IN THE HIGH COURT OF ZIMBABWE

HELD AT HARARE

Case No. HC3616/2002

In the matter between:

MORGAN TSVANGIRAI Applicant

and

ROBERT GABRIEL MUGABE First Respondent

REGISTRAR-GENERAL OF ELECTIONS Second Respondent

THE MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS Third Respondent

THE ELECTORAL SUPERVISORY COMMISSION Fourth Respondent

THE PETITIONER'S HEADS OF ARGUMENT

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I N D E X

(iv) **Background**

This is an election petition relating to the Presidential Election conducted in Zimbabwe from 9 to 11 March 2002. It was instituted on 12 April 2002. Election petitions are, by constitutional convention, considered to be inherently urgent; their central contention is that an election result has been irregularly obtained, which has serious and obvious implications. The Electoral Act, in imposing a stringent time limit on petitioners, itself emphasises this.

The petition in this matter elicited no speedy response. Affidavits were ultimately filed by the Respondents only on 7 June 2002. Attempts by the Petitioner to procure from the Registrar of the High Court an expeditious hearing failed. It was ultimately necessary to bring an application against the Registrar of the High Court - for which no precedent is known - for a *mandamus* to compel him to set the matter down for hearing. Hlatshwayo J granted such an order on 4 July 2003.

The application for a *mandamus*, it may be noted, was opposed. Unusually the Registrar of the High Court entered the lists, instead of simply abiding the result. Unusually, too, he made complete common cause with the Respondents (to the extent of not even being separately represented),

instead of adopting the stance of neutrality which his role as chief administrative functionary of the court in which the *lis* was pending might be thought to dictate.

Unusually, too, all the Respondents vigorously opposed the Petitioner's attempt to ensure that the election petition was heard at least before the second anniversary of the Presidential election. The petition, as will be shown below, impugns in respect after respect the integrity of the election. It asserts, in specified detail, that its process was rigged and its outcome stolen.

These contentions - supported by witnesses, facts the Respondents have not been able to dispute and the evidence of an international independent election expert, Professor Jorgen Elklit (consultant in elections in Lesotho, South Africa and Tanzania) - call out for a speedy and confident answer: if one exists. It might be thought that the Respondents, reposing confidence both in the courts of Zimbabwe and the strength of their case, would have moved swiftly to refute the Petitioner's case. Instead they have taken refuge in delay and now, forced at last to a hearing, in technical evasion.

The proceedings, by direction of the Judge President, have been divided into two hearings. The first, scheduled to be heard from 3 to 7 November 2003, relates to matters which entail legal argument only, or as regards which (it is evident from the papers) the material facts are not in issue. It will demonstrated below that a

number of these issues, if resolved in the Petitioner's favour, each and their own establish that the Presidential Election, 2002 was held in flagrant breach of the law, and that - on each of these individual answers - is vitiated.

(v) **The issues for the November hearing**

The minute of the pre-trial meeting at which the issues to be dealt with were delineated is attached for convenience as a schedule to these heads. The issues directed by the Judge President to be dealt with at the November hearing appear from this, and are dealt with in turn in these heads of argument.

(vi) **Executive summary of the Petitioner's argument**

These heads of argument are unavoidably long and, in part, complex. It is accordingly appropriate at the outset to state most simply their scheme, and to summarise their thrust.

We group the issues in specified clusters, each under a separate main section heading, and each dealing with a particular focus.

Thus the first cluster relates to the **Fourth Respondent**, commencing with an endeavour by the Respondents at this late stage to remove the Fourth Respondent from the matter. (How this would assist them, is not apparent: even if the Fourth Respondent were not a party, the Petitioner's contentions regarding the fatal consequences for the election of its functioning would stand). We proceed to show that in several key respects the Fourth Respondent was not validly constituted; the result is (on this basis alone) to vitiate the election.

The second cluster relates again to certain defensive **procedural contentions** of the Respondents, directed this time at seeking to deflect an attack by the Petitioner on the constitutionality of section 158 of the Electoral Act.

The third entails, remarkably, a contention by the Respondents - thus including the President and Minister of Justice of the country - that the **High Court has no jurisdiction to hear a case** which invokes the Constitution's Declaration of Rights. The contention is evidently that this has been entrusted to the Supreme Court - exclusively.

The fourth group of issues is central to the Petitioner's legal attack. It is that **section 158 of the Electoral Act** (introduced in 1990), in purporting to give the power to the President to amend Zimbabwe's electoral law by regulation, constitutes a dispensing power, invalid for four centuries; infringes the separation

of powers entrenched in the Constitution; vests in the President a legislative power without any qualifications of policy or criteria for its use; and makes him (as framer of the rules for the election in which he himself was a contender) a judge in his own cause.

Given the extensive use by the President (especially in the last days and hours preceding the election) of this power in framing subordinate legislative instruments in the form of Notices and Regulations, and the conduct of the election in terms of these, the effect of the declared unconstitutionality of section 158 is the nullifying of the election *ab initio.*

The fifth concerns detailed respects in which the Petitioner contends that the **Election Regulations and Notices** were on other grounds invalid.

A sixth issue is whether (as the Petitioner contends) the correct interpretation of **section 149 of the Electoral Act** is that either a demonstrable failure to conduct an election in accordance with the principles laid down in the Act or a mistake or failure demonstrably affecting the result suffices for invalidity of the result; or whether (as the Respondents contend) **both** have to be shown before an election result is nullified. The Petitioner is able to show that Parliament adopted the Act in those terms, and that it was the Law Reviser who - whether by error or otherwise - has purported to change the text of the provision by substituting “and”

for the conjunction actually used by Parliament, “or”.

The seventh issue concerns failures related to the extension of the election for a **third day** (11 March 2002); the eighth to the unlawfulness of holding **local elections** in the key urban constituencies of Harare and Chitungizwa (using the same polling stations, and although constituencies and local wards did not coincide); the ninth **the failure to permit postal voting** other than for the security forces and diplomats; the tenth the **unlawful retrospective extension of the period for registration** of voters.

Further issues include: the fundamental breach of electoral fairness (according to leading authority) of **changing the rules** for the conduct of the election in the last few days; and **irregularities pertaining to polling stations** in several compelling respects.

In summary, the Petitioner submits that the Pesident’s attempts to lay down by purported legislative measures the framework for the election in which he himself was a candidate doomed it from the outset; that the failure lawfully to constitute the Fourth Respondent as the exclusive, independent election administrator was equally fatal; that the Regulations and Notices were in any event in several other respects fatally flawed; that the conduct of the election, even on the facts which are not in issue, demonstrates their non-compliance with the requirement (on the

correct interpretation of section 149) of conducting the elections in accordance with the principles laid down in the Act; that in any event, on the approach laid down both by this court on several occasions, the test for an affected result does not require the Petitioner to show what the exact numerical result would otherwise have been, or even that he would otherwise have won (although that inference arises in the present case). The test is that the objection should not be trivial: it must "***be something substantial, something calculated really to affect the result of the election***" (per Mfalila J in **Pio v Smith 1986 (3) SA 145 (Z) at 171;** approved and applied by Garwe J (as he then was) in **Matamisa v Chiyangwa (Chinhoyi Election Petition) 2001 (1) ZLR 334 (HC); see too Dongo v Mwashita 1995 (2) ZCR 228 (HC) at 240)**.

On any one of these bases it is accordingly submitted that the Presidential Election, 2002 was invalid. It is so to be declared, on these legal and factual grounds; the second phase of the Petition (relating to the detailed factual issues advanced by the Petitioner, concerning systematic killings, assault, intimidation and other abuses of authority) in fact is not required.

So viewed, the invalidity of the election is established at this first phase of the hearing in one or more of the following four main respects: the Fourth Respondent - the independent and exclusive election administrator contemplated by the Constitution - was not validly constituted. Without it no lawful election could be

held. Secondly, the First Respondent became a legislator plenipotentiary - and exercised these powers to his own advantage in an election in which he was the incumbent candidate. Thirdly, the election was conducted in multiple material respects (even on the undisputed facts) in respects which are in breach of the principles laid down in the Electoral Act; this alone, without regard for the effect, vitiates the election. But in any event, applying the test for material effect laid down by this court itself, it is clear that the result was affected in the requisite sense.

We turn now to consider each of the clusters of issues, in the same sequence. First, however, we set out a chronology of material events.

PRESIDENTIAL ELECTION 2002

10 January 2002	Electoral (Presidential) Notice 2002 (SI3A/2002) published setting the following dates**:** 31 January 2002 - sitting of nomination court 9 and 19 March 2002 - dates on which polling to take place 10 January 2002 - date on which voters rolls closed
10 January 2002	Initial date for closure for voters rolls
17 January 2002	Electoral (Amendment) Regulations 2002 (No. 10) (SI8A of 2002) published
23 January 2002	Electoral (Modification) (Postponement of Harare City Council Elections) Notice 2002 (SI 13A/2002) published
27 January 2002	Second closing date for voters rolls
29 January 2002	Electoral (Presidential Election) (No. 2) Notice 2002 (SI 14B of 2002) published closing the voters rolls as at 27 January 2002
31 January 2002	Nomination court sat
1 February 2002	General Notice 55B of 2002 published in relation to the Political Parties (Finance) Act
4 February 2002	General Notice 55D of 2002 published in relation to the postponement of Nomination of Harare Mayoral and City Council Elections
4 February 2002	General Laws Amendment Act 2002 (No. 2 of 2002) promulgated and came into force (General Notice 55E of 2002)
6 February 2002	Presidential Election: 9 - 10 March 2002: Nomination Court Results published in General Notice 55F of 2002

6 February 2002	Electoral (Amendment) Regulations 2002 (No. 11) (SI 17A of 2002) published

22 February 2002	Electoral (Amendment) Regulations 2002 (No. 12) (SI34 of 2002) published
22 February 2002	Urban Councils (Election) (Amendment) Regulations 2002, (No. 3) (SI35 of 2002) published
27 February 2002	Supreme Court declares the General Laws Amendment Act 2002 to be invalid
1 March 2002	Electoral (Presidential Election) (No. 3) Notice 2002 (SI 41A of 2002) published closing the voters rolls as at 3 March 2002
1 March 2002	Electoral (Amendment) Regulations 2002 (No. 13) (SI41B of 2002) published
3 March 2002	Third closing date for voters rolls
5 March 2002	Public Holidays and Prohibition of Business (Declaration of Public Holidays) Notice 2002 (SI 41C of 2002) published declaring 9 March 2002 to be a public holiday
5 March 2002	Electoral Act (Modification) Notice 2002 (SI 41D of 2002) published
5 March 2002	Urban Councils (Election) (Amendment) Regulations 2002 (No. 4) (SI 41E of 2002) published
5 March 2002	Electoral (Amendment) Regulations 2002 (No. 14) (SI 41F of 2002) published
8 March 2002	Electoral (Amendment) Regulations 2002 (No. 15) SI42A of 2002) published
8 March 2002	Electoral (Modification) (No. 2) Notice 2002 (SI 42B of 2002) published

8 March 2002	Electoral (Electoral Code for Conduct for Political Parties and Candidates and Multiparty Liaison Committee) Regulations 2002 (SI 42C of 2002) published
8 March 2002	Hearing before Supreme Court in matter between Tsvangirai v Registrar General of Elections and Others case no. SC 76/2002. Supreme Court declines to make an immediate ruling, and reserves its judgment.
9 March 2002	First day of polling
10 March 2002	Second day of polling
10 March 2002	Urgent application heard by Hlatshwayo J in Case No. HC 2800/02 to extend voting. Order made extending voting to include 11 March 2002, see judgment HH 36-2002
11 March 2002	Electoral (Presidential Election) (No. 4) Notice 2002 (SI 42D of 2002) published extending voting to 11 March 2002
11 March 2002	Electoral Act (Modification) (No. 3) Notice 2002 (SI 42E of 2002) published
11 March 2002	Third day of polling
13 March 2002	Results of presidential election announced
19 March 2002	Election of President notice (GN 116E of 2002) published
19 March 2002	Harare councillors and mayoral results published in **The Herald** newspaper
19 March 2002	Chitungwiza mayoral election results published in **The Herald** newspaper
28 March 2002	Election of President notice (GN 118B of 2002) published
4 April 2002	After almost a month, Supreme Court hands down judgment SC20/02 in case no. SC76/2002
12 April 2002	Petition lodged

A. ISSUES RELATING TO THE FOURTH RESPONDENT

Introduction

1. Three of the listed issues concern the Fourth Respondent. The first two relate to a belated endeavour to remove the Fourth Respondent as a party. The third, irrespective of the result of the first two, is one of the key issues in the case. The issues are:

(1) Should the Fourth Respondent be a party to these proceedings ?

(2) If not, what scale of costs should follow the dismissal of the Petition as against the Fourth Respondent ?

(15) Was the composition of the Fourth Respondent at the time of the elections such that it did not comply with the Constitution, and if so, does that in any way bear upon the validity of the election ?

For convenience, we deal with them together, at the outset, and in the above order.

(1) A party ?

2. Section 102 of the Electoral Act unsurprisingly does not attempt to stipulate who must be cited as a party in election petition proceedings. The common law rule accordingly applies.

3. 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 52-3; 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 will be affected by the order the Court is asked to make.

4. The Fourth Respondent plainly is such a person in this case. In the first place, this is simply so because this Court has already so held (**Mumbamarwo v Kasukuwere (Mount Darwin South Election Petition HH8/2002 at p 12**).

5. The Fourth Respondent is a creature of the Constitution of Zimbabwe. Section 61, as amended provides as follows:

"***61*** ***<u>Electoral Supervisory Commission</u>***

(1) There shall be an Electoral Supervisory Commission which shall consist of -

(a) chairman and two other members appointed by the President after consultation with the Judicial Service Commission; and

(b) two other members appointed by the President after consultation with the Speaker.

(2) A person shall not be eligible for appointment if

(a) he is a member of Parliament or any local authority; or

(b) he is a public officer.

(3) The functions of the Electoral Supervisory Commission shall be -

(a) to supervise the registration of voters and the conduct of elections to Parliament and to the office of President; and

(b) subject to any Act of Parliament, to supervise the registration of voters and the conduct of elections to the governing body of any local authority; and

(c) to consider any proposed Bill or proposed statutory instrument which may be referred to it and which relates to the registration of voters or to any election referred to in paragraph (a) or (b).

(4) [Repealed]

(5) The Electoral Supervisory Commission may make such reports to the President concerning the matters under its supervision or any draft Bill or statutory instrument that is referred to it as it thinks fit and, if the Commission so requests in any such report other than a report on a draft Bill or statutory instrument, the Minister shall ensure that the report concerned is laid before Parliament.

> ***(6)*** ***<u>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 of any person or authority.</u>***
>
> ***(7)*** ***An Act of Parliament may make provision for the powers and functions of the Electoral Supervisory Commission and, without prejudice to the generality of the foregoing, may make provision for the disqualifications, tenure of office and remuneration of the members thereof.***
>
> ***(8)*** ***Where the members of the Electoral Supervisory Commission are not unanimous in regard to any matter, the view of the majority shall prevail.***
>
> ***(9)*** ***The salary paid to a member of the Electoral Supervisory Commission shall not be reduced during his tenure of office***" (emphasis added).

6. It is perfectly obvious from the Constitution that the Electoral Supervisory Commission is an integral part of the election process. Not only is it specifically allotted the primary functions of registering voters and conducting the elections by the Constitution itself (section 61 (3)(c)), but it is the <u>only</u> body which may carry out these functions (section 61(6)). In any case in which the legality of the registration of voters and/or the conduct of elections are placed in issue, the Fourth Respondent patently has a direct and substantial interest and must be joined. The contrary contention is either frivolous or a transparently contrived attempt to remove the Fourth Respondent from the case precisely because the respondents have no substantive answer to the third aspect dealt with below (the invalid composition of the Fourth Respondent).

7. This role is further expanded in the present case when regard is had to the fact that the Commission was given power to appoint, accredit and deploy monitors, see section 15B of the Electoral Regulations 1992, SI 58/1992, as amened by SI 41B/2002. It was directed by the Minister to establish the Observers' Accreditation Committee, see section 15C(2) of those Regulations. Clearly the Commission did not protest this direction from the Minister in its role and functions. It did not protest the direction that its Chairman serve with two appointee of the Minister of Justice and two appointees of the Minister of Foreign Affairs on that committee. At the time the Electoral Act made no provision for the Commission to deal with monitors and observers - other than through the invalid amendments set out in the General Laws Amendment Act 2002, as to which see below.

(2) <u>Costs</u> ?

8. So far as costs are concerned, if the Petitioner is found to have been wrong to join the Commission, then there is no basis to award costs other than on the ordinary scale. At worst the Petitioner acted out of an abundance of caution and not in disregard of the law; let alone has the Petitioner been guilty of any misconduct justifying an award of costs on the higher scale.

(3) Was the Fourth Respondent invalidly constituted ?

9. The First Respondent directed that the staff of the Commission would be assigned to the Commission by a Minister (see section 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 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".***

10. Assignment no longer depended on a request from the Commission, and no longer came from the Public Service. These two changes purportedly effected by the Notice are in material conflict with the Act. These changes came but four days before polling started. Both changes undermine the constitutionally entrenched independence of the Commission. It should be for the Commission to determine whether it seeks the assignment. Those assigned must be members of the Public Service; in terms of the notice, they need not be.

11. Equally importantly, it is common cause that at the time of the presidential election in March 2002, the Commission only had four members, whose appointments had not been published in the Government Gazette. The Constitution required five members, but the First Respondent failed to appoint a fifth member. It is not known whether the missing member was one about whom the President had to consult the Judicial Service Commission or had to consult the Speaker (see section 61(1)(a) and (b) of the Constitution). No explanation has been proffered by the First Respondent as to why he did not fulfil his obligations in terms of the Constitution. He even refuses to disclose the date on which he appointed the members of the Electoral Supervisory Commission (see the Further Particulars for Trial filed on behalf of the First Respondent).

12. Although section 114(3b) of the Constitution allows for a quorum of one-half of the membership of the Electoral Supervisory Commission, section 12 of the Electoral Act [Chapter 2:01] envisages the Electoral Supervisory Commission acting as a single body. It cannot act as a single body when it is missing a member. That member might well influence the decisions of the Electoral Supervisory Commission, compare **John v Rees & Others [1969] 2 All ER 274 (ChD) at 309E-G**. A quorum (for attendance at meetings) is not to be confused with the question whether a body has been duly constituted, as required by law.

13. Where appointments of a board are not made in terms of the legislation, the resultant board is invalidly constituted, compare **Marawa v Minister of Transport & Ors 2000 (2) ZLR 225 (SC) at 229-232**.

14. Thus in no less than four material respects the explicit legal requirements for the valid constitution of the Fourth Respondent were not met. Any one of these failures is dispositive. If the Fourth Respondent was not lawfully constituted, neither the registration of voters for the 2002 Presidential election nor the election itself was validly conducted. Without the independent body in place, properly constituted and compliant with the four requirements just outlined, the election did not take place in accordance with the most basic requirements of the Constitution. Nullity is the consequence (see the discussion in relation to issue 7 below). In any event, the appointment of the Electoral Supervisory Commission is required to be notified in the Government Gazette, see section 31(2) of the Interpretation Act [Chapter 1:01], as has been done in the past. It is common cause that no such notification has been given, and the President cannot secretly appoint persons to a public commission.

15. It is, without question, for this reason that the Respondents seek - at this significantly late stage - to object to the citation of the Fourth Respondent as a party, in an endeavour, by removing the Fourth Respondent, to

eliminate the issue.

16. That endeavour, we submit, is inept. Even if the Fourth Respondent were (despite the argument relating to the first issue) to be removed as a party, the Petitioner's legal and factual contentions relating to it stand on the papers. These, as we have shown, conclusively establish that the Fourth Respondent was not constituted in accordance with section 61 of the Constitution and the Electoral Act.

17. If the Commission was improperly constituted at the time of the presidential election, then the constitutional requirement for a duly appointed Electoral Supervisory Commission has not been met. This would clearly constitute a situation where the election was not conducted in accordance with the principles laid down in this Act, see section 149(a) of the Electoral Act. The requirements of the Constitution have been incorporated into the Electoral Act by necessary implication as being constitutional requirements.

18. Therefore the failure of the First Respondent to appoint a properly constituted Electoral Supervisory Commission invalidates the whole electoral process. (See also the dealing with section 3 of SI 4D/2002 under section E below).

B. PRELIMINARY PROCEDURAL POINTS

19. The Respondents raise three preliminary procedural points. These are technical and aim to prevent in particular a determination in these proceedings of one of the Petitioner's most fundamental attacks: the unconstitutionality of the purported amendment by the First Respondent of section 158 of the Electoral Act.

20. These issues are:

(3) Should the challenge to the constitutionality of section 158 of the Electoral Act [Chapter 2:01] be heard together with the Petition ?

(5) Does the Petitioner have *locus standi* to challenge the constitutionality of section 158 of the Electoral Act ?

(14) Can the declaration sought on electoral legislation be properly brought together with an election petition ?

