

JUDICIAL SERVICE COMMISSION

"A Zimbabwe in which world class justice prevails!"



PRESENTATION TO THE CONFERENCE OF CONSTITUTIONAL JURISDICTIONS OF AFRICA

by

**THE HONOURABLE MR JUSTICE LUKE MALABA –
CHIEF JUSTICE OF ZIMBABWE**

12 – 16 October 2021

**TOPIC: MODELS OF ELECTORAL JUSTICE: Shared experience
of the Zimbabwean model of electoral justice
system.**

INTRODUCTION

What do you think of when you hear of a 'model of electoral justice'? Do you think of the courts, specialised tribunals and the men and women charged with resolving election disputes? Do you think of a goal of a model of electoral justice - be it achieving justice between warring election candidates, the rectification of electoral malpractices or even the vindication of an individual's right to vote? Do you, perhaps, think of the reasons and bases of electoral justice models? Whatsoever each and every one of us considers a model of electoral justice to be, I am certain that there are, in some respects, similarities in our perspectives, and in others, major differences. So too, is it with perspectives of models of electoral justice at a national level. They will differ from one country to another, yet still, share basic features.

In light of this, I note that the premise of my presentation is that there is a presumption of a choice of a model of electoral justice in every electoral system. Such a choice is obviously influenced by the particular needs of a nation and the conformity of chosen electoral justice model to the electoral system in use. But experience and wisdom tell us that some comparable features of the models in other countries, may help us understand our own models of electoral justice and improve them to ensure that they serve the purpose they are designed for. I am therefore honoured and delighted to share with you about the Zimbabwean

model of electoral justice. But before I relate to qualitative features of our model, I find it prudent to first traverse through the philosophical and constitutional underpinnings of our electoral justice model. Many of these philosophical and constitutional foundational notions are not germane to the Zimbabwean context and, resultantly, will enhance our understanding of the great importance of having electoral justice models in the first place.

The political context informing electoral justice systems:

Models of electoral justice derive their design from the existential and political needs surrounding them. Today, many a country find themselves with organised electoral models. Most of these electoral models are results of centuries of political clashes, of political contestations and of political strivings. Due to the similar political processes giving rise to electoral models, there are common philosophical underpinnings of electoral justice systems worth adverting to in the presentation.

Models of electoral systems and justice are essentially means to particular ends in politics. These political ends arise out of the shared need by all human beings for the flourishing of life. As Professor Finnis argues there are basic goods like life, knowledge and aesthetic experience that all human beings pursue. To Finnis, these are "opportunities of being all that

one can be,"¹ which, by ethical reasoning, result in human flourishing.²

The shared political, economic and social goals of human beings necessitate political organisation and establishments. Political organisation of a people is not only an unavoidable process, but it is also a process that invariably leads to governance - and in an overwhelming number of cases constitutional governance. All nations thus have to make the important decision of how they will organise themselves in order to achieve their shared aspirations.

One consequence occurring after the process of political organisation is that people cede their inherent power into the hands of a leader and representatives. The leader and representatives, in turn, exercise such power on their behalf. The emerging political and social setup thus comprises of a leader, representatives and the represented people and it is sustained by the processes of political participation. There is, resultantly and by such political participation, a controlled interplay of political forces and interests as well as individual aspirations.

¹ See Lisska, Anthony J. *New Blackfriars* 65, no. 768 (1984): 288-90 at p. 288. Accessed August 28, 2021. <http://www.jstor.org/stable/43247572>. See also, Hon, Tan Seow. "Justification in Finnis' Natural Law Theory." *Singapore Journal of Legal Studies*, 2000, 590-639. <http://www.jstor.org/stable/24868152>. Accessed August 28, 2021.

² See Lisska A. J. *op. cit.* at p. 288.

The leader and the representatives are placed in the positions of decision-makers. By reason of ceding individual rights to self-govern, the represented people will occasionally require to be heard, to participate in government and to be informed of the state of affairs of their government. This gives rise to political participation which is largely, but not only, carried out through elections. Political participation is not limited to elections, although voting is generally regarded as representing the most effective mode of participation. It is a channel of communication with representatives and leaders and will, on a rational analysis, not always be successful.³ Therefore, effective political participation involves 'having a voice in decisions that affect' a people.⁴

Considering that the political organisation of a people and participation above results in an arrangement consisting of the represented people on one side and the leaders and representatives on the other, the survival of such a system will lie in its ability to remain 'up-to-date' with the political goals that it stands for. If a model of political participation is to remain relevant to the people that it serves, it follows that the model of electoral justice created for it should also be relevant. There is a complementariness in the political

³ See Sidney Verba, "Democratic Participation," *The Annals of the American Academy of Political and Social Science*, Sep., 1967, Vol. 373, Social Goals and Indicators for American Society, Volume 2 (Sep., 1967), pp. 53- 78 at p. 57. Available at: <https://www.jstor.org/stable/1037353>. Accessed on 28 August 2021.

⁴ See Sidney Verba, "Democratic Participation," *op. cit.* at p. 57.

model. The leader, as in the Zimbabwean case, must 'uphold, defend, obey and respect the Constitution as the Supreme law.'⁵ So too, the representatives must protect the Constitution and promote democratic governance, as these are the foundations of political representation.⁶

Likewise, the individuals have a duty to participate in the governance of their affairs. For these reasons, proponents of the theory of the *social contract* suggest that the leader and representatives, who are usually referred to as the 'sovereign,' have a duty to ensure that citizens participate in decision making on multi-varied levels.⁷ Such participation is almost always through elections. This, by implication requires electoral justice models to be able to give effect to the political design of the day - aimed at breathing life into the aspirations of the people.

In such a political system, the representatives are placed in a position of trust. One philosopher, David Gauthier, recognises trust, rationality and self-interest as the blending elements of governmental systems.⁸ A key characteristic is that a single

⁵ See section 90(1) of the Constitution of Zimbabwe, 2013.

⁶ See for instance and in the Zimbabwean model, section 119(1) of the Constitution of Zimbabwe, 2013.

⁷ See Markus Loewe, Tina Zintl, Annabelle Houdret. The social contract as a tool of analysis: Introduction to the special issue on "Framing the evolution of new social contracts in Middle Eastern and North African countries", *World Development*, Volume 145, 2021, at p. 6. Available at: <https://doi.org/10.1016/j.worlddev.2020.104982>. Accessed on 30 August 2021.

⁸ See, Ann Cudd and Seena Eftekhari of the Metaphysics Research Lab – Stanford Centre for Study of Language and Information, "Contractarianism," Stanford Encyclopaedia of Philosophy, 2017. Available at: <https://plato.stanford.edu/entries/contractarianism/#3>. Accessed on 29 August 2021.

representative is placed in this position by large numbers of people. Even though there may be similarities in the aspirations of the people who place the representative in a position of trust, the representative still has to juggle exclusively conflicting interests of the people. Electoral justice systems thus recognise the importance of the task that is reposed in the leader and in the representative. An electoral system must justly yield to the will of the people of identifying the leader with the highest aptitude and sensitivity to the common aspirations of the people and understanding of the inherent conflicts of interest of his or her constituents.

