Zhuwarara in response submitted that s 161 (2) as currently worded confers jurisdiction on the Electoral Court in respect of all applications arising from the Electoral Act. He submitted that s 161 must be read as a whole to get its full meaning. I agree that provisions of a statute must be construed within the context in which they are found.
>
> The Electoral Act has been extensively amended since my decision in *Makone* (supra). The wording of the current s 161 is totally different from the earlier version….
>
> Subsection (2) brought in changes which makes the decision, in *Makone* inapplicable. The Electoral Court now has exclusive jurisdiction, which it did not have in 2008. The word "exclusive", means this court now has a domain over which, it does not share its jurisdiction with any other court. That domain is marked by s 161(2)(a) and (b), which caps it all by adding that this court now has powers similar to those exercised by the High Court, when, it determines electoral issues. The combination of exclusive jurisdiction and the addition of powers similar to those exercised by the High Court means this court now enjoys unlimited jurisdiction over all electoral cases, except criminal cases and cases, which have been specifically, allocated to other courts. Applications are now specifically mentioned as falling within the Electoral Courts jurisdiction. In 2008 they fell under "other matters". The Electoral Court now has "power to give such judgments, orders and directions in those matters as might be given by the High Court". The granting to the Electoral Court of exclusive jurisdiction, and power to give such judgments, orders and directions in those matters as might be given by the High Court, is a clear enhancement of the Electoral Court's jurisdiction after the *Makon*e case (supra).The fact that the Legislature which is deemed to know the law made these deliberate changes, means it intended to alter case law by giving this court jurisdiction the *Makone* case (supra) said it did not have. Exclusive jurisdiction means this court does not share concurrent jurisdiction with any other court, on matters it has jurisdiction on. The granting of power to give judgments and orders the High Court might give enables this court to exercise jurisdiction over cases in which it used to decline jurisdiction and such cases would be heard by the High Court. It has simply been given exclusive jurisdiction with unlimited power to hear and determine cases under the Electoral Act just as the High Court had jurisdiction to hear such cases during the era when the Electoral Court did not have exclusive jurisdiction."

Therefore argued that this court has exclusive jurisdiction as provided by s 162(2)(a) of the Act.

On the urgency of the matter the applicants aver that they received the copy of the voters roll on the 10 of July 2023 and even though they raised concerns, it is not those concerns which gave rise to the present cause of action in this matter. They say the cause of action arose when it became clear that the voters roll provided was not the one which will be used in the election as required by law. They aver that this only happened when they received the final list on 8 August 2023 which clearly demonstrated that a different roll will be used in the election. They further content that it is specifically for this reason that the urgency of the matter is inextricably intertwined with the merits of the matter. Contended that the relief sought is final in nature. They justify this through the case of *Registrar General of Elections* v *Combined Harare Residents Association & Anor* SC 7/02 CHIDYAUSIKU CJ (as he then was) stated as follows:-

> "Where the relief sought as interim is essentially the same as the relief sought on return day, the court's correct approach should be to proceed by way of an urgent court application seeking final relief. See *Econet* v *Mujuru* HH 58-97."

It is applicants view that Electoral matters are dealt on urgent basis as was in the case of *Mliswa* v *The Chairperson of ZEC & Ors* above. It was argued that this matter was heard on both urgency and merits and therefore should be determined as such. On the other hand the respondents argue that the present application is pursued before the electoral court and that the jurisdiction of that court is limited. It is governed in terms of s 161(2) of the Electoral Act which provides as follows:-

> "The Electoral Court shall have exclusive jurisdiction-
> (a) To hear appeals, applications and petitions in terms of this Act; and
> (b) To review any decision of the Commission or any other person made or purporting to have made under this Act."

To buttress the above the respondents argue that the interpretation of the above provisions where done by Supreme Court in two decisions that is *Tinashe Kambarami* v *1893 Mthawakazi Restoration Trust & Ors* SC 66/21 and more recently in *Saviour Kasukuwere* v *Lovedal Mangwana & Ors* SC 78/23.

