

Morgan Tsvangirai
And
Robert Gabriel Mugabe
And
The Electoral Supervisory Commission

Petitioner
1st Respondent
2nd Respondent

HIGH COURT OF ZIMBABWE
HLATSHWAYO J
HARARE, 28 November 2005

*Advocates Jeremy Gauntlett SC, Adrian De Bourbon SC,
Happius Zhou, for the petitioner*
Mr Terence Hussein, for the 1st respondent
Mr George Chikumbirike, for the 2nd respondent

HLATSHWAYO J: This is the judgment in the first part of an application in which the petitioner seeks the setting aside of the first respondent's victory in the 2002 Presidential election. The petition has been approached in two stages; the first being the challenge on preliminary matters which I dismissed in my ruling of 10 June 2004 and the reasons for which dismissal appear herein and the second stage is the trial itself, which has not yet commenced as the petitioner is still gathering and/or analyzing further evidence. The 2nd and 3rd respondents, the Registrar-General and the Minister of Justice, Legal and Parliamentary Affairs were removed as respondents, but shall be referred to as the 2nd and 3rd respondents in this judgment as they were in the pleadings to avoid confusion. Similarly, the 4th respondent, the Electoral Supervisory Commission (ESC), now appearing as the 2nd respondent after unsuccessfully objecting to its joinder, shall continue to be referred to as the 4th respondent.

BACKGROUND

The background to this judgment is that the petitioner has approached the Supreme Court for certain relief and on Thursday 17 November 2005 the Supreme Court reserved judgment in the matter in which the petitioner seeks the nullification of the order of this court of 10 June 2002. As the presiding judge in the matter I was not cited as a party and therefore I could not formally place before the superior court my own view of the matter.

The first point I make pertains to what at law this court is entitled or required to do concerning its role in the petition process in general and the reserved reasons for judgment specifically in the light of the constitutional challenge now before the Supreme Court. Once a matter has been filed with a higher court, the lower court has to be extremely circumspect in how it continues to deal with the same matter. My respectful view is that from the

moment the petitioner filed his application with the superior court, the proceedings of this court were immediately stayed or frozen pending the finalization of the constitutional challenge. No issues in dispute before the higher court could be entertained by this court either *mero motu* or at the instance of any party. Specifically, and in my considered view, this court could not proceed to hand down the reasons for the ruling until the Supreme Court had concluded its proceedings. All it could do was stand ready to do so at the turn if so required by the higher court. For, the challenge before the Supreme Court, as I understand it, is not a *mandamus* for the handing down of reasons for judgment where it would have been quite proper to comply without waiting for the ruling of the Supreme Court.

To have proceeded to hand out reasons for judgment after the petitioner had filed a complaint in this regard would have been tantamount to foisting a judgment on a party which had clearly chosen a route of seeking satisfaction first from the Supreme Court with the real danger that such a party could, with justification, consider itself not bound to accept or act upon the judgment including the necessary concomitants of the release of the judgment such as the fixing of the time limits relating, for example, to appeals.

On the other hand, the above approach would have led to further delays. Since the impugned order has already been issued and the Supreme Court is still to decide on the challenge it would appear that the reasons for judgment could similarly be released and the higher court will then deal with both the order and the reasons thereof.

Faced with this dilemma, I called the legal representatives of parties to my chambers on Friday 25 November, and put before them the two competing positions, and they all agreed that the reasons should be handed down. Advocate *Zhou*, instructed by Mr *Briant Elliot*, opined that since the operative part of the judgment had already been issued, it was proper to release the reasons thereof the pendency of the matter before the Supreme Court notwithstanding. All the lawyers further agreed that the reasons be handed down in open court on Monday 28 November at 10.00 a.m.

The second point I raise relates to my own perspective of the development of the dispute, now before the Supreme Court.

On 10 June, 2004 I issued the following order in this matter: -

"I hereby order as follows:

1. Dismiss with costs the Fourth Respondent's objection that it was not properly cited as a party to these proceedings.
2. Dismiss with costs the relief sought by the Petitioner as to the constitutional validity of section 158 of the *Electoral Act [Chapter 2:01]* and the *Electoral Act (Modification) Notice 2002, Statutory Instrument 41D of 2002* and the

declaration sought that all orders made and directions given and acts done in terms of the *Electoral Act (Modification) Notice 2002, SI 41D* are void.

3. Dismiss with costs the preliminary points raised by the Petitioner in that none of them on its own nor all of them collectively suffice at this stage to invalidate the election." (underlining added).

The terms of the above order, especially as highlighted in the underlined part, clearly show that this was a preliminary or interlocutory ruling, pending the full ventilation of the issues in the second or trial stage of the petition.

On 16 July, 2004 I called the parties into my chambers in order to discuss with them the set down of the second phase of the petition which had been scheduled in the Court Roll for the first part of the last term of court. It is noteworthy that at this stage the petitioner had not indicated any intention to appeal or to apply for leave to do so, and was already well out of the time limits for noting an appeal. The reason for petitioner's failure to note an appeal in my opinion was the commonly held view that this ruling was interlocutory and the petitioner would take a position upon the conclusion of the second phase. I did not understand the situation to be that the petitioner had waived his right to appeal. At any rate, I would assume, the petitioner's lawyers must have had at the back of their minds the firm position that the Supreme Court is loath to consider piecemeal appeals. See *S v Tekere & Ors* (1) 1980 ZLR 441 (A), *Masedza & Ors v Magistrate, Rusape & Anor* 1998 (1) ZLR 36 (H), *Diamond Insurance Co (Pvt) Ltd v Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor* 2001 (1) ZLR 243 (H).