Some people, rightly so, consider the need for commonality in governance and political participation as necessitating the development and adoption by all people of an equal and universal standard by which leaders and representatives will be bound and will execute their duties. Equally, this political set up requires that all elements of an electoral system are bound by the same standard - that is the leader, the representatives and the represented are subject to the same law.

It goes without saying that in elections, any person vying for a public office must be fully conversant with the complex interactions between a public office and the people who are subject to the exercise of public powers. Consequently, the electoral system and justice model through which they are enabled to assume positions and responsibilities of governance,

must remain alive and informed of the interactions of their public office and the electorate. In other words, it must always give effect to the political aim of the people it serves of forming a participatory government.

A failure by an electoral justice model to live up to the political needs of its participants betrays the objective of forming a participatory government. Such a failure may recede into chaos. I will, at this point, pay homage to Thomas Hobbes' description of the 'state of nature' or 'natural condition of man' that graphically portrays the mayhem occasioned by an absence of a common power 'to keep people in awe' and 'to regulate their behaviour.'⁹ Hobbes says that man would always be in a condition of war and ...:

"In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no culture of the Earth, no Navigation, nor use of the commodities that may be imported by the Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all continua fear, and danger of violent death; And the life of man, solitariness, poor, nasty, brutish and short..."¹⁰

The above state of affairs, although unpleasant, crisply picture the chaos that would reign in all our societies in the absence of structures to nip the excesses of uncontrolled human

⁹ See A. Nuri Yurdusev, "Thomas Hobbes and international relations: from realism to rationalism," *Australian Journal of International Affairs*, 60:2, (2006) 305-321 at p. 310, DOI: [10.1080/10357710600696191](https://doi.org/10.1080/10357710600696191). Accessed on 30 August 2021.

¹⁰ See A. Nuri Yurdusev, "Thomas Hobbes and international relations: from realism to rationalism," *op. cit.* at p. 310.

behaviour especially in election contexts. Conversely, the prevailing constitutional set up in Zimbabwe as well as in many other countries that is primarily intended to catalyse human progress is brought about by just electoral processes. One may thus, rightly so, pause to possibly imagine, the likely effect of a failure in a system of electoral justice that is intended to forestall and contain the lurking 'natural condition of man.'

The emergence of models of electoral justice:

Juxtaposing the 'natural state of man' and the shared political, social and economic interests of the people, there must be a means to contain and 'make right' the fallibilities to which human beings fall in their political *cum* electoral endeavours. These means are embedded in models of electoral justice. Models of electoral justice are, therefore, creatures of human beings. They are designs and safeguards created to keep the common aspirations and political aims of a people as the central goal of their adopted system of governance. Models arise out of a realisation that without them, not only are the political objects of a people shrouded in jeopardy but even their lives too.

These models therefore pursue the establishment of a government that is representative of the common aspirations of the people. Any government that exhibits itself as an antithesis of the people it is intended to serve brews discontentment, bitterness and - in the most extreme circumstances - anarchy. Such a result

is counterproductive and may even 'hoist a nation by its own petard.'

Introducing the Zimbabwean model of electoral justice:

The foregoing theoretical antecedents account for the design of most models of electoral justice. For example, through their exposition it can be understood why Zimbabwe is a republic. The foundational provisions of the Constitution of Zimbabwe declare that "Zimbabwe is a unitary, democratic and sovereign republic."¹¹ This provision determines what a consonant model of electoral justice would look like. Even though such a provision of the Constitution hardly features in constitutional litigation and is inadvertently given less prominence in the day-to-day constitutional mechanisms, it actually stands as the cornerstone of electoral justice. The notions of democracy, of a unitary and republic state recognise the inevitability, of all people in a country, participating in their governance both directly and indirectly.

The Constitutional Democracy:

I have discussed the political contexts within which the ultimate need of an electoral justice model emerges. The electoral justice model, however, is not the only outcome of this political context. Political objectives result in other

¹¹ See section 1 of the Constitution of Zimbabwe, 2013.

important safeguards intended to bring accord to the political aims of the people.

One result of the political context within which electoral justice models exist is usually the contemporaneous subsistence of a constitutional democracy. A constitutional democracy is a direct acknowledgment of the inherent political divergence of people in a state. It recognises that political differences can exist in perpetuity and it thus stands out as a mechanism to contain divergence of views and interests, for the good of every person. In the context of this presentation, the constitutional democracy is therefore the vehicle of electoral justice and electoral justice models.

Democratic states ought to provide mechanisms to protect electoral rights. This obligation can be gleaned from the definition of democracy itself. The word democracy is a derivative of the Greek word "demo-kratos," which can be broken down to "demos" meaning 'people' and "kratos" meaning 'rule.' Taken as a whole, democracy connotes rule by the people.¹² Such rule by the people thus includes 'both popular participation and government in the public interest.'¹³

In a constitutional democracy the constitution sets out who represents the people; how they represent the people and how

¹² Lindell, G., Scott, R. (1999). "A Greek – English Lexicon" at Perseus.

¹³ See A. Heywood, *Political Ideologies: An Introduction, 3rd Edition*, Palgrave Macmillan, 2003 at p. 330, cited by the Museum of Australian Democracy, *Defining Democracy* [Online], Available at: <https://www.moadoph.gov.au/democracy/defining-democracy/#>. Accessed on 29 August 2021.

they are elected to represent the people.¹⁴ The wisdom of establishing a constitutional democracy is better summed up in the Ciceronian maxim *salus populi suprema lex* – that is to say the welfare of the people is the supreme law. To quote a champion of the maxim, who advocated for a civilised government based on respect of rights and the social contract, John Locke:

“*Salus populi suprema lex*, is certainly so just and fundamental a rule, that he, who sincerely follows it, cannot dangerously err. ... For it being the interest as well as intention of the people, to have a fair and equal representative; whoever brings it nearest to that, is an undoubted friend to, and establisher of the government, and cannot miss the consent and approbation of the community...”¹⁵

Evidently, the historical origins of democratic and constitutional governance are closely connected to the shared intentions of the people. To this end, even though the purpose of a constitutional democracy embraces all aspects of governance – pervading through any governmental conduct – it is particularly relevant in the discourse of electoral justice. Electoral justice must uphold the popular intentions of the ‘demos’ in setting up an electoral system. There is, therefore, a beckoning to all stakeholders in an electoral justice model to be alive to the supremacy of the will of the ‘demos’ who set up the model.

¹⁴ See the Museum of Australian Democracy, *Defining Democracy* [Online], *op. cit.*

¹⁵ See John Locke, *Two Treatises of Government* [eBook], London Printed MDCLXXXVIII [1688]. Available at: <https://www.gutenberg.org/files/7370/7370-h/7370-h.htm>. Accessed on 29 August 2021.

