



**THE UNIVERSITY OF ZIMBABWE**  
**LAW FACULTY**

---

Strengthening pre and intra poll dispute resolution in the Zimbabwean Electoral Law

---

**DISSERTATION PROPOSAL SUBMITTED IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS OF A MASTERS DEGREE IN CONSTITUTIONAL AND ELECTORAL LAW  
(LMCE)**

**ENOCK DAMBUDZO**

Registration number: R135979J

**THE FACULTY OF LAW  
UNIVERSITY OF ZIMBABWE**

## Introduction

One essential feature of any democratic nation is the regular holding of free and fair elections. Accordingly most countries in Africa, Zimbabwe included, expressly claim to be democracies in their respective Constitutions, thus elections are a regular occurrence. Be that as it may, Africa is fairly young in the discipline of democratic elections, having come out of colonialism within the past century most countries are still adjusting to this fairly new concept of elections, with South Africa holding its first democratic election only in 1994.<sup>1</sup> Comparatively jurisdictions such as Britain and America have had elections for a longer period, for example, Britain held its first election in 1708<sup>2</sup> and United States of America in 1788<sup>3</sup>. It goes without saying that the African electoral jurisprudence, particularly Zimbabwe has a lot of catching up to do in order to comply with international best practices on democracy and elections. The researcher has noted that most countries in Africa conform to the minimalist theory of democracy which focuses on the formality of the election and not the substance.<sup>4</sup> As such, much emphasis in Africa, Zimbabwe included is on the actual election and not the environment within which elections are conducted. That is why elections are seldom set aside for malpractices except when a petitioner proves that elections were affected in a material way.

This paper takes a maximalist<sup>5</sup> approach to democracy which prioritises both the substance and form of elections as opposed to the minimalist approach which has been adopted in practice in Zimbabwe<sup>6</sup>. The maximalist approach views election not as an even but a cumulative process culminating in a vote<sup>7</sup>. Therefore, the focus of this research is on electoral dispute resolution, as it is an essential feature of any democratic election, particularly the pre-poll and intra poll dispute resolution. The

---

<sup>1</sup> S.J Ndlovu-Gatsheni: Elections in Zimbabwe: a recipe for tension or a remedy for reconciliation? 2012 “history and anthropology indicate that elections were unknown in Africa during the pre-colonial period. Instead, pre-colonial Africans had various other systems of legitimating authority and measures for ensuring representation”

<sup>2</sup> C Rallings and M Thrasher: “**British Electoral Facts 1832-1999**”, Ashgate Publishing Ltd 2000

<sup>3</sup> M Jensen, G DenBoer : “The Documentary History of the First Federal Elections, 1788-1790. University of Wisconsin Press. 1976 pp. 196-197

<sup>4</sup> Section 59 (6) (a) of the Ugandan Presidential Elections Act states: “The election of a candidate as a president shall only be annulled on any of the following grounds, if proved to the satisfaction of the court:(a) ...that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the results of the election in a **substantial manner**”

<sup>5</sup>A.Kendall-Taylor,A.Lindstaedt & E Frantz **Defining Democracy** <https://doi.org/10.1093/hepl/9780198820819.003.0002> -“the maximalist approach, which holds that democracy must be viewed as more than the presence of regularly held, competitive elections. In addition to repeated, competitive elections, supporters of a maximalist approach include a variety of other attributes in their definitions of democracy. Some of the criteria are procedural (the rule of law, participation, and accountability), while others are substantive (equality and political and civil liberties)”

<sup>6</sup> A. Przeworski, “Minimalist conception of democracy: a defense,” (Cambridge: Cambridge University Press, 1999, 23-55), p. 23 -“a Schumpeterian conception of democracy....[Which maintains that] democracy is just a system in which rulers are selected by competitive elections.”

<sup>7</sup> Mutharika and Another v Chilima & Another (MscA Constitutional Appeal No. 1 of 2020) [2020] MWSC 1-Nyirenda J adopted a qualitative approach to elections by reasoning that the process is as important as the voting itself, thus infraction to any of the two could be fatal.

election period is divided into three broad phases. Firstly, the pre-election period is the period prior to an election until the commencement of the official election campaign period. Secondly, the election period being the official campaign period up to and including Election Day. The post election period refers to the processing and communication of election results and the aftermath, including electoral dispute resolution.<sup>8</sup> As stated above, the thrust of this work shall be pre-election period and intra-poll dispute resolution. This inevitably leads to a critique of the existing mechanisms and institutions set up in terms of the Constitution and the Electoral Act of Zimbabwe.