Nonetheless, cognizant of the need for the parties to be informed of the court's position on the preliminary issues for their benefit in the second phase of the proceedings, but while emphasizing at the same time that I considered the preliminary issues and ruling as interlocutory, I undertook to endeavour to produce the reasons for the ruling before the commencement of the second phase of the petition, which phase has not commenced as already noted.-

After the preliminary points were dismissed in June 2004 as indicated above, the main matter was set down for a hearing in September. However, before the matter could commence, the applicant wrote to indicate that he was not ready to proceed before accessing and studying certain documents he wished to discover and in connection with which he had filed a separate application.

See Letter to hearing judge's clerk by petitioner's lawyers dated 3 August 2004 where it is stated *inter alia*:

"Because of the great importance of the election material, we respectfully submit that it is essential that we are given an adequate opportunity to inspect and analyse

it prior to the commencement of Phase 2 of the Election Petition, Case No. HC 3616/2002”.

The petitioner in that letter, attached hereto as an Annexure concludes:

“The election material has a fundamental bearing on many of the General Issues contained in the Pre-Trial Conference minute and we consider that it is essential that it is inspected and analysed before proceeding further with Election Petition.”

The inspection of the election material is currently on-going, and the petitioner has not indicated when the analysis would be concluded and the petitioner would be ready to proceed to Phase 2 of the petition. When Phase 2 of the petition was stayed at the instance of the petitioner, the hearing judge was, understandably, assigned other duties, has never been reassigned exclusively to the petition and was only been able to work intermittently on the judgment. In retrospect, the delay in the handing down the reasons for the order could have been avoided had I indicated and secured on the Court Roll the time necessary to conclude the matter. However, a desire not to unduly interfere with the Court Roll deterred me from doing so especially given that a longer set down to deal with Phase 2 of the petition appeared imminent.

To that extent I take full responsibility and deeply regret the delay caused up to that stage. Ironically, it was precisely at this stage when the necessary arrangements had been made with the Judge President to expedite the conclusion of the matter that the applicant without the basic courtesy of a notice to the presiding judge approached the Supreme Court, with the consequences already noted above.

It must be noted also that the absence of reasons for the June 10 2004 order could not stop the petitioner from proceeding with Phase 2 of the petition. What prevented the commencement of Phase 2 was the petitioner’s desire to gather further evidence and, I understand, the petitioner is still in the process of collecting and analyzing further evidence to present to the court.

My reasons for the above order follow below. I have also attached as an annexure the Pre-Trial Conference Minute entered into by the parties, which contains the issues for decision.

ISSUES RELATING TO THE FOURTH RESPONDENT

There are basically two issues relating to the fourth respondent as set out in the PTC Minute:

- 1) Should the Fourth Respondent be a party to these proceeding?

- 2) Did the composition of the Fourth Respondent at the time of the elections comply with the Constitution, and if not, does that in any way bear upon the validity of the election?

I shall deal with these issues in the above order.

Propriety of joining the Fourth Respondent

Contrary to the assertion by the Petitioner in his heads of argument that the endeavor to remove the fourth respondent as a party was belated, the fourth respondent objected to its inclusion as a substantive party at the earliest possible opportunity in its notice of opposition. The opposing affidavit filed by the then Chairman of the Electoral Supervisory Commission (ESC), Sobusa Gula Ndebele, is cogent and clear in this regard.

The application for the removal of the fourth respondent as a party was brought in terms of Order 13 Rule 87(2), which states:

“At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application –

- (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
- (b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party;”

It was submitted on behalf of the petitioner that Section 102 of the Electoral Act does not stipulate who must be cited as a party in election petition proceedings, and that therefore the common law rule applies. The common law rule is that a person with a direct and substantial interest in the subject matter of the petition must be joined (*Zimbabwe Teachers Association v Minister of Education and Culture* 1990 (2) ZLR 48 (HC) at 52-53; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659). Another way of testing whether a person should be joined is whether he should be affected by the order the court is asked to make. Mr *Chikumbirike*, for the fourth respondent, preferred to state the common law position negatively, thus: parties without a ‘direct and substantial interest’ in the subject matter of litigation should not be joined; if they are made parties, then it is a case of misjoinder. However, there is only a difference of emphasis in the manner in which the respective counsel have preferred to state the common law. The common law rules on joinder of parties have now been codified and extended in our Rules of Court: Order 13 Rules 85, 86 and 87.

Rule 85 states the classic common law position. Rule 86 grants the court on its own motion or upon application by a party or with the consent of the parties, a wide discretion to

join parties on the basis of convenience and/or to order separation of trials. Rule 87(2)(b) expands more on the concept of a convenient party by requiring to be joined any party "whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon". Therefore, it appears to me that our law recognizes two classes of parties that must or may be joined: necessary and convenient parties or substantive and nominal parties. While necessary parties are generally substantive, must be joined and are affected by an order of costs, convenient parties may be substantive but are usually just nominal, their joinder is typically discretionary and may not be affected by an order of costs as they, more often than not, remain neutral abide the decision of the court.

Applying the above general summation of the rules of joinder to the case before me, the capacity in which the fourth respondent is joined is not apparent on the record as the petitioner merely states: "The 4th Respondent is the Electoral Supervisory Commission established in terms of s.61 of the Constitution of Zimbabwe." However, when one examines the duties of the ESC and the matters before the court in this case, the conclusion becomes inescapable that the fourth respondent should be viewed at the very least as a convenient party "whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon".