The Zimbabwean model of electoral justice is acutely alive to the fact that an election is a means of democratic participation. It enables the aspirations of the common men in the breadth and width of a nation to be openly presented without fear of electoral injustice, thus facilitating the assembly of these aspirations into a mutually beneficial national goal. In light of the theoretical background of electoral justice models, this ought to ring the bells signalling the enormity of the task that any person taking part in the electoral justice system is faced with. The enormity of the task of delivering electoral justice is given effect in Zimbabwe in the judicial acceptance of the fact that:

“Under the Constitution, an election to an elective public office is regarded as a central institution in a democratic society practising a representative form of government. It is by an election that is freely and fairly held in accordance with the tenets of the Constitution and the provisions of the Electoral Law that Zimbabwean citizens can directly or indirectly through freely chosen representatives take part in the government of their affairs.”¹⁶

The moment of choice of a constitutional democracy:

The constitutional democracy is a political creature. It is by choice. There always comes a time in the formative stages of all nations where the people choose to define how their political, social and economic affairs will be handled – this is the ‘*moment of choice*.’ Nowadays, the moment when the constitutional

¹⁶ See *Tsvangirai v Mugabe and Others* CCZ–20–17 at p. 9.

democracy is chosen is a moment that is simultaneous with the actual adoption of a constitution by a people. Constitutional democracies are thus implanted into legal norms that are accepted by the people to whom they apply as being superior and imperative. It is the people who define their own democracy.

The particular aspects of an electoral justice system are a foremost consideration in any *moment of choice* for a constitution. In this *moment*, the people identify the 'sentries' of their constitutional democracy, the means of changing these 'sentries' as well as the means of warding off any threats to democracy and the resolution of disputes arising from the implementation of their constitutional democracy. The fundamental values underlying an electoral justice system, the rules that will govern the electoral justice system and the rights of the participants in the electoral justice system are also spelt out.

Accordingly, the choice of a model of electoral justice is no light matter. It is a choice of an adequate safeguard against the effects of uncontrolled exercise of political whims in an electoral system. Fulfilling the dual role of being an arbiter and providing 'checks and balances' in elections, a befitting electoral justice model can forestall bloodshed, anarchy and subversion of the popular will. The International Institute for Democracy and Electoral Assistance - International IDEA - reminds us that:

“Adopting provisions and [electoral justice] mechanisms that stem from local traditions and contexts—which are in line with the society’s democratic principles and shared values—may prevent electoral disputes...”¹⁷

An electoral justice model should therefore be carefully chosen so that it fully caters for the democracy it serves.

Of fundamental values in electoral justice models:

I turn now to consider an important aspect of the electoral justice system.

Electoral justice models are founded on fundamental values. Fundamental values reflect the relative worth that is placed on electoral justice by a constitutional democracy. The Zimbabwean model adopts fundamental values as the anchors of its electoral model. By their nature, fundamental values are a reflection of the particular attributes and results that a constitutional democracy intends to elicit from an electoral justice system. Where an electoral system fails to reflect the fundamental values on which it is based, this is a symptom of deficiencies and failures in the utilisation of the system.

I would exhort every person taking part in the dispensation of electoral justice to pause and reflect on the fundamental values infused in their model of electoral justice. In the Zimbabwean model, fundamental values weave together various components of

¹⁷ See International IDEA, “*Electoral Justice: An Overview of the International IDEA Handbook*,” Sweden: International Institute for Democracy and Electoral Assistance; 2010 at p. 11. Available at: <https://www.idea.int/sites/default/files/publications/chapters/electoral-justice-handbook/electoral-justice-handbook-overview.pdf> Accessed on 17 August 2021.

the electoral justice model that is enacted by the Constitution. These values include respect for the supremacy of the Constitution; the rule of law; fundamental human rights and freedoms; recognition of the inherent dignity and worth of each human being; recognition of the equality of all human beings; gender equality; good governance; and recognition of and respect for the liberation struggle.¹⁸ The Constitution of Zimbabwe helpfully elaborates what the principles of good governance, which bind the State and all institutions and agencies of government at every level comprise. These include a multi-party democratic political system; an electoral system based on – universal adult suffrage and equality of votes, free, fair and regular elections, and adequate representation of the electorate; the orderly transfer of power following elections; respect for the rights of all political parties; and observance of the principle of separation of powers.

The utility of fundamental values in electoral justice models:

You will recall the seminal points I made in this presentation that individuals are a prominent feature of any electoral justice system. Additionally, I have also noted that fundamental values are a reflection of the objectives that a people wish to elicit from an electoral justice system. Taken together, fundamental values preserve the special position of the individual in the electoral justice system. It is for this reason

¹⁸ See section 3(1) of the Constitution of Zimbabwe, 2013.

that fundamental values have actually been regarded as the inspiration and rationale justification for both legislative action and the exercise of public authority in Zimbabwe.¹⁹ They resemble the rights and concomitant duties on the State in our governmental and electoral justice system.

In addition, values are a reference point of the conduct required of the political parties into which the individuals are organised. Through values, electoral justice becomes attainable because they create a binding and fixed standard or measure for ensuring that the electoral system is not subjected to abuse. It is appropriate to sum up on this aspect by quoting a passage from the *Tsvangirai v Mugabe and Others* presidential petition that:

“It is when all measures have been taken by public officials responsible for conducting an election in accordance with the Electoral Law to ensure that the election is violence free and all the necessary mechanisms for voters to cast their vote freely in secret have been put in place, that the right of every Zimbabwean citizen to a free, fair and credible election is secured and the person elected has the right to hold office. So a free, fair and credible election for any elective public office is an essence of democratic self-government.”²⁰

¹⁹ See *Gonese and Anor v Parliament of Zimbabwe and Others* CCZ-4-20 at p. 21.

²⁰ See *Tsvangirai v Mugabe and Others* CCZ-20-17 at p. 11.

Borrowing from the *dictum* above it is perceivable that a value-oriented system of elections and electoral justice, shapes the measures that may be taken to ensure the credibility of elections and electoral justice. Thus, in the Zimbabwean case, the values portray a republic underpinned by democracy.

Even though the masses are accorded a right to take part in an election to choose leaders and representatives, constitutional democracies ensure that there is a mechanism to hold the leaders and representatives accountable. I have noted that a great measure of confidence, trust and control is reposed in leaders and representatives. Accordingly, Jean-Jacques Rousseau, a leading proponent of the *social contract*, crisply simplified the activity of placing confidence, trust and control in our leaders when he stated that:

“each man, in giving himself to all, gives himself to nobody.”²¹

In light of the great deal of trust placed in leaders, I call on everyone to widen our perspectives of the importance of electoral justice. This is because electoral justice is not a momentary event applicable to the imminent election. It transcends a single election and extends into future electoral processes. A failure to uphold electoral justice in a particular election undermines the prospect of future elections, the

²¹ See Jean-Jacques Rousseau, quoted by Nicola-Ann Hardwick, in *Rousseau and the social contract tradition* [Online], Available at: <https://www.e-ir.info/2011/03/01/rousseau-and-the-social-contract-tradition/>. Accessed on 29 August 2021.

continued existence of a constitutional democracy and the fulfilment of the common aspirations of the people.

As such, the principles of constitutional democracy, the fundamental values of the electoral system and the safeguards on the electoral justice must always be respected. The failure to honour these norms in election time and outside election time jeopardises the relevance of these values. We must, therefore, always bear in mind the underlying philosophical and constitutional aspects of the electoral justice system.

A constitution therefore stands as a sturdy means of ensuring that there is electoral accountability. Typically, a constitution carries the electoral model of a nation. It is a necessary implication of the political context within which elections occur. In the 'moment of choice' of a constitution, people usually decide on the scientific method that they will use to entrust a leader and representative with their economic, social and political concerns. In the presidential election petition of *Tsvangirai v Mugabe and Others*, the foundational function of a constitution in electoral justice was pronounced.