It is not the researcher's position that Zimbabwe has no pre or intra poll dispute resolutions at all. The Electoral Act provides for some mechanisms aimed at resolving electoral malpractices and grievances. These procedures include: the electoral courts and constitutional court, the Electoral Court is established in terms of Section 161 of the Electoral Act [CHAPTER 2:13], Multiparty Liaison Committees<sup>9</sup> and the Electoral Code of Conduct<sup>10</sup>. Notwithstanding the intention in establishing these mechanisms, the trail of disputed elections is evidence that these mechanisms have inherent weaknesses which have proved insufficient for the intended purpose. The jurisdiction of the electoral court vis-à-vis the High Court is not clear, further the interdependency of the Electoral Court Rules and High Court Rules as well is not clearly demarcated. Multi-Party liaison committees while constituted by Political party members lacks the objectivity required for any adjudicating body. On the face of it, the procedure for reporting and dealing with malpractices prior to elections seems clear, but practically the procedure has vexed even seasoned legal practitioners. As such, there is need to revisit these procedures with a view to simplify the process while consolidating. This necessarily involves augmenting the functions of the Zimbabwe Electoral Commission.

The Constitution of Zimbabwe Amendment (NO.20) Act 2013 establishes the Zimbabwe Electoral Commission as the sole body managing the conduct of elections in Zimbabwe.<sup>11</sup> The Constitution further provides for the autonomy of the Commission in executing its mandate.<sup>12</sup> However, in executing their mandate the Zimbabwe Electoral Commission is assisted by other institutions, since the former's role is mainly limited to administrative issues. As such, the Judiciary and the Executive (police) are some of the key stake holders in the electoral discourse, particularly in grievance

---

<sup>8</sup> Zimbabwe Electoral Support Network: "Conflict resolution in electoral processes: the case of Zimbabwe" <https://www.zesn.org.zw/wp-content/uploads/2019/03>.

<sup>9</sup> Electoral Act [CHAPTER 2:13] Part XXIA deals with the establishment of multi-party liaison committees

<sup>10</sup> Electoral Code of Conduct for Political Parties and Candidates and other Stakeholders [Schedule substituted by s 36 of Act No. 6 of 2018]

<sup>11</sup> The Constitution of the Republic of Zimbabwe, 2013 (hereafter "Constitution"): Section 238 of the Constitution

<sup>12</sup> Section 235 of the Constitution of Zimbabwe

resolution. The Zimbabwe Electoral Commission on its own does not have any power to adjudicate disputes; at best they receive reports and forward them to the police. This is a serious departure from the common practice even in Southern Africa where a majority of Electoral management bodies have quasi-judicial power. Therefore, the lack of such quasi-judicial power by ZEC means that other institutions have to perform that function, an untenable situation which has resulted in grave injustices in the past. It appears that ZEC's power to administer their processes is also curtailed, one example is the case of transposition of numbers in the **Dexter Nduna v Gift Konjana** case,<sup>13</sup> where ZEC was supposed to reverse the error made in reading the results but it could not for want of legal authority to do so. This resulted in a lengthy litigation which to date remains an indelible stain in the Zimbabwean Electoral jurisprudence. The said case clearly amplifies the need for resolution mechanisms which are prompt and easy to navigate. To that end, one inescapable and logical conclusion is that ZEC must be endowed with quasi-judicial powers to deal with mainly administrative challenges.

It is broadly accepted that elections can either facilitate reduction of tensions by constituting legitimate government, or they can aggravate them through polarizing already tense societies as is the case in Zimbabwe. The Zimbabwean history has shown that elections have been characterized by fierce conflict and often bloody in some cases. Therefore, electoral dispute resolution becomes highly critical in the realization of non-contested elections. Dispute resolution is as critical as the polling itself because the more disputes are resolved the more the electoral process is accepted as legitimate. It should be highlighted however that: challenges around an election should not necessarily be perceived as weakness in the system, but as evidence of the strength of the political system.<sup>14</sup> Therefore much emphasis must be placed on dispute resolution as much as it is on the democratic outcome of an election.