1.3. In *Kambarami* (supra) the court finds that:

"A reading of s 161 of the Electoral Act has similar wording as found in s 89(1)(a) of the Labour Act [Chapter 28:01]. Section 161 clearly states that the court has jurisdiction to hear appeals. applications and petitions in terms of the Act. All matters brought before the court must be over election processes or any matter relating to elections. Likewise all issues brought before the Labour Court must pertain to labour matters only. The only difference between the two provisions which are strikingly similar is on s 161(b).

Section 161(b) gives the Electoral Court extra power to grant judgments, orders and directions as may be granted by the High Court.A cursory examination of the provision suggests that it is an open ended provision which suggests that the Electoral Court is at par with the High Court as both courts can grant similar judgments, orders and directions...

Applying the above principles, it seems to me that an interpretation of s 161(2)(b) of the Electoral Act requires that it apply the golden rule. As a starting point an examination of the meaning of "applications"

Envisaged under s 161(2)(a) of the Act is imperative. Examples of applications envisaged in the Act are set out in Part X111 of the Electoral Act. The main one is an electoral petition. There is also provision for an application made in terms of s 67A of the Act for the extension of the period for counting votes, an application made in terms of s 70(4) where the court may grant leave to any person to open any packet or box containing electoral residue and lastly an application made in terms of s 129(1) of the Act wherein the court can order a runoff of elections to be done on the same day. The case in issue was clearly not an electoral petition nor did it fall under any of the above cited examples.

The examples cited above, which are aptly captured in the appellant's heads of argument, serve to show that applications which may be entertained by the Electoral Court, have a marked difference from those that may be heard by the High Court. This is where, in my view, the court a quo fell into error. The High Court is a court with inherent jurisdiction. It has the power to hear all types of applications brought to it in terms of Order 32 of the High Court Rules, 1971.The types of applications that the High Court can hear are not stipulated in the Act as is the position in the Electoral Act. That the High Court has inherent jurisdiction is a common law principle which has been specifically codified by s 176 of the Constitution. The Electoral Act does not have such a provision. Thus, the High Court can grant any order as it may deem fit. This is in complete variance with the applications envisaged under the Electoral Act where there is a set remedy which the court must apply for every application before it. For example under s 67A in an application for the extension of the period for counting votes the court's remedy is that it may for good cause shown extend the period for counting of the votes. Also, in an application made in terms of s 70(4) the court on application can order that a ballot packet be reopened. It is clear that the Electoral Act provides for situations where the court can exercise its jurisdiction and further provides for the remedies which the court can grant.

The net effect is that the nature of the jurisdiction which is granted in the Electoral Act is that the court cannot stray from the provisions of the Act. It is bound to follow the powers set out in the Act. Therefore a proper interpretation of the provision that the Electoral Court can exercise the same powers as the High Court in making judgments, orders and directions in appeals, applications and petitions, can only be that such power is limited to the confines of the Act.

1.4. Respondents further argue that in *Kambarami* **(**supra) the Supreme Court found that:-

"For the application for a declaratory order made a quo by the first and second respondents to have been properly before the court, it must have been provided for in the Act as can be drawn from the remarks by ZIYAMBI JA in *National Railways of Zimbabwe* v *Zimbabwe Railway Artisans Union & Others* 2005 (1) ZLR 341 (S) wherein the court noted the following at 347. 'Thus, before an application can be entertained by the Labour Court, it must be satisfied that such an application is an application "in terms of this Act or any other enactment". This necessarily means that the Act or other enactment must specifically provide for applications to the Labour Court, of the type that the applicant seeks to bring. Before the court *a quo* could entertain the application before it ought to have been satisfied that the application fell within confines of the Electoral Act p 12 para 28 cyclostyled judgement.'" [Emphasis added]