There was judicial recognition that "Zimbabwe is a constitutional democracy practising a representative system of government," and that "by the exercise of their sovereign authority, the people of Zimbabwe made the Constitution in terms of which they established elective public offices. They vested the offices with powers of government, to be exercised in

accordance with the Constitution or any other law on their behalf and for their benefit.”²²

Based on the foundational provisions of the Constitution, electoral models are thus a necessary, scientific and organised means of ensuring the political participation and organisation of people. The Zimbabwean electoral model incorporates these qualities of being scientific and organised. It requires an election, despite the voting method used, to be ‘simple, accurate, verifiable, secure and transparent.’²³

The Constitution of Zimbabwe also enacts the related fundamental norms that demand that there must be appropriate mechanisms to eliminate electoral violence, electoral malpractices and to ensure that electoral materials are safely kept.²⁴ The sum effect of these scientific characteristics of Zimbabwe’s electoral model is that transparency and accountability stand out as the evidence of all valid electoral processes. In keeping with these characteristics, the electoral justice model must give effect to electoral system in use.

Additionally, the Zimbabwean electoral model recognises political parties as the primary means through which the Zimbabwean electoral system has been organised. Political parties have coalesced around common ideologies and aspirations

²² See *Tsvangirai v Mugabe and Others* CCZ–20–17 at p. 9.

²³ See section 156(a) of the Constitution of Zimbabwe, 2013.

²⁴ See section 156(c) of the Constitution of Zimbabwe, 2013.

that people share. The use of political parties thus narrows down the divergence of political goals in a nation. When people, in their political parties, gather around the same goals, order ensues.

Once there is an overall electoral system there must be a concomitant justice system to sustain it. Every system is liable to abuse, to misuse and to being misunderstood. This is neither abnormal nor is it avoidable when the astuteness of human beings is taken into account. Yet still, a robust electoral justice system will infuse dispute resolution mechanisms into it beforehand. Electoral justice systems must accept the inherency of disputes. The dispute resolution mechanisms will contain the excesses of human abuse as they arise and ensure the inviolability of the electoral justice system that a people would have committed themselves to.

Having set out the basic philosophical, historical, constitutional and jurisprudential aspects of an electoral justice system, I am now moving on to discuss some of the qualitative characteristics of the Zimbabwean electoral justice system. I earnestly hope that by this discussion, you will be able to draw lessons from our experience, which lessons will enable you to evaluate and refine the models in your own jurisdictions.

RESOLUTION OF ELECTORAL DISPUTES

It is standard practice that an emotive subject such as the election of a state's leadership ought to have mechanisms in place to determine the disputes that are bound to arise in the process. The resolution of electoral disputes in our jurisdiction is a matter within the exclusive purview of the courts of justice. In many countries, the electoral justice models arrive at the method of electoral adjudication, by reason of evolutionary and historical experiences. Zimbabwe is no exception with our electoral justice system influenced heavily by our colonial heritage. This has been the *status quo* since the dawn of independence.

Electoral dispute resolution is a common theme particularly in constitutional democracies where the individual is the centre of the electoral system. States have adopted different models primarily based on their intended political aim. There is the legislative model that is also referred to as "power verification". It is premised upon the principle of checks and balances between the arms of the state. The legislature in essence regulates its own processes. Under this model, elected legislators determine the validity of an election.

There is also provision of the specialised electoral tribunal model in other jurisdictions. The appeal surrounding this model is based on the expertise and familiarity with the subject matter of the selected adjudicators to determine and protect electoral

rights. This model has been applauded as it provides for expert counsel on matters of constitutional and national interest without exposing the judiciary to allegations of interference or bias. However, it has been detracted for allowing in certain instances those in charge of organising elections, that is electoral commissions, authority to preside over their own causes. It is a model in direct competition with our chosen judicial court system.

The judicial court model of justice is nominally referred to as the English model which is an od to its origins. The model is premised upon the perceived independence of the judiciary from external influences. Challenges to election results, at any of the levels of elections, are exclusively heard by the judicial arm of the State. Its most ardent supporters point out that the task of judging and qualifying elections has a judicial nature, and as such, it must be done by a judicial authority in order to guarantee the authenticity, regularity and validity of the election. Thus, the role of the judiciary in dispensing this critical function cannot be understated as judges are inherently non-partisan in the delivery of their occupational mandate. A functional judiciary is arguably best placed to be indifferent to political and party interest in the determination of electoral challenges.

This judicial mechanism of resolving electoral challenges is different from other quasi-judicial mechanisms that have been

adopted in other jurisdictions. Whereas there is recognition of specialised electoral tribunal models, the Zimbabwean model has divested such authority from the Zimbabwe Electoral Commission (hereinafter "ZEC"). The determination of electoral disputes is precluded from its influence despite ZEC's guardianship of the voters roll as prescribed in the Constitution.

There is no recognition of the concept of "judge commissioners" with ZEC completely externalised in instances of electoral petitions. The only function that the Commission provides in electoral petitions is the provision of the voters roll at the behest of the aggrieved parties looking to petition the courts. This design is a deliberate aspect of our model. The reasoning behind this is in no way intended to limit the effective resolution of electoral disputes as it is an accepted proposition that challenges to election results or the conduct of elections are a reflection of the resilience of the electoral system.²⁵

Our model is intended to afford greater transparency to the process as ZEC's conduct may in certain instances form the gravamen of the electoral petition. The significance of design is then highlighted as the judiciary is a perceived impartial third party in the dispute. It also prevents the Commission from presiding over its own shortcomings and fosters public

²⁵ Petit (2000), p. 5.

confidence in the efficacy of lodging petitions in electoral disputes.

However, the judiciary's mandate does not extend to all its levels. The authority to determine electoral disputes is vested in the High Court through its Electoral Court division except in instances of presidential petitions which are in the exclusive domain of the Constitutional Court. The High Court is a superior court of record and its endowment with the jurisdiction to determine electoral disputes reflects the sensitivity of our model to instability occasioned by electoral challenges. The court of law is also an arena that commands the respect of its users and is generally insulated from instances of sensationalism as there exists a prescribed level of comity in the conduct of its affairs. This is particularly apt in Zimbabwe where the majority of political parties and their leading candidates have an extensive legal background.

An extensive adjudication mechanism that provides redress for infringed electoral rights is central to the credibility and validity of an electoral system. The Electoral Court and by extension the High Court is thus in a position to sufficiently guarantee and determine the rights of parties in electoral challenges. This is in part also due to the level of experience as the High Court judges are experienced legal officers with the requisite legal grounding to exhaustively determine the important questions of law raised in the petitions.

The appointment of judges to the Electoral Court is a matter of serious concern. Judges of the Electoral Court are the men and women who are empowered to test the constitutionality and legality of elections - therefore, it is necessary to ensure that the 'right' judges compose the court. A decision of the Zimbabwean Supreme Court held that if the judges of the Electoral Court are improperly appointed, they lack judicial authority and that any purported exercise of judicial power by improperly appointed judges undermines the rights of litigants to protection of the law.²⁶ As such, it is this constitutional regard that guides the appointment of High Court judges to the Electoral Court division.