Emphasis in Zimbabwe's electoral dispute resolution as is the case in many countries is on, wrongly in the researcher's view, election petitions mainly yet it is trite that pre-election/poll and intra-poll dispute resolutions are equally important. This can be gleaned from the fact that comparatively, the election petitions have a clearer and a more elaborate procedure than pre election and intra-poll disputes. Paradoxically issues raised in many election petitions relate to pre and intra polling malpractices. As such, it is this thesis' contention that a proper and functional procedure for handling pre election disputes guarantees a more acceptable poll and promotes harmony, whereas in election petition the process is done ex post facto. Further to

---

<sup>13</sup> *Konjana v Nduna (9 of 2021) [2021] ZWCC 9 (05 October 2021)*

<sup>14</sup> International Foundation for Electoral Systems: *Addressing Election Disputes and Election Offenses in Zimbabwe 2019*

that, pre election dispute resolution is way cheaper because if properly done it dispenses the need for re-runs, recounts and lengthy trials.

The institutions that support democracy affect the quality of elections and the dispute resolutions mechanisms and their outcomes, therefore it is the duty of every jurisdiction to continually evolve their electoral laws. In that light, it is the sworn intention of this thesis to provide a detailed analysis of the electoral dispute resolution procedure in Zimbabwe and offer insights on how it can be improved.

## **1.1 Background of the study**

This thesis is set against a backdrop of a history of contested elections, which are marred with violence, corruption and manipulation.<sup>15</sup> Historical and political evolution of a society directly or indirectly affects the electoral processes. In fact, they comprise the macro-environmental context within which elections are held.<sup>16</sup> There have been significant improvements in as far as racial discrimination and other similar vices are concerned, however the electoral dispute resolution dispute is still lagging behind. The reasons range from the overbearing influence of the Executive/ruling Party in the administration of the elections, the perceived partisan stance of the Judiciary and general mistrust of the Electoral management body. These problems have persisted to date. Without generalizing much, a brief historical background to the Electoral System in Zimbabwe will suffice in order to set the context for the argument in favor of transforming the pre and intra-election dispute resolution.

Zimbabwe held its inaugural democratic election in 1980 after the Lancaster House conference since provisions of the 18 April 1980 constitution guaranteed multiparty democracy. The atmosphere within which the elections were set reflected the divisions wrought by the civil war that had preceded it. The British Governor, Lord Soames, arrogated to himself new powers to control meetings, suspend contestants from campaigning, and to disqualify a party from contesting the general election. To enforce these draconian measures he enlisted the help of the existing security forces. Around 70 000 men, including regular forces and a 20 000 strong army auxiliary wing were deployed for the elections. Some 600 British policemen were posted to the polling station.<sup>17</sup> ZANU-PF and PF-ZAPU had their offices raided and their meetings

---

<sup>15</sup> S.J Ndlovu-Gatsheni Nationalist-Military Alliance and the Fate of Democracy in Zimbabwe African Journal on Conflict Resolution.: Zimbabwe's elections have been a recipe for tension, violence and death for those who have not understood that the elections were nothing more than a ritual designed to promote the myth of democracy and a cover for the authoritarianism of the strong 'nationalist-military alliance' established during the liberation struggle, (2006) 6(1): 40-80

<sup>16</sup> Zimbabwe Election Support Network Report on the Zimbabwe 29 March 2008 Harmonized Elections and 27 June Presidential Run-Off. Harare: (2008)

<sup>17</sup> S.Booyesen and L. Toulou: Zimbabwe" IN Denis Kadima and Susan Booyesen Compendium of Elections in Southern Africa 1989-2009: 20 Years of Multiparty Democracy, EISA, Johannesburg, (2009) Chapter 15 632-635

banned. There were also claims from all parties concerned of threats and intimidation. Robert G. Mugabe, survived two bomb attacks on claimed that some 20 000 of his supporters were arrested during the campaign. Bishop Muzorewa's United African [National] Council (UANC), favored by South Africa and settler interests, was accorded both financial and logistical support reported to be valued at Z\$6m<sup>18</sup>. As can be seen, deliberate attempts were made to influence the votes through illegal means, and since there is no evidence, there is no telling how much such actions influenced the vote, suffice to say by today's standards such conduct would be deemed as electoral malpractice.