21. Logically the first of these issues to be dealt with is *locus standi*

Approach to *locus standi*

22. In **United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors 1997 (2) ZLR 254 (SC),** it was common cause that the power conferred on the President by section 158(2)(c) of the Electoral Act to make Statutory Instruments "***validating anything done in connection with, arising out of or resulting from any election in contravention of any provision of this Act***", had not yet been exercised. The court said at 258B:

"***The applicant must be able to show a likelihood of itself being affected by the law impugned before it can invoke a constitutional right to invalidate that law".***

23. Because no Statutory Instrument had been made, the applicant could not properly allege, in terms of section 24(1) of the Constitution, that the Declaration of Rights was "***....likely to be contravened in relation to him***". The Supreme Court said that the phrase "***likely to be contravened***"

"***.....does not embrace any fanciful or remote prospect of the Declaration of Rights being contravened. Nor does it refer to the Declaration of Rights being liable to contravention.... Rather it means a 'reasonable probability' of such a contravention occurring... There must exist a realistic or appreciable probability - and not merely a reasonable possibility - for there to be the requisite basis to invoke a constitutional challenge" (*at 259G-260A).**

24. On the facts before it in **United Parties**, the court concluded that the applicant's concern was "***... predicated on surmise or conjecture***" (**at 260E**).

The Supreme Court said, in concluding its discussion of this issue:

"***Although not restricted in its ambit to a claimant, voter or any other specified person, the contention that [section 158(2)(c)] offends against section 20(1) of the Constitution is quite untenable. There is extant no Statutory Instrument made by the President providing for the validation of anything done in relation to an election in contravention of the Act or any other law. Until such a Statutory Instrument is made, the issue of its constitutionality does not arise. It is prematurely raised. A law that does not exist cannot be impugned. The power to make the law must be implemented before it, or anything done under it, becomes open to challenge***" (**at 260F-G**).

25. Clearly, the situation in **United Parties** was quite different from that in the present matter, which is not "***predicated on surmise or conjecture"***. The position now is that the President has exercised his power to make Statutory Instruments under section 158 of the Electoral Act. Section 4 of the Electoral Act (Modification) Notice, 2002, SI 41D/2002 deprived a vast number of persons, both inside and outside of Zimbabwe, of their right to a postal vote. The supplementary voters roll established by section 5 of SI 41D/2002 facilitated voting by a large number of voters who, it will be submitted, were not lawfully entitled to vote, having "registered" after the lawful date for the closure of the roll had passed. At the same time, the effect of the "disqualification list" established by section 6 was to prevent a large number of lawfully registered voters from voting. These various factors might well have affected the final outcome of the Presidential Election, a matter which is at the very heart of the election petition.

26. In **United Parties** the Supreme Court said:

> "***No evidence has been offered that at any past election anyone has been impeded in the enjoyment of his or her rights under [the impugned] provisions [of the Electoral Act]"*** **(at 259F;228H)**.

27. Such a remark could clearly not be made about the present case. The enactment of SI 41D/2002 has clearly contravened the Petitioner's right to the protection of law contained in section 18(1) of the Constitution. It is submitted that had such a Statutory Instrument been enacted in the circumstances of the **United Parties** case, the court would have entertained the application, since it would have fallen within the doctrine of *locus standi* enunciated in that decision. This would have been particularly so, had the issue of the contravention of section 18 (1) of the Constitution been raised.

What is the proper test for *locus standi* in the present proceedings ?

Rights

The **Tsvangirai** decision, like **United Parties**, was a constitutional application made directly to the Supreme Court in terms of section 24(1) of the Constitution. That provision states:

"***If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress***".

The Petitioner was denied access to inspect the supplementary voters roll purportedly established by section 5 of SI 41D/2002. This was a contravention of section 18(1) of the Electoral Act which stipulates that "***[t]he voters roll for every constituency shall be open to inspection by the public, free of charge, at the office of the constituency registrar during office hours"***.

28. It is submitted that the facts of this case are also clearly distinguishable from the facts in **Tsvangerai v Registrar-General of Elections SC 20/__.** Firstly that case concerned a claim for constitutional relief under section 24(1) of the Constitution made directly to the Supreme Court. This case, in contrast, does not involve a direct claim invoking section 24, but an election petition challenging - on several grounds - the legality of an election in which the Petitioner was himself a candidate. Secondly, the case turned on an analysis by Chidyausiku CJ of the particular perceived insufficiency of factual allegations in the founding affidavits. In this case, explicit factual allegations, the absence of which were found to be determinative in **Tsvangerai supra**) have been made, precisely to forestall

a similar resort to technicality in denying access to the courts.

29. The "ordinary criteria" for establishing *locus standi* were well articulated by Sandura JA in **Stevenson v Minister of Local Government and National Housing & Ors SC 38/02** (not yet reported) at page 2 of the cyclostyled judgement where he said:

"***.....what [a party] has to show in order to satisfy [the locus standi] requirement is that he has an interest or special reason which entitles him to bring such proceedings***".

He added:

"***In many cases the requisite interest or special reason entitling a party to bring legal proceedings has been described as 'a real and substantial interest' or as 'a direct and substantial interest.'"***

30. As examples, the learned Judge of Appeal cited (at pages 2-3 of the cyclostyled judgment)**United Watch and Diamond Co (Pvt) Ltd & Ors v Disa Hotels Ltd & Anor 1972 (4) SA 409 (C) at 415; PE Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pvt) Ltd 1980 (4) SA 801 (T) at 804B; Zimbabwe Teachers Association & Ors v Minster of Education and Culture 1990 (2) ZLR 48 (HC); and Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A).**

31. Sandura JA said at page 4 of the cyclostyled judgment:

"**As a resident of Harare and as a registered voter, the appellant had an interest in the issue of whether the affairs of the City of Harare should be run by a Commission appointed by the Minister or by an elected mayor and an elected council".**

32. The same reasoning must apply in respect of *locus standi* in the present matter. Presidential elections are national elections. As a candidate in the election the Petitioner, who is also a registered voter, citizen and resident of Zimbabwe, has an interest in the issue of whether the presidential election was unfair and unlawful because section 158 of the Electoral Act is unconstitutional, and because SI 41D/2002, purportedly enacted under section 158, is accordingly invalid. It is submitted that the Supreme Court's decision in **Stevenson** is binding in respect of all questions pertaining to *locus standi*, except where the issue of *locus standi* arises in terms of a direct constitutional application to the Supreme Court under section 24(1) of the Constitution.

33. The question of what constitutes "sufficient interest" for the purpose of establishing *locus standi* has been addressed by a number of academic writers. Woolf, Jowell and Le Sueur, the authors of **De Smith, Woolf and Jowell's Principles of Judicial Review (1999)** state at 40, paragraph 2-020 that "'***sufficient interest' should be regarded as being an extremely flexible test of standing. The more important the issue and the stronger the merits of the application, the more ready will the courts be to grant permission notwithstanding the limited personal involvement of the applicant".***

34. **Leyland and Woods** in **Administrative Law** (**3rd edition, 1999)** note **at 370** that ***"...the more serious the potential illegality the more likely it is that the interest is going to be sufficient. Simply put, it will often be desirable that serious cases of ultra vires action are regarded as open to challenge***".

35. A similar point is made by **Wade and Forsyth Administrative Law (Eighth edition, 2000) at 601**:

"***However remote the applicant's interest, even if he is merely one taxpayer objecting to the assessment of another, he may still succeed if he shows a clear case of default or abuse. The law will now focus upon public policy rather than private interest".***

At 682 the same authors note that "***...the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved***".

These last words, which also appear in the 7th edition of Wade and Forsyth, have been expressly approved of in **R v Secretary of State for Foreign and Commonwealth Affairs; ex parte Word Development Movement Ltd [1995] 1 WLR 386 (HL) at 395**. **Wade and Forsyth supra** also refer with approval (**at 681**) to the decision of the House of Lords in **R v Inland Revenue Commissioners: ex parte National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 (HL)**, where Lord Diplock quoted the words of Lord Denning in the same case (in the Court of Appeal):

"***I regard it as a matter of high constitutional principle that if there is good ground for supposing that a Government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the Court of Law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate***".

In the present election it is equally clear that an unlawful election result will "injure" millions of Zimbabwean voters, in addition to the Petitioner himself.

36. *Locus standi* in the context of the South African Bill of Rights was considered by that country's Constitutional Court in **Ferreira v Levin NO & Ors: Vryenhoek & Ors v Powell NO & Ors 1996 (1) SA 984 (CC)**. **At 1082 G-H (paragraph 165)** Chaskalson P said:

"***I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled***".

37. In **Zimbabwe Teachers Association & Ors v Minister of Education 1990 (2) ZLR 48 (HC)** Ebrahim J **at 56-57** referred with approval to **United Watch and Diamond Co (Pvt) Ltd & Ors (supra)** where Corbett J said **at 415H**: ***"...a direct and substantial interest is a legal interest in the subject matter of the action".***

38. For the reasons set out above, it is submitted that the Petitioner clearly has a legal interest in section 158 of the Electoral Act, and the Statutory Instruments purportedly enacted by the President under it. Moreover, it is also clear that an interest is not the same thing as a right. Thus, even if the Petitioner's rights are not engaged, he will still have *locus standi*, provided only that one of his interests is affected.

39. The Petitioner's interests are affected by the Statutory instruments purportedly enacted by the President under section 158. Moreover, an interest is not the same thing as a right. Thus, while a candidate in a presidential election may not himself have a right to a postal vote, he clearly has an interest in the law and procedure pertaining to postal voting, since it affects his prospects in the election. As has been seen in the authorities referred to above, where an issue of public importance has arisen, the interest need only be a slight one in order to establish *locus standi*. Finally, as will be dealt with further later in these heads, where a matter is of public interest - which is the case in the present election petition - *locus standi* will exist even if the petitioner does not himself have an interest in the matter.

***Locus standi* - and a remedy - on the basis of the Petitioner's legitimate expectations**

40. "Law" is defined in section 113(1) of the Constitution as including "***any unwritten law in force in Zimbabwe*"**. Therefore, the right to protection of law contained in section 18(1) of the Constitution must include, amongst other things, legitimate expectations. The legitimate expectations doctrine has now been accepted by our courts, in a number of decisions, as part of the law of Zimbabwe. See, for example, cases such as: **Health Professions Council v McGown 1994 (2) ZLR 329 (SC); Taylor v Minister of Higher Education & Anor 1996 (2) ZLR 772 (SC)**.

41. A number of decisions from foreign jurisdictions relating to the legitimate expectations doctrine have been approved of and followed by our courts. **See for example, Administrator, Transvaal and Others v Traub & Ors 1989 (4) SA 731 (A); Council of Civil Service Unions & Ors v Minister for the Civil Service [1984] 3 ALL ER 935 (HL)**. In **Traub** Corbett CJ drew attention to some of the circumstances under which a legitimate expectation will come into being. He referred with approval **at 756I** to the speech of Lord Fraser in **CCSU at 943j - 944a** where the latter said:

"***But even where a person claiming some benefit or privilege has no legal right to it..... he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation..... Legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which***

the claimant can reasonably expect to continue...*".*

42. Wade and Forsyth, op cit 498 state that "an expectation may....be a procedural expectation where a particular procedure Y has been promised. [In such cases]..... procedural expectations are protected simply by requiring the promised procedure be followed". Thus, in Traub the respondents did not have, in the circumstances, a right to be promoted. However, they had a legitimate expectation, that they would be promoted, based on past practice, and/or a legitimate expectation that if there was a departure from past practice they would be given a fair hearing before the decision not to promote them was taken. The decision not to promote them was held to be invalid in that it was made without the correct procedure - the holding of a hearing - having been followed.

43. Similarly, in the **Taylor** decision the Supreme Court considered the meaning of section 11(2) of the Public Service (General) Regulations which states that the head of a ministry may transfer a person at any time without his consent. The Supreme Court said at **777D** that:

"***....the phrase 'without his consent' does not mean 'without a hearing'. The two concepts are entirely different. Under the first the person does not himself have to approve of the transfer before it is made effective; the right to transfer him without his consent arises under the terms of the contract of employment as set out in the regulations. Per contra, the right to a 'hearing' is a matter of procedural justice"***.

44. The court found that, in the circumstances of the case, the appellant had a legitimate expectation that he would be afforded a hearing before being transferred. Because the Minster had not afforded the appellant a hearing - a procedural requirement in the circumstances - the decision to transfer him was set aside. In other words, the decision to make the transfer was invalid because the power to make the transfer had not been exercised in a procedurally correct manner.

45. In **Traub**, Corbett CJ said at **756G**, after referring with approval to a number of English cases:

"***'Legitimate expectations' are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis"***.

He added at **758D**:

"***...the legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken***."

At **758G** he said:

"***A frequently recurring theme in.... cases concerning legitimate expectation is the duty on the part of the decision-maker to 'act fairly***'".

He made it clear **at 758H** that the courts are "***.... concerned with the manner in which ....decisions are taken*****". See too <u>Muringi v Air Zimbabwe Corporation</u> 1997 (2) ZLR 488 (SC) at 490.**

46. The relevance of all of this for the present matter is that if a promise or undertaking or regular practice can give rise to a legitimate expectation, how much more will this be the case when the procedure that is the subject of the expectation is one that is mandated by the Constitution. It is submitted that the Petitioner legitimately expected that the provisions in Part XV of the Electoral Act relating to postal voting would not be changed otherwise than by an Act of Parliament. This expectation was reasonable and legitimate because section 28(4) of the Constitution stipulates that presidential elections must be conducted in terms of the Electoral Law, which must be an Act of Parliament according to section 113(1) of the Constitution. Moreover, the Petitioner also legitimately expected to benefit from votes cast by some, or most, postal voters because, prior to the enactment of SI 41D/2002, Part XV of the Electoral Act entitled a wide range of persons to claim postal votes. The effect of SI 41D/2002 was to limit postal voting to categories of persons widely seen as likely to support the incumbent.

47. The Petitioner was not entitled to a postal vote, just as the doctors in **<u>Traub</u>** were not entitled to be promoted and the appellant in **<u>Taylor</u>** had no right not to be transferred. But in the present case, just as in **<u>Traub</u>** and **<u>Taylo</u>**r, the

Petitioner has legitimate expectations under the common law which are protected by section 18(1) of the Constitution. As has been said above, legitimate expectations go beyond enforceable rights. Because the legitimate expectations doctrine is part of the law of Zimbabwe, a person's legitimate expectations are protected by section 18 of the Constitution - the protection of law provision. Put differently, one could say that the Petitioner has a right, under section 18(1), to have more than just his rights protected: he has a right to have his legitimate expectations protected as well.

48. In **Traub** Corbett CJ said at **761I** that the benefit the doctors expected to acquire - promotion to Senior House Officer - was "***...an essential [step].... in the ladder of professional progress in the hospital hierarchy***". Similarly, in the present case, the benefit that was the subject of the expectation - votes in a presidential election , arising from a wide range of persons being allowed to acquire postal votes - was, to say the least, an essential step in the political career of a candidate aspiring to become president.

49. In **Traub** and **Taylor**, administrative decisions were set aside by the courts because the correct procedure was not followed in making those decisions. In the present petition, it is submitted that the courts must invalidate section 158 of the Electoral Act because its existence is not consistent with the correct enactment of Electoral Law. As has been seen, the latter must be enacted by Parliament. By enacting a constitutional provision stating that

Electoral Law must be enacted by Parliament, the state committed itself, legally, to act in a certain way when enacting that type of law. In **R v Home Secretary, ex parte Khan [1984] 1 WLR 1337 (CA)**, the Home Office had issued a circular specifying the conditions which needed to be satisfied before the appellant's nephew could be issued with a residence permit. The conditions were satisfied, but the Home Office refused to issue the permit, arguing that it was entitled to change the policy. The Court of Appeal held that no "***overriding public interest***" existed to justify departing from the original policy. The decision not to issue the permit was therefore quashed, and the court ordered that the permit be issued. This was a substantive remedy, in that the court ordered that the benefit sought - the permit - be granted, rather than just a hearing. See also **R v North and East Devon Health Authority, ex parte Coughlan [2000] 2 WLR 622; R v Inland Revenue Commissioners, ex parte Preston [1985] AC 835**; and **Minister for Immigration and Ethnic Affairs v Teoh 1994-1995 183 CLR 273 (HCA); 128 ALR 353**.

50. It is submitted that, in the same way, the legitimate expectations doctrine, besides affording the petitioner *locus standi*, is also, in itself, a basis upon which the court can ensure that the state follows the procedure for creating Electoral Law that it has committed itself to. Just as the Home Office in Khan could not change a policy that it was lawfully obliged to follow, so the State in Zimbabwe cannot unlawfully change the procedure for creating

Electoral Law by seeking to enact it through section 158 of the Electoral Act.

51. In order to have *locus standi* to challenge the constitutionality of section 158 of the Electoral Act, the Petitioner must have a sufficient personal interest in the matter. It is submitted that such a personal interest exists, by virtue of the Petitioner's legitimate expectations.

<u>*Locus standi* on the basis of freedom of expression</u>

52. Feltoe, in his article "**Legal Standing in Public Law**" (**Zimbabwe Human Rights Bulletin, no. 7, September 2002, page 187**) has argued that, in a case of this sort, *locus standi* also exists on the basis of a legitimate expectation founded on section 20(1) of the Constitution (the Freedom of Expression clause). He writes at page 199:

"***The right of freedom of expression includes the right to receive and impart information without interference. An election is one of the most important ways in which the electorate can express its will. The distortion and manipulation of the electoral process violates this free expression of electoral will. The main opposition candidate in an election has himself a right to expect that voters will be able to express themselves in a free and fair election. Thus he should be taken to have a right to take legal action to ensure that his and the electorate's rights are not violated***".

***Locus standi* on the basis of section 102(1) of the Electoral Act**

53. Section 102(1) of the Electoral Act states:

"***An election petition complaining of an undue return or an undue election of a person to the office of president by reason of irregularity or any other cause whatsoever, may be presented to the High Court within thirty days of the declaration of the result in respect of which the petition is presented, by any person -***

(a) claiming to have had a right to be elected at that election; or

(b) alleging himself to have been a candidate at such election".

54. The word "undue" is defined in the **Collins Concise Dictionary** as meaning "unjust, improper, or illegal". It is therefore submitted that the ambit of "undue" is broad enough to include a complaint alleging that section 158 of the Electoral Act is unconstitutional. In other words, a candidate in a presidential election has *locus standi*, by virtue of section 102(1), to challenge the constitutionality of section 158 of the Electoral Act. Clearly, an election will be "undue" if it was carried out in terms of Statutory Instruments enacted under an unconstitutional provision in the Electoral Act. Moreover, the words "***...irregularity or any other cause whatsoever..."***, as they appear in section 102(1), also emphasise the broad application of the provision. Any alleged electoral illegality may be challenged on the basis of section 102(1).

55. In **Hurungwe East Election Petition 2001 (1) ZLR 285 (HC)** Devittie J said at **286F-G**

"***.....where the alleged violations of rights entrenched in the Constitution relate to matters which have a bearing on the entire electoral process, then I question the wisdom of bringing such matters into the fray, bearing in mind that, in terms of the Electoral Act, the trial of an election petition is limited to an inquiry on the commission of corrupt or illegal practices 'with reference to the election the subject of the petition'; which is the election in the individual constituency***"

The **Hurungwe East Election Petition** was concerned with a parliamentary election, not a presidential election. Accordingly, Devittie J's concerns do not, with respect, apply in the context of the present election petition. At **286H** Devittie J said:

"***When the constitutional issue raised touches the validity of all seats contested, common sense would seem to dictate the institution of globular proceedings in an appropriate forum, seeking to impeach the entire electoral process on the grounds of the beach of rights contravened in the Constitution***".

56. Thus, it would be inappropriate to raise such a constitutional issue in an individual parliamentary election petition, since the issue would affect all of the seats contested. However this is not the case in the present matter, which concerns a single presidential election. Accordingly, the High Court is an appropriate forum within which to bring an election petition raising amongst other things, constitutional issues. In other words, whilst it is not possible to institute "globular" constitutional proceedings in an election

petition brought in respect of an individual parliamentary constituency, it is possible to do so in an election petition challenging the outcome of a presidential election.

Do Zimbabwe's courts derive their constitutional jurisdiction exclusively from section 24 of the Constitution ? If not, what are the implications for *locus standi* ?

57. It is clear in fact that the courts do not derive their constitutional jurisdiction exclusively from section 24 of the Constitution. That provision was obviously inserted *ex abundante cautela* and in the interests of clarity. However, the courts also have the power to test the constitutionality of laws on the basis of section 3 of the Constitution. The provision reads:

"***This Constitution is the Supreme Law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void***".

By necessary implication, this provision empowers the courts to strike down unconstitutional laws. Moreover, section 3 must be read together with section 18(1) of the Constitution, which reads:

"***Subject to the provisions of this Constitution, every person is entitled to the protection of law".***

The only effective way of "protecting" section 3 is by affording the courts the power to enforce it.

58. In Canada, the courts have accepted that a person may challenge the constitutionality of a law by invoking either the supremacy or enforcement provisions (sections 52(1) and 24(1) respectively) of the Canadian Constitution Act, 1982. Section 52(1) states:

"***The Constitution of Canada is the Supreme Law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect***".

59. Section 24(1) provides:

"***Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances***".

60. **Peter Hogg, Constitutional Law of Canada (1998, Loose-leaf edition, vol. 2)**, says at page 37-2:

"***[The] Supremacy clause gives to the Charter overriding effect. Since the Charter is part of the 'Constitution of Canada', any law that is inconsistent with the Charter is 'of no force or effect'. Since it inevitably falls to the courts to determine whether or not a law is inconsistent with the Charter, s. 52(1) provides an explicit basis for judicial review of legislation in Canada***".

Later on the same page, he adds:

"***In addition, however, the Charter contains its own remedy clause, namely, s. 24***".