It was argued that this position was challenged before Supreme Court in *Kasukuwere* case on the basis that the provisions of s 171(3) of the Constitution coupled with the fact that the Electoral Court is a division of the High Court, vested with inherent jurisdiction in all electoral matters and that it needs not have a provision in the Electoral Act giving it jurisdiction. Contended that this argument was dismissed by the Supreme Court which held as follows:

"The appellant went to great lengths arguing that what was before the court a quo was an electoral matter which should have been filed before the Electoral Court on the basis that it has exclusive jurisdiction to hear all electoral matters. The submissions by the 17 Judgment No. SC78/23 Civil Appeal No. SC387/23 appellant raise the issue whether the conferment of exclusive jurisdiction on the Electoral Court in terms of s 161 of the Act ousts the court a quo's jurisdiction in electoral matters. That issue was resolved by the *Kambarami* case (supra) where it was stated that:

'25. The Electoral Act does not provide nor purport to give the cour the jurisdiction to grant declaratory orders. A declarator by nature is special remedy open to any individual who has an interest in a matter who seeks a declaration on existing or future rights. The power of the High Court to grant declaratory orders is entrenched in s 1 the High Court Act.'

Section 14 provides as follows: '14. High Court determine future or contingent rights The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, cannot claim any notwithstanding that such person consequential upon such determination.'

26. It seems to me that s 14 of the High Court Act is a special provision which flows from the fact that the High Court has inherent jurisdiction which the Electoral Court does not have. The remedy of a declaration of rights is a remedy which the High Court grants within its discretion. That is not a remedy which may be shared by a court which has limited

jurisdiction. 27. It could not have been the intention of the legislature to give the Electoral Court the power to grant declaratory orders through the amendment of s 161 of the Act. In my view, s 161 of the Act was amended so as to provide the Electoral Court with wider powers so that it is not restricted to dealing only with election petitions as was the position prior to 2012." *ZIMASCO (Pvt) Ltd* v *Maynard Marikano* 2014 (1) ZLR 1). [38] The decision in the *Kambarami* case that the Electoral Court does not have jurisdiction to issue declaratory orders is final and binding. The correctness and finality of decisions of the Supreme Court cannot be impugned as was enunciated in *Lytton Investments (Pvt) Ltd* v *Standard Chartered Bank Zimbabwe Limited & Anor* 2018 (2) ZLR 743 (CCZ) at 756 where it was held that: "The principles that emerge from s 169 (1) of the Constitution, as read with s 26 of the Act (Supreme Court Act) are clear. A decision of the Supreme Court, on any non- constitutional matter in an appeal is final and binding on the parties all courts except the Supreme Court itself. What is clear is that the purpose of the principle of finality of decisions of the Supreme Court on all non- constitutional matters is to bring to an end the litigation on the non-constitutional matters. A decision of the Supreme Court on a non- constitutional matter is part of the litigation process. The decision is therefore correct because it is final. It is not final because it is correct. The correctness of the decision at law is determined by the legal status of finality. The question of the wrongness of the decision would not arise. There cannot be a wrong decision of the Supreme Court on a non-constitutional matter. 19 [39] The submission by the appellant that the decision in the *Kambarami* case is in per incuriam in without merit. This Court engaged the import of s 161 of the Act in coming up with its decision. The fact that the Electoral Court is a division of the High Court does not detract from the fact that it is a creature of statute with limited jurisdiction. The court *a quo* was therefore correct as it was bound to follow the decision in the *Kambarami* case. [40] This Court finds that the Electoral Court did not have jurisdiction to issue a declaratory order which was sought by the first respondent in the court a quo. Accordingly, this Court finds no merit to the challenge to the court *a quo*'s jurisdiction.'" Page 16-18 cyclostyled judgment.