The 1985 elections were held within a tense environment. There had been attacks by the Fifth Brigade on the Matabele people and the people of the Midlands regions over the previous three years. In the initial months of 1983, it is alleged that over 2 000 civilians in Matabeleland North alone lost their lives. When the 1985 elections took place, almost all PF-ZAPU offices had been closed or burned down.<sup>19</sup> PF-ZAPU also experienced acute challenges in campaigning as permission for rallies was routinely withheld, the police acted in a partisan manner by not protecting the opposition party's supporters. Even after the 1985 election, there was a purge on PF ZAPU again. This culminated in three days of violence that included murders and evictions of people identified as opposition supporters.<sup>20</sup>

The Elections in 2002 were one of the darkest yet in Zimbabwe in terms of Electoral jurisprudence. These elections were against the backdrop of arbitrary land seizures on white farmers who were perceived as sponsors of the emerging Movement for Democratic Change, a charismatic opposition Party. Though masked as land redistribution, to an analytical mind it was a clear intimidation ploy by the incumbent. There are several election petitions for this election, chief of which is the Buhera North election, where an official from the opposition was burnt alive. There is a report authored by South African judges called the Khampepe report, which criticized the plebiscite heavily in the following terms: "Having regard to all the circumstances, and in particular the cumulative substantial departures from international standards of free and fair elections found in Zimbabwe during the pre-election period, these elections, in our view, cannot be considered to be free and fair".<sup>21</sup>

---

<sup>18</sup> S.Booyesen and L. Toulou (note 14 above)

<sup>19</sup> Catholic Commission for Justice and Peace and Legal Resources Foundation Breaking Silence, Building True Peace: A Report on the Disturbances in Matabeleland and the Midlands Regions 1980-1988; (1997) Harare, 46-47

<sup>20</sup> N Kriger ZANU (PF) Strategies in General Elections, 1980-2000: Discourse and Coercion. African Affairs, 2005 104(414): 1-34

<sup>21</sup> E Cropley: Zimbabwe calls South African report on its 2002 election 'rubbish'/Khampepe Report on 2002 Presidential Election in Zimbabwe, 2014

Throughout these years, the ruling party Zanu-PF emerged as both the engineer and the beneficiary of two decades of electoral despotism. However, the Constitution of Zimbabwe Amendment (No 18) Act, 2007, improved the electoral law in various respects. The Zimbabwe Electoral Commission (ZEC) was entrusted to be the sole electoral management body; the Zimbabwe Human Rights Commission was set up, and criteria for constituency delimitation were established.

The 2008 elections took place under conditions where there was severe limitation in respect of fairness as most of the critical aspects of the process lacked transparency.<sup>22</sup>This lack of transparency and the reluctance to release results were crucial to the events that unfolded after the elections. The slow pace of the verification, tabulation and announcement of results, coupled with the opaqueness of the process, fuelled rumors of vote-rigging and military interference. Accordingly tensions rose so did incidents of violence, hate speech and the war rhetoric that followed the Elections resulted in deaths, displacements, destruction of homes and many casualties to the extent that Morgan Tsvangirai the opposition leader, who was arrested several times during the campaign had to forfeit, arguing that that a free and fair election was impossible in the climate of alleged “state-sponsored violence” that prevailed in the run-up to the election. On 25 June 2008 the ZEC said that the withdrawal had been filed out of time and that the run-off would still take place. Needless to say that ZANU PF won the controversial uncontested run off.

The following elections in 2013 and 2018 are equally tainted as a result of manipulation of the elections before voting and during voting. The use of intimidation, vote buying, and unchecked expenditure, abuse of state resource, partisan security sector and partisan traditional leaders tilted the election in favour of the incumbent. Due to the grown of social media, violence and intimidation are now kept at a minimum and they come in subtle packaging.

As noted above some of these electoral malpractices have been perpetrated while having dispute resolution mechanisms and the judicial route for curbing electoral malpractices. This then begs the question, why are these actions persisting? The answer could lie in the highly technical nature of the procedure or the haphazard approach to addressing the electoral disputes or most importantly lack of the political will to genuinely democratise the electoral process.