At **37-3** Hogg says:

"***s. 24(1) is applicable only to breaches of the Charter of Rights; s. 52(1) is applicable to the entire Constitution of Canada, including the Charter of Rights. Secondly, s. 24(1) is available only to a person whose rights have been infringed; s. 52(1) is available in some circumstances to persons whose rights have not been infringed***"

At page **37-20** Hogg adds:

"***Section 24(1) is not the exclusive remedy for a breach of the Charter of Rights. [The]....Supremacy clause of s. 52(1)...renders 'of no force or effect' any law that is inconsistent with the Constitution of Canada***".

Hogg notes at 37-21 that "***[s]tanding to apply for a remedy under s. 24(1) is granted to 'anyone' whose Charter rights 'have been infringed or denied'. This imposes stricter requirements of standing [and]... contemplates that it is the applicant's own rights that have been infringed or denied***".

61. However, in **R v Big M Drug Mart Ltd [1985] 1 SCR 295; (1985) 13 CRR 64 (SCC)**, the Supreme Court of Canada held that the fact that a corporation had no standing under section 24(1) to challenge the law was irrelevant. The challenge was based on the supremacy clause of s. 52(1). The court said at 313:

"***Where, as here, the challenge is based on the unconstitutionality of legislation, recourse to s. 24 is unnecessary and the particular effect on the challenged party is irrelevant***".

At page **37-22** Hogg says:

"***Sometimes a person, motivated by public interest, wishes to make a Charter challenge to a statute that does not even apply to the challenger. This cannot be done under s. 24(1). However, in <u>Minister of Justice v Borowski</u> [[1981] 2 S.C.R. 575] the Supreme Court of Canada granted standing to an anti-abortion activist to bring an action for a declaration that the Criminal Code=s abortion provisions were unconstitutional. Those provisions could never actually be applied to the applicant, who was neither a doctor nor a woman, but he was granted standing nevertheless. This illustrates that the availability of a declaration of invalidity under the general law is governed by more generous standing requirements than are the remedies authorized by s. 24(1)".***

62. In **<u>Ferreira v Levin</u>,** ***supra***, the South African Constitutional Court took a similar - though slightly narrower - approach towards allowing constitutional challenges to be based on the supremacy clause (see Chaskalson P at paragraphs 166-168). O'Regan J held at para [223] that where it is alleged that the Bill of Rights has been contravened, the challenge must be based on the enforcement provision. Where a constitutional challenge is based on grounds other than alleged violations of the Bill of Rights, she ruled that the challenge must be brought in terms of the supremacy clause. In other words, she compartmentalises the supremacy and enforcement provisions in the context of initiating constitutional challenges. This is a somewhat narrower view than that adopted in Canada where, as has been seen, the supremacy clause may be invoked to bring any kind of constitutional challenge.

63. It is submitted that the broader Canadian approach is more logical, and is therefore to be preferred. However, even if the South African approach is followed by this Honourable Court, the Petitioner could still secure a remedy on the basis of the supremacy clause. Although he would be precluded from alleging a violation of sections 18(1) and 20(1) of the Constitution, he could still allege that Parliament's purported conferment of Electoral Law making powers on the President was *ultra vires* the provisions of the Constitution that specify how Electoral Law must be made.

64. **Laurence Tribe <u>American Constitutional Law</u> (3rd edition, 2000)** notes at **207 - 208** that the American Constitution does not expressly confer upon the Federal Courts the "***....power to refuse to give effect to congressional legislation if it is inconsistent with.....the Constitution***". However, in **<u>Marbury v Madison</u> 5 US (1 CRANCH) 137 (1803)** Marshall CJ inferred the existence of such a power. He said at **177-178**:

"***All those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, <u>and consequently the theory of every such Government must be that an act of the legislature, repugnant to the Constitution, is void</u>. [Thus].....[i]t is emphatically the province and duty of the judicial department to say what the law is***" (emphasis supplied).

He added at 178:

"***Those, then, who controvert the principle, that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. This doctrine....would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits"***

65. In view of the fact that Canadian and American courts have been able to infer constitutional jurisdiction from the notion of constitutional supremacy, it is submitted that there is no reason why Zimbabwean courts should not do likewise. The significance of this for the present matter is that even if the restrictive approach towards *locus standi* enunciated in **Tsvangirai v Registrar General of Elections & Ors**, ***supra***, applies to all constitutional litigation brought in terms of section 24 of the Constitution (a view which it is submitted should be rejected) and not just to applications brought under subsection (1) of that provision, there are no grounds for holding that such a restrictive approach ought to apply where the constitutional challenge is founded on section 3. This emerges clearly from the Canadian decisions referred to above. Thus a person who alleges that a law contravenes a provision in the Declaration of Rights need not show that the impugned law applies to him, provided that the action is founded on section 3 and not on section 24.

66. In addition, it is submitted that constitutional challenges framed on the basis of section 3 of the Constitution need not allege that a provision in the Declaration of Rights has been infringed. Such an allegation, it is submitted, need only be made where the challenge is framed in terms of section 24. The latter provision is concerned exclusively with the jurisdiction of the courts in respect of the enforcement of the Declaration of Rights. Section 3 is broader in that it justifies challenging the constitutionality of any law, regardless of whether or not it is alleged that the impugned law has violated a provision in the Declaration of Rights. In **S v Gatzi; S v Rufaro Hotel (Pvt) Ltd 1994 (1) ZLR 7 (HC)** the High Court considered the constitutionality of the Presidential Powers (Temporary Measures) Act. It was not alleged that the Act violated any of the provisions of the Declaration of Rights (although, no doubt, it could have argued that the Act contravened section 18(1) of the Constitution). The court did not explicitly state the basis upon which it was entertaining a constitutional challenge. However, a reference to section 3 of the Constitution at page 14C of Adam J's judgement implies that the court founded its jurisdiction on the concept of constitutional supremacy set out in that provision and on the ultra vires doctrine.

Conclusion

67. It is accordingly submitted that the Respondents' attempt to dispute the

Petitioner's standing in these proceedings is a contrived attempt to escape addressing the merits of the matter. Their central proposition has only to be stated for its fatuity to be apparent: the Petitioner, the unsuccessful candidate in the Presidential election, has no right or interest affected by its result.

68. It is submitted that the converse is quite obvious - on any one of the many bases we have analysed. Just one of these bases is enough to give the Petitioner standing; for the Respondents to succeed in their denial of standing, on the other hand, they have to refute each and every basis so advanced by the Petitioner.

C. THE HIGH COURT'S JURISDICTION

(4) Does the High Court have jurisdiction to rule on a matter relating to a breach of the Declaration of Rights of the Constitution ?

(a) The High Court's Jurisdiction under the High Court Act

69. Section 81(1) of the Constitution states:

"***There shall be a High Court which shall be a superior court of record and shall have such jurisdiction and powers as may be conferred upon it by or in terms of this Constitution or any Act of Parliament".***

70. This provision did not constitute a new judicial body. The High Court was already in existence. It had, prior to 1980, exercised an inherent jurisdiction to control illegality, which included, as the cases demonstrate, a constitutional jurisdiction (see for instance **Madzimbamuto v Lardner-Burke NO 1966 (4) SA 462 (R), 1966 (2) SA 445 (R); see also Minister of the Interior v Harris 1952 (4) SA 769 (A) at 789**).

71. Section 81 (1) of the Constitution thus took the High Court, with its inherent constitutional jurisdiction, and entrenched its status and powers in the Constitution (cf. **Van Rooyen v The State 2002 (5) SA 246 (CC) at 287G-**

288D).

72. If the Respondents are right, the Constitution did the very opposite: it deliberately stripped the High Court of its existing constitutional jurisdiction. Patently that is not expressly so provided. The Respondents must accordingly contend that that conclusion arises by necessary implication. This in turn requires them to show both that the express terms of the Constitution (in failing to make such explicit provision) made no sense as they stand, and that the implied elimination of the High Court's constitutional jurisdiction is consistent with all the relevant express terms of the Constitution (**Rennie NO v Gordon 1988 (1) SA 1 (A) at 22E-G,** per Corbett JA (later CJ)).

73. It is submitted that the Respondents can show neither requirement. Sections 13 and 23 of the High Court Act [Chapter 7:06] declare the High Court has full original civil and criminal jurisdiction over all matters in Zimbabwe. The words "civil case" are defined in section 2 of the High Court Act as referring to "***...any case or matter which is not a criminal case or matter***". Clearly, this includes constitutional cases and matters. It follows therefore that constitutional cases and matters - including cases and matters pertaining to the Declaration of Rights - fall within the ambit of the High Court's jurisdiction. Nothing contained in section 24 or any other provision of the Constitution can be construed as derogating from or restricting the High

Court's jurisdiction in respect of the Declaration of Rights. Even if section 24 is regarded as being silent on the question of the High Court=s jurisdiction, this cannot affect the power conferred upon the Court by the provisions of the High Court Act referred to above.

74. In **Dow v Attorney-General 1994 (6) BCLR 1 (BCA)** the question before the court was whether the failure to mention "sex" in section 15 of the Botswana Constitution (the protection from discrimination provision) meant that discrimination on the basis of sex was not prohibited. The court noted that section 3 of the Botswana Constitution provides that "***...every person ... is entitled to the fundamental rights and freedoms of the individual... whatever his... sex....***". Aguda JA held at **43B-C** that "***....the mere omission of the word 'sex' from the provision of section 15 (3) of the Constitution cannot be held to limit the fundamental rights and freedoms of the individual entrenched in section 3...***". Thus, a mere omission to mention a right in one provision cannot have the effect of limiting the right concerned if it is provided for in another provision.

75. In **Rattigan & Ors v Chief Immigration Officer & Ors 1994 (2) ZLR 54 (SC)** Gubbay CJ at 59 agreed with this approach. Thus, the broad jurisdiction conferred on the High Court by the High Court Act is not fettered by any omission in section 24 of the Constitution in respect of that Court's jurisdiction.

(b) **Judicial decisions pertaining to the High Court's jurisdiction**

76. The High Court's jurisdiction in respect of the Declaration of Rights was considered by Gillespie J in **S v Chakwinya 1997 (1) ZLR 109 (HC)**. He observed that "***a similar provision to section 24(4) [of the Constitution], which pertains to the Supreme Court, is not made in respect of the High Court***" (**at 115c**). That provision expressly confers original jurisdiction upon the Supreme Court in respect of applications and referrals made in terms of section 24(1) of the Constitution. Moreover, it provides that the Supreme Court "***...may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights***".

77. However, in **Chakwinya** Gillespie J said that this does not mean that the High Court is powerless to give remedies to protect persons' constitutional rights (**at 115c**). He held that section 24(4) specifically mentions the Supreme Court "***...ex abundante cautela and lest otherwise it be thought that the Supreme Court, a court of appellate jurisdiction, has no original jurisdiction pertaining to the point at issue. Ubi ius, ibi remedium; and the remedy for the accused here lies in the inherent jurisdiction of this Court to regulate its own proceedings and to protect the rights of those coming before it. The Court has a common law power to put a stop to any wrong that has been done to an accused person in the name of the law***" (**at 115c**).

78. Gillespie J's interpretation of the ambit of section 24(4) appeared to have been overruled by a subsequent Supreme Court decision, **S v Mbire 1997 (1) ZLR 579 (SC)**, although that decision made no reference to **Chakwinya**. In **Mbire** Gubbay CJ said:

"***It is only the Supreme Court that is empowered to make such an order under the authority of s 24(4) of the Constitution when an application or a referral comes before it pursuant to subs (1) or (2)". (at 581).***

79. However, as pointed out by **Linnington Constitutional Law of Zimbabwe (at 244, para 620**) when read in the context of the case, it is clear that this dictum applies only to the magistrate's court and not to the High Court (**see Mbire at 580-581**). Gillespie J has himself construed the "Mbire dictum" in this way in **S v Mavharamu 1998 (2) ZLR 341 (HC) at 351 n. 24**, where he also reiterated the approach he enunciated in **Chakwinya (at 351B-E)**. In another High Court decision, **S v Kusangaya 1998 (Z) ZLR 10 (HC)**, Devittie J said at 13:

"***.....where rights enshrined in the Constitution are breached, this court has jurisdiction to grant an appropriate remedy. In my view, the provisions of the Constitution which provide for reference to the Supreme Court of constitutional questions, merely provide a procedural mechanism whereby constitutional matters may be raised by the lower courts for decision by the Supreme Court. The inherent jurisdiction of the High Court is not thereby affected***".

Kusangaya was concerned with the right to a fair trial within a reasonable time contained in section 18(2) of the Constitution.

80. The Supreme Court has itself now ruled (in **Banana v Attorney-General 1998 (1) ZLR 309 (SC)**) that "***.....the High Court [has] jurisdiction to entertain..... applications in terms of section 24(4)***" (per Gubbay CJ **at 313**). In other words, the Supreme Court sees the jurisdiction of the High Court in respect of the Declaration of Rights as something conferred by section 24(4). (Gubbay CJ **at 313** did however, accept in addition the inherent common law jurisdiction of the High Court.) In **Banana** the jurisdiction of the High Court was emphasised by the fact that Gubbay CJ at 313 actually criticised the High Court for making a referral to the Supreme Court under section 24(2) of the Constitution, instead of determining the constitutional issue itself, although the Chief Justice accepted that the referral had been competently made. That decision binds this Court, and is thus dispositive of the issue.

81. In an earlier Supreme Court decision, **Minister of Home Affairs v Bickle and Others 1983 (2) ZLR 400 (SC)**, Georges CJ **at 432** accepted that the High Court has jurisdiction to rule on matters relating to breaches of the Declaration of Rights. His criticism of the High Court was limited to expressing at 432D-E the view that it:

"***.....should not, despite the wish of the parties, deal solely with the constitutional issue. Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights***".

In other words, the High Court is entitled to deal with a constitutional issue if a remedy depends upon it.

(c) **The High Court's jurisdiction in terms of section 24(7) of the Constitution**

82. The jurisdiction of the High Court also arises by implication from the language used in section 24(7) of the Constitution. That provision says:

"***Where any law is held by a competent court to be in contravention of the Declaration of Rights....***"(our emphasis).

The words "competent court" draw attention to the fact that the Supreme Court does not have exclusive jurisdiction to rule on contraventions of the Declaration of Rights. Were this not the case, section 24(7) would only refer to the "Supreme Court" and not to a "competent court" Section 24(7) does later make a reference to the Supreme Court, highlighting the fact that, for the purposes of section 24,"competent court" and "Supreme Court" are not synonyms for each other. Thus the words "competent court" encompass more than just the Supreme Court: they in fact include the High Court as well.

(d) **The High Court's jurisdiction in terms of section 3 of the Constitution**

83. Furthermore, it is respectfully submitted that both the High Court and the Supreme Court have an additional ground for exercising a constitutional jurisdiction that is independent of both section 24 and the common law. This "additional ground" is based on section 3 of the Constitution. It is respectfully submitted that, by necessary implication, the concept of constitutional supremacy enunciated in that provision confers upon the superior courts the power to invalidate laws that are not consistent with the Constitution.

(e) **The jurisdiction of the High Court as 'constitutional bedrock'**

84. The High Court has made a number of rulings in respect of provisions contained in the Declaration of Rights. See for example:

Barrows & Anor v Minister of Home Affairs & Ors 1995 (2) ZLR 139 (HC)

Bickle & Ors v Minister of Home Affairs 1983 (2) ZLR 431 (HC)

Bishi v Secretary for Education 1989 (2) ZLR 240 (HC)
Building and Engineering Supply Co (Pvt) Ltd v Controller of Customs 1988 (1) ZLR 238 (HC)

Bull v Minister of State (Security) & Ors 1987 (1) SA 422 (ZH)

Chirwa v Registrar-General 1993 (1) ZLR 1 (HC)

Commissioner of Police v Commercial Farmers Union 2000 (1) ZLR 503 (HC)

CW v Commissioner of Taxes 1988 (2) ZLR 27 (HC)

Davies & Ors v Minister of Lands, Agriculture and Water Development 1994 (2) ZLR 294 (HC)

Dube v Chairman, Public Service Commission & Anor 1990 (2) ZLR 181 (HC)

Granger v Minister of State (Security) 1985 (1) ZLR 153 (HC)

Hambly v Chief Immigration Officer (1) 1995 (2) ZLR 264 (HC)

Hokonya v Director of Prisons & Anor 1989 (1) ZLR 317 (HC)

In re Muskwe 1992 (1) ZLR 44 (HC)

Jiah & Ors v Public Service Commission & Anor 1997 (1) ZLR 595 (HC)

Kona and Others v Attorney-General 1986 (1) ZLR 187 (HC)

Makomboredze v Minister of State (Security) 1986 (1) ZLR 73 (HC)

Mandizvidza v Chaduka NO & Ors 1999 (2) ZLR 375 (HC)

Marumahoko v Chairman, Public Service Commission & Anor 1991 (1) ZLR 27 (HC)

Mhlanga v Sheriff of the High Court 1999 (1) ZLR 276 (HC)

Mhora and Another v Minister of Home Affairs & Anor 1990 (2) ZLR 236 (HC)

Moll v Commissioner of Police & Ors 1983 (1) ZLR 238 (HC)

Motsi v Attorney-General & Ors 1995 (2) ZLR 278 (HC)

Mujuru v Moyse & Ors 1996 (2) ZLR 642 (HC)
Nyakabambo v Minister of Justice, Legal and Parliamentary Affairs & Ors 1989 (1) ZLR 96 (HC)

Paweni v Minister of State (Security) & Anor 1984 (1) ZLR 236 (HC)

Pickering v Zimbabwe Newspapers (1980) Ltd 1991 (1) ZLR 71 (HC)

Pretorius v Minister of Defence (1) 1980 ZLR 150 (HC)

PTC Managerial Employees Workers Committee v PTC & Anor 1998 (1) ZLR 444 (HC)

S v Banana 1998 (2) ZLR 533 (HC)

S v Chakwinya 1997 (1) ZLR 109 (HC)

S v Chidawu 1998 (2) ZLR 76 (HC)

S v Chogugudza 1996 (1) ZLR 28 (HC)

S v Kusangaya 1998 (2) ZLR 10 (HC)

S v Makwakwa 1997 (2) ZLR 298 (HC)

S v Mavharamu 1998 (2) ZLR 341 (HC)

S v Modus Publications (Pvt) Ltd & Anor 1996 (2) ZLR 553 (HC)

S v Moyo 1988 (2) ZLR 79 (HC)

S v Musindo 1997 (1) ZLR 395 (HC)

S v Nemutenzi 1992 (2) ZLR 233 (HC)

S v Paweni & Anor 1994 ZLR 16 (HC)

S v Poli 1987 (2) ZLR 30 (HC)

S v Tau 1997 (1) ZLR 93 (HC)

S v Yusuf 1997 (1) ZLR 102 (HC)

Wazara v Principal, Belvedere Technical Teacher's College & Anor 1997 (2) ZLR 508 (HC)

85. Another High Court decision, **S v Gatzi; S v Rufaro Hotel (Pvt) Ltd 1994 (1) ZLR 7 (HC)**, considered the constitutionality of impugned legislation, but

without referring expressly to any particular provision in the Declaration of Rights.

86. Because the High Court has made so many such rulings over the years, it is submitted that, on the basis alone, the High Court's power to do so has become a "bedrock" feature of Zimbabwe's Constitutional law.

Michael J Perry ("**What is the Constitution**?" in **Larry Alexander (ed) Constitutionalism: Philosophical Foundations (1998) at 104-106**) notes that in the United States doubts exist about the correctness of certain constitutional practices and premises. He cites as an example "***...the premise that the privileges and immunities - the rights and freedoms - protected against the national Government by the Bill of Rights are protected against state Government by the fourteenth amendment. It has been controversial whether that or any similar premise was, as the Supreme Court's 'incorporation' jurisprudence holds, established by the fourteenth amendment***". However, Perry argues that "***if, over time [a constitutional] practice or.... premise... has become such a fixed and widely affirmed and relied upon....feature of the life of our political community that the premise (or the practice) is, for us, bedrock, then the premise has achieved a virtual constitutional status; it has become a part of our fundamental law - the law that is constitutive of ourselves as a political community of a certain sort. Such a premise ought not now to be overturned by the court***".

Thus even if doubts existed about the extent of the High Court's constitutional jurisdiction, its practice in this regard has become "***a fixed and widely affirmed and relied upon***" feature of the life of Zimbabweans, and ought not therefore to be changed. As already indicated, the Supreme Court decisions in **Bickle supra** and **Banana supra** stand in the way of any such attempt.

(f) **The role of the High Court in the development of Zimbabwe's constitutional jurisprudence**

87. Contrary approach would mean that only one court - the Supreme Court - would rule on matters relating to the Declaration of Rights. This point was well made in the context of South African constitutional jurisprudence by Chaskalson P, as he then was, in **Bruce & Anor v Fleecytex Johannesburg CC & Ors 1998 (2) SA 1143 (CC)**. Writing for a unanimous Constitutional Court, he said **at 1148, para [8]**:

"***It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment***".

This approach was reiterated by the Constitutional Court in a subsequent decision, **Christian Education South Africa v Minister of Education 1999 (2) SA 83 (CC), at 88, para [8]**. Later in **Christian Education** Langa DP said, at **90, para [12]**:

"***If direct access were to be given in this matter, this court would be sitting as a court of first and final instance, without there being the possibility of an appeal from its decision. It would not have had the benefit of the views of the High Court which has jurisdiction***".

Accordingly, it is respectfully submitted that it will be in the interests of justice in Zimbabwe for the High Court to be allowed to continue exercising a "***Declaration of Rights jurisdiction***". This will not of course preclude"***...in a proper case, speedy access to the final court in the land***" (**Mandirwhe v Minister of State 1986 (1) ZLR 1 (SC) at 7, per Baron JA**), through utilising the procedure established by section 24(1) of the Constitution.