Some of the duties of the ESC are to "supervise the registration of voters and the conduct of elections" and to make reports to the President concerning the matters under its supervision including reports on any draft bill or any statutory instrument that is referred to it. The issues before the court include challenges to the composition of the ESC, conduct of the election, constitutionality of laws and regulations used in the registration of voters and management of the election. In paragraph 119 of his affidavit, the petitioner criticizes the 4th respondent directly concerning its conduct at most polling stations, thus:

"The Electoral Supervisory Commission monitors took a passive role in the proceedings and were not seen to be closely involved in monitoring the process of voting. Very rarely did independent observers witness Electoral Supervisory Commission monitors challenging or intervening in any party of the voting, especially on occasions when people were turned away for not being on the electoral register. In most cases, the Electoral Supervisory Commission monitors seemed to limit themselves to sitting in their designated places at polling stations and taking notes, interacting very little with presiding and polling officers."

Granted, there is no specific remedy prayed for as against the ESC in the draft Order, but how is a respondent whose victory in an election is impugned supposed to defend himself or herself without the joinder of the ESC against allegations that the ESC

was not properly constituted or failed to discharge its constitutional duties, thus rendering the election void? Put differently, a challenge of the validity of an election such as the one mounted by the petitioner in this case should be of such interest to a body set up to supervise elections that if not joined such a body would demand to be made a party if only to better assist the court in understanding the role it played and providing that independent and disinterested view of the matter.

The 4th respondent goes on to mount a final startling argument against its inclusion in this petition, viz., that the manner it conducts its election supervision is a matter beyond this court's jurisdiction and therefore cannot be raised before it, may not be questioned by any court of law. This remarkable submission is ostensibly based on section 61(6) of the Constitution, which provides thus:

"The Electoral Supervisory Commission shall not in the exercise of its functions in terms of subsection (3) or (5) be subject to the direction or control or any person or authority".

Now, the entrenchment of the independence of a body or person in the above terms is a well-established constitutional device, which does not then put such body or person above the law. The actions of such bodies or persons are still subject to legal review. For example, in section 79B of the Constitution the independence of the judiciary is entrenched in exactly the same terms, but it would be quite a novel proposition to interpret that entrenchment as removing from legal review the conduct of the judiciary in the exercise of its functions. The kind of protection that the constitutional provision extends to the ESC is the independence in the conduct of its duties of monitoring, for example, the criticism of how its officials discharged their duties quoted at length above is completely inappropriate. No court can interfere or inquire into the manner in which the ESC conducts its duties, no court can order that ESC officials be more active in the discharge of their duties, etc. But if the grievance is that the ESC was not properly constituted, acted illegally or failed to discharge its duties altogether, such a challenge cannot be answered by reference to the provision which constitutionally entrenches the independence of the Commission.

All in all, therefore, I came to the conclusion that the fourth respondent was properly cited as an essential party to these proceedings. In dismissing the 4th respondent's objection to its inclusion as a party I also awarded costs against it because of the inflexible stance it had taken of demanding to be removed completely when it was self evident that its "presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon". Had the fourth respondent's request been that it desired to be considered merely as a nominal

party, I would have taken a different view regarding costs. However, the question of costs, if any, payable by the fourth respondent will still have to be reviewed at the conclusion of the first and final parts of the petition depending on the position the ESC would have taken on various issues.

Was the 4th Respondent Validly Constituted?

The petitioner submits that at the time of the Presidential election in March 2002, the ESC only had four members, whose appointment had not been published in the Government Gazette, whereas the full compliment according to the Constitution is five. The petitioner then concludes that the alleged failure by the 1st Respondent to appoint a properly constituted Electoral Supervisory Commission invalidates the whole electoral process. It is very difficult to follow this line of reasoning because one has to make too many assumptions to sustain it. It is not stated what had led to the vacancy or whether when the ESC was set up, insufficient members were appointed to it. The petitioner admits that he does not have sufficient information in this regard. He complains that the 1st Respondent refused to disclose the date on which he appointed members of the ESC.

If it cannot be established whether the initial appointment was proper, it cannot be assumed that just because at the time of the election there happened to be a vacancy, therefore the composition of the commission is invalid.

As to whether the four members could validly discharge the duties of the commission, section 114(3) of the Constitution speaks clearly on this, thus:

“3a) a body established by or in terms of this Constitution may act notwithstanding any vacancy in its membership if the members of the body who authorize or perform the act concerned constitute a quorum of the membership of that body.

[Subsection as inserted by section 19 of Act 23 of 1987]

(3b) Except as otherwise provided in this Constitution or in any law or rule regulating the proceedings of the body concerned, one half of the membership of any body established by or in terms of this Constitution shall constitute a quorum of the membership of that body.

[Section as inserted by section 19 of Act 23 of 1987]”

It is common cause that at the time of the election, the 4th respondent had four members. The minimum required to form a quorum is at least three members. Therefore,

in terms of the above provisions of the Constitution, the fourth respondent could act notwithstanding the absence of the one member.

Regarding the publication in the Gazette, I am in agreement with the 4th respondent's submission that such publication is not mandatory but discretionary as shown by the use of the word "may"; it is evidentiary and not constitutive. Section 31(2) of the Interpretation Act reads:

"(2) When any act, matter or thing is by an enactment directed to be done by the President or by any Minister, notification that such act, matter or thing has been done **may**, unless a specified instrument or method is by that enactment prescribed for the notification, be by notice published in the *Gazette* which shall for all purposes whatsoever be prima facie proof that such act, matter or thing has been done."