## 1.2 STATEMENT OF THE PROBLEM

---

<sup>22</sup> Elections Institute for Sustainable Democracy in Africa- “Zimbabwe: 2008 Elections and their aftermath”, (EISA,2008)

The writer envisages a situation where elections are conducted in a peaceful and fair environment where people are free to express their will, without fear of any reprisal. This necessarily demands that conflict and malpractice prevention mechanisms are put in place and are easily accessible to citizens. Currently, the pre-polling and intra-polling adjudication is obfuscated in rigmarole of procedures and sometimes overlapping roles of the adjudicating and policing institutions. On the other hand the Electoral Management Body, ZEC has no such powers at all, despite the Constitution offering a *carte blanche* to the Electoral Commission by giving it power to do all that is necessary to achieve free and fair elections.<sup>23</sup> A similar provision in other Constitutions, for example in Zambia, has been taken to imply that the EMB has some adjudicating powers. Unfortunately not in Zimbabwe, to illustrate this point, if one reports electoral malpractices to ZEC, the later at best can just refer you to another institution for remedy, which the researcher feels is an anomaly considering ZEC is best placed to deal with the raised issues. In this regard Zimbabwe has lagged behind other jurisdictions, wherein the procedure for resolving pre and intra-poll disputes is fairly centralized and straightforward. ZEC is on record lamenting this apparent lack of quasi-judicial power, which has left ZEC emasculated. Premised on this line of thought, this research will focus on how to improve and consolidate the dispute resolution procedures in Zimbabwe in order to bring it into conformity with the international best practices.

### **1.3 JUSTIFICATION OF THE RESEARCH**

This is a case of *res ipsa loquitur*, the state of political polarization in Zimbabwe, mistrust of ZEC and distrust of the judiciary are all testament to the weak state of electoral dispute resolution. Most electoral disputes go unchecked or unsolved due to the intricate nature of the procedures, thus the grievances of the past elections are carried over to the next plebiscite. As such, this creates a constant state of political tension and legal uncertainty in the society, which in many instances has led to violent confrontation or civil wars. Weak electoral systems are characterised by frail policy agendas, non-existent intraparty democracy, selfish personal interests, unstable political alliances, the cartelised dominance of class interests and weak regulatory oversight. Electoral processes may exacerbate conflict by setting the stage for social clashes among rival supporters, which may have structural social, economic, tribal and political dimensions. Managing election-related conflict is important in order to build a strong, democratic and peaceful society, based on the rule of law, accountability and transparency.

### **1.4 RESEARCH QUESTIONS**

---

<sup>23</sup> Section 239 (k) of the Constitution



- a. How has the current dispute resolution mechanism fared in light of the history of highly contested elections?
- b. What are the perceived and actual flaws in the Zimbabwean pre-election and intra-elections dispute resolution?
- c. How have other countries approached pre-election and intra-electoral disputes and what are the international best practices.
- d. What can be done to strengthen the electoral dispute resolution prior to election and during polling

## 1.5 METHODOLOGY

The research mainly took a desktop analysis of materials dealing with the subject matter directly or indirectly.

This approach necessarily involves the study of constitutional provisions and analyzing how they have been put into practice. The researcher analysed case law, the Constitution, Acts of Parliament, Statutory Instruments, law theories to ascertain whether the Zimbabwean Electoral jurisprudence prior and intra polling is sufficient enough to confer the elections the impartiality and transparency they need in order to pass the mark of democracy.

The research utilised the comparative approach. This approach involves making comparisons between countries in a bid to locate where the Zimbabwean jurisprudence ranks, and to draw lessons there from. The research primarily focused on the electoral practice in Africa, with particular emphasis on jurisdictions in Southern Africa.

## 1.6 LITERATURE REVIEW

There is a dearth of material dealing in depth with pre-election and intra-poll dispute resolution. Primarily this research utilised legislation governing election the **Constitution of Zimbabwe Amendment (No. 20) Act 2013** and the **Electoral Act [CHAPTER 2:13]** being chief among others. The Constitution provides for multi-party democracy and free and fair elections. More so the Constitution establishes institutions which govern elections in Zimbabwe. The Constitution gives power to the Zimbabwe Electoral Commission power to do everything in their power to resolve any matter reported to them. However, **the Electoral Act and the Zimbabwe Electoral Commission Act [CHAPTER 2:12]**, do not give effect to the Constitutional provision, instead the **Electoral Act** establishes other mechanisms for dealing with reports which practically ousts the power of ZEC to deliberate disputes. Similarly, the Zimbabwe Electoral Commission Act seems to accord ZEC with administrative powers only. Therefore, the researcher in the body of this work will explore the possible reasons

and effect of this lacuna in the electoral law. These Acts cited above constitute the foundation of this research and are very instrumental in the exposition of the current procedure regarding conflict resolution and prevention.