(g) **The jurisdiction of the High Court as a means of giving full effect to the right to the protection of the law**

88. Section 81(1) of the Constitution must be considered in conjunction with section 18(1) of the Constitution. This is in accordance with the approach to constitutional interpretation enunciated by the Supreme Court in **In re Munhumeso & Ors 1994 (1) ZLR 49 (SC) at 59;1995 (1) SA 551 (ZS) at 559**. There Gubbay CJ said:

"***All provisions bearing upon a particular subject are to be considered together and construed as a whole in order to effect the true objective***".

89. Section 18(1) is such a provision. It states:

"***Subject to the provisions of this Constitution, every person is entitled to the protection of the law***".

90. The law can only afford protection to the extent that the courts are empowered to enforce it. To be sure, the fact that the Supreme Court has jurisdiction to enforce the Declaration of Rights means that the "***protection of the law***" provision is being complied with. However, there are degrees of compliance. Thus, the protection of the law will be afforded to a greater and fuller degree if the High Court retains its power to enforce the Declaration of Rights. This is because, as was stated in the two South African Constitutional Court decisions referred to above, the quality - and therefore the correctness - of judicial decisions will be enhanced if the issues concerned are considered by more than one court. Thus, an interpretation of section 24 of the Constitution that does not result in the curtailment of the jurisdiction of the High Court would be consistent with section 18(1) and with the approach to interpretation set out in **Munhumeso**. Moreover, it would also accord with Gubbay CJ's dictum in **Rattigan & Ors v Chief Immigration Officer & Ors 1994 (2) ZLR 54 (SC) at 57** that the preferred rule of constitutional construction "***...is one which serves the interest of the***

Constitution and best carries out its objects and promotes its purposes".

Conclusion

91. It is accordingly submitted that the inherent jurisdiction of the High Court to determine constitutional issues is, as might be expected, confirmed, not ousted, by the Constitution. If only the Supreme Court had constitutional jurisdiction section 24 would not be necessary - or at least would read very differently. The attempt to deny jurisdiction in this matter is, we submit, without merit.

D. THE UNCONSTITUTIONALITY OF SECTION 158 OF THE ELECTORAL ACT

92. Four of the issues concern section 158 and its Regulations. The issues are:

(6) Is section 158 of the Electoral Act [Chapter 2:01] unconstitutional?

(7) If so, does that afford a basis on its own to set aside the election of the First Respondent ?

(8) If section 158 is unlawful, is the invalidity retrospective, and does it affect the election in question ?

(9) If the section is not unconstitutional, are the various Regulations made thereunder by the First Respondent nonetheless unconstitutional, or contrary to section 149 of the Electoral Act [Chapter 2:01] ?

93. We submit that if either section 158 or its Regulations are unconstitutional, the result is that on that basis alone, the election was invalidly conducted.

Issue 6: is section 158 unconstitutional ?

94. Section 158 of the Electoral Act purports to delegate to the President the power to amend the Electoral Law mentioned in the Constitution. Elections

for the office of President have to be conducted in terms of the Electoral Law, see section 28(4) of the Constitution, as do elections to Parliament, see section 58(3) of the Constitution. Thus the effect of section 158 is a grant by the legislature to the head of the executive of a power to amend one of its own statutes - and this in relation to the framing of rules for his own election.

95. The Electoral Law is defined in section 113 to mean an Act of Parliament having effect for the purposes of section 58(4). Section 58(4) provides:

> "***An <u>Act of Parliament</u> shall make provision for the election of members of Parliament, including elections for the purposes of filling casual vacancies"*** (emphasis supplied).

In other words, the legislation that comprises the Electoral Law <u>must</u> be an Act of Parliament. Parliament dictates terms of the Electoral Law.

96. It is beyond rational debate that Parliament cannot delegate its constitutional function in this regard to any person, including the President. Thus simply by the application of section 58(4) of the Constitution, the power given by Parliament to the President to amend the Electoral Law by regulation is unconstitutional.

97. It is to be noted that section 32(2) of the Constitution cannot be read as altering section 58(4). The two provisions are properly to be read as being consistent with the concept that the Constitution directs Parliament to make the Electoral Law and not to delegate that power to any person or authority.

98. It is submitted that section 158 of the Electoral Act is an unconstitutional delegation of Parliament's legislative powers to the President.

In terms of section 3 of the Constitution:

"***This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void***".

Insofar as section 158 of the Electoral Act vests legislative power in the President, it is null and void and any regulations made thereunder are similarly null and void.

99. It is to be noted that the power purportedly granted by section 158 to the President can be exercised even if Parliament is sitting. No criteria are given as to when the President may use the power under section 158. It is to be noted that, when the Government considers it necessary, it suspends Standing Orders and passes legislation in a single sitting; there have been a number of instances of this action in Parliament. Parliament could and

should fulfil its constitutional obligations to enact the Electoral Law and of course to amend it when that become necessary.

100. The power purportedly given to the President under section 158 may be exercised "***as he considers*** ***necessary or desirable to ensure that any election is properly and efficiently conducted and to deal with any matter or situation connected with, arising out of or resulting from the election***" (emphasis added). In other words there is no limitation to the use of this legislative power by the President, and no need to procure subsequent parliamentary approval, as for example with the Presidential Powers (Temporary Measures) Act [Chapter 10:20]. In practice he has made changes to the Electoral Law that apply not only to the then pending general election, but also as to future by-elections.

101. The President used a similar section in the earlier legislation to make the Electoral Act (Modification) Notice 1990, SI 24C of 1990, which dealt with both parliamentary and presidential elections. This Notice was later purportedly validated retrospectively by the President under the present provision, see the Electoral Act (Modification) (No. 2) Notice 1990, SI 52C of 1990.

102. The President purported to use his powers in terms of section 158 of the Electoral Act in respect of the 1985 General Election in the Electoral Act

(Modification) Notice 1995, SI 72B of 1995. In respect of the 2000 General Election, the Electoral Act (Modification) No. 2000, SI 161B of 2000, the Electoral Act (Modification) No. 2 (Notice 2000), SI 177A of 2000, and the Electoral Act (Modification) No. 3) Notice 2000, SI 318 of 2000, were issued by the President. This latter notice was declared to be unconstitutional by the Supreme Court in the matter of **Movement for Democratic Change & Anor v Chinamasa NO & Anor 2001 (1) ZLR 69 (SC)**.

103. The present notice, being the Electoral Act (Modification) Notice, 2002, published in SI 41D of 2002 on 5 March 2002, was made three days before polling commences. It deals with vital issues relating to the manner in which the election is to be conducted. No public debate of the provisions took place and the Petitioner as the major contender in the elections was not consulted on the matter. In reality one of the candidates in the forthcoming election has radically altered the conditions under which the election is to be conducted. An examination of virtually every section of the Notice will show a major intrusion into the provisions made by Parliament in the Electoral Law, and the Notice therefore complete negates what Parliament has legislated in that regard.

104. Section 50 of the Constitution provides that Parliament is to make laws for the peace, order and good government of Zimbabwe. No other body is given the power to make such laws.

105. It is submitted that the provisions relating to the legislature, the executive and the judiciary in the Zimbabwe Constitution constitute a clear separation of powers. The President is not accountable to Parliament. The value of leaving legislative power, including the power to amend statutes, in the hands of Parliament, in accordance with the fundamental principle of the separation of powers, is that there can be an open and public debate about such legislation before it is enacted into law, and any issue of the constitutional validity of the legislation can be examined by the Parliamentary Legal Committee.

The protections are not available when the change to the existing statute is simply made in a statutory instrument, without warning and debate, by the President.

106. In addition, in terms of section 61(3)(c) of the Constitution, the Electoral Supervisory Commission is required to be involved in the legislative process. No such protection exists in terms of section 158 of the Electoral Act.

107. At the time of the enactment of section 158 of the Electoral Act[1], on 28 March 1990[2], section 32 of the Constitution provided as follows:

[1] Then section 151 of the Electoral Act 1990 (Act 7 of 1990).

[2] The provision was in fact first introduced in similar form on 5 April 1985 as section 165A of the Electoral Act 1979 by section 75 of the Electoral Amendment Act 1985 (Act 13 of 1985) to deal with the 1985 general election.

"***The legislative authority of Zimbabwe shall vest in the Legislature which shall consist of the President and Parliament".***

That was in turn amended by the introduction of a subsection (2) by the Constitution of Zimbabwe Amendment (No. 12) Act 1993 (Act 4 of 1993), with effect from 1 November 1993, reading as follows:

"***(2) The provisions of subsection (1) shall not be construed as preventing the Legislature from conferring legislative functions on any person or authority***".

That provision was introduced after argument had been heard in the matter of **S v Gatsi; S v Rufaro Hotel (Pvt) Ltd t/a Rufaro Buses 1994 (1) ZLR 7 (HC)**, but before judgment was given.

108. The provision is clearly not intended to have retroactive effect, nor can it be interpreted as in some way validating what had been done by Parliament years before in 1990.

109. Indeed, it is submitted that the enactment of the new section 32(2) was, in itself, an acknowledgement that in the absence of such an amendment, Parliament could not confer on another person the powers and functions conferred upon it by the Constitution.

110. However, it is submitted that the matter of the validity of the legislation must be adjudged at the time of its enactment. At the time of its enactment it is respectfully submitted that Parliament did not have the constitutional authority to delegate to the President of the day the sweeping power to amend the constitutional required Electoral Law.

111. While Parliament may not delegate its essential legislative functions, Parliament may legitimately delegate regulatory powers. The distinction is vital. Such delegation would not be an impermissible delegation of legislative functions.

112. The United States Supreme Court has tended to take a very restrictive view of the extent to which Congress may delegate its functions to the executive. According to United States jurisprudence, a delegation of congressional legislative functions will be constitutionally permissible only in circumstances where Congress lays down, by legislative acts, an intelligible principle to which the person or body authorised to act is directed to conform. Congress must clearly delineate the general policy and the boundaries of the delegated authority. The delegation must not be so broad or vague that the authority to whom the power is delegated makes law rather than acting within the framework of law made by Congress.

113. The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

See:

Field v Clark 143 US 649 (1892) at page 692; 36 L Ed 294 at page 310, where Harlan J said:

"***That Congress cannot delegate legislative power to the President is a principle universally recognised as vital to the integrity and maintenance of the system of Government ordained by the Constitution***".

Panama Refining Co v Ryan 293 US 388 (1935) at page 421; 79 L Ed 446 at page 459 where Hughes CJ said:

"***The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested***".

Immigration and Naturalisation Services v Chadha 462 US 919 (1983) at page 951; 77 L Ed (2d) 317 at page 344, where Burger CJ said:

"***It emerges clearly that the prescription for legislative action in Art 1 represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure***".

Loving v United States 517 US 748 (1996); 135 L Ed (2d) 36 at page 49, where Kennedy J, speaking for the Court, said:

"***Another strand of our separation-of-powers jurisprudence, the delegation doctrine, has been developed to prevent Congress from forsaking its***

duties ....
The fundamental precept of the delegation doctrine is that the law making
function belongs to Congress ... and may not be conveyed to another branch or entity".

In **Panama Refining Co v Ryan, supra**, the United States Supreme Court struck down as unconstitutional a law which gave the President wide powers to regulate trade in petroleum products. It was found that the delegating legislation did not establish any criteria to govern the president; nor did it require the President to make any finding before taking action.

114. Compared with the United States Supreme Court, the Privy Council has, at first glance, taken a more liberal view of delegation of legislative functions: accepting as valid delegations which gave a wide discretion to the delegate. Compare:

Hodge v The Queen (1883) 9 Appellant Cas 117 (PC)[3]

Powell v Apollo Candle Company Ltd (1885) 10 Appellant Cas 282 (PC)[4]

Attorney-General for Australia v The Queen & Orr [1957] AC 288 (PC) at page 315; [1957] 2 All ER 45 (PC) at page 53, where Viscount Simonds said:

[3] This case in fact dealt with the powers to make what amounted to by-laws.
[4] This decision concerned the right of the legislative to allow the Governor to fix levels of duty for goods which were not in the tariff by notice in the Gazette.

"*The delegation of regulative power by the legislature to an executive body does not mean that the legislature has abdicated a power constitutionally vested in it. For the executive body is at all times subject to the control of the legislature. On the other hand, in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard*".

Cobb & Co Ltd & Ors v Kropp & Ors [1967] 1 AC 141 (PC) at page 156; [1966] 2 All ER 913 (PC) at page 920

To similar effect is the decision of the High Court of Australia in **The Victorian Stevedoring & General Contracting Company (Pty) Ltd v Dignan (1931) 46 CLR 73 (HCA)**.

115. Even in Commonwealth jurisdictions, it is accepted that Parliament's power of delegation is not absolute and that an 'abdication', 'abandonment' or 'surrender' of Parliament's legislative authority to the Executive would be invalid. **See Re Gray (1918) 42 DLR 1 (SCC) at pages 2-3 and 16.** Reference is however made to the dissenting judgment of Idington J who at page 8 said:

"***The several measures required to produce such results must be enacted by the Parliament of Canada in a due and lawful method according to our constitution and its entire powers thereunder cannot be by a single stroke of the pen surrendered or transferred to anybody. The delegation of legislation in way of regulations may be very well resorted to in such a way as to be clearly understood as such, but a wholesale surrender of the will of the people to any autocratic power is exactly what we are fighting against***".

116. In India, the Supreme Court has looked at the issue on a number of occasions. In the case of **In re The Delhi Laws Act 1912, etc [1951] SCR 747 (SCI)**, Mahajan J, as he then was, said at page **946**:

"***... the Parliament has no power to delegate its essential legislative functions to others, whether State Legislatures or executive authorities, except, of course, functions which really in their true nature are ministerial***".

117. In **Rajnarainsingh v Chairman, Patna Administration Committee, Patna & Anor [1955] 1 SCR 290 (SCI)**, the Indian Supreme Court held that while Parliament does, generally, have the power to delegate its legislative functions, essential legislative functions cannot be delegated. It went on to hold that an essential legislative function consists in the determination or choosing of legislative policy and of formally making the policy into a binding rule of conduct. Bose J, giving the judgment of the Court, applied the "radical change" approach, see page 303.

118. It is submitted that even on the most benevolent view of the permissibility of delegation of legislative power, section 158 of the Electoral Act is invalid. It constitutes an abdication by Parliament of its legislative authority, more so in respect of legislation specifically dealt with in the Constitution itself as the Electoral Law.

119. With the exception of **Re Gray, supra**, all the cases in which delegation of legislative powers was challenged dealt with delegation in respect of a specific subject area. **Re Gray** was concerned with sweeping war measures, and is perhaps explicable on the basis of "King and Empire" during war, rather than a considered decision in a peace time environment.

It is extremely unlikely that in the Commonwealth, where countries now have written constitutions, that the decision in **Re Gray** would be followed in a peacetime scenario.

120. The effect of the decision is **S v Gatsi, supra**, was that the delegation of law-making power to the President did not infringe the Constitution. Both Adam J and Smith J based their conclusions in this regard on the traditional British approach based on the supremacy of Parliament.

The finding by Smith J at page 25 that the maxim *delegatus non potest delegare* had no application in the matter is undoubtedly correct. Parliament is not a delegated authority. In terms of the Constitution Parliament is the sole legislator. Thus, the approach of Smith J at page 26 is respectfully supported. The Constitution has not delegated authority to Parliament; it has created Parliament, set out its powers, and delineated its relationship with the other branches of Government. The Constitution created the legislative power and gave that power to Parliament.

However, at page 28 Smith J said:

"***Thus, in my opinion, Parliament cannot, without amending the Constitution, create a new legislative body to take over its legislative functions because that would be inconsistent with the Constitution. <u>It may, however, delegate its legislative functions as it thinks fit</u>***" (emphasis added).

121. With all respect, that is precisely what Parliament has done with the Electoral Law. It in effect created a new legislative body outside the constitutional confines.

122. It is respectfully submitted that the better approach is that which was applied by the Constitutional Court in Western Cape Legislature **<u>President of the RSA</u> 1995 (4) SA 877 (CC)**. The facts of that case are very close to the facts of the present case. However, in South Africa the power was clearly given to the President as a matter of administrative convenience in the new constitutional order in that country; in Zimbabwe
the power is given to allow the President to act outside Parliament no matter the reason. Even so, the delegation by the South African Parliament was held to be contrary to the separation of powers principle in the Constitution.

Reference is made in particular to the following passages:

Chaskalson P paragraph [62]

Mahomed DP paragraphs [135 - 137], [142]

Kriegler J paragraph [162]

Sachs J paragraphs [199], [204] and [206].

123. The rationale in that decision is that where there is a written constitution with the separation of powers doctrine entrenched in it, the power of the one branch of government, namely the legislature, to pass its authority to another branch of government, namely the executive, will only be permitted in limited circumstances. The one circumstance which is universally recognised is the right to delegate the power to make legislation (usually called subordinate legislation) to give effect to the laws passed by the legislature. Limited delegation might also be permissible in times of war and national emergency. Although Chaskalson P indicated that there might be other circumstances in which urgency allows for a delegation of the legislative function, neither Mahomed DP or Sachs J agreed with the approach. (The issue of course does not arise in the present matter: no such circumstances were, or could be, invoked in 1990 to justify the delegation of plenary legislative power).

124. The approach to separation of powers has been discussed in a number of cases, as well as in the statement issued by this Honourable Court. Reference is made to the statement issued by the judges of the Supreme Court of Zimbabwe following the political reaction to the judgment in **Smith v Mutasa NO & Anor 1989 (3) ZLR 183 (SC)** - reported at page 219 of the

law reports.

"***The Constitution of Zimbabwe lays down the separation of powers between the Executive, the Legislature and the Judiciary. Parliament makes the laws. The duty to interpret the laws made by Parliament is assigned to the Judiciary. The Judiciary presides over the observation of the Rule of Law. Parliament cannot disobey its own laws. If it does the courts of justice will determine whether Parliament has contravened the provisions of its own enactments***".

See also the majority judgment in **Biti & Anor v Minister of Justice, Legal And Parliamentary Affairs & Anor SC 10/2002 at pages 14-18**.

125. **In President of the Republic of South Africa & Ors v South African Rugby Football Union & Ors 2000 (1) SA 1 (CC)**, the Constitutional Court said at page 62:

"***[132] The exercise of public power is regulated by the Constitution in different ways. There is a separation of powers between the Legislature, the Executive and the Judiciary which determines who may exercise power in particular spheres. An overarching Bill of Rights regulates and controls the exercise of public power, and specific provisions of the Constitution regulate and control the exercise of particular powers"***.

126. To similar effect, the Zimbabwe Supreme Court in **Chairman, Public Service Commission & Ors v Zimbabwe Teachers' Association & Ors 1996 (1) ZLR 637 (SC) at page 651;1997 (1) SA 209 (ZS) at pages 218-219**, per Gubbay CJ, Korsah JA and Ebrahim JA, said:

"***We consider that this argument fails to take into account the fact that Zimbabwe, unlike Great Britain, is not a parliamentary democracy. It is a constitutional democracy. The centre-piece of our democracy is not a sovereign parliament but a supreme law (the Constitution). See Smith v Mutasa NO and Another 1990 (3) SA 756 (ZS) at 761I-762A (1989 (3) ZLR 183 at 192G-H)***".

127. In **Ex parte Chairperson of the Constitutional Assembly: in Re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)** the Constitutional Court stated at page 810:

"**[108] There is, however, no universal model of separation of powers and, in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute. This is apparent from the objector's own examples. While in the USA, France and the Netherlands members of the Executive may not continue to be members of the Legislature, this is not a requirement of the German system of separation of powers. Moreover, because of the different systems of checks and balances that exist in these countries, the relationship between the different branches of government and the power or influence that one branch of government has over the other, differs from one country to another.**

[109] The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation. In Justice Frankfurter's words, '(t)he areas are partly interacting, not wholly disjointed'".

128. Since the "***centre-piece of our democracy***" is the Constitution, see above, it is respectfully submitted that it must be in the Constitution that the power of Parliament to allow the executive to make laws has to be found. To the contrary, the Constitution is explicit that the power to make laws vests with the Parliament, and specifically that Parliament must deal with the Electoral Law.

129. When regard is had to the considerations enunciated by Mahomed DP in the **Western Cape Legislature case, supra, at paragraphs [136] and [137]**, it is submitted that section 158 of the Electoral Act fails each consideration. Even in the positive considerations, see sub-paragraph 1 in paragraph [136], the delegation is as wide as can be imagined, even if the words "***good government***" or "***efficient local government***" are not read into it.

130. It must be emphasised that the power given to the President in terms of section 158 is as wide as can be imagined, to be used as and when the President decides with no checks and balances. If it is correct, as will no doubt be argued on behalf of the State, that no court can inquire into the jurisdictional basis for any regulations made, then all the more so is the very wide delegation correctly condemned by Mahomed DP.

131. As Mahomed DP said at paragraph [141], the legislation is an abdication of Parliament's legislative function, leaving the President absolutely free to

change the entire structure and policy of any legislation, including the common law, without even the requirement to give advance notice or to consult. It fails on a second basis too; it delineates neither the policy to be applied nor criteria to be followed (see **Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC) paras [48], [49] and [54]**).