Finally, the petitioner complains that the 1st Respondent directed that the staff of the Commission would be assigned to the Commission by a Minister (s.3 of the Electoral Act (Modification) Notice 2002, SI 41D/2002), this notwithstanding section 11 of the Electoral Act, which provides:

"11 **Staff of Commission**

- (1) At the request of the Commission, the Minister may assign to the Commission such members of the Public Service Commission employed in his Ministry as may be necessary to perform secretarial and administrative functions for the Commission.
- (2) The person for the time being performing the functions of secretary of the Commission may attend meetings of the Commission but shall not vote on any question before the Commission".

According to the petitioner, assignment now no longer depended on a request from the Commission, and no longer necessarily came from the Public Service, thus undermining the independence of the Commission. In response it has been argued that the Constitution did not specifically prohibit the employment by 4th respondent, of any other persons. The Electoral Act merely provided the 4th respondent with an option: if it wants to, it can request the Minister for secretarial and administrative personnel. Once more, I must say I do not find merit in the petitioner's submission on this score and at this stage. Perhaps, at the trial stage, the petitioner will be able to prove that specific persons at a sufficiently high administrative level were foisted on the Commission with a view to advantage the 1st respondent and injure the petitioner's chances of winning, and that the Commission's role was thereby so severely compromised as to warrant the setting aside of the election.

CONSTITUTIONAL CHALLENGES

The petitioner has sought to challenge the constitutionality of s.158 of the Electoral Act (*Chapter 2:01*) and the validity of electoral notices on the basis that they are *ultra vires*. These issues are generally captured in the Pre-trial Conference Minute as follows:

- 1) Should the challenge to the constitutionality of section 158 of the Electoral Act [*Chapter 2:01*] be heard together with the Petition?
- 2) Does the Petitioner have *locus standi* to challenge the constitutionality of section 158 of the Electoral Act?
- 3) Can the declaration sought on electoral legislation be properly brought together with an election petition?

I shall deal with the above issues in reverse order:

Declaration on Electoral Legislation

The declaration on electoral legislation is an additional draft order filed by the petitioner days after the last day allowed for filing the petition. The 1st respondent's heads of argument put the issues in this regard very clearly and what follows draws closely upon them.

The petition was filed on 12 April 2002, the last day filing of the petition, and the Draft Order attached to the petition prayed for the following relief:

"DRAFT ORDER

IT IS DECLARED:

1. That the First Respondent was not duly elected as President of Zimbabwe as a result of the Presidential Election held on 9-11 March 2002.
2. That the General Notice 116E of 2002 published by the Third Respondent in a Government Gazette Extraordinary dated 19 March 2002 and General Notice 118B of 2002 published by the Acting Secretary for Justice, Legal and Parliamentary Affairs in a Government Gazette Extraordinary dated 28 March 2002 be and are hereby set aside.

ACCORDINGLY, IT IS ORDERED:

1. That in accordance with section 102(2)(b) of the Electoral Act [*Chapter 2:02*] the Registrar of this Honourable Court shall forthwith give notice of the declaration set out in paragraphs 1 and 2 above to the Second Respondent who shall forthwith publish a notice in the Government Gazette stating the effect of the order of this Honourable Court.
2. That the costs of this application shall be paid by the Respondents, jointly and severally, the one paying, the others to be absolved.

BY THE COURT

REGISTRAR"

According to Section 21 of the Electoral (Applications, Appeals and Petitions) Rules, 1995, an election petition shall be in the form of a Court Application and shall state, inter alia, "the exact relief sought by the Petitioner". On 15 April 2002, that is, three days after the statutorily prescribed period for filing a petition, the petitioner's legal practitioners wrote to the Third Respondent as follows:

"We refer to the Court Application filed and served on you in this matter on 12 April 2002.

In the draft order attached to our Court Application, we are seeking a Declaration and Order in relation to the result of the recent Presidential Elections.

We now attach hereto an additional Draft Order seeking a Declaration and Order in relation to Section 158 of the Electoral Act." (emphasis added)

The above letter states clearly that three days after the petition was presented, the petitioner was "now" seeking a further declaration and Order in relation to Section 158 of the Electoral Act. The additional draft order sought the following:

"IT IS DECLARED:

That Section 158 of the Electoral Act [*Chapter 2:01*] is invalid and of no legal force.

Accordingly: That section 158 of the Electoral Act (Modification) Notice 2002 published in Statutory Instrument 41D of 2002 on 5 March 2002 was invalid and of no legal force.

Alternatively: That the Electoral Act (Modification) Notice 2002, published in Statutory Instrument 41D of 2002 on 5 March 2002 was invalid and of no legal force.

IT IS ORDERED:

1. That all orders made, directions given and acts done in terms of the said Electoral (Modification) Notice 2002, published in Statutory Instrument 41D of 5 March 2002 purportedly in accordance with section 158 of the Electoral Act [*Chapter 2:02*] are null and void.
2. That the Respondents pay the costs of this application, jointly and severally, the one paying, the others to be absolved.