The ability to effectively determine electoral disputes is expressly highlighted by the exclusivity enjoyed by the Constitutional Court in presidential petitions. The question of the validity of the election of a head of state is a pertinent issue which is granted the audience of the most senior judicial officers in constitutional affairs. There are also safeguards in place relating to the other species of petitions where a right of appeal on a question of law is provided for by the Electoral Court. The deliberation on a question of law on appeal by the Supreme Court also provides non-presidential petitions a robust mechanism to preserve electoral rights.

²⁶ See *Marimo & Anor v Minister of Justice & Ors* 2006 (2) ZLR 48 (S) at p. 58.

The interaction between the electoral process and the judiciary is principally mediated by the right to a fair and impartial hearing. The concept of free and fair elections is embedded in the need to appoint a majority leader, who will not think on minority lines. Every Zimbabwean citizen, regardless of voting status, has a fundamental right to a free, fair and credible election. In other words, he or she has a right to a valid election held in accordance with the relevant provisions of the law governing the conduct of the election.

The judiciary then comes into focus as a guardian of these rights. The Court is enjoined in the discharge of its mandate to act in accordance with the values fundamental to any democratic society. The guiding principle is that the basis of the authority of a representative government to govern is free, fair and regular elections.

ELECTORAL COURT MANDATE IN ELECTION PETITIONS

The Electoral Court is the court designated to exclusively determine electoral petitions other than presidential petitions which is the reserve of the Constitutional Court.²⁷ The Electoral Court is of significance regarding local government and parliamentary petitions. The Electoral Act provides for the law that establishes the Court and sets out its functions. It is

²⁷ Section 161 of the Electoral Act [*Chapter 2:13*] was amended by Act No.3 of 2012 which conferred exclusive jurisdiction upon the Electoral Court.

established in terms of section 161 of the Electoral Act which notes the following:

“(1) There is hereby established a court, to be known as the Electoral Court, which shall be a court of record.

(2) The **Electoral Court shall have exclusive jurisdiction—**
(a) to hear appeals, applications and petitions in terms of this Act...” (my emphasis)

The import of section 161 is to preclude other Courts established in terms of the Constitution from exercising jurisdiction in election petitions.²⁸ The bar extends to the High Court which is a court clothed with inherent jurisdiction to determine any civil or criminal matter in Zimbabwe.²⁹ This indicates the *sui generis* nature of election petitions and was highlighted in the case of *Chiokoyo v Ndlovu & Ors*, 2014 (1) ZLR 473 (H) as follows

“Where the legislature gives the other Court exclusive jurisdiction as was done by s 161 (2) of the Electoral Act, the High Court though clothed with original jurisdiction cannot hear such cases. They were lawfully taken away from it and given to another court of competent jurisdiction.”

The word “exclusive”, means this court, now has a domain over which, it does not share its jurisdiction with any other court. The combination of exclusive jurisdiction and the addition of powers similar to those exercised by the High Court means this court now enjoys unlimited jurisdiction over all electoral

²⁸ Section 162 of the Constitution provides as follows: Judicial authority derives from the people of Zimbabwe and is vested in the courts, which comprise— (a) the Constitutional Court; (b) the Supreme Court; (c) the High Court; (d) the Labour Court; (e) the Administrative Court; (f) the magistrates’ courts; (g) the customary law courts; and (h) other courts established by or under an Act of Parliament

²⁹ *Derdale Investments (Pvt) Ltd v Econet Wireless (Pvt) Ltd & Ors* HH 656-14, highlighted that the High Court has unlimited original jurisdiction which it exercises unless its jurisdiction is specifically ousted.

cases, except criminal cases and cases, which have been specifically, allocated to other courts.³⁰

However, it is important to note that there is a stricture to the powers of the Electoral Court regarding the conference of exclusive jurisdiction in electoral petitions. This was provided in the case of *Kambarami v 1893 Mthwakazi Restoration Movement Trust & Ors* SC 66/21

“It is clear that the Electoral Act provides for situations where the court can exercise its jurisdiction and further provides for the remedies which the court can grant. The net effect is that the nature of the jurisdiction which is granted in the Electoral Act is that the court cannot stray from the provisions of the Act. It is bound to follow the powers set out in the Act...It could not have been the intention of the legislature to give the Electoral Court the power to grant declaratory orders through the amendment of s 161 of the Act. In my view, s 161 of the Act was amended so as to provide the Electoral Court with wider powers so that it is not restricted to dealing only with election petitions as was the position prior to 2012.”

The Electoral Court is essentially a creature of statute established to provide electoral justice to its petitioners. It is strictly limited to the powers provided in the Electoral Act and its verdict is not definitive. Section 172(2) of the Electoral Act stipulates that a decision of the Electoral Court on a question of law may be the subject of an appeal to the Supreme Court.

³⁰ *Mliswa v The Chairperson Zimbabwe Electoral Commission* HH 586-15

This clause serves a profound purpose as the Supreme Court is the apex court in non - constitutional matters.³¹ This elevates the level of scrutiny that is afforded a petition that has been lodged with the Electoral Court. Greater transparency is afforded to the process, particularly where a contentious point of law is granted the audience of a venerable arena such as the Supreme Court.

LOCUS STANDI IN ELECTORAL PETITIONS

The discretion to challenge the impropriety of an electoral outcome is restricted in our jurisdiction. The onus is upon the losing candidate to cast aspersions on the validity of the election. This is provided for in terms of section 167 of the Electoral Act which is worded in the following manner:

"167 Who may present election petition

A petition complaining of an undue return or an undue election of a member of Parliament by reason of want of qualification, disqualification, electoral malpractice, irregularity or any other cause whatsoever may be presented to the Electoral Court by any candidate at such election."

The aforementioned provision on *locus standi* in election petitions is meant to preserve a litany of petitions from parties lacking direct and substantial interest in the matter. This benefits the participating candidates because the Electoral Court is in a position to attend to their genuine grievances

³¹ S169(1) The Supreme Court is the final court of appeal for Zimbabwe, except in matters over which the Constitutional Court has jurisdiction.

which also dispenses of public interest in the matter. Akin to a petition in the Electoral Court, only an aggrieved presidential candidate shall be entitled in terms of section 93 of the Constitution to challenge the validity of a presidential election result.

Despite the restricted access to petition the Courts, our jurisdiction is alive to the need to involve the public in the process. The model aims to safeguard the interests of the individual who has cast his vote thus it is imperative that he is involved in the adjudication process in some measure. We have taken steps to protect the integrity of the electoral justice system by allowing the live broadcast of presidential petitions.

The import of this is that the judiciary's authority to determine the petitions is not exercised in a vacuum. The public is allowed to passively participate as observers in the proceedings that accord validity to the elections. This is in the public interest because the institution and determination of election petitions, has the potential to cause instability and change the composition of one of the chief organs of State.

Another notable issue that has been defined by the Electoral Court relates to the citation of the respondent in electoral petitions. The Electoral Act in section 166 of Part XXIII defines a respondent as "President, a member of Parliament or councillor whose election or qualification for holding the office is complained of in an election petition". The legislature intended

to demonstrate beyond doubt the centrality of the winning candidate in election petitions. The challenge is against him or her. This is valid even where his agents or any other person with or without his approval commits acts that benefit his ascension into office. A finding that the election was tainted to such an extent as would materially affect its outcome triggers, by operation of law, the holding of a new election.