132. Accordingly, it is submitted that with the supreme law being the Constitution (see section 3 of the Constitution, a delegation of anything more than the power to give effect to the laws enacted by Parliament is an invalid use of the power of Parliament. It must therefore be found that section 158 of the Electoral Act is invalid as being in breach of the Constitution of Zimbabwe. It is submitted that this surrender of parliamentary functions to the executive is totally inconsistent with:

(a) section 50 of the Constitution, in terms of which it is Parliament that is empowered to make laws;

(b) the concept of the Electoral Law in the Constitution; and

(c) the entire scheme of the separation of powers envisaged in the Constitution of Zimbabwe;

(d) the principle of legality (inasmuch as the head of the executive is given the power to make the rules in respect of a contest in which he himself has an interest).

133. The argument submitted is in no way affected by section 32(2) of the Constitution. This provision was only inserted with effect from 1 November 1993, and clearly does not apply retrospectively. Legislation is always interpreted as applying prospectively, unless there is a clear indication that it is to be applied retrospectively, see **Curtis v Johannesburg Municipality 1906 TS 308 at page 311, Mohamed v Union Government 1911 AD 1 at page 8[5], Principal Immigration Officer v Purshotam 1928 AD 435 at page 443, Jockey Club of South Africa v Transvaal Racing Club 1959 1 SA 441 (A) at page 451, Protea International (Pty) Ltd v Peat Marwick Mitchell & Co**

1990 (2) SA 566 (A) at page 573, Sun World International Inc v Unifruco Ltd 1998 (3) SA 151 (C) at pages 164J-165A and Director of Public Prosecutions: Cape of Good Hope v Bathgate 2000 (2) SA 535 (C), paragraph 121, page 568. See also Bater & Anor v Muchengeti 1995 (1) ZLR 80 (SC).

134. Nor does it seek to validate laws previously passed which were clearly invalid. If the argument above that Parliament cannot abrogate its

[5] Applied in Western Cape Provincial Government and Others: in Re Dvb Behuising (Pty) Ltd 2001 (1) SA 500 (CC), footnote 119, page 530

constitutional responsibility in respect of the Electoral Law is rejected, then there can be no question that section 32(2) was inserted in 1993 to validate what had been placed in the Electoral Law in 1985. This option was open to Parliament, but has not been used.

135. It is respectfully submitted that in any event section 32(2) must be interpreted in accordance with the principle that the legislative authority so far as primary law is concerned vests in Parliament, and the conferring of legislative functions on any person or authority in terms of section 32(2) is not to usurp the function of Parliament. It is merely to complement it. Where, as here, section 158 of the Electoral Act is used to overrule not only Parliament but also the Courts, it is respectfully submitted that such cannot be justified in terms of section 32(2) of the Constitution.

136. Therefore section 158 of the Electoral Act is unconstitutional. This being the position, we next argue, the Electoral Act (Modification) Notice, 2002, published in SI 41D of 2002 on 5 March 2002, is equally invalid and of no legal force.

(7) If so, does that (the unconstitutionality of section 158) afford a basis on its own to set aside the election of the First Respondent ?

(8) If section 158 is unlawful, is the invalidity retrospective, and does that affect the election in question ?

137. In terms of section 3 of the Constitution of Zimbabwe, the Constitution is the supreme law of Zimbabwe, and any other law inconsistent with the Constitution is void. The real question to be determined is whether such a law is void from the date of its declaration

by this Honourable Court, or from the date of its enactment, or from the date of the commencement of the Constitution. It is submitted that section 3 of the Constitution makes it clear that the fact of inconsistency makes the law void, not any pronouncement by a court. The court merely examines the matter to determine if there is any such inconsistency.

138. The Constitution of South Africa provides in section 172(1)(b) that a court may limit the retrospective effect of the declaration of invalidity. The reason for this is that under law where a court declares legislation to be invalid, it is invalid from the date of the enactment of the Constitution, see **Ferreira v Levin NO & Ors; Vryenhoek & Ors v Powell NO & Ors 1996 (1) SA 984 (CC) where Ackermann J in para [28], page 1007**, said:

"***A pre-existing law which was inconsistent with the provisions of the Constitution became invalid the moment the relevant provisions of the Constitution came into effect. The fact that this Court has the power in terms of s 98(5) of the Constitution to postpone the operation of invalidity and, in terms of s 98(6), to regulate the consequences of the invalidity, does not detract from the conclusion that the test for invalidity is an objective one and that the inception of invalidity of a pre-existing law occurs when the relevant provision of the Constitution came into operation. The provisions of s 98(5) and (6), which permit the Court to control the result of a declaration of invalidity, may give temporary validity to the law and require it to be obeyed and persons who ignore statutes that are inconsistent with the Constitution may not always be able to do so with impunity".***

139. This position was confirmed in **Dawood & Anor v Minister of Home Affairs & Ors and other cases 200 (1) SA 997 (C) at page 1050** where it was said:

"***In other words, in the absence of a contrary order, the declaration of invalidity invalidates the relevant statutory provision and any actions taken under such provision from the moment the [statutory provision] or the Constitution came into effect, whichever is the latter date, and not from the moment of the Court's order'...***"

140. In **Ex parte Minister of Safety and Security & Ors; In re S v Walters & Anor 2002 (4) SA 613 (CC)**, Kriegler J at paragraph [75], page 652 said:

"***In principle, the finding of invalidity dated back to the moment the inconsistency arose between the section and the constitutionally protected right in infringes***".

See also the comments by the same learned judge in **Ex parte Women's Legal Centre; In re Moise v Greater Germiston Transitional Local Council**

2001 (4) SA 1288 (CC) at paragraph [13], page 1296D-E.

141. Thus, section 158 was invalid from the moment of its enactment. It does not require the Court to do anything more than declare it to be so invalid as to render it void *ab initio*. It was certainly void and of no legal effect during the 2002 Presidential Elections, and thus the use of it by the First Respondent to change the election rules in his favour was equally invalid.

142. Since the rules of the presidential election were thus predicated on a void law, the election itself cannot stand. It cannot be and is not consistent with the principles of the electoral law to have the rules of the election on vital matters determined by the use of a void statutory provision which conflicts with the Constitution.

143. Thus on this basis alone the election must be set aside.

E. OTHER ISSUES REGARDING VALIDITY OF REGULATIONS AND NOTICE

144. These issues are related:

10. Were the regulations made in terms of the Electoral Act *ultra vires* of the said Act ?

11. If so, does that afford a basis on its own to set aside the election of the First Respondent ?

12. (a) What was the effect of the nullification by the Supreme Court of the General Laws Amendment Act 2002 (Act 2/2002) ?

(b) Was the retrospective validation contained in the Electoral Act (Modification) Notice 2002, SI 41D/2002, lawful and in accordance with the principles of the Electoral Law?

(c) Was it lawful to publish Regulations in terms of section 157 or 158 of the Electoral Act [Chapter 2:01] subsequent to the nullification of the General Laws Amendment Act 2002 which introduced most of the provisions of that Act, and whether this was in accordance with the principles of the Electoral Law?

(d) Was it lawful and in accordance with the principles of the Electoral Law for the First Respondent to publish the Electoral Act (Modification) Notice 2002, SI 41D/2002, three days before the polling in the election commenced ?

(a) "Changing the rules"

145. Clearly not all legislation enacted by the Third Respondent was unlawful; nor were all the notices published by the Second Respondent. With the setting of the date of the nomination court as being 31 January 2002, the Minister and indeed Parliament was entitled to make changes to the rules under which the presidential election was to be conducted. After that date the rules could not be changed as that would be tantamount to changing "the rules of the game" after "the game" had commenced. This offends against one of the most fundamental tenets of electoral law: the goalposts may not be thus shifted, least of all by one of the contestants (**see Campbell v Bennett et al (2002) 212 F Supp 2d 1339 at 1344**). Changing the rules prevents fairness to the participants in the election and is contrary to the due process clause in the Constitution, compare **Holland & Ors v Minister of the Public Service, Labour and Social Welfare 1997 (1) ZLR 186 (SC) at 190 and S v Delta Consolidated (Pvt) Ltd & Ors 1991 (2) ZLR 234 (SC)**.

146. Free elections are the hallmark of democracy. That principle is entrenched by international human rights instruments. Article 21 of the Universal Declaration of Human Rights thus provides:

"***Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.***

....

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures".

See also Article 25 of the International Covenant on Civil and Political Rights, which provides:

"***Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:***

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country".

The Universal Declaration has attained the status of being declaratory of public international law, and thus forms part of the common law of Zimbabwe.

147. Parliament sought to change to the law relating to elections by inserting into the General Laws Amendment Bill 2001 certain provisions relating to the Electoral Act at the committee stage. This Bill was improperly passed by Parliament at the Third Reading and its validity was challenged by the Petitioner's party before the Supreme Court. The Supreme Court, by a 4 to 1 majority, held that the legislation to have been improperly enacted and declared it in toto to be invalid and of no force or effect, see **Biti & Anor v Minister of Justice, Legal & Parliamentary Affairs & Anor SC 10/2002** (not yet reported).

148. The effect of the ruling of the Supreme Court was to require the presidential elections to proceed under the law that existed at 3 February 2002 before the General Laws Amendment Act 2002 was gazetted. The effect of the nullification of that Act is that none of its provisions could be used in the election. Neither could any regulation or notice made in terms of that Act or provisions of it have any effect, as such regulation or notice would also be invalid *ab initio.* It was as if it did not and had never existed. But that is not how the First Respondent and his government saw the matter. They prepared for the election in which the First Respondent was a candidate as though that law existed and had not been declared invalid by the Supreme Court. To clothe their action with legality, the First Respondent purported to use section 158 of the Electoral Act to validate acting in terms of an invalid law, see section 7 of the Electoral Act (Modification) Notice 2002, SI

41D/2002.

149. In fact the Third Respondent went further than that. He purported to use section 157 of the Electoral Act to legislate for matters not dealt with in the Electoral Act, other than as amended by the General Laws Amendment Act 2002.

(b) <u>Electoral (Amendment) Regulations, 2002 (No. 11). SI 17A of 2002</u>

150. These Regulations prescribed the fees to be paid by observers. The Regulations were made in terms of section 157 of the Electoral Act. Section 6 of those Regulations amend the principal regulations by the addition of a new section 21A. Section 21A deals with accreditation fee to be paid by observers in terms of section 14C of the Act.

151. There are two issues arising from these Regulations. The first issue is that the Electoral Act at the time the Regulations became operational on 6 February 2002 had no provision for observer fees. Section 14C of the Act which is cited in those Regulations had been introduced by the General Laws Amendment Act 2002, but it was held to be invalid and of no force or effect. Thus the Regulations, to that extent, were null and void, and *ultra vires* the Act.

Secondly, in the absence of the section 14C, section 157 of the Act in terms of which the Minister purported to make those Regulations does not allow the Minister to make regulations relating to observers or the fees to be paid by them. Section 157(2) expressly provides for the matters which may be provided for in the regulations to be made by the Minister in regulations. To the extent that the Minister purported to act in terms of section 157, he clearly acted outside his powers. Section 157(2) gave no power to the Minister to fix fees for observers.

152. Furthermore these Regulations were made **after** the nomination court had sat and concluded its business.

153. Even after the Supreme Court gave its judgment on the invalidity of the General Laws Amendment Act 2002 on 27 February 2002, the Third Respondent did not seek to revisit the issue of section 21A of the Regulations.

154. In other words, the presidential election was conducted in breach of the Electoral Act if the observers were treated in accordance with these Regulations.

155. Similar submissions are made with respect to the Electoral (Amendment) Regulations 2002 (No. 12) published on 22 February 2002 in SI 34 of 2002.

(c) Electoral (Amendment) Regulations 2002 (No. 13), SI 41B of 2002

156. This instrument was published by the Minister in terms of section 157 of the Act. Its date of operation was 1 March 2003, barely a week before polling was to take place. The Statutory Instrument re-enacted many of the provisions of the General Laws Amendment Act 2002.

157. These Regulations show a determined effort to subvert the electoral process by enacting through the back door provisions of a piece of legislation which had been thrown out by the Court.

158. It is submitted that the first point to be considered is that the Minister acted *ultra vires* the provisions of the Act. Section 157 in terms of which he purported to make the regulations prescribed what may be provided for in the regulations which the Minister may make. Matters such as the functions of the commission regarding observers and monitors, conduct of election agents, monitors and observers, are not covered by section 157. That is, indeed, the reason why the Legislature had seen fit to enact those issue through an Act of Parliament. The inference is inescapable that the purpose was to ensure strict control (and possibly manipulation) of the observers, monitors and agents through the authority of the Electoral Supervisory Commission.

159. It is submitted that the Minister acted as he did not because he had or believed he had power in terms of section 157 to so act, but in a deliberate attempt to subvert the ruling of the Supreme Court and to ensure that the presidential election was conducted in terms of an invalid piece of legislation for the benefit of the First Respondent.

160. Apart from being *ultra vires* the enabling statute, the Regulations can also be impugned on the ground that the Minister acted *mala fides* in re-enacting provisions of an Act of Parliament which had been declared invalid through the use of subsidiary legislation. See **Kerchoff v Minister of Law & Order (unreported)** cited in **Cockram, Interpretation of Statutes** at page 114, and subsequently confirmed on appeal to the Appellate Division, and **S v Mngadi & Ors 1986 (1) SA 526 (N).**

161. Accordingly, it is submitted that the Regulations are therefore invalid on two grounds, namely:

(a) that the Minister acted *ultra vires* the enabling Act; or

(b) that the Minister acted *mala fides*.

The foregoing is yet another instance where “the rules of the game” are being changed after the nomination court had considered the nomination

papers and a week before the voting.

Section 102(1) of the Electoral Act provides:

"***An election petition complaining of an undue return or an undue election of a person to the office of President by reason of irregularity or any other cause whatsoever, may be presented to the High Court within thirty days of the declaration of the result of the election in respect of which the petition is presented, by any person -***

(a) claiming to have had a right to be elected at that election; or

(b) alleging himself to have been a candidate at such election"

162. The concept of "***any other cause whatsoever***" is of wide ambit and need not relate solely to acts of violence or intimidation, see the remarks of Ziyambi J in the **Chiredzi North Parliamentary Election Petition: Mare v Chauke HH 110-2001 at pages 22 and 23** of the cyclostyled judgment. The invalid legislation by the Third Respondent, affecting as it did the conduct of the elections constitutes "***any other cause***" for setting aside the election of the First Respondent as President. The making of the Regulations is an irregularity which had a direct and substantial bearing on the election process. The monitors, observers and agents were undoubtedly appointed and treated in terms of the impugned Regulations. For that reason, the issue of the Regulations is on its own a sufficient ground for the election to be set aside.

(d) Electoral Act (Modification) Notice, 2002, SI 41D of 2002

163. The Notice was made by the President, ostensibly in terms of section 158 of the Act. Its date of operation was 5 March 2002, which was three days before polling commenced in the presidential election.

164. The Notice introduced certain aspects which fundamentally affected the conducting of the election. The Notice purported to retrospectively validate anything that was done under the General Laws Amendment Act 2002, even though that law had been declared invalid. The retrospective validation of otherwise invalid things is not in accordance with electoral law.

165. The first problem is section 158 itself. Once it is clear that section 158 (for the reasons argued above) was unconstitutional and hence invalid from the outset, then everything done under it is *pro non scripto*.

166. The second problem is that the Notice, to the extent that it purports to validate otherwise invalid acts done under the invalidated Act, is *ultra vires* section 158 of the Electoral Act. The President no doubt did not properly understand the provisions of section 158(2)(c). That provision empowers the President to validate things only where the following are satisfied:

(a) the thing to be validated must have been done in connection with or arose out of or resulted from an election;

(b) the thing (and consequently) in question must have been in contravention of either the Electoral Act or any other law

167. Section 158(2) is in the terms of a *post hoc* indemnity for otherwise illegal acts. It does not permit the licensing of illegal acts not yet done. The latter is a dispensing power, illegal at least since the 17th century (**Thomas v Sorrell (1674) Vaughan 330; Halsbury Laws of England (4th ed) vol 8 para 912).** In **Kauluma v Minister of Defence 1987 (2) SA 833 (A)** the South African occupying forces in Namibia unsuccessfully tried to assert just such a construction as authorising in advance their abduction of civilians from Cassinga in Angola. In the present case no election had been conducted at the time that the President purported to retrospectively validate acts done under an Act which had been declared to be invalid.

The things which the President sought to validate had not been done **in** contravention of the Electoral Act or another law. Instead, those are things which would be done **in accordance with** (and not in contravention of) the invalidated Act. (See further **Dicey Introduction to the Study of the Law of the Constitution 18th ed 1923**) **228-233, 547-9**).

168. In short, the Notice is not one which the President could make in terms of section 158. To the extent that he purported to act in terms of that section then he acted ultra vires the enabling Act. For that reason the Notice is invalid.

169. In the third place, the Notice can also be set aside on the following grounds:

(a) It is a negation of the judgment of the Supreme Court which had declared the Amendment Act to be invalid. It is therefore in violation of section 18 of the Act, in that it re-enacted the provisions which the MDC had successfully challenged. The Supreme Court has held that:

"***The right of full and unimpeded access to courts is of cardinal importance for the adjudication of justiciable disputes. It ensures a mechanism by which such disputes are resolved in a peaceful, regulated and institutionalized manner***".

MDC & Anor v Chinamasa & Anor NNO 2001 (1) ZLR 69 (SC) at 78G-H.

The manner in which the Notice was made makes the judgment of the Supreme Court worthless. The concept of a fair hearing by an independent and impartial tribunal is therefore negated. Simultaneously the principle of legality which underlies the whole Constitution is undermined: the executive has not acted in a way which respects and implements the judgment (by remedying the

defects identified by the judgment). The executive has, in defiance of the judgment, sought to undo it.

(b) The First Respondent who enacted the Notice three days before the polling was a candidate in the election. His enactment of the notice therefore contravened the principle of natural justice *nemo judex in causa sua.* He certainly did not act fairly in introducing additional rules into the game in which he was a contender a few hours before the voting.

See: Biti & Anor v Minister of Justice, Legal & Parliamentary Affairs & Anor SC10-02 at page 7.

(c) The Notice contains provisions which are prejudicial in that:

(i) they disenfranchised some persons at very short notice (just three days. The limiting of persons entitled to receive a postal ballot paper means that some persons who were out of the country but did not fall within the limited categories were not able to vote (section 4 of the Notice).

(ii) the Notice empowers the Registrar-General to keep a register of persons disenfranchised because of the issue of citizenship (section 6 of the Notice).

(iii) the Registrar-General is empowered to prepare a supplementary voters' roll for persons who failed to register even after the second extension of the closure of the roll had been granted. See section 5. The supplementary roll presents an opportunity to manipulate the process of registering voters.

170. It is submitted that it was patently fair for the First Respondent to publish a Notice which had such far reaching effects just hours before the polling. The First Respondent acted contrary to the principles of Electoral Law.

Does section 3 of SI 41D/2002 contravene section 61 of the Constitution?

171. It is submitted that SI 41D/2002 was invalid, and hence the election conducted pursuant to its terms vitiated, for a yet further reason. (This argument is also related to issue 15, dealt with under section A above).

172. (a) Sec Section 11 (1) of the Electoral Act says: "***At the request of the Commission, the Minister may assign to the Commission such members of the Public Service employed in his ministry as may be necessary to perform secretarial and administrative functions for the Commission***" (my emphasis). Section 11 is contained in part III of the Electoral Act, which part bears the heading 'Electoral Supervisory

Commission: Procedure and Conditions of Service of Members.' The heading accurately describes the content of the part III, which consists of sections 6 - 14A. Section 6 says, in relevant part: "***In this part - 'Commission' means the Electoral Supervisory Commission appointed in terms of section 61 of the Constitution***". Section 3 (1) of the Act states that "'***Minister' means the Minister of Justice, Legal and Parliamentary Affairs or any other Minister to whom the President may, from time to time, assign the administration of this Act***". Section 113 (1) of the Constitution says:

"'Public Service' means the service of the state but does not include -

(a) the Prison Service, Police Force or Defence Forces;

(b) Service as a judge of the Supreme Court or the High Court or as a person appointed to preside over a special court under section 92;

(c) service as a member of any commission, established by this Constitution or any body corporate established directly by or under any Act of Parliament for special purposes specified in that Act;

(d) service which this Constitution or an Act of Parliament provides shall not form part of the Public Service".

(b) Section 3 of SI 41D/2002 purported to modify section 11 of the Electoral Act. Section 3 says: "***Notwithstanding subsection (1) of section 11 of the Act, the Minister or <u>any other Minister</u> may assign to the Commission such <u>persons in the employment of the state</u> as***

may be necessary to perform secretarial and administrative functions for the Commission' (my emphasis).

(c) Section 61 (6) of the Constitution provides that "***[t]he 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 of any person or authority***". According to section 61 (3) (a) of the Constitution, "***[t]he functions of the Electoral Supervisory Commission shall be - (a) to supervise the registration of voters and the conduct of elections to Parliament and to the office of President***"

(c) It is submitted that section 3 of SI 41D/2002 contravenes section 61 (6) of the Constitution in that it purports to direct or control the way in which the Electoral Supervisory Commission exercises its powers in terms of section 61 (3) (a) of the Constitution. Section 11 (1) of the Electoral Act *correctly* provides that the Minister may assign staff "***at the request of the Commission….***". If staff are assigned "***at the request of the Commission***" there is clear compliance with section 61 (6) of the Constitution. However, section 3 of SI 41D/2002 purports to empower the Minister of Justice "***…or any other Minister…;*** " to assign staff to the Commission, regardless of whether the Commissioner has requested staff. Moreover, staff assigned under section 3 need not be members of the Public Service: it suffices that

they are "***…persons in the employment of the state…,***" a much broader category of persons. Thus persons excluded from the definition of "Public Service" in section 113 (1) of the Constitution - such as members of the Defence Forces - may be assigned by a Minister to the Electoral Supervisory Commission.