BY THE COURT

REGISTRAR"

Counsel for the 1st Respondent then submitted that because of the preemptory provisions of electoral legislation, no additional relief may be sought after the prescribed 30 day period for filing the petition. This submission finds support in case law from our jurisdiction and beyond as I observed in the case of *Mfandaedza Hove v Joram Gumbo* HH-43-2002, pp. 4-5 of cyclostyled judgment:

"My brother DEVITTIE in the *Mutoko South Election Petition* HH 68/2000, emphasized this point as follows:

Procedure lies at the heart of the law. Its aim is to guarantee precision in order that the ends of justice may be achieved and unnecessary time and expense avoided. These ideals are placed in jeopardy where lack of precision leads to the person accused not knowing with sufficient clarity the case he

has to meet. Much time and expense is wasted by the failure to set forth succinctly and according to law the charge raised and the particulars relied upon." @ P.3 of cyclostyled judgment.

In the same vein CHIEF JUSTICE CHANDRACHUD observed in the Indian case of *Charan Lal Sahu and Ors v Singh* [1985] LRC (Const.) 31 thus:

The importance of specific pleading in these matters can be appreciated only if it is realized that the absence of a specific plea puts the respondent at a great disadvantage. He must know what case he has to meet. He cannot be kept guessing whether the petitioner means what he says, "connivance" here, or whether the petitioner has used that expression as meaning, "consent". It is remarkable that, in their petition, the petitioners have furnished no particulars of the alleged consent, if what is meant by the use of the word connivance is consent. They cannot be allowed to keep their options open until the trial and adduce such evidence of the consent as seems convenient and comes handy. That is the importance of precision in pleadings, particularly in election petitions. Accordingly, it is impermissible to substitute the word "consent" for the word "connivance" which occurs in the pleading of the petitioners. At p. 42.

Again in *Mitilesh Kumah v Venkataraman & Ors* [1989] LRC (Const.) 1, the petitioner had failed to set out in a succinct and clear narrative form all the facts necessary to enable the respondents and the court to understand the petitioner's case. There was neither an allegation that the first respondent had committed an act of undue influence nor that others had committed it with the consent of the first respondent. The petition was dismissed as disclosing no cause of action.

In both judgments, the Indian Court also took the opportunity to warn against possible political abuse of election petitions if specificity of pleas is not insisted upon. In *Charan Lal Sahu* case the warning was that "every kind of fanciful doubt or frivolous dispute under the sun will have to be inquired into by this Court and election petitions will become a fertile ground for fighting political battles".

In *Keyser v Conroy* (1917) CPD 353 it was held that the court would not allow an amendment to an election petition, in circumstances where the amendment contains additional charges. In *Nicholson v Van Niekerk* 1915 TPD 581 it was held that where the court on application, allows an inspection of ballot papers, each party may only make use of and produce before the court the particular papers complained of by him, and is confined to the terms of the order of court allowing the inspection, and the court will not, after the inspection has taken place, allow an amendment of the petition, or the replying affidavit in order to rely upon the defective ballot papers discovered at the inspection."

In the event, therefore, this court declines the relief sought as to the constitutional validity of section 158 of the Electoral Act and the validity of the Electoral Act (Modification) Notice 2002, Statutory Instrument 41D of 2002 and dismisses the belated relief sought that all orders made, directions given and acts done in terms of the Electoral Act (Modification) Notice 2002, published in Statutory Instrument 41D on 5 March 2002 were void.

In the light of the above decision, it is unnecessary to consider the other two related issues noted earlier, for, even though the petitioner does mention in his founding affidavit his unhappiness with section 158 of the Electoral Act, the absence of any specific relief sought with regard to the impugned section makes it unnecessary for this court to inquire into the constitutionality of this section and the validity of the regulations made under it. In passing one cannot avoid noting that the failure of the petitioner in this challenge illustrates the inadvisability of combining an electoral with a constitutional challenge. At any rate even if section 158 was found to be unconstitutional, it would appear that in terms of subsections 5, 6 and 7 of section 24 of the Constitution unconstitutionality was intended to operate *ex nunc* and not *ex tunc*, or that an order of court may be made in such a way as to mediate the unconstitutionality.

Also affected by this ruling are the issues pertaining to the High Court's jurisdiction in matters relating to the Declaration of Rights. Specifically, cluster headings B, C, D and E, pages 10 to 93 of the petitioner's heads of argument fall away with this ruling.

INTERPRETATION OF SECTION 149 OF THE ELECTORAL ACT

The next issue is well set out in the petitioner's heads of argument and I will adopt the petitioner's formulation thereof. The issue pertains to the question whether, as the Respondents contend, an election challenge in our law requires a petitioner not merely to establish that, as a fact, the election was not conducted in accordance with the principles laid down in the Electoral Act, but, in addition, that the failure affected the results. The issue in the PTC Minute reads:

13. Should section 149 of the Electoral Act [Chapter 2:01] be properly read and interpreted as though the word "and" separating sub-paragraphs (a) and (b) read "or"?

In the current edition of the revised statutes, issued in terms of the Statute Law Compilation and Revision Act [*Chapter 1:03*], section 149 of the Electoral Act [*Chapter 2:01*] reads as follows:

"149 When non-compliance with this Act invalidates election

An election shall be set aside by the High Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the High Court that –

- (a) the election was not conducted in accordance with the principles laid down in this Act; and
- (b) such mistake or non-compliance did affect the result of the election." (emphasis added)

The current Electoral Act was enacted as the Electoral Act 1990, Act 7 of 1990. In its original form, the present section 149 appeared as section 142 and read as follows:

"142. An election shall be set aside by the High Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the High Court that –

- (a) the election was not conducted in accordance with the principles laid down in this Act; or
- (b) such mistake or non-compliance did affect the result of the election. (emphasis added)

The difference between the two versions is the preposition which separates sub-paragraphs (a) and (b). In making the revised edition of 1996, the word "or" was changed to "and". Section 53(1) of the Constitution provides:

"As soon as may be after an Act of Parliament has been assented to by the President, the Clerk of Parliament shall cause a fair copy of the Act, duly authenticated by the signature of the President and the public seal, to be enrolled on record in the office of the Registrar of the High Court and such copy shall be conclusive evidence of the provisions of such Act".