Therefore, the petitioner is entitled to cite only the person against whom he or she makes the challenge. This narrows the issues for determination and promotes the integrity of the process particularly, in circumstances where third parties have caused the irregularity, the causal link to the impugned result is sufficiently established. The integrity of the petition constitutes valid grounds for departing from the common law principle normally adhered to when selecting respondents in an electoral petition.

CONSTITUTIONAL COURT MANDATE IN ELECTORAL PETITIONS

The Constitutional Court occupies the most prominent role in electoral dispute resolution as the presidential election inarguably forms the cornerstone of general elections in Zimbabwe. The outcome of the presidential elections informs the government of the day of its leadership. As the highest office in the state, it has the potential to cause major instability as painstakingly highlighted by the deadlock in the 2008 presidential election which threatened the peace and stability

of the nation.³² Thus, it was afforded constitutional concern by the enactment of the Constitution in 2013.

Section 93 of the Constitution endows the right to challenge the presidential election. It is the primary provision that regularises the procedure to be adopted when an aggrieved candidate seeks to review the presidential election and provides the relief that can be obtained by the challenging party. The Constitutional Court is accorded extensive latitude regarding the order it can grant.

Previously, the presidential petition was not the exclusive affair of the Constitutional Court.³³ This is evidenced by the jurisprudence developed in the case of *Tsvangirai v Mugabe & Anor* SC 84/05. The applicant lodged an application to the Supreme Court for redress alleging that the rights to protection of the law and to a fair hearing within a reasonable time, guaranteed to him by the Constitution had been infringed by the High Court. The crux of his complaint was the length of the delay in hearing and determining the presidential election petition by the High Court.

However, the application lacked merit and was consequently dismissed due to other substantive points of law. Regardless the matter highlighted significant gaps in our electoral justice

³² Brian Raftopoulos, *Elections, Mediation and Deadlock in Zimbabwe?* (ARI) (2008)

³³ Previously the right to challenge the validity of a presidential election was exercised in the High Court.

system particularly relating to timelines in dealing with presidential petitions. It also illustrated how the function of an incumbent government can potentially be undermined by protracted litigation surrounding the presidential office.

The developments in our electoral justice system have made concerted efforts to ensure that presidential petitions are determined both expeditiously and judiciously. Section 93 stipulates the following on the nature of a presidential election petition:

“93 Challenge to presidential election

(1) Subject to this section, any aggrieved candidate may challenge the validity of an election of a President or Vice-President by lodging a petition or application with the Constitutional Court within seven days after the date of the declaration of the results of the election.

(2) The election of a Vice-President may be challenged only on the ground that he or she is or was not qualified for election.

(3) The Constitutional Court must hear and determine a petition or application under subsection (1) within fourteen days after the petition or application was lodged, and the court’s decision is final.

(4) In determining a petition or application under subsection (1), the Constitutional Court may— (a) declare a winner; (b) invalidate the election, in which case a fresh election must be held within sixty days after the determination; or (c) make any other order it considers just and appropriate.

(5) If, in a petition or application under subsection (1)— (a) the Constitutional Court sets aside the election of a President, the election of the President’s two Vice-Presidents is automatically nullified; (b) the Constitutional Court sets aside the election of either or both Vice- Presidents, the President must without delay

appoint a qualified person or qualified persons, as the case may be, to be Vice-President or Vice- Presidents.”

The above provision provides the genesis for the formulation of a presidential petition. It is from section 93 in conjunction with section 167 that the Constitutional Court is accorded its exclusive jurisdiction in presidential petitions.³⁴ The endowment of exclusive jurisdiction to hear presidential challenges upon the Constitutional Court is by design as it is the apex court in constitutional matters.³⁵ The recognition of its rank in the hierarchy of courts imbued with jurisdiction to determine constitutional matters is illustrated in the finality of its decision regarding presidential petitions.

Once a presidential petition has been determined by the Constitutional Court, the matter is for all intents and purposes exhaustively decided. This ties into the significance of the presidential petition as its resolution accredits legitimacy to the election of the president-elect or in the event of an adverse order dissolves the presidium entirely. This is supported by section 94 of the Constitution which provides the following:

“94 Assumption of office by President and Vice-Presidents

(1) Persons elected as President and Vice-Presidents assume office when they take, before the Chief Justice or the next most senior judge available, the oaths of President and

³⁴ Section 167(2) (b) of the Constitution stipulates that: (2) Subject to this Constitution, only the Constitutional Court may...(b) hear and determine disputes relating to election to the office of President;

³⁵ Section 167(1): The Constitutional Court— (a) is the highest court in all constitutional matters, and its decisions on those matters bind all other courts;

Vice-President respectively in the forms set out in the Third Schedule, which oaths they must take –

(a) ...or

1. **in the event of a challenge to the validity of their election,** within forty-eight hours after the Constitutional Court has declared them to be the winners." (*my emphasis*)

The Constitutional Court is afforded a wide range of powers in the event that the presidential petition has merit. The Court is entitled to declare a winner to give to effect to the will of the sovereign. The range of its powers is illustrated in section 93(4) where it is tasked with granting any order it considers just and appropriate instead of calling for fresh elections.

The only caveat in the exercise of these extensive powers is that the Court ought to have invalidated the election results. The exercise of the Court's powers under section 93(4) ought to be judicious as capriciousness negatively impacts the confidence of the citizenry in the institutions established to protect their rights. This is significant regarding presidential petitions as the Constitutional Court is the sole legal forum that provides for the protection of the presidential vote.

The importance of timeously determining presidential petitions is reflected by the brevity of the timelines outlined in section 93 of the Constitution. These timelines regulate the amount of time that it is afforded to aggrieved contestants to petition the Constitutional Court. The aggrieved candidates are granted

seven days to lodge their petitions. The reasoning behind this is not only to expedite the resolution of the petition but to ensure that in the event of substantial irregularities which nullify the result, the sanctity of the presidential election is preserved by an order of the Constitutional Court which cures the material abuse of the process.

The restrictive timelines also extend to the Court as it is obligated to resolve the presidential challenge within fourteen days. This is in line with the maxim that posits that justice delayed is justice denied.³⁶ The strictures on timelines also extend to an order for fresh elections which is required to be held within sixty days from the invalidation of the presidential elections.

Section 93 also serves to limit the challenge of the election to the office of Vice- President. Section 93(2) states that the election of a Vice-President may be challenged only on the ground that he or she is or was not qualified for election. This limits the scope for the challenges that are brought before the Court in respect of the presidium. This delimitation protects the dignity of the office.

However, the election to the post of Vice - President has barely been the focus of the presidential petitions that have been brought before the Constitutional Court in terms of the

³⁶Manemo & Anor v Achinulo & Anor HB 12/2002

Constitution in 2013. Primary attention in our jurisdiction has been devoted to petitions challenging the validity of presidential elections. The most prominent presidential petitions in terms of the current Constitution are *Chamisa v Mnangagwa & Ors* CCZ 21/19 and *Tsvangirai v Mugabe and Ors* CCZ 20/17 because they established pertinent principles that guide the Court in reaching their determination.