In addition to the above sources, the writer has made extensive use of several articles particularly as a basis for a comparative study. Chief of these articles is one by the **Zimbabwe Electoral Support Network**<sup>24</sup>, on the analysis of the dispute resolution mechanisms. The article rightfully points out that dispute resolution is as important as the voting itself, it goes on to list several of the dispute resolution mechanisms in Zimbabwe. The article further critiques each mechanism, exposing the deficiency in each of them. As an illustration the article by ZESN criticizes the litigation route as being too adversarial and too expensive, thus making it both undesirable and expensive especially in a ravaged economy like Zimbabwe. Articles of similar import have been interacted with as will be unraveled in the body of the work.

## 1.7 CHAPTER SYNOPSIS

The dissertation is basically organised into five themes which are presented in chapters. The inaugural Chapter primarily focuses on introducing the study topic as well as laying a foundation from which to build the argument. There is also exposition of the background of the study which sets the stage upon which the critique of the dispute resolution and recommendations thereto will be made. The first Chapter also summarises the discussion to follow in the main work and the format the work going to adopt.

The second chapter critically reviews the Electoral jurisprudence in Zimbabwe cases dealing with pre-election and intra-poll disputes and/or malpractices, in terms of the Constitution and the Electoral Act. The motivation is to expose the deficiency of the current procedures related to dispute resolution mechanisms in Zimbabwe. The Chapter undertakes a critique of the appropriateness mechanisms for dispute resolution and dealing with electoral malpractices, this will involve an interrogation of the designated magistrates, the code of conduct and the multi-party liaison committees among other institutions. The research will also look at several solved and unsolved cases of misconduct and disputes in a bid to show how in need of improvement the electoral dispute resolution is.

The third Chapter discusses the deficiencies in the role and functions of the Zimbabwe Electoral Commission, which has led to the timid and emasculated approach to electoral malpractices and electoral disputes. The researcher will undertake a thorough analysis of the Constitution, the Zimbabwe Electoral

---

<sup>24</sup> Zimbabwe Electoral Support Network (n 6 above) page 11

Commission Act and the Electoral Act on provisions providing for the Zimbabwe Electoral Commission. This discussion will then juxtapose the statutorily provided roles vis-a-vis the practical realities that have confronted ZEC and how the later has dealt with the challenges.

The 4<sup>th</sup> Chapter will follow with a comparative analysis of how other jurisdictions have tackled issues in the pre-poll and intra-poll disputes and malpractices with varying rates of success. In this chapter, the international instruments will be considered in light of the practice in Zimbabwe, ultimately an informed judgment will be made on where Zimbabwe stands.

The last chapter will then summarise the discussion from the preceding chapters. This chapter will proffer recommendations on what is needed to augment the electoral dispute resolution and tackling of malpractices. Finally, the fifth chapter will then conclude the research.

## **CONCLUSION**

This chapter was introductory. It was meant to introduce the concept of intra-poll and pre-poll electoral dispute resolution. To do so successfully the chapter had to outline the history of elections in Zimbabwe, because it is in the history that this research finds justification and purpose. An inescapable conclusion is that Zimbabwe's electoral history is marred by violence and manipulation, as a result of dominance by one Party. It is thus the contention of the researcher that a proper and simple pre-poll and intra-poll dispute resolution mechanism can ameliorate these challenges. The contention of this research is that this process is supposed to be administered by the Zimbabwe Electoral Commission and not several institutions as provided in the Electoral Act. Having set the context of the research, the researcher in the following chapter will respond to the research questions presented here and will deal with each and every concept raised in this introductory chapter.