(e) The Electoral Supervisory Commission cannot supervise the registration of voters and the conduct of elections properly unless it is able to request the staff it wants. The Commission exercises its powers through its staff. Thus it is submitted that if a Minster assigns staff to the Commission in the absence of a request from that body, this will amount to directing or controlling the Commission in a way prohibited by subsections (6) and (3) (a) of section 61 of the Constitution. The staff assigned to the Commission, the Minister responsible for the assignment, and the President who purported to enact section 3 of SI 41D/2002 are all *persons* unlawfully directing or controlling the Commission, in their various ways, for the purposes of section 61 (6) of the Constitution.

(f) In addition, it is also submitted that section 3 of SI 41D/2002 is unconstitutional and unlawful in that its purported enactment under section 158 of the Electoral Act contravenes section 61 (7) of the Constitution. The latter says: "***An Act of Parliament may make***

provision for the powers and functions of the Electoral Supervisory-Commission and, without prejudice to the generality of the foregoing, may make provision for the disqualifications, tenure of office and remuneration of the members thereof" (my emphasis). Thus *only Parliament* may make laws concerning the powers and functions of the Commission. No other person or authority may exercise such a power. Accordingly, the President cannot utilise section 158 of the Electoral Act in order to enact laws concerning the powers and functions of the Commission. Even Parliament can only exercise its lawmaking power in this regard in a way that is consistent with section 61 and the other provisions of the Constitution.

F. INTERPRETATION OF SECTION 149 OF ELECTORAL ACT

173. The next issue is vital to the question whether (as the Respondents contend) an election challenge in Zimbabwe 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 that failure affected the result. The issue 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" ?**

174. 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).

175. 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:

[**When non-compliance with Act invalidates election]**

"***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; <u>or</u>

(b) such mistake or non-compliance did affect the result of the election" (emphasis added).

The difference between the two version is the preposition which separates sub-paragraphs (a) and (b). In making the revised edition of 1996, the word "or" was changed to "and".

176. Section 53(1) of the Constitution of Zimbabwe 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***".

177. 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 1990 used the preposition "or" between the two sub-paragraphs.

178. 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.

179. 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. The change was not made by Parliament. The inference that the change was a deliberate endeavour, but whether the change was deliberate or inadvertent is irrelevant, as the Law Reviser had no right or power to allow make or allow such a fundamental change to the law.

180. Section 32 of the Constitution vested Parliament with the power to make legislation in the form of Acts, see section 51(4) of the Constitution which provides:

"***All laws made by Parliament shall be styled "Acts" and the words of enactment shall be 'enacted by the President and the Parliament of Zimbabwe' or words to the like effect***".

181. 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 functions are set out in section 10 of the Act, as it has been amended, as follows:

"10 <u>Functions of Law Reviser</u>

(1) Subject to this Act, it shall be the function of the Law Reviser to compile the statutes in revised form, whether loose-leaf or otherwise, and to ensure that each statute is continuously revised in such a manner that an up-to-date text of each statute is available as a single document.

(2) In the discharge of his function in terms of subsection (1) the Law Reviser may -

(a) in the case of a statute compiled in loose-leaf form, prepare and issue a replacement page or replacement pages for any statute affected by -

(i) grammatical or typographical errors; or

(ii) amendment or repeal whether such amendment or repeal is express or implied;

(a1) arrange statutes in any sequence or groups that may be convenient, irrespective of the dates when they came into operation, and assign identifying number to the statutes so arranged;

(b) consolidate into one statute any two or more statutes in pari materia, making the alterations thereby rendered necessary;

(c) supply or alter marginal notes or headings in any statute and insert a table showing the arrangement of sections where, in the opinion of the Law Reviser, such a course is desirable;

(d) compile an alphabetical table, a subject-matter index and such other tables and indexes to the statutes as the Law Reviser considers desirable;

(e) correct cross-references;

(e1) omit enacting provisions of statutes;

(f) for the purpose of correcting any grammatical or typographical errors in any statute, make verbal additions, omissions or alterations not affecting the meaning of the statute;

(g) omit any amending or repealing statute or any such provision of a statute;

(g1) omit or alter any savings provision contained in a statute;

(h) make such amendments, omissions or alterations as the Law Reviser considers necessary to bring any statute into conformity with the Constitution, this Act and the Interpretation Act [Chapter 1:01];

(i) make such formal alterations as to names, localities, offices and otherwise as the Law Reviser considers necessary to bring any statute into conformity with the prevailing circumstances of Zimbabwe;

(j) invite, receive and consider suggestions from the courts, the legal profession and other users of the law concerning any matter referred to in subsection (1);

(k) alter the order of sections, subsections, paragraphs or other subdivisions in any law and in all cases where it may be necessary to do so renumber the sections, subsections, paragraphs or other subdivisions;

(l) alter the form or arrangement of any section by transferring words, by combining it in whole or in part with another section or other sections or by dividing it into two or more subsections; and

(m) do all other things pertaining to form and method which may be necessary to achieve the objects stated in subsection (1).

(3) The powers conferred upon the Law Reviser by this section shall not be taken to imply any power in the Law Reviser to make major alteration or amendment in the matter or substance of any statute, but shall include powers to make such alterations in the language of statutes as are requisite in order to preserve a uniform mode of expression and to make such amendments as are necessary to bring out more clearly what the Law Reviser considers to have been the

intention of Parliament" (our emphasis).

182. What emerges from section 10(2) 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 may not change the meaning and/or the substance of a statutory provision. See in particular paragraph (f) of section 10(2), as well as paragraphs (h) and (l). If - as happens with legislation - Parliament has made an error not merely of a clerical kind, it and it alone must amend it.

183. To put this matter beyond any doubt, Parliament included subsection (3) in section 10 of the Act. Clearly Parliament has no intention to delegate its legislative function, whether acting in terms of section 32(2) of the Constitution or otherwise, to the Law Reviser.

184. 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 the erroneous reproduction of the Schedule in question.

185. In **Pio v Smith 1986 (2) ZLR 120 (SC) at 130**, Beck JA said:

"***Section 156 of the Electoral Act is designed to ensure that an election will not lightly be set aside. In Gunn & Ors v Sharpe & Ors [1974] 2 All ER 1058 (QBD) Willis J, at 1063j-1064a, said of the similarly worded s 37(1) of the Representation of the People Act,1949***:

'***We are very conscious of the importance of the principle which occurs throughout the cases to which we have been referred that elections should not be lightly set aside, simply because there have been some informalities and errors, and that both s 13 of the 1872 Act and s 37 of the 1949 Act were framed with this principle in mind'***.

Section 156 of the Electoral Act reads as follows:

> ***'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 or non-compliance did not affect the result of the election'***.

In Morgan v Simpson supra at 725e-g, Lord Denning, speaking of the corresponding s 37(1) of the Representation of the People Act, 1949, pointed out that it, like our s 156, is couched in the negative and says when an election is not to be declared invalid. He held however, having regard to the history of the law as to elections and to the case law, that the section should be construed as if it was couched in positive form. Mutatis mutandis, in relation to our s 156, that positive form would run thus:

'***An election shall be declared invalid 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 not so conducted as to be substantially in accordance with the principles laid down in this Act or that the mistake or non-compliance did affect the result'.***

So construing the section the court of appeal held that any breach of the election rules which is shown to have affected the result of an election is of itself enough to cause the elections to be set aside".

186. This passage was clearly in the mind of the drafter of section 142 of the Electoral Act 1990 when he couched the provision in the positive rather than the negative form that has been the case in previous Electoral Acts. It is to be noted that the present case is the converse of that dealt with in **Morgan v Simpson**, so that the application of its logic (as opposed by the Supreme Court in **Pio v Smith supra**) means that indeed (as the Petitioner contends) that a failure to conduct the election in accordance with the principles laid down in the Electoral Act "***is of itself enough to cause the elections to be set aside***".

187. The alteration *in casu* was not for the purposes of correcting a grammatical or typographical error, as contemplated by section 10(2)(f) of the Act. The alteration was also not necessary to bring the Electoral Act into line with the Constitution, the Interpretation Act or the Statute Law Compilation and Revision Act itself as envisaged in paragraph (h) of section 10(2).

188. In any event, the alteration by the reviser changed the meaning and effect of section 149 of the Electoral Act fundamentally. As formulated in the original Act 7 of 1990, a petitioner is entitled to succeed if he proves that an election was not conducted in accordance with the principles laid down

in the Act. Once that is established, he need not go further and also establish that the mistake or none compliance complained of did affect the result of the election. On the other hand, the formulation in [Chapter 2:01] means that it is not sufficient for a petitioner to establish non-compliance with the principles of the Act. A petitioner must go further and also establish that the result of the election was affected. Thus, according to the formulation in [Chapter 2:01], an infraction of the principles of the Act, no matter how gross, does not warrant the setting aside of an election if a petitioner cannot prove that the outcome was affected.

189. That approach - urged for obvious reasons by the respondents - is thus not only in conflict with what has been shown to be the true text of the Electoral Act, but also in conflict with the leading authorities of **Morgan v Simpson supra** and **Pio v Smith supra**.

190. The alteration by the law reviser constitutes a major alteration or amendment in the matter and substance of the statute. That, it is respectfully submitted, is precisely what the Law Reviser is precluded from doing by section 10(3) of the Act.

As explained by Gubbay J in **S v Mpofu, *supra*, at 437-438**, section 53(2) of the Constitution does not assist in this matter. The revised edition must accord with the law and common sense dictates that the deposited version

cannot be a means to amend the law. Indeed, as already submitted, section 10(3) of the Statute Law Compilation and Revision Act makes this totally clear. The courts are not bound by an error of the draftsman or the printer. Put differently, Parliament makes the law, not the draftsman or the printer.

191. In these circumstances, the substitution of “and” for “or” by the Law Reviser was *ultra vires* section 10 of the Statute Law Compilation and Revision Act [Chapter 1:03]. Accordingly, section 149 of the Electoral Act [Chapter 2:01] is to be read as if the word “or” and not the word “and” occurs between subparagraph (a) and subparagraph (b), and thus the requirements are to be read as being disjunctive and separate.

192. The implications for this case are considerable. These heads of argument demonstrate, we submit, that in multiple respects the Presidential Election was <u>not</u> conducted in accordance with the principles laid down by the Electoral Act. The inquiry into the <u>effect</u> of these failures does not arise, given the correct text of section 149.

193. But, we should emphasise, if the second and separate basis for invalidation - effect on the result - is considered, it must be borne in mind that it is not for a Petitioner to show that, but for the irregularity, he would have won. As we demonstrate in section H below, this court has unequivocably held that the threshold is only whether the irregularity substantially bears upon the

result.

194. On both bases, it is submitted, the correct application of section 149 nullifies the election, by virtue of the non-compliance with Electoral Act principles and the material effect of irregularities analysed in these heads of argument.

G. ‘THIRD DAY’ FAILURES

(16) Was the failure to have polling in all polling stations throughout the country on 11 March 2002 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?

195. 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 be 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 Honourable Court in case no HC 2800/2002 on 10 March 2002. The matter was heard that same day by Mr

Justice Hlatshwayo. The learned judge was inclined to grant an extension in respect of Harare and Chitungwiza, but the Third Respondent insisted on the extension applying to the whole country. Such an order was then 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. This Notice authorised the Registrar-General to extend the poll for the elections to 7 pm on Monday 11 March 2002.

(d) In fact, polling stations in Harare and Chitungwiza only opened around noon, and were closed precisely at 7 pm.

(e) Polling stations did not open in any other area of Zimbabwe.

196. The proviso to section 52(1) of the Electoral Act [*Chapter 2:01*] requires a polling station to be open for at least eight hours continuously on each polling day. In other words, every fixed polling station had to be open on Monday 11 March 2002 for at least eight continuous hours. It is common cause this did not happen, in respect of both (d) and (e) above.

197. In addition, reference is made to section 53(4) which provides:

"**(4)** ***The presiding officer shall permit every voter who, at the time fixed in terms of this section for the closing of the polling station concerned -***

(a) is inside the room, tent, vehicle or other place in which the ballot box is placed; or

(b) in his opinion, was in the immediate precincts of the polling station before the proposed closing of the polling station and was prevented from entering the room, tent, vehicle or other place in which the ballot box is placed owing to congestion therein;

to record his vote before closing the polling station*".*

198. Clearly the order from the Second Respondent to close all polling stations at precisely 7 pm was a breach of this provision. Persons waiting to vote, whether within the area of the polling station or within its immediate precincts, were denied the right to cast their vote. Section 53(4) is peremptory and binding upon every presiding officer. The Second Respondent's instructions to close at precisely 7 pm on that Monday was accordingly unlawful.

199. Section 53 (Part XIV) is made applicable to presidential elections by section 103 of the Act.

200. Thus, the failure to comply with the law in relating to polling on Monday 11 March 2002 means beyond doubt that the election was not conducted in accordance with the principles laid down in the Act. In summary, the

principles relating to elections in respect of:

(a) the opening of polling stations throughout the country;

(b) the requirements that all polling stations be opened for at least eight consecutive hours; and

(c) the premature closure of polling stations;

all breach the principles of the electoral law. Solely on this basis the election must be set aside. But in any event, manifestly the failure to operate the polling stations meets the alternative requirement of section 149, in the sense (as already explained) of substantially bearing upon the result.

H. UNLAWFULNESS OF SIMULTANEOUSLY HOLDING LOCAL GOVERNMENT ELECTIONS

17. (a) Were the elections for the Mayor and Councillors of Harare and for the Mayor of Chitungwiza lawfully held at the same time as the elections 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 ?

201. As pointed out by the Supreme Court in **Stevenson v Minister of Local Government and National Housing & Ors SC 38/2002**, an election for the office of Executive Mayor of Harare should have been held in terms of section 103J of the Electoral Act within sixty days of the former mayor resigning, that is at the worst within sixty days of 9 June 1999. In addition, a general election of councillors should have been held in August 1999. This date could have been postponed for one year by the Third Respondent, which would mean that such general election of councillors should have been held by August 2000. In fact, no such elections were held.

202. Towards the end of 2001, litigation ensued to ensure that elections took place for a mayor and councillors of Harare. This litigation culminated in the judgment of the Supreme Court in **Registrar-General of Elections v Combined**

Harare Residents Association & Anor SC 7/2002. In that matter, Ebrahim JA found the Electoral Act (Modification) (Postponement of Harare City Council Elections Notice) 2002, SI 13A of 2002 to be invalid. The majority of the Court declined to express an opinion on that issue. The effect of the ruling of the majority, however, was that there was no judicial edict to enforce the holding of those elections.

203. The effect of the Electoral Act (Modification) (Postponement of Harare City Council Elections Notice) 2002 was that the Harare City Council Elections were ordered by the First Respondent to take place on 9 and 10 March 2002. By the Electoral Act (Modification) (No. 3) Notice 2002, SI 42E of 2002, that period was extended to include 11 March 2002. In other words, the mayoral and council elections in Harare as well as the mayoral election in Chitungwiza, were held over precisely the same period as the elections for President.

204. Furthermore, precisely the same polling stations were used. Persons in Harare had to cast three votes, whilst those in Chitungwiza cast two votes. Persons throughout the rest of Zimbabwe cast only one vote.

205. The first point that needs to be made is that the Delimitation Commission made it clear that in delimiting the parliamentary constituencies of Harare Province "***it was not possible to ensure that all the wards fell within***

constituency boundaries. Many wards, therefore, straddle constituency boundaries. This was unavoidable".

206. The effect of this is that polling stations in a constituency would involve polling in one or more wards. Since the presidential election was a constituency based election, see **Registrar-General of Elections & Ors v Tsvangirai SC 12/2002**, this created problems for the application of the Electoral Act, in particular of section 51(2). Section 103U of the Electoral Act applies this provision to elections for councillors and mayors. Thus there was immediately a breach of one of the principles of the electoral law, namely certainty as to where a person is entitled to vote.

207. It is common cause that the number of polling stations in the Harare Province were reduced from the number used in the 2000 Parliamentary Election. The Delimitation Commission of 2000 gave the total number of registered voters in Harare Province as 799 452, see Proclamation 8 of 2000, SI 148B of 2000. The Fourth Respondent gave the total voter population of Harare Province as 878 715, see page 100, an increase of 79 263 voters, or nearly 10%. Despite the additional day for voting, barely 50% of the registered voters cast their vote. This must be compared with the voter turnout of over 60% in other provinces, which did not have the third day of voting. Obviously the delays in voting prevented many people from casting their vote.

208. Although the amendments made to the Electoral Act in 1997 brought local government elections within the ambit of the Electoral Act, it is submitted that the very nature of local government politics and of elections renders them totally unsuited to be conducted at the same time as an election for the office of President. Furthermore, the constitution specifically provides for different periods of office of the President and Members of Parliament, thereby ensuring that as a general rule elections for those offices do not take place during the same year, let alone at the same time. It is submitted that the principle embodies in the Electoral Act is to ensure that elections for different offices are dealt with at different times so that voters can exercise their rights without the type of confusion that clearly arose in the March 2002 Presidential Election in Harare and Chitungwiza.

209. We again submit that the requirements of section 149 of the Electoral Act (properly construed, as demonstrated above) are met: there was a failure to comply with the principles laid down by the Electoral Act; further and in any event, the simultaneous conduct of the local government and Presidential elections had a material effect, in the sense delineated by Ziyambi J.

I. FAILURE TO PERMIT POSTAL VOTING

(19) 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?

210. The principle enunciated in the Electoral Act concerning voting by post is set out in Part XIV, sections 61 to 71. These provisions are expressly made applicable to the presidential election by section 103 of the Act. Thus it is a principle of the Electoral Act that postal voting will be allowed in respect of presidential elections.

211. The persons who can apply to vote by post are laid down in section 61(2) of the Electoral Act. The purported amendment to this provision by section 3(k) of the General Laws Amendment Act 2002 can be ignored for that amendment was held to be invalid.

212. The First Respondent sought to change the principle set out in the electoral law. He did so by a notice issued four days before polling was to commence, see the Electoral Act (Modification) Notice 2002, SI41D of 2002, published in the Government Gazette Extraordinary of 5 March 2002.

In fact, by then all postal votes should have been delivered to the applicants. In fact, no applicants for postal votes had been accepted. So the effect of what the First Respondent did was to ban something that the law permitted, but which administratively had not been granted to registered voters. It is to be borne in mind that section 93(2) of the Electoral Act lays down the principle that in an election to the office of President, every registered voter shall be entitled to vote. What the First Respondent was doing was to remove that right from those entitled to a postal vote.

213. So in effect, despite the requirement of section 93(2), and the period between 10 January 2002 when the election was proclaimed, the Second Respondent made no facilities available for persons who qualified to vote by post to in fact do so. The many thousands of registered voters who were outside Zimbabwe over the period 9-11 March 2002 - including all those temporarily not of the country who were not diplomats or Police or Defence Force members - were thus deprived of their right in terms of section 93(2) to cast their vote in the presidential election. The Second Respondent was not entitled to ignore the law.

214. It might well be that many people were deprived of the opportunity to vote. In fact, it matters not how many were deprived. The fact is the election was not conducted in accordance with the principles laid down in the electoral law. It hardly becomes one of the candidates in a presidential election to use

powers four days before polling to disenfranchise even one potential voter. Once again, the rules of the contest were changed, once again by the executive (and in the form of one of the candidates himself), and once again at the latest conceivable stage. Such action clearly negates the whole principle of voting by post enshrined in the Electoral Act.

215. For these reasons, it is respectfully submitted that the failure to allow postal voting in terms of Part XIV negated the principles of the electoral law, and thereby invalidates the election for the election was not conducted in accordance with the principles laid down in the Electoral Act, see section 149.

J. UNLAWFUL RETROSPECTIVE EXTENSION OF PERIOD FOR REGISTRATION OF VOTERS

23. (a) Up to what date were persons lawfully entitled to be registered as voters for the voters rolls used for the presidential election?

(b) Was it lawful to etend the period for the registration of voters retrospectively ?

These questions are to be considered together because they are closely related.

216. Section 94(1)(c) of the Electoral Act provides:

"***Not later than ten days after the commencement of the period referred to in paragraph (a) or (b) of subsection (1) of section ninety-three, the Registrar-General shall publish in the Gazette a notice announcing -***

© ***a day on which the voters rolls for that election shall be regarded as closed for the purpose of accepting the registration of voters who may vote at the election, which day may be on or after the date of publication of the notice or not more than thirty-one days before that date"***.

Subsection (2) of section 94 states:

"***The Registrar-General may, by further notice published in the Gazette, alter any day, time or place fixed in terms of subsection (1) and the day, time or place as so altered shall be deemed to have been fixed in terms of subsection***

(1)".

Section 93(1)(a) of the Act provides in relevant part:

"***.....An election to the office of President shall be held within ninety days.....before the term of office of the President expires***"

Section 4 of Electoral (Presidential Election) Notice, 2002, SI 3A of 2002

stated:

"***Voters rolls shall be regarded as closed with effect from the 10th January, 2002, for the purpose of accepting the registration of voters who may vote at the election of a President"***

217. It is submitted that 10 January 2002 was the date up to which persons were lawfully entitled to be registered as voters. The purported further extensions to this date were "effected" retrospectively. While section 94(2) of the Electoral Act allows the Registrar-General to alter the date of closure of the voters roll, there is nothing in that provision to indicate that this power can be exercised retrospectively. In **Nkomo & Anor v Attorney-General & Ors 1993 (2) ZLR 422 (SC)** Gubbay CJ noted at 429 that Roman Dutch law contains a strong presumption against a retrospective construction of statutory provisions. In **Transnet Ltd v Ngcezula 1995 (3) SA 538 (A)** it was held that it is presumed, unless the contrary appears either expressly or by necessary implication, that the legislature intends to regulate only future matters.