The respondents contend that the present application is premised in terms of s 21 of the Electoral Act. To enjoy jurisdiction, there must be a provision in s 21 that permits the filing of the present application as was discussed in *Kambarami* case. It is therefore common cause that no provision of s 21 permits or provides for the filing of the present application for a mandatory interdict. It follows therefore that the court is not vested with jurisdiction in this matter.

In so far as the operations of s 21 of the Electoral Act [*Chapter 2:13*], the applicants accept that they were given a voters roll and they now want another one without first complying with provisions of s 21(3) of the same act. It states that:-

"The commission shall within a reasonable period of time provide any person who requests, it and who pays the prescribed fee, with a copy of any voters roll, including a consolidated roll referred to in section 20(4a),either in printed form as the person may request."

Argued that the applicants never pleaded any requisites under the same law to entitle them to then approach the court for being denied that right and then that a *mandamus* be issued against the respondents. Also contended that it is common cause that the first applicant has previously made this request and was furnished with the voters roll as required by the law. Also that the second applicant was provided with a voters roll posts nominations as required by law.

As for polling station, the applicants say the voters does not indicate the polling stations that are to be used in the elections, however they admit a notice was given by the commission which shows these polling stations. Section 20 (2) provides for details required as follows:-

> "(2) A voters roll shall specify, in relation to each registered voter -
> (a) A voter's first and last names, date of birth, national registration number and sex: and
> (b) The place where the voter ordinarily resides: and
> (c) Such other information as may be prescribed or as the Commission considers appropriate."

The law does not prescribe that a roll must, for its validity, contain names of polling stations. As a matter of law, therefore one cannot seek a *mandamus* demanding a roll that he or she alleges have the full list of polling stations where no provision of the Electoral act mandates that such a list be provided. This provision gives the commission a discretion which is purely administrative in nature.

The issue of mix up in Ward 6 of Pfura District in Mount Darwin was raised and the commission argues that they rectified it. Further the issue of extra polling stations was raised and the commission explained that it was not like creating more polling stations but voting points for convenience so as to maintain the 1000 voter threshold. These were the arguments presented by both sides.

Analysis

When the case was placed before me, I endorsed it "Not Urgent". That I did after taking into account the relief which was being sought by the applicants. The prayer was for *mandamus* interdict which in my view was incompetent in the circumstances as the Electoral Court is an establishment of a statute thereby falling within the category of a special court.

What it entails is that it cannot operate outside the dictates of the statute creating it. Let me also point out that a court's order should not be issued against a lawful process unless the conduct of the authority concerned is so perverse as to contradict the authority's mandate in terms of the law. The impression given by the applicants is that there is a new voter's roll created by the commission to be used in the election contrary to what they have. My endorsement was also as result of that the applicants were admitting having received a voters roll even though they wanted what they term a new voters roll or amended voters roll. Following the endorsement, the applicants petitioned this court that it be heard on urgency of the matter. When granted the audience the applicants raised an issue of recusal of the judge of which in terms of the law was totally incompetent as the court had had already made a decision. There was nothing to recuse myself from as doing so would amount to a reversal of my earlier decision and gives urgency to the matter before another judge. When I declined this aspect Adv T Mpofu who was representing the applicants suggested that I be addressed on the urgency. However the parties suggested that they be given a chance to deliberate failure to reach an agreement would revert back. There was no agreement reached and they came back to address me on urgency within 24 hours of the proposal. Let me point out that the issue of urgency was so intertwined with the merits such that the two could not be separated. Even the two legal practitioners agree on that aspect despite the fact that Mr *Kanengoni* for the respondents just relied on the courts' earlier endorsement on urgency of the matter. Because of that this court will combine the issues as it gives its judgment as the matter was fully argued. A look at the issues the court, put full arguments of parties as argued. From the facts it is not denied that there has been previous pronouncement by this court and the Supreme Court on this matter regarding special jurisdiction. I have also taken note of the fact that the elections have already commenced in sectors such as Chiefs Council and the security. What it means the proclamation by the President regarding the election date in the exercise of his constitutional function and in terms of the Electoral Law is now being given effect. This can only be stopped or be postponed by none other than the constitutional court which enjoys exclusive jurisdiction on such matters. This I say because the relief being sought in this matter if granted has an effect of postponing the whole election for ZEC to