In addition, the Electoral Act provides for the fulfilment of the rights which are highlighted under section 93 of the Constitution. It is the operational legal framework for constitutional provisions on the electoral system. The principle of subsidiarity applies to section 93 of the Constitution as such it finds expression in the Electoral Act.

The principle of subsidiarity is based on the concept of one-system-of-law. Whilst the Constitution is the supreme law of the land it is not separate from the rest of the laws. The principles of constitutional consistency and validity underscore the fact that the Constitution sets the standard with which every other law authorized by it must conform. The Constitution lays out basic rights and it is up to legislation to give effect to them. This is the nature of the symbiotic relationship between the Constitution and the Electoral Act.

Thus, the presidential petition under section 93 of the Constitution is subject to the relevant provisions contained in the Electoral Act. One ought to adhere to the provisions of the

Electoral Act when petitioning the Constitutional Court regarding presidential petitions. In other words, the Electoral Act is the enabling act of parliament for implementing the ideals set out in the Constitution regarding presidential petitions. Section 111 of the Electoral Act gives expression to section 93 of the Constitution as follows:

"111 Election petitions in respect of election to office of President

(1) 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 Constitutional Court within seven 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 or herself to have been a candidate at such election.

(2) If, on the trial of an election petition presented in terms of subsection (1), the Constitutional Court makes an order declaring—

(a) that the President was duly elected, such election shall be and remain valid as if no election petition had been presented against his or her election; or

(b) that the President was not duly elected, the registrar of the Constitutional Court shall forthwith give notice of that fact to the Chief Elections Officer who shall publish a notice in the *Gazette* stating the effect of the order of the Constitutional Court.

(3) A declaration by the Constitutional Court in terms of paragraph

(b) of subsection (2) shall not invalidate anything done by the President before that declaration."

The above provision reiterates the ideals contained in section 93 of the Constitution in a manner that gives effect to the principle that norms of greater specificity should be relied upon before resorting to norms of greater abstraction. It provides the basis for aggrieved candidates to challenge the presidential elections in a manner that is consistent with the rights provided by section 93.

PROCEDURAL ASPECTS OF ELECTORAL PETITIONS

Zimbabwean courts will subscribe strictly to the procedural rules in Election petitions. An election petition is *sui generis* and can therefore not be governed by ordinary rules. This is so because election petitions should meet the highest standards of public scrutiny. That principle is more readily achieved when the procedures that have been designed to guarantee the integrity of the proceedings are scrupulously observed. The law governing the manner and grounds on which an election may be set aside is to be found in statute and the Court can do no more than relate to the provisions of the Electoral Act and the Electoral Rules as promulgated.

As already mentioned, in Election petitions, the procedure must be complied with. This includes the procedure as to the format of the election petition. In Zimbabwe, there is judicial consensus that the rules on the form of election petitions are peremptory. Rule 21 of the Electoral Petitions Rules is prescriptive as to the form of the petition. It sets out several

requirements. Likewise, in the Presidential petition, a respondent is limited to opposing the petition only. The courts have held that a failure by a petitioner to comply with any of these rules on format is fatal and these include: that the electoral complaint must be brought on petition and not on notice; that the names of any person accused of corruption must appear on the face of the petition; that the grounds of petition must appear on the face of the petition; and that the petition must be signed by the petitioner and not his legal practitioner. The fastidious approach we have adopted in our jurisdiction is relevant as it creates a consistency of result. It fosters a measure of confidence, trust and control in the electoral justice system. It prevents a porous model wherein there is no regulation as to the manner an election can be challenged.

PRESUMPTION OF VALIDITY IN ELECTORAL PETITIONS

Once the petition satisfies all the procedural requirements of the relevant electoral court, the question turns to merits of the petition. There exists a presumption that once an election has been properly concluded, the emergent result is valid. Therefore, courts inherently approach electoral adjudication with a presumption of validity. The presumption conforms to the attendant burden of proof on the petitioner to prove the grounds of his or her complaints. In a recent Constitutional Court decision in an electoral petition, it was stated that:

“There is a presumption of validity of an election. This is so because as long as the election was conducted substantially in terms of the constitution and all laws governing the conduct of the elections it would have reflected the will of the people.”

The onus and burden of proof therefore rest with the applicant to motivate his claim and it is for him or her to substantiate his allegations to the satisfaction of the court. The applicant ought to produce sufficient and clear evidence to establish the grounds of the application to entitle him to the granting of the relief sought.

The discharge of the burden of proof is intrinsically tied to the standard of proof required in electoral petitions. There exists a defined standard which aggrieved candidates ought to satisfy in order to successfully challenge an electoral outcome. This standard is established in our constitutional jurisprudence. The Constitutional Court bench in the authoritative case of *Chamisa v Mnangagwa & Ors* (supra) defined the logical premises of the standard of proof followed in Zimbabwe as follows:

“The purpose of election laws is to obtain a correct expression of the will of the voters. Where the allegations of electoral malpractices do not contain allegations of commission of acts requiring proof of a criminal intent, such as fraud, corruption, violence, intimidation and bribery, the standard of proof remains that of a balance of probabilities. In allegations that relate to commission of acts that require proof of criminal intent, the criminal standard of proof beyond reasonable doubt would apply. There is no basis for departing from settled principles of standards of proof to hold a petitioner to a higher standard of proof in electoral petition cases simply by reason of

their *sui generis* nature. In the view of the Court, there is no justification for an "intermediate standard of proof" to be applied in election petitions."

These principles have been consistently followed by Electoral Courts in Zimbabwe, especially where allegations imputing criminal intent are made. As such corrupt practices are required to be proved beyond a reasonable doubt. So fundamental is this principle that one court described it as having been followed 'since independence' - in other words, there is a consistent approach to matters where allegations of corruption are made against another party.

There are good reasons for prescribing such strict standards of proof in electoral matters. Zimbabwean courts are alive to the need to protect the vote of the individual, as such, it is of paramount importance in a democracy that the electoral process is not set at naught and the elected candidate thrown out unless the grounds mentioned in the Act and on which the petition was presented have been clearly and fully proved.

To this end, speculations are not acceptable evidence. Nor is it proper for a court to base its decision on findings that are based wholly or partly on findings made by a team of international observers.

Similarly, in hearing oral evidence, the court must be alive to the fact that an election petition is essentially political. Courts should be circumspect and ensure that witnesses have not tailor-made their testimony to suit the political interests of

the candidate they are supporting. Therefore, it has been said that in election cases it is very easy to get the help of interested witnesses but very difficult to prove charges of corrupt practices.

INVALIDATION OF ELECTIONS UNDER THE ZIMBABWEAN ELECTORAL JUSTICE MODEL

Our electoral justice system pays homage to the doctrine of substantial compliance. In effect, the doctrine encapsulates the notion that a court should not overrule an election on the grounds of trivialities.³⁷ For an election to be overruled, there must be substantial non-compliance with the electoral law that has the effect of vitiating the election. The doctrine is essentially part of our law as it is entrenched within section 177 of the Electoral Act. The section is worded in the following terms:

"177 When non-compliance with this Act invalidates election
An election shall be set aside by the Electoral Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the Electoral 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."