218. Accordingly, it is submitted that the purported further extensions of the date of closure of the voters roll, being retrospective, were invalid. It is also submitted that since section 158 of the Electoral Act is unconstitutional, it must follow that any purported validation of voters done under that provision will also be invalid. Voter registration after 10 January 2002 was therefore unlawful.

219. Again, it is submitted, on either element of section 149 - non-compliance with Electoral Law principle, and material fact - on this ground too the result is nullified.

K. SUPPLEMENTARY LIST UNLAWFUL

We deal first in this context with issue 23(c), then with issue 24.

23(c) Was it lawful to compile a supplementary list of additional voters and were those persons entitled to vote ?

220. Section 5(1) of Electoral Act (Modification) Notice, 2002, SI 41D of 2002 stated:

> "***Notwithstanding any provision of the Act but subject to this section, the Registrar-General shall prepare a roll, called the 'Supplementary Voters Roll', on which shall be included the names of persons who were registered as voters between the 27th January, 2002 and the 3rd March, 2002***".

The same Statutory Instrument purports to confer upon such "voters" the right to vote in the Presidential election of 9th and 10th March, 2002 (see section 5(3) as read with section 2).

221. Since SI 41D/2002 was purportedly enacted in terms of section 158 of the Electoral Act, it must follow that if section 158 is unconstitutional, all of the provisions contained in SI 41D/2002, including section 5, are invalid. Section 5 is a provision which purports to enact primary Electoral Law. This is made clear by the words "***notwithstanding any provision of the Act but subject to this section...***", which appear at the beginning of section 5(1), and

whose purported effect is to “exempt” section 5 from having to comply with any of the provisions in the existing Electoral Act. The “primary” nature of section 5 is also seen in the fact that it purports to create a new voters roll: the “Supplementary Voters Roll”. Accordingly, it is submitted that section 5 cannot be “read down” as not constituting primary Electoral Law. In other words, it cannot be argued that section 5 purports to be nothing more than subordinate legislation. This being the case, it must follow that the President cannot be said to have used his “powers” under section 158 merely to create subordinate legislation, so that the issue of the constitutionality of the primary lawmaking powers purportedly conferred by that provision does not arise. On the contrary, it is clear that the enactment of section 5 was an exercise of the primary law making power purportedly conferred by section 158.

222. Even if section 158 were to be held to be *intra vires* the Constitution, it is submitted that section 5 of SI 41D/2002 is still unlawful. This is due firstly to the fact that section 2 of SI 41D/2002 states that “***this notice shall have effect for the purposes of the election to the office of President [to] be held on the 9th and 10th of March, 2002***". Section 3 of SI 42E of 2002 says that “***the Registrar-General is hereby authorised to extend the poll for the elections referred to in section 2 to 7.00 p.m. on Monday, the 11th March, 2002***". However, while the election itself was extended by a day, SI 41D/2002 was *not* similarly extended. Thus, SI 41D/2002 ceased to

operate on the 10th, so that its provisions did not apply with respect to voting on the 11th. It was therefore unlawful for persons registered as voters on the Supplementary Voters Roll to be permitted to vote on the 11th.

223. Section 3 of the Electoral Act defines "voters roll" as:

> "***(a) the voters roll or supplementary voters roll for any constituency; or***
>
> ***(b) the voters roll for the area of any local authority or for any ward of such an area;***
>
> ***as the case may be, prepared and maintained under this Act by the Registrar-General***".

224. Apart from section 3, the only other provision in the Act that refers expressly to a supplementary voters roll is section 103E. That provision is however concerned exclusively with local authority elections. There is no provision in the Act authorising the creation of a supplementary voters roll in respect of presidential or parliamentary elections. Section 24 of the Act is concerned purely with "***....an entirely new registration of voters....***" (section 24(1)), which is not the same thing as creating a supplementary roll. Accordingly, it is submitted that the supplementary voters roll purportedly created by section 5 of SI 41D/2002 was not established lawfully. This means that persons purportedly registered as voters on that roll were not lawfully entitled to vote.

225. It must also be noted that the supplementary voters roll was not made open to inspection by the public, contrary to section 18(1) of the Electoral Act. That provision reads:

> "***The voters roll for every constituency <u>shall</u> be open to inspection by the public, free of charge, at the office of the constituency registrar during office hours***".

226. The word "shall" emphasises the peremptory nature of the provision, see **<u>Sterling Products International Ltd v Zulu</u> 1988 (2) ZLR 293 (SC), <u>Standard Bank Ltd v van Rhyn</u> 1925 AD 266 and <u>Chizikani & Anor v Central African Building Society</u> 1998 (1) ZLR 371 (SC) at 374-5**. The purpose underlying the right to inspect a voters roll is that of ensuring that the election will be free, fair and lawful. Inspection enables unlawful additions or subtractions to the voters roll to be detected. Because the petitioner was not able to inspect the supplementary roll, not only was his right to do so under section 18(1) of the Act violated, but also his right to the protection of law in terms of section 18(1) of the Constitution.

227. It is also submitted that section 5 of SI 41D/2002 is *ultra vires* section 158 of the Electoral Act. Section 158 (1) (again, assuming its validity) states that:

"***...the President may make such statutory instruments as he considers necessary or desirable to ensure that any election is properly and efficiently conducted and to deal with any matter or situation connected with, arising out of or resulting from the election"***.

228. On its ordinary meaning the word "properly" connotes regularity and fairness. In other words, an election will be conducted "properly" if, amongst other things, it is conducted "fairly". An election cannot be "proper" or "fair" if a new supplementary voters roll is produced at virtually the last minute. Even if it had been made available to the petitioner for inspection (which it was not) there would have been no time to inspect it properly. Accordingly, it is submitted that the creation of a supplementary voters roll, in the circumstances cited above, was *ultra vires* the powers purportedly conferred upon the President by section 158(1). Moreover, section 5 of SI 41D/2002 cannot be saved by recourse to the words "***..as he considers necessary or desirable..."***, as they appear in subsection (1) of section 158.

229. The Respondents may seek to contend that the subjective language in which the discretionary power is framed gives the President the exclusive right to decide what is "necessary or desirable". However, in **Patriotic Front-Zimbabwe African People's Union v Minister of Justice, Legal & Parliamentary Affairs 1985 (1) ZLR 305 (SC)**, the Supreme Court held at 318F-G that "***[t]he President, in the exercise of his powers....is supposed to act lawfully and reasonably. If he acts unlawfully or unreasonably to the***

detriment of the rights of citizens, the courts.... have jurisdiction to review the exercise under those circumstances of the President's actions" (per Dumbutshena CJ).

230. With regard to the specific issue of the exercise of subjectively worded discretionary powers, Dumbutshena CJ said in **Minister of Home Affairs and Director of Prisons v Austin and Harper 1986 (1) ZLR 240 (SC) at 258**:

"***In the exercise of his 'subjective' discretion... the Minister has to examine objective facts. It is the consideration of those objective facts or information that will determine whether the Minister has acted reasonably or unreasonably***".

(See also Secretary of State for Education and Science v Tameside MBC [1977] AC 1014).

231. In other words, even subjectively worded discretionary powers must be exercised on reasonable grounds. The question of what constitutes reasonable grounds is something that must be determined objectively. Thus, a discretion will have been exercised reasonably if it can be seen to have been based on, and justified in terms of the facts in a particular case. In **Forum Party of Zimbabwe & Ors v Minister of Local Government, Rural and Urban Development & Ors 1996 (1) ZLR 461 (HC)** Adam J adopted a similar approach. He said at **486**:

"***It cannot be denied that what appears to the President must surely accord with a true state of affairs ascertainable and not manifestly without reasonable foundation***....".

232. It is submitted that no reasonable foundation exists to justify the President's conclusion that the enactment of section 5 of SI 41D/2002 - the establishment of a supplementary voters roll days before the Presidential election - was "necessary" or "desirable". Moreover, section 5 can scarcely be regarded as being consistent with the idea of an "efficiently" conducted election, since a supplementary voters roll, introduced days before an election, and not made available to the public for inspection, introduces both chaos and uncertainty into the election.

233. Subsection (1) of section 158 concludes with the words "***...and to deal with any matter or situation connected with, arising out of or resulting from the election***". It is submitted that words derive their "colour" and their "content" from the context in which they appear. Moreover, where general words follow specific words, the former must be construed and defined in relation to the latter. Thus, the words "matter" and "situation" refer to developments which, if not dealt with adequately, would prevent the elections from being conducted "properly" or "efficiently". Thus, statutory instruments purportedly created in terms of section 158 which are not consistent with the "proper" and "efficient" running of an election will be *ultra vires* the Electoral Act and therefore invalid. Accordingly, the words

"matter" and "situation" do not enable the President to enact statutory instruments that are not related to an election being conducted "properly" and "efficiently". Section 5 of SI 41D/2002 cannot therefore be saved by appealing to the words "matter" and "situation".

234. Subsection (2) of section 158 states that statutory instruments created by the President "***....may provide for - (a) suspending or amending any provision of this Act or any other law in so far as it applies to any election***". Thus, the President's power is limited to suspending or amending *particular provisions* of the Electoral Act. Section 5 of SI 41D/2002 does not refer to any particular provision of the Act. Since a mere addition to the General Electoral Law does not involve amending any particular *provision*, it is submitted that section 5 is *ultra vires* section 158(2)(a) as well.

(24) Was it lawful to have a supplementary list of persons who were disqualified to vote and was this in accordance with the principles of the Electoral Law ?

235. Section 3 (1) of Electoral Act (Modification) (no. 2) notice, 2002, SI 42 B/2002 purports to empower the Registrar-General to prepare a list of persons "***…disqualified to vote…***" by reason of having renounced or lost their Zimbabwean citizenship. A person on the list "***…shall not be entitled to vote at the election, notwithstanding that his name appears on the roll for any***

constituency" (Section 3 (3)). According to section 3 (4) of SI 42B, such persons will only be able to vote if they can prove either that they successfully appealed against the notices of objection sent to them in terms of section 25 of the Electoral Act or, if the appeals were still pending on the first polling day, that they had not become disqualified to vote. (Section 3 of SI 42B replaced a similar provision, section 6 of SI 41D/2002: see section 5 of SI 42B.)

236. It is submitted that section 3 of SI 42B is not in accordance with the principles of the Electoral Law. Section 93 (2) of the Electoral Act states that "***in an election to the office of President, every registered voter shall be entitled to vote"***. This principle means that no name may be removed from the voters roll after it has been lawfully closed. It has been argued in question 23 (a) that the voters roll was lawfully closed on 19 January 2002. Thus everyone who was registered on 10 January was entitled to vote. Besides being inconsistent with section 93 (2) of the Act, section 3 of SI 42B also violates the general principles of the Electoral Law set out in section 4 (1) (c) of the Act. The latter refers to the need for elections to be conducted efficiently, properly, freely and fairly. It is submitted that an election which unlawfully deprives registered voters of their right to vote is not consistent with an election that is conducted properly, freely and fairly.

237. It is also submitted that the creation of a supplementary list of persons disqualified to vote cannot be justified by attempting to invoke paragraph 3 (3) of Schedule 3 of the Constitution. The latter says:

"***Any person who is registered on the electoral roll of a constituency shall be entitled to vote at an election which is held for that constituency unless -***

(a) he has then ceased to be a citizen of Zimbabwe; or

(b) he is then, in accordance with the provisions of subparagraph (2), disqualified for registration; or

(c) in the case of a person who was registered on the electoral roll by virtue of qualifications referred to in subparagraph (1) (b), he has ceased to be so qualified".

238. Nothing in paragraph 3 (3) can be construed as authorising or permitting the removal of voters from the voters roll *after* the closure of the roll for the specific presidential election concerned. In fact, paragraph 3 (3) is concerned with the removal of voters *before* the closure of the roll. Were this not the case, the Electoral Act would surely have made provision for the establishment of a supplementary voters roll of voters disqualified to vote. Moreover, it is important to take into account the significance of section 94 (1) (c) of the Electoral Act. The latter provides that "***…the Registrar-General shall publish in the Gazette a notice announcing - …a day on which the voters rolls for that election shall be regarded as closed for the purpose of accepting the registration of voters who may vote at the election…***' (my emphasis). Thus, the Registrar-General has until the date of closure to

decide who he will accept as registered voters. It must follow therefore that no registered voter may be denied the right to vote *after* the passing of the date of closure. Section 93 (2) of the Electoral Act states clearly and without qualification that "***in an election to the office of President every registered***
voter shall be entitled to vote".

239. Section 3 of SI 42B/2002 does not purport to suspend or amend any *particular provision* of the Electoral Act. As has been argued in respect of question 23 (c), the President's power, in terms of section 158 (2) of the Electoral Act, to change the Electoral Act, is limited to *suspending* or *amending* particular provisions of the Act. Since section 3 does not do that, it must follow that it is *ultra vires* section 158 of the Act. Moreover, the fact that section 158 is itself clearly unconstitutional means that everything purportedly enacted under it - including SI 42B/2002 in its entirety - is also invalid.

240. Section 2 of SI 42B/2002 states that "***this notice shall have effect for the purposes of the election to the office of President to be held on the 9 and 10 of March 2002***". While the election itself was extended to the 11 of March 2002, SI 42B/2002 was not. Therefore, it is submitted that none of its provisions - including section 3 - were operative or legally in force on the 11 of March 2002.

241. For these various reasons it is submitted that it was not lawful to have a supplementary list of persons who were disqualified to vote.

L. CHANGING THE RULES

25. 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 ?

242. Section 2 of the Electoral Act states that "***[t]his Act shall apply to - ..... elections to the office of President for the purposes of the Constitution***". Thus, one of the principles of the Electoral Law is to give effect to the purposes of the Constitution. This is important because it explicitly links the principles of the Electoral Law with the values and rights that underlie the purposes of the Constitution. Two of the most important rights contained in the Constitution - the right to the protection of law (section 18(1)) and freedom of expression (section 20(1)) - are of particular significance in the context of the question. It is submitted that section 18(1) of the Constitution incorporates the concept of the rule of law. In other words, the constitutional right to protection of law assigns law a particular role in Zimbabwe. In the context of Electoral Law, this means that the law concerned must be enacted in time to enable it to perform its proper function - to protect the holding of free and fair elections that enable voters to express themselves freely. Where Electoral Law is purportedly changed after the nomination process is complete, it must be questionable whether it will

be able to perform its proper protective function if there is little time for it to be digested and implemented properly. This will be a problem even where the new changes are seriously intended to give effect to electoral principles. The problem is far more serious, of course, where, as in the context of the present petition, the purported changes to the Electoral Law are not consistent with the electoral principles.

243. What has been said earlier under previous headings about the problems with both the enactment and content of the changes to the Electoral Law will not be repeated here. The question to be considered here is whether the outcome of the election was materially affected. Section 149 of the Electoral Act reads:

"***An election will 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".

244. In **Matamisa v Chiyangwa and Another (Chinhoyi Election Petition) 2001 (1) ZLR 334 (HC)** Garwe J referred with approval at **340F-G** to **Pio v Smith 1986 (3) SA 145 (Z) at 171** where Mfalila J quoted with approval what was said by Grove J in **Gill v Reed and Holms (1874) 31 LTR 69 at 72**:

"***An election is not to be upset for an informality or for a triviality. It is not to be upset because the clock at one of the polling booths was five minutes too late, or because some of the voting papers were not delivered in a proper manner, or were not marked in a proper way. The objection must be something substantial, something calculated really to affect the result of the election***".

See also <u>Dongo v Mwashita & Ors</u> 1995 (2) ZLR 228 (HC) at 240.

245. It is submitted that the changes to the Electoral Law since the completion of the nomination process satisfy this test of materiality. In **<u>Election Petition for the Seke Constituency</u> HH-11-2002** Ziyambi J noted at page 28 of the cyclostyled judgement that "***one of the principles of the Act is that every person should be afforded a fair opportunity to cast his vote for the candidate of his choice"***. In the context of presidential elections the relevant provision is section 93(2) of the Electoral Act which states:

"***In an election to the office of President, every registered voter shall be entitled to vote***".

In the **<u>Seke Petition</u>** Ziyambi J said at page 31:

"***The reality of the matter is that a large portion of the electorate of the Seke constituency was not afforded the opportunity to cast their votes because of the fact that their names were not recorded on the voters roll at the polling stations at which they tendered their vote***".

246. It is submitted that sections 4 and 6 of SI 41D/2002, by depriving, unlawfully, large numbers of registered voters of the opportunity to vote,

materially affected the outcome of the election for the purposes of section 149 of the Electoral Act. This conclusion is consistent with the approach adopted by Ziyambi J in the **Seke** petition. Also of significance is the fact that in **Seke** Ziyambi J said at 32 that "***once the irregularity was proved, the onus was on the first respondent to establish that the non-compliance was trivial***". With respect, Ziyambi J's approach to the question of onus is correct, and is equally applicable in the context of the present election petition.

247. At pages **33-34** Ziyambi J considered the meaning of the words "***affect the result of the election***" as they appear in section 149 of the Electoral Act. She said:

"***I do not consider the words....to mean that the court must be satisfied that but for the mistake or non-compliance, another candidate, say, the petitioner, would have been elected. To put this construction on that section would be tantamount to attributing to the court prophetic powers which would enable it to know whether the 10 835 affected persons would all have voted and who they would have voted. Rather, I respectfully agree with the reasoning of Grove J in the Borough of Hackney case at page 72 where he said***:

'***I am very strongly inclined to think that the expression 'the result of the election' does not in this Act necessarily mean the result to another candidate having been elected at the poll. The result may be of various kinds. The result of the election would, in my judgment be affected, if, instead of a majority of 500, there was a majority of only 10 or even 100.. Does not the word 'affect' mean substantially 'bear upon the result'?***.

In the instant case, although it is not possible for this court to say what the result might have been had the affected voters been afforded the opportunity to cast their votes, it appears to me that the result would have been different. In the result I am satisfied that the mistake or non-compliance did

affect the result of the election. It follows that the election must be set aside" (emphasis added).

248. The approach adopted by Ziyambi J on this issue is clearly correct. Conversely stated, it is binding upon this court unless it is able to state that the approach by Ziyambi J is clearly wrong. It is submitted that there is no basis to do that. It is also submitted that the supplementary voters roll created by section 5 of SI 41D/ 2002, by allowing persons unlawfully registered on the voters roll after 10 January 2002 - the date of closure - to vote, also materially affected the outcome of the election in the sense alluded to by Ziyambi J in the **Seke** case.

249. This conclusion is reinforced by the established authority that once non-compliance is established by a petitioner, the *onus* rests on a respondent to prove that the non-compliance did not affect the result (in the sense explained by Ziyambi J): **Putter v Tighy 1949 (2) SA 400 (A) at 410; Snyman v Schoeman 1949 (2) SA 1 (A) at 9; Gerdener v Returning Officer 1976 (2) SA 663 (N) at 674F *et seq***. This the Respondents have patently been able to do. Such is the nature of the non-compliance, this is unsurprising.

250. In an American decision, **Campbell v Bennett, 212 F Supp 2d 1339; 2002 US Dist. Lexis 17455**, the plaintiff, a candidate for political office, challenged

a statutory change in the deadline for independent candidate registration that went into effect at the time he lost his party primary election without prior notice, precluding him from petitioning to get on the ballot. He argued that this violated his rights under the first and fourteenth amendments of the United States Constitution. The new, shorter, deadline reduced the time allowed to a candidate to circulate petitions from a month to a day. The plaintiff was thus denied his right to petition, because this could not be done in the period allocated - one day.

251. Thompson J noted that "***…what is at issue in this case is the due-process concept of fair notice, which is central to the legitimacy of our legal system***". This was because "***[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted***" (**Landgraf v USI Film Products, 511 US 244, 264, 114 S. CT 1483, 1497, 128 L. ED. 2d 229 (1994)**, quoted with approval by Thompson J). The learned judge added: "***In other words, any law that requires you to do something by a certain date must give you adequate time to do it; otherwise the law would be irrational and arbitrary for compliance with it would be impossible"***.

252. It is submitted that the reasoning of Thompson J in **Campbell** is relevant in the present election petition. Electoral Act (Modification) (no. 2) Notice,

2002, SI 42B/2002 came into operation on 8 March 2002 - one day before the commencement of the presidential election. It purported to repeal section 6 of SI 41D/2002. Section 3 (1) of SI 42B/2002 purported to empower the Registrar-General to prepare a list of persons disqualified to vote by reason of having lost or renounced their citizenship. As has already been above, it was *unlawful* to remove such persons from the voters roll after the date for the closure of the voters roll had been set for 10 January 2002. Clearly, such affected persons would find it difficult, if not impossible, to comply with section 3 (4) of SI 42B (i.e.: that they prove to a presiding officer that they appealed against the notice of objection concerned and that the appeals were successful or that they had not become disqualified to vote by virtue of having lost or renounced their citizenship). While section 3 (4) is ostensibly concerned with voters rights, Thompson J in **Campbell** quoted with approval the decision in **Bullock v Carter 405 US 134, 143, 92 S. CT 849, 856, 31 L. ED 2d 92 (1972)**, where the court held: "***The rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical effect on voters"***. It is submitted that the converse is also true: laws that affect voters also affect candidates.