come out with a new voter's roll. ZEC denies that it has a different voters roll and the applicants insist they have. Can a court compel a party to produce what they do not have in the absence of such proof. It is common cause that judgment should be capable of enforcement otherwise it would be an exercise in futility. ZEC insists that the few areas which were raised such as Mount Darwin Pfura District Ward 6 were attended to. There was Multi-Political Party meeting held on 11 August 2023 where all political parties were represented. The second applicant's signature like all other political participants is endorsed on the minutes attached to the opposing affidavit where the third respondent chaired the meeting. The third respondent was shocked to hear of this application whose cause of action is said to have arisen on 8 August 2023 well before the meeting was held. Also the applicants are the only one complaining of the voters roll given that there were many other stake holders in that meeting. It is also surprising that the heads of argument by the applicants found their way to the press well before the judge had seen them. As stated above the parties were given the voters roll as far back as 10 July 2023 and the respondents insist they do not have a new voters roll nor do they have an amended one. So what is it that this court should order ZEC to give. The provisions of the law as argued by both parties are quite clear as to what this court can do or not do. It is judicial notice that all participants are now in an election mood and are in full swing for the polls coming in few days time and for ZEC to come out with another voter's roll is a matter this court cannot interfere with as it is a purely administrative function. Looking at the whole submissions by the applicants they are general in nature and lacks specificity save for few examples given and the Pfura case which ZEC said they attended to. This gives this court the impression that the applicants are just being mischievous. It should be noted that elections of this nature are very sensitive as they have public interest and any mischievous conduct by any of the parties may bear serious consequences. It is therefore the responsibility each party to correctly inform the public especially officers of the court.

The provisions of the Electoral Act do not give this court jurisdiction to give a mandamus interdict as argued in the Supreme Court in the *Kambarami* case made this very clear. The inherent jurisdiction as created by s14 of the High court Act does not in any way extend the Electoral Court. Just like Labour Court, it is a special creature of statute no wonder why

judges are specifically appointed to that court to function not as High Court generally but as Electoral Court a division of the High Court with specific mandate. What it simply means is that they cannot act outside what is specifically provided under the electoral act as submitted by Mr *Kanengoni*. What is not expressly given by the statute cannot be included unless the statute is so vague as to call for the rules of interpretation to give effect to that statute.

Conclusion

Having discussed as above and also taking into account the arguments by both parties, I have no doubt that the relief being sought here is not only incompetent but has also no standing at law. Specifically, the reason why I endorsed not urgent. It is quite clear that ZEC insists that they do not have a different voters roll from the one given to all political parties, and as for the list of new polling stations an explanation has been given that it was simply to maintain the 1000 voters threshold. In light of this to give such as an order as sought in this application it will be an exercise in futility as it might not be capable of being enforced. From the arguments as discussed, I am not persuaded by the applicants' position. I however tend to agree with the interpretation of the already decided cases by the Supreme Court as given above. The *mandamus* interdict being sought cannot be given under the Electoral Court as it is a special court with a specific mandate. Assuming the Electoral Court had jurisdiction to do so in this case it was also not competent for this court to grant this relief for it would amount to a postponement of the whole election to enable ZEC to come out with an amended or new voters roll. I say so because the proclamation by the President of the Republic of Zimbabwe in the exercise of his Constitutional powers given effect by the Electoral Act cannot be undone by this court. After perusing the papers filed before me and hearing both counsel, **it is ordered that:**

1. The application is incompetent and be and is hereby dismissed.
2. No order as to costs.

Mtetwa and Nyambirai, for the applicants
Nyika Kanengoni and Partners, for the respondents