The copy of the Act signed by the President on 30 March 1990, which is deposited with the Registrar of the High Court, shows that as enacted section 142 of the Electoral Act used the preposition "or" between the two sub-paragraphs. However, although the Electoral Act 1990 has been amended on various occasions, Parliament has not effected any amendment to section 142, as it was originally numbered, nor to section 149, as it is now numbered. The change from the disjunctive "or" to the conjunctive "and" was made by the Law Reviser when the revised edition of the statutes was published in 1996. There is merit in the petitioner's submission that the Law Reviser had no power to make or allow such a fundamental change to the law, that power being reserved for the President and Parliament by section 51(4) of the Constitution.

The Law Reviser is appointed in terms of section 9 of the Statute Law Compilation and Revision Act [*Chapter 1:03*], as a functionary of the State and not as a delegated authority to make laws. His or her functions are set out in section 10 of the Act, and what emerges therefrom is that the power of the Law Reviser to "alter" statutes is strictly limited to matters of form and what may be termed "cosmetic" changes. He or she may not change the meaning and/or the substance of a statutory provision. See in particular paragraph (f) as read with paragraphs (h) and (l) of section 10(2).

The decision of GUBBAY J, as he then was, in *S v Mpofu* 1978 RLR 435 (G) is clear authority for the proposition that a court will read a statute in a revised edition as it should be read, and not merely as it is printed. Whilst in that case the revised edition had omitted aspects of the legislation as originally enacted, and the present matter involves a change of wording, the effect of the judgment is that the court will apply the true statute so as not to cause a manifest injustice to any person and to ensure that the true legislative provisions made by Parliament are applied. The learned judge held that the omissions were clearly *ultra vires* the powers of the compiler of the revised edition, and were due to erroneous reproduction of the schedule in question.

The passage by BECK JA in *Pio v Smith* 1986 (2) ZLR 120 (SC) at page 130 is very helpful in highlighting the history of the provision. It would appear, and here I am merely speculating, that the "error" made by the reviser stemmed from the change from a negative formulation pertaining to the setting aside of elections contained in earlier Acts to the positive formulation in the current Act. For example Section 156 of the Electoral Act (the forerunner of the current section 149) was formulated negatively, thus:

"156. No election shall be set aside by the High Court by reason of any mistake or non-compliance with the provisions of this Act if it appears to the High Court that the election was conducted in accordance with the principles laid down in this Act and that such mistake such mistake or non-compliance did not affect the results of the election." (emphasis added)

Therefore, it appears to me that the conjunctive "and" is appropriate in a negatively formulated and not in a positively formulated election invalidation clause. For a positive formulation, the disjunctive "or" is appropriate. In fact, the positively formulated provision with a conjunctive "and" is repetitive, and tautology is to be avoided in statutory interpretation.

To illustrate this, one needs to analyse the provision closely. Ironically, the meaning of the provision is clearer in the negative formulation. Elections must not be set aside by reason of (simple) mistakes or non-compliance with (ordinary provisions not amounting to principles) of the Act unless such mistakes or non-compliance did affect the results of the election. In other words non-compliance with the principles of the Act will nullify an election automatically without the need to inquire into its effect on the results whereas mistake or non-compliance with ("ordinary" or "non-principle") provisions of the Act will not.

Therefore, section 149 can then be rendered with better clarity with the help of italicized explanatory remarks in brackets, thus: -

"149 When non-compliance with this Act (*through mistake or non-compliance with provisions*) invalidates election

An election shall be set aside by the High Court by reason of any mistake or non-compliance with the ("*ordinary*" and "*principle*") provisions of this Act if, and only if, it appears to the High Court that –

- (a) the election was not conducted in accordance with the principles laid down in this Act; or
- (b) such mistake or non-compliance (*with "ordinary", "non principle" provisions*) did affect the result of the election."

It is clear, therefore, that if the conjunctive "and" was used between the two sub-paragraphs, non-compliance with the provisions of the Act would feature in both sub-paragraphs, thus making sub-paragraph (a) redundant. The logical interpretation of the section is therefore that the legislature perceived two types of non-compliance with the provisions of the Act; one involving principles enshrined in the Act and the other involving ordinary provisions, and to separate the two the preposition "or" and not "and" would be appropriate.

The Electoral Act does not set out specifically what should be regarded as "principles"; there is no part or section of the Act entitled "Principles" and no definition of "principles" in the definition section. However, principles of an election should not be difficult to identify. The Act itself has codified some of them, though negatively. For example, it is a principle of elections that they should be free of corrupt and illegal practices and the Act specifically provides not only for the nullification of elections tainted with corruption or illegality without the need to prove that the results were thereby affected (See section 124), but also for the criminal prosecution of perpetrators.

Thus, provisions which form the bedrock of the concept of democratic elections, of free, fair and unimpeded choice, like universal suffrage and the secrecy of the ballot will constitute principles, while administrative and certain procedural provisions can be regarded as ordinary provisions.