The requirements stated above are conjunctive such that subsection (a) cannot exist independently of subsection (b).

³⁷ See *Matamisa v Chiyangwa and Anor* (Chinhoyi Election Petition) 2001 (1) ZLR 334 (H) at p. 340.

This interpretation is based upon the use of the term "and" to join the provisions. It reflects that subsection (b) is a corollary to the significance that is afforded the existence of non-compliance. The non-compliance should have a bearing on the outcome of the election to set aside the result. The Electoral Act sets out the five bases upon which an electoral outcome may be challenged, namely (a) want of qualification, (b) disqualification, (c) electoral malpractice, (d) irregularity, and (e) any other cause whatsoever.

ADJUDICATION OF PRESIDENTIAL PETITIONS

The presidential petition occupies a central position in our electoral justice system. The presidential election itself is the embodiment of the choice accorded to citizens by our model to select their leader and representatives. By voting the party candidates into power, the citizens essentially obey the law as prescribed by the constitution. The election through voters' participation organises the citizens into a common entity of purpose.

Therefore, the swift resolution of presidential challenges is imperative to the stability of the State. Prolonged delays in the determination of such petitions undermines the authority of the office. The Constitution is alive to these considerations hence the fourteen-day period fixed for the Constitutional Court to determine the merits of such a petition. Once the matter is heard by the convened bench, the Court is then called upon to

make a determination that disposes of the petition in compliance with the strict timelines. The order it grants is final and definitive.

WITHDRAWAL OF PRESIDENTIAL PETITIONS

Before moving onto the requirements for voiding a presidential election, an important question has been decided in our jurisdiction. The Constitutional Court has been seized with the question of the validity of withdrawing a presidential petition before its hearing. This was founded in the case of *Tsvangirai v Mugabe & Ors (supra)* whereby the aggrieved applicant having filed his court application sought to withdraw his petition. The petitioner had challenged the validity of the president elect's victory based on corruption allegations.

The Court's determination on the petitioner's unilateral act of withdrawal highlighted several important principles guiding our electoral justice model as a republican state. It was established that there exists an intrinsic link between the right of the petitioner to be heard and the Court's obligation to determine the petition.

The absence of an express provision for the withdrawal of a presidential petition in the Constitution serves an important function. It protects the interest of every citizen in the determination of the petition. As indicated earlier on, every citizen has a right to participate in the election. By foregoing,

the right of withdrawal, the Constitution places an obligation on the Court to determine the merits of the petition. This accords the elected leader the necessary legitimacy as the process is transparent and inclusive.

The fundamental principles of justice, transparency and accountability act as a compass that guides the conduct of the Constitutional Court in the adjudication of presidential petitions. The Court is conjoined to determine the petition once it has been properly filed by an aggrieved presidential candidate. Thus, our electoral jurisprudence upholds this constitutional ideal by outlawing the withdrawal of a petition lodged under section 93(1) of the Constitution.

REQUIREMENTS FOR INVALIDATING A PRESIDENTIAL ELECTION

The determination of the Constitutional Court on the presidential petition promotes the transparency of our electoral justice system. The citizenry has an absolute interest in the determination of a presidential petition that is lodged in the Constitutional Court. This interest is established in the Constitution. It is the people who, in the exercise of their sovereign authority, decided that when a petition is lodged with the Court challenging the validity of an election of a President they are entitled to know the veracity of the allegations upon which the validity of the election is impugned.³⁸ This is

³⁸ Tsvangirai v Mugabe & Ors CCZ 20/17

significant as once a presidential petition is heard the Court is compelled by the strict timelines to provide a definitive order on the allegations.

In our model, section 93(4) provides the remedies which can be granted by the Constitutional Court regarding presidential petitions lodged by aggrieved candidates. The scope of the authority accorded to the Court is extensive. Once a presidential election is invalidated, the Constitutional Court is well within its rights to grant an order it deems just and appropriate to the prevailing circumstances.

The Zimbabwean position on the annulment of presidential elections follows the doctrine of substantial compliance. This approach was elucidated in the pre-eminent case of *Chamisa v Mnangagwa (supra)* wherein a two-pronged stage was highlighted as follows:

“the Court must be satisfied that this breach has affected the results of the election. In other words, an applicant must prove that the entire election process is so fundamentally flawed and so poorly conducted that it cannot be said to have been conducted in substantial compliance with the law. Additionally, an election result that has been obtained through fraud would necessarily be invalidated”

The aforementioned case also established the template for the invalidation of a presidential election. The requirements were set out in the following manner:

“...a court will only invalidate a Presidential election in the following circumstances -

1. Upon proof of commission of electoral malpractices of such a nature and scale as to make it impossible for the court to hold that the result of an election represents the will of the electorate.

2. The Presidential election was so poorly conducted that it could not be said to have been conducted in accordance with the principles for conducting a free, fair and credible election prescribed by the Constitution and the law of elections.

3. The proved irregularities, whilst showing non-compliance with particular provisions of the law of elections, are of such a nature and effect that they affected the result of the Presidential election”

Thus, it is trite in our jurisdiction that the requirement of non-compliance and its effect on the result of a presidential election operate conjunctively in determining the validity of a petition before the Constitutional Court. Therefore, in instances where irregularities have been proven to the Court’s satisfaction, the issue turns to their nature and effect on the Presidential election. In circumstances where they are found to be immaterial or negligible, the presidential petition fails to invalidate the result.

CONCLUSION

The electoral justice system in Zimbabwe is reflective of the ideals contained in the Constitution. These ideals are highlighted by fundamental electoral rights contained in sections 67, 69 and 155 of the Constitution. They are buttressed by the provisions of the Electoral Act which is the primary statutory mechanism for the preservation, promotion and development of electoral rights. Protection is afforded to the

electoral rights of participants and public interest in the outcome of general elections.

The model is cognisant of the importance of the individual who is the essence of the electoral system as established by the Constitution. The design is clearly intended to achieve a political aim. The citizen is given a right to participate in the election process. This right is generally exercised under the guise of political parties. These become the principal vehicles through which the electoral justice system functions.

The political parties provide the candidates who represent the interests of the public once elected into office. The multi-party system is intended to advance the interests of the general public. It is in the advancement of this public interest that our model provides mechanisms for safeguarding these electoral rights.

The Constitution of Zimbabwe, 2013 is the foundational bedrock of our model of electoral justice. Its principles pervade through the entire electoral justice model. Chief among these principles is that the rule of law must prevail in order for other constitutional imperatives on the conduct of elections to be given effect.

The Courts occupy an important position in the dispensation of electoral justice. There exists a hierarchy in the composition of Courts as forums for electoral rights. The Constitutional

Court is accorded sole jurisdiction regarding the important question of presidential petitions. This is distinct from the Electoral Court which is accorded exclusive determination to deal with any other electoral challenge except the presidential challenge. A right of appeal is also vested in the Supreme Court regarding the Electoral Court's verdict.

In summation, the electoral justice system in Zimbabwe is premised upon the interplay between the ideals contained in the Constitution and their protection by the judiciary. The constitutional principles are interpreted by the Electoral Act through the advent of the established judicial forums which promote the transparency, inclusiveness and integrity of the system.