253. Similar considerations apply in respect of the supplementary voters roll purportedly established by section 5 of SI 41D. The petitioner was not afforded a reasonable time period within which to inspect that 'roll'. (In fact,

that roll has never been made available to the petitioner.) This is in spite of the fact that section 18 (1) of the Electoral Act states that members of the public have a right to inspect the voters roll (this point is also discussed above in connection with question 23c).

254. It is submitted that the concepts of ‘due process’ and ‘procedural fairness’ are included in and protected by section 18 (1) of the Constitution, the protection of law provision. Moreover, the electoral principles contained in section 4 (1) (c) of the Electoral Act that require “***…that elections are conducted efficiently, properly, freely and fairly***”, are, being law, also subject to the protection of section 18 (1) of the Constitution. Clearly, an election cannot be “**properly, freely and fairly conducted**” if important electoral laws and rules are enacted so late that persons do not have sufficient time to ascertain what the law is and conform their conduct accordingly. In addition, section 158 (1) of the Electoral Act stipulates that the President may make Statutory Instruments “***…to ensure that any election is properly and efficiently conducted and to deal with any matter or situation connected with, arising out of or resulting from the election***”. For the purposes of section 158, the word ‘properly’ clearly incorporates the concept of ‘fairness’. Thus a ‘proper’ election is by definition a ‘fair’ election. Section 4 (1) (c) of the Electoral Act refers to both terms, not because they are distinct, but *ex abundante cautela*, in order to make it crystal clear that ‘fairness’ is an electoral principle. Finally, it is submitted that the words

‘matter’ and ‘situation’, as they appear in section 158 (1), must be construed in conformity with the preceding principles - ‘properly’ and ‘efficiently’. Thus, it is only ‘matters’ and ‘situations’ relating to ‘proper’ and ‘efficient’ elections, which fall within the ambit of the President’s law making powers as purportedly conferred by section 158 of the Electoral Act.

255. Once again, it is submitted that the incidents of changing the rules outlined above patently establish **both** of the separate elements of section 149: a failure to conduct the election in accordance with Electoral Act principles, and in any event, a material effect on the result (in the sense expounded by Ziyambi J in the **Seke** case supra).

M. IRREGULARITIES RELATING TO POLLING STATIONS

(26) Did the Second Respondent comply with the law with regard to the notification of the location of polling stations ?

(**27**) **Did the Second Respondent fail to notify the location of polling stations at the times required in terms of the Electoral Act, and did his failure effect the outcome of the election to the extent that it can be set aside?**

(**28**) **Did the decision by the Second Respondent to reduce the number of polling stations in certain urban constituencies and to increase the number of mobile stations in certain rural constituencies constitute a breach of the Electoral Act requiring the election to be voided**

256. It is common cause that the Second Respondent only announced three days before polling commenced the number and location of polling stations (**see paragraph 72, page 22)**. It is also common cause that the number of polling stations in rural areas, where the First Respondent supposedly had the most support, was increased substantially, while those in the urban areas, where the Petitioner had his support, were reduced substantially, see paragraph 74, page 23.

257. Although the Presidential Election in March 2002 was specifically conducted on a constituency basis, the Second Respondent, purportedly acting in terms of section 15(3)(a) of the Electoral Act [Chapter 2:01], assumed many of the functions of a constituency registrar. Thus he took it upon himself to decide where polling stations would be and the number of such polling stations. Firstly in law he had no authority to do so. In any event, having usurped the functions of the constituency registrars, the Second Respondent failed to act reasonably and in accordance with the law in delaying the announcement of the location of polling stations, and in determining the numbers of both fixed and mobile polling stations in urban and rural constituencies. In fact, we shall show, he acted arbitrarily and (the inference is inescapable) in bad faith.

258. Whilst section 51 or the Electoral Act does not specify a time period when the constituency registrar must establish polling stations, that requirement must be read in relation to other provisions in the electoral laws.

259. It is repeated that in the instant case the announcement of the location of polling stations was made during the course of the Wednesday prior to voting commencing at 7 a.m. on the Saturday. Thus, the announcement was made less than 72 hours prior to polling commencing.

260. Section 15A of the Electoral Regulations 1992, SI 58 of 1992, as amended by SI 17A of 2002 and SI 41F of 2002, sets out the requirements for

election agents and polling agents in presidential elections. Furthermore, section 17 of those regulations, initially repealed by SI 8A of 2002 was reintroduced by SI 41F of 2002. This latter regulation was only published on the Tuesday before polling took place.

261. In terms of these provision, a candidate in a presidential election may appoint, *inter alia*, a constituency election agent, who in turn may appoint four polling agents per polling station.

262. The names of each polling agent must be notified to the Registrar-General not later than forty-eight hours before polling commences. In other words, by 7 a.m. on the Thursday. Thus, having only learnt during the course of the Wednesday where the polling stations would be, and the changes in the number of polling stations, the Petitioner, and other candidates who did not have advance warning of these legislative changes, had less than a working day in order to notify the Second Respondent in writing of the full names and addresses of several thousand polling agents.

263. In addition, by virtue of section 17(2) of the Regulations, the Second Respondent had to issue each polling agent an accreditation certificate before the polling agent disbursed to the polling station. Thus, someone acting as a

polling agent in Hwange or Victoria Falls would not have had time to acquire the necessary accreditation certificate.

264. Equally, with the changes in the location and number of polling stations from the Parliamentary Elections of 2001, the Petitioner would undoubtedly have had to change his choice of polling agents, and in some instances find more polling agents, with less than twenty-four hours notice.

265. But more importantly, section 86 of the Electoral Act requires not less than three days notice of the full names and addresses of every polling agent to be given to a constituency registrar and for public notice of that to be given in a newspaper circulating in the constituency. Thus, these notices had to be published on the Tuesday, at which time neither the number of polling agents, nor the number of polling stations nor the location of those polling stations was known. The provisions of section 86 could not be complied with for the purposes of the election.

266. In order to allow compliance with the various statutory provisions relating to polling agents, the Second Respondent was obligated to give more notice than he did, especially considering the fact that he was moving away from the system established prior to and during the 2001 Parliamentary Elections. In acting in the way he did he acted arbitrarily and in a grossly unreasonable manner, and that affected the ability of candidates to properly contest the election. It is clearly evidence of the desire of the Second Respondent to ensure that the election campaign of the Petitioner could not be carried out in an orderly manner.

267. The requirement of a public official to act reasonably is well established in law. The well-known judgment of **Kruse v Johnson [1898] 2 QB 91 at page 99** has been consistently followed, see for example **Patriotic Front - Zimbabwe African Peoples' Union v Minister of Justice, Legal and Parliamentary Affairs 1985 (1) (ZLR 305 (SC) at pages 323 and 332**. The principle of requiring a public official to act reasonably has been established in many cases, see for example:

S v Paweni & Anor 1985 (1) SA 301 (ZH)

Triangle Ltd & Anor v Sabi-Limpopo Authority & Anor NO 1978 (1) SA 724 (R)

Natal Newspapers (Pty) Ltd & Ors v State President of the Republic of South Africa & Ors 1986 (4) SA 1109 (N) at page 1117

Union of Teachers' Associations of South Africa & Anor v Minister of Education and Culture, House of Representatives & Anor 1993 (2) SA 828 (C) at pages 838-839

Gemi v Minister of Justice, Transkei 1993 (2) SA 276 (Tk) at pages 287-288, quoting from Grogan (1990) 6 SAJHR 36 at page 39

New National Party of South Africa v Government of the Republic of South Africa & Ors 1999 (3) SA 191 (CC) at pages 205-206, para [23] per Yacoob J and pages 239-241, paras [122]-[124], per O=Regan J (in dissent).

268. As to the number of polling stations, it is submitted that the facts show beyond doubt that what the Second Respondent was seeking to achieve was a situation where, in urban areas which supported the Petitioner, voting became difficult, whereas in the rural areas voting was comparatively easy. This was particularly the case in Harare where the Second Respondent,

despite decisions of the Supreme Court to the contrary, chose to reduce the number of polling stations even though the elections on 9 and 10 March 2002 related not simply to the election of the President, but to the election of a mayor and of councillors. In the result, the Second Respondent achieved his aim by ensuring a very small voter turn-out in Harare and Chitungwiza. Added to this is the fact that it was mostly in the urban areas that the register of disqualified voters in term of section 6 of the Electoral Act (Modification) Notice 2002, SI 41D of 2002, and section 3 of the Electoral Act (Modification) (No. 2) Notice 2002, SI 42B of 2002, would be most in use.

269. It is respectfully submitted that the evidence establishes that the Second Respondent engineered, and deliberately so, a situation whereby the late announcement of polling stations, and the reduced numbers of polling stations in the urban areas, brought about a low voter turnout in those areas which the Petitioner looked to for his main support.

270. In so acting, the Second Respondent acted grossly unreasonably, arbitrarily and in bad faith, and his conduct affected the outcome of the election to the extent required by section 149 of the Electoral Act. Once again, it is submitted, **both** of the **separate** elements of section 149 of the Electoral Act are established, and again, on the basis of the polling station irregularities alone the election result is nullified.

N. DID THE REGISTRAR-GENERAL EXERCISE HIS DISCRETION TO DETERMINE THE NUMBER OF POLLING STATIONS LAWFULLY ?

(a) Discretionary powers and reasonableness

271. Section 51(1) of the Electoral Act says:

"***A constituency registrar shall establish, at such convenient places as he may determine, as many fixed polling stations as he may consider to be necessary for the purposes of conveniently taking a poll of the voters of his constituency".***

Subsection (4) of section 51 says:

"***Additional polling stations may be established or provided for in terms of this section at any time, whether before or after the commencement of the poll***".

According to section 15(3)(a) of the Act "***....the Registrar-General may - ...assume and exercise any function which in terms of this Act is vested in a constituency registrar...".***

272. It is submitted that in establishing only 3 polling stations per urban constituency, the Registrar-General abused the discretionary power conferred by section 51 (1). This is because the number of polling stations established was not reasonable in the circumstances. The fact that the discretionary power is framed in subjective language does not mean that the Registrar-

General can do as he pleases. In **Minister of Home Affairs and Director of Prisons v Austin and Harper 1986 (1) ZLR 240 (S)** Dumbutshena CJ said at **258**: "***In the exercise of his 'subjective' discretion…the Minister has to examine objective facts. It is the consideration of those objective facts or information that will determine whether the Minister has acted reasonably or unreasonably***". Thus, even subjectively worded discretionary powers must be exercised on reasonable grounds. The test for determining whether a ground is reasonable is objective. Accordingly, a discretion will have been exercised reasonably if it can be seen to have been based on, and justified in terms of, the facts in a particular case.

273. In **Forum Party of Zimbabwe and Others v Minister of Local Government, Rural and Urban Development and Others 1996 (1) ZLR 461 (H)**, the court had to consider the nature and extent of the law making powers conferred upon the President by section 2 (1) of the Presidential Powers (Temporary Measures) Act. That provision provides that

"***[w]hen it appears to the President that -***

(a) a situation has arisen or is likely to arise which needs to be dealt with urgently…then, subject to the Constitution and this Act, the President may make such regulations as he considers will deal with the situation' (my emphasis).

The words "***when it appears to the President…***" indicate that the President has a subjective discretionary power to decide when a situation is urgent.

However, Adam J said at 486:

"***…It cannot be denied that what appears to the President must surely accord with a true state of affairs ascertainable and not manifestly without reasonable foundation that a situation has arisen or is likely to arise which needs to be dealt with urgently. A situation cannot be said to have arisen if it is not so factually***".

274. In the same way, it is submitted that there was no "reasonable foundation" to justify the Registrar-General's decision that 3 polling stations per constituency would suffice "***…for the purposes of conveniently taking a poll…***" (my emphasis). The huge lines of voters that formed outside the few polling stations that were established in urban constituencies is clear proof of the fact that the Registrar-General did not exercise his discretion properly. Moreover, it is submitted that the effect of the word 'convenient' in section 51 (1) of the Act is to limit further the ambit of the Registrar-General's discretion. A poll can hardly be said to have been taken 'conveniently' if voters have to wait many hours in line before being able to cast their votes, if indeed they are able to vote at all. In addition, when exercising his discretion under section 51 (1) the Registrar-General must do so in a way which accords with Schedule 3 paragraph 3 (3) of the Constitution and section 93 (2) of the Electoral Act. The former provides that "***[a]ny person who is registered on the electoral roll of a constituency shall be entitled to vote at an election which is held for that constituency….***". The latter says: "***In an election to the office of President, every registered voter shall be***

entitled to vote" (my emphasis). Thus, if a voter in an urban constituency voting impossible or even just inconvenient, because insufficient polling stations have been established, it must mean that the Registrar-General has not exercised his discretion under section 51 (1) reasonably.

275. The law relating to the exercise of discretionary power, like all law in Zimbabwe, falls within the parameters of section 18 (1) of the Constitution. The latter states that "***[s]ubject to the provisions of this Constitution, every person is entitled to the protection of the law"***. By exercising his discretion under section 51 (1) of the Electoral Act unlawfully, it is submitted that the Registrar-General contravened section 18 (1) of the Constitution, in respect of the voters - and candidates - who were prejudiced by his decision were denied their constitutional right to the protection of law.

(b) Freedom of expression

276. The failure to establish enough polling stations in urban areas also contravened section 20 (1) of the Constitution which provides in relevant part: "***…no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference…***' (my emphasis). In **In Re Munhumeso and Others 1995 (1) SA 551 (ZSC)** Gubbay CJ **at 557**

described freedom of expression as "***one of the most precious of all the guaranteed freedoms***", the importance of which "***must never be underestimated [because it lies] at the foundation of a democratic society and [is] one of the basic conditions for its progress and for the development of every man"***. For this reason freedom of expression will "***always…be jealously guarded by the courts"*** (per Gubbay CJ in **Woods and Others v Minister of Justice, Legal and Parliamentary Affairs and Others 1995 (1) SA 703 (ZSC) at 705**).

277. It is submitted that voting in a presidential election is a form of political expression. Voters who were prevented from voting because of insufficient polling stations were deprived of their right to express and impart their political opinions and ideas through voting. Similarly, the petitioner was prevented from receiving the opinions - in the form of votes - of those voters who were denied the opportunity of expressing themselves by voting. In an American decision, **Campbell v Bennet et al 212 F. Supp. 2d 1339; 2002 US Dist. Lexis 17455**, Thompson J referred with approval[6] to **Williams v Rhodes, 393 US 23, 30-31, 89 S Ct 5, 10, ZIL ed 2d 24, 45 Ohio Op. 2d 236 (1968)** where it was held that ***"…the right of qualified voters, regardless of their political persuasion, to cast their votes effectively…rank[s] among our most precious freedoms***". Thompson J also referred with approval to

[6] At n. 3 of the judgement. I only have access to the Lexis version of the Decision, which does not contain page numbers.

Bullock v Carter, 405 US 134, 143, 92 S Ct 849, 856, 31 L Ed 2d 92 (1972) where it was held that "***[t]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical effect on voters***". It is submitted that the converse is equally true.

(c) Discrimination

278. Section 23(1) of the Constitution says:

"***Subject to the provisions of this section -***

(a) …

> ***1.no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority***".

Subsection (2) of section 23 days:

"***For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour, creed or gender are prejudiced -***

(a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or

(b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description;

and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour, creed or gender of the persons concerned" (my emphasis).

279. It is submitted that by establishing insufficient polling stations in urban constituencies, the Registrar-General discriminated against urban voters on the grounds of 'place of origin' and 'political opinions'. The words 'place of origin' are sufficiently broad to include 'place of residence'. Moreover, for the purposes of the voters roll, persons registered as voters on voters rolls in urban constituencies have as their 'place of origin' the urban constituency concerned. In other words, voters 'originating' in urban constituencies were treated differently from voters registered in rural constituencies. This difference in treatment amounted to more than just differentiation and was in fact a form of unfair discrimination against voters who 'originated' in urban constituencies.

280. It is also submitted that the unreasonably low number of polling stations in urban constituencies was the result of unfair discrimination against urban voters on the ground of the 'political opinions' of urban voters. The Parliamentary election held in 2000 established that the majority of voters in urban constituencies support the petitioner's party. Accordingly, the conduct of the Registrar-General in establishing insufficient polling stations

in urban areas must give rise to an inference that he intended to discriminate unfairly against voters registered in urban constituencies on the ground of their perceived 'political opinions.'

281. It is submitted that there is no legally justifiable reason for establishing more polling stations in rural constituencies than in urban ones. Section 60 (3) of the Constitution says: "***[T]he boundaries of the constituencies shall be such that at the time of delimitation the number of voters registered in each common roll constituency is as nearly as may be equal to the number of voters registered in each of the other common roll constituencies***". A divergence of no more "***…than twenty per centum more or less than the average number of registered voters in constituencies on the common roll"*** may be permissible if it results from having given due consideration to one or more of the factors listed in section 60 (4) of the Constitution. (The factors concerned include: the physical features of the constituency; the means of communication within the area; the geographical distribution of voters; and community of interest).

282. It must follow therefore that since all constituencies should normally contain the same number of registered voters, they ought also to be serviced by the same number of polling stations. In **Mandizvidza v Chaduka No and Others 1999 (2) ZLR 375 (H)** the applicant challenged the constitutionality of a teacher training college's policy of expelling or suspending pregnant

students, regardless of whether or not the students were married or not. The college sought to justify its policy by claiming that it did not have facilities to care for pregnant and nursing mothers and their babies. Gwaunza J (as she then was) rejected this contention, stating **at 383 B-C** that "***…non provision of these facilities amounts to discrimination against women, in as much as it negates the right by women to combine their roles as mothers and productive members of the society, when at the same time the father of the child is free to pursue his productive activities unencumbered by any such responsibilities***". In the same way, non-provision of sufficient polling stations in urban constituencies amounted to discrimination against urban voters, in as much as it negated the right of many urban voters to vote, while rural voters were not subject to any such constraint. Although the decision in **Mandizvidza** was overturned on appeal (see **Chaduka NO and Another v Mandizvidza**, not yet reported, j**udgment no. S-114-2001**), this was because the Supreme Court held that section 23 was inapplicable in the circumstances of the case since it only operates vertically and the college was a private institution. Gwaunza J's reasoning concerning the failure to provide facilities was not repudiated.

283. Even if "***place of residence***" does not fall within the ambit of "***place of origin***", it is submitted that discrimination on the ground of "*place of residence"*" is still unconstitutional. This is because the prohibited grounds of discrimination referred to in section 23 (2) of the Constitution do not

constitute an exhaustive list. A Canadian judge, Catherine Fraser, writing about section 23 of Zimbabwe's Constitution in a journal article ("**Judicial Independence, Impartiality and Equality: A Canadian Perspective (part 2)**" **(1998) 10 *Legal Forum* 16**) has drawn attention to the need to read that provision together with section 11 of the Constitution. She says at page 27 that since being amended section 11 is

"***…more all-encompassing referring to the fact that 'persons in Zimbabwe are entitled…to the fundamental rights and freedoms of the individual specified in this chapter'. In this sense, therefore, the sweep of the guaranteed rights is potentially no longer limited only to those who fall within certain proscribed categories. Instead, the appeal is to broad notions of individual rights and freedoms for all persons***".

(Section 11 is the 'introductory' or 'umbrella' provision in Chapter III of the Constitution which contains the Declaration of Rights.) It is submitted that this view is correct. Accordingly, section 23 (2) of the Constitution does not create an exhaustive list of prohibited forms of discrimination. It must therefore follow that discrimination on the ground of place of residence is unconstitutional.

284. The "non-exhaustive" interpretation of section 23 (2) is reinforced by the fact that it must be read together with article 26 of the International Covenant on Civil and Political Rights (1966), which Zimbabwe acceded to on 13 May 1991. (Zimbabwe's obligations under the Convention took effect from 13 August 1991). Article 26 says: "***All persons are equal before the***

law and are entitled without <u>any discrimination</u> to the equal protection of the law. In this respect, the law shall <u>prohibit any discrimination</u> and guarantee to all persons equal and effective protection against discrimination on <u>any ground such as</u> race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or <u>other status</u>" (my emphasis). It is submitted that the words "any discrimination", "any ground", "such as" and "other status" all point to the fact that the prohibited forms of discrimination cited in article 26 do not constitute an exhaustive list. It is trite that provisions in the Constitution must be interpreted wherever possible in a way consistent with Zimbabwe's treaty obligations (see **<u>S v A Juvenile</u> 1989 (2) ZLR 61 (S) at 72**). It is submitted that section 23 (2) of the Constitution can and must be interpreted in a way that accords with article 26. In other words, construed in the light of article 26, section 23 (2) cannot be said to establish a closed list of prohibited forms of discrimination.

0. **CONCLUSION AND COSTS**

285. It is submitted that the Presidential Election, 2002 was conducted in a manner which was unconstitutional and otherwise in conflict with law in each of the respects identified. Each, for the reasons given, was material; each is dispositive of the case. The relief sought must follows.

286. It is submitted that costs should follow the result, and that the test of substantial success should apply. Thus if the Petitioner succeeds substantially in respect of the relief sought on any one or more of the bases argued, costs should follow.

287. The Respondents have made common cause in opposing the Petition; it is submitted that the costs order should be joint and several.

288. The Petition has entailed an exceptional burden of legal research, investigation of statutory provisions (as the ambit of the bundle of statutes, regulations and notices indicates), and use of comparative constitutional materials. It is submitted that the costs order should specifically include the costs of three instructed counsel.

289. We wish to acknowledge the considerable assistance of Dr Greg Linnington of the University of Zimbabwe.

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13 October 2003