However, an aggrieved party will have to prove that the impugned election was not conducted in accordance with principles laid down in the Act. This may include the need to conduct a trial to prove that the violation did occur if this is disputed and that the non-compliance constituted a departure from the principles laid down in the Act. It does not follow that in every case of an alleged violation of a principle, there would be no need for a trial, as the petitioner seems to suggest in his heads of argument. All that the subparagraph (a) does is to relieve the petitioner of the need to prove that such departure did affect the result of the election. In fact, seeking to invalidate an election on the basis of non-compliance with principles laid down in the Act might entail arguing the violation of a combination of principles, which must be shown to have been contravened in the official

conduct of an election so that the actual finding of nullity is almost akin to a finding that the election was not free and fair.

In conclusion, therefore, I have come to the firm view, and hereby rule, that the substitution of "and" for "or" in section 149 of the Electoral Act [*Chapter 2:01*] by the Law Reviser was *ultra vires* section 10 of the Statute Law Compilation and Revision Act [*Chapter 1:03*], and accordingly declare that section 149 of the said Electoral Act is to be read as if the word "or" and not the word "and" occurs between subparagraphs (a) and subparagraph (b).

ALLEGED 'THIRD DAY' FAILURES

The issues under this sub-heading are stated as follows in PTC Minute:

- (16) Was the failure to have polling in all polling stations throughout the country on 11 March 2000 lawful and in accordance with the principles of the Electoral Law, and/or did this affect the manner in which the election was conducted and the outcome of the election to the extent that the election can be set aside?
- (18) Did the failure to have all the polling stations in Harare and Chitungwiza open for the requisite period and during the stipulated hours on Monday 11 March 2002 affect the outcome of the election to the extent that the result of the election can be set aside?

The following facts are common cause:

- (a) When the dates of the Presidential Election were initially promulgated, see the Electoral (Presidential Election) Notice 2002, SI 3A of 2002, a poll was to taken on Saturday 9 March 2002 and Sunday 10 March 2002.
- (b) Because of the slowness of the processing of voters, the petitioner made application to this Court in case no. HC 2800/2002 on 10 March 2002. Although the Court was inclined to grant an extension in respect of Harare and Chitungwiza, the Third Respondent insisted, for administrative reasons, an extension applying to the whole country and such an order was made.
- (c) In conformity with the order, the First Respondent issued the Electoral Act (Modification)(No.3) Notice 2002, SI 42E of 2002, on 11 March 2002. The notice authorized the Registrar-General to extend the poll for the election to 7 pm on Monday 11 March 2002.

- (d) Polling stations did not open at all in any other areas outside Harare and Chitungwiza on Monday 11 March 2002.

The above facts are what may be taken as common cause. The rest may fairly be open to dispute and the details may vary from different constituencies and polling stations. For example, the petitioner submits that polling stations in Harare and Chitungwiza only opened around noon and were closed precisely at 7 pm. The first respondent has submitted, with justification in my view, that these and related issues can only be determined at the trial of the petition with full-scale examination of the evidence. Purely based on the facts, which are common cause and without the benefit of additional evidence, which can only be led at the trial of this petition, I am inclined to take the view that there was substantial compliance with the order under very difficult circumstances where the order for extension had to be communicated to a myriad of administrators already implementing complex activities consequent upon the closure of polling. That the extension was implemented at all and carried out without compromising the security of the ballot is testimony to the poll administrators' commendable efforts to comply with the order. At any rate, the petitioner had an opportunity to have the alleged third day failures judicially reviewed in an application for a further extension, which was dismissed by the High Court, the very next day.

SIMULTANEOUS HOLDING OF PRESIDENTIAL AND LOCAL GOVT ELECTINS

The issues in this respect are presented thus:

- (a) Were the elections for the Mayor and Councilors of Harare and for the Mayor of Chitungwiza lawfully held at the same time as the election for President?
- (b) Was this in accordance with the principles of the Electoral Law, and/or did this materially affect the outcome of the election to the detriment of the Petitioner?

The points made in the submissions are that:

- 1) The simultaneous holding of Presidential and local government elections in the two municipalities led to delay in the voting and prevented many people from casting their vote. It was precisely in appreciation of this difficulty that

the third voting day was granted in these municipalities was granted by a High Court order and implemented by the respondents, although there is a difference of opinion as to the degree of compliance. This issue has already been address in the previous subheading on "Alleged Third Day Failures".

- 2) The ward and constituency boundaries did not coincide, thus leading to uncertainty as to where a person is entitled to vote. The magnitude and significance of this alleged breach of the electoral law is a matter that requires additional evidence to properly assess, but also appears to have been addressed in part by the extension of the voting period.
- 3) Local government politics and elections render them totally unsuited to be conducted at the same time as an election for the office of the President. The petitioner does not point to any legal provision allegedly violated by holding a two- or three-in-one election and in verbal presentations counsel for the first respondent pointed out that the petitioner had in fact won and accepted the results in the municipalities concerned. From the court's point of view, there is no legal dispute to resolve in this regard, with the parties merely trading political and policy preferences.

POSTAL VOTING AND REGISTRATON OF VOTERS

The issues posed in this regard are the following:

- (a) Did the failure to permit postal voting, other than for the Police, members of the Defence Forces and diplomats, constitute such non-compliance with the principles of the Electoral Law as to amount to the election not being conducted in accordance with the principles laid down in the Act, thereby resulting in the setting aside of the election?
- (b) Was it lawful to extend the period for the registration of voters retrospectively?
- (c) Was it lawful to compile a supplementary list of additional voters and were those persons entitled to vote.
- (d) Was it in accordance with the principles of the Electoral Law for the law and rules relating to the Presidential election to be changed after the nomination process was complete and did this materially affect the outcome of the election?

The first respondent has submitted that the laws that were enacted to govern the above matters, their timing and scope, must be seen in the light of the striking down on procedural grounds of the General Laws Amendment Act 2002, which then left many gaps

which had to be filled to provide the necessary legal framework for the conduct of the elections. And if those laws had not been nullified, the electoral authorities were perfectly entitled to use and rely on them for their actions. The petitioner has pointed out in detail how the use of the Electoral Act (Modification) Notice 2002, SI 41D of 2002 had impacted on postal voting and registration of voters. I have already ruled that the attack on the constitutionality of section 158 of the Electoral Act and the validity of SI 41D/2002 cannot be sustained in this petition. I am also of the view that when the Electoral Act penalizes non-compliance with "principles laid down in this Act", it is referring to extant laws, rather than ones that are otherwise desirable. Furthermore, these are some of clusters of issues, which require additional evidence to be given in order for them to be properly considered and this is due to be done in Phase 2 of this petition. Accordingly, I do not find these issues, individually or in combination, to be sufficient at this stage to nullify the election.

ALLEGED IRREGULARITIES RELATING TO POLLING STATIONS

The issues in this connection pertain to the alleged delay in the announcement of the number and location of polling stations (2nd respondent, who is no longer a party to these proceedings allegedly made the disclosure three days before polling commenced, although the petitioner does concede that section 51 of the Electoral Act does not specify a time period when the constituency registrar must establish polling stations) and that, according to the petitioner, "the number of polling stations in rural areas, where the First Respondent had the most support, was increased substantially, while those in urban areas, where the Petitioner had his support, were reduced substantially."

Apart from the observation made above in parenthesis that the 2nd respondent to whom most of the allegations in this cluster of sub-issues is directed is no longer a party to these proceedings, the allegations themselves require the leading of evidence for substantiation, the examination and cross-examination of the officials responsible for the impugned decisions in order to assess whether the decisions made were rational or reasonable and the extent to which they could have affected the outcome. According to the petitioner, the 2nd respondent acted unreasonably, arbitrarily and in bad faith and his conduct affected the outcome of the election, but in law these remain allegations until supportive evidence is produced and tested. The petitioner's stance of relying solely on analysis of the legislative provisions, some of which, as he rightly concede, are silent on the points in issue, is, in my considered view ill-advised. The same criticism can be leveled at the petitioner's attack on the registrar-general's discretionary determination of the number of polling stations. There could be many valid reasons why it could be justified to increase

the number of polling stations in rural areas as against urban areas: the sheer geographical size of rural constituencies would require a greater concentration of polling stations to reduce walking distances, rural communities have severely limited means of transportation and such amenities as lighting and roads that urbanites take for granted are luxuries to rural folk. If the petitioner wants to raise the matter to even the level of unconstitutional discrimination of urbanites in preference to rural folks, he must back up his assertions with appropriate factual and expert evidence and not expect the court to accept the allegations at face value.

CONCLUSION AND COSTS

I am in agreement with the petitioner that costs should follow the result and that the test of substantial success should apply, so that if a party succeeds substantially in respect of the relief sought on any one or more of the bases argued, costs should follow. The 4th respondent was unsuccessful in its bid to be removed as a party to these proceedings. However, the costs awarded against it in this regard are cancelled out by the costs it is entitled to for its substantial success on the issues of the composition of the ESC and assignment of employees, so that as between the petitioner and the 4th respondent no costs will be due from one party to the other.

The petitioner has been successful in the interpretation of section 149 that it urged, but the 1st respondent has been the more substantially successful party in resisting the relief sought by the petitioner on several bases and is therefore entitled to its costs.

Accordingly, I hereby record and confirm the dismissal of this application on preliminary issues with the petitioner to pay the 1st respondent's costs.

Finally, and for ease of reference I herein list the essential orders and declarations made in this application:

- 1) Dismiss with costs the Fourth Respondent's objection that it was not properly cited as a party to these proceedings.
- 2) Dismiss with costs the relief sought by the Petitioner as to the constitutional validity of section 158 of the *Electoral Act [Chapter 2:01]* and the *Electoral Act (Modification) Notice 2002, Statutory Instrument 41D of 2002* and the declaration sought that all orders made and directions given and acts done in terms of the *Electoral Act (Modification) Notice 2002, SI 41D* are void.
- 3) Dismiss with costs the preliminary points raised by the Petitioner in that none of them on its own nor all of them collectively suffice at this stage to invalidate the election."

- 4) Rule that the substitution of "and" for "or" in section 149 of the Electoral Act [*Chapter 2:01*] by the Law Reviser was *ultra vires* section 10 of the Statute Law Compilation and Revision Act [*Chapter 1:03*], and accordingly declare that section 149 of the said Electoral Act is to be read as if the word "or" and not the word "and" occurs between subparagraphs (a) and subparagraph (b).

Gill, Godlonton & Gerrans, the applicant's legal practitioners

Hussein Ranchod & Co, the 1st respondent's legal practitioners

Civil Division of the Attorney-General's Office, the 2nd respondent's legal practitioners