## **Chapter II**

### **2.0 Major sources of pre and intra poll conflict**

#### **2.1 Introduction**

Conflict often refers to some form of friction, disagreement, or discord emanating within a group when the beliefs or actions of some are either resisted by or

unacceptable to other members of another group. Conventionally, conflict arises from opposing interests involving scarce resources and goal divergence and frustration.<sup>25</sup> Conflict has often been proposed to occur in mixed-motive relationships where persons have both competitive and cooperative interests.<sup>26</sup> The competitive elements produce the conflict; the cooperative elements create the incentives to bargain to reach an agreement.<sup>27</sup> All these definitions are applicable to electoral dispute related conflict. An election by its nature is a contestation adjudicated by an ‘independent referee’ and in accordance with a set of rules. Therefore conflict arises from apparent or perceived violation of the rules either by the referee or by the contestants. In Zimbabwe, elections are governed by several pieces of legislation, chief of which are the **Constitution and the Electoral Act**. These pieces of legislation guide the electoral process with regards to what ought to/not to happen during elections. It is, therefore, the determination of infractions that has caused many a conflict not only in Zimbabwe but Africa at large. To that end this chapter outlines the main causes of electoral conflict as they have manifested in Zimbabwe and how they impede the democratic process.

## 2.2 The Constitution of Zimbabwe

Zimbabwe is a constitutional democracy, therefore the Constitution is the supreme law in Zimbabwe, any law, practice or custom contrary to it is void to the extent of the inconsistency.<sup>28</sup> Therefore the electoral jurisprudence has to be viewed from this perspective. In that vein the Constitution has useful provisions which form the basis for electoral law in Zimbabwe.

### i. Founding values and Principles

The Constitution provides guidelines on how the State can function under the principles of good governance. In Section 3(2) there is an elaborate list of principles to consider for the state, which include, multi-party democratic political system, universal suffrage, free and fair elections, respect for the rights of all political parties and transparency, justice, accountability and responsiveness. In this light, these principles mentioned above have been major sources of electoral conflict in Zimbabwe, particularly with regards to perceived abridgement of these rights. There have been back and forth accusations between political parties inter se and political parties against the ZEC. If one were to single out one recurrent theme from 1980, it

---

<sup>25</sup> Mack, R.W. and Snyder, R.C. (1957), “The analysis of social conflict - toward an overview and synthesis”, *Journal of Conflict Resolution*, Vol. 1, pp. 212-48.

<sup>26</sup> Bacharach, S.B. and Lawler, E.J. (1981), *Bargaining: Power, Tactics and Outcomes*, Jossey-Bass, San Francisco, CA.

<sup>27</sup> Deutsch, M. and Krauss, R.M. (1962), “Studies of interpersonal bargaining”, *Journal of Conflict Resolution*, Vol. 6, pp. 52-72.

<sup>28</sup> Chapter 1, Section 2 (1) of the Constitution of Zimbabwe Amendment (No 20) Act 2013

would be that elections are not free and fair. Thus this has led to contested results election after election.

ii. The Bill of Rights

**Chapter 4 of the Constitution** contains a declaration of rights, which apply both horizontally and vertically. **Section 45 (3)** extends the application of the Bill of rights to juristic persons in as far as the right is applicable to that class of persons. To that end there are rights in the Bill which have electoral connotations, such as the right to assembly and association, the right to conscience and political rights. All these rights in conjunction with all other rights in the Constitution can affect an election, either positively if enforced or negatively if abridged. During pre electoral period<sup>29</sup> Zimbabwe has witnessed a number of electoral conflicts emanating from the perceived infractions of the above mentioned rights. For example, in the build up to the March 26 By-Elections there were accusations against the State, that there was a systematic constriction of opposition campaign rallies. The reasons for the withholding of permission by the Police ranged from Covid 19 regulation, lack of capacity and inadequate notice by opposition parties. This then culminated in a successful court application by the opposition Party Citizens Coalition for Change.<sup>30</sup> From this example, one can clearly see that issues of unequal enforcement of law and abridgements of the right to freedom of association come to the fore as a major conflict theme.

Another perennial contentious issue as well is the unequal distribution of airtime on public media. It has been the outcry of the opposition that ZANU PF is favourably allocated the most viewed and most listened to times to do their campaigns, while other political parties are relegated to midnight and early or mid morning slots. These and similar issues have been topical particularly in the Political Actors Dialogue (POLAD). According to ZBC<sup>31</sup> online, some of the recommendations made by the POLAD include regulation to have all political parties getting equal access on national television at the peak of the campaign period.<sup>32</sup> Historically Zimbabwe has been known for heavy media censorship, as seen in both AIPPA and POSA which were utilised as legal smokescreens for undermining both freedom of expression and opposition politics in Zimbabwe<sup>33</sup>. One would have thought that the establishment of the Media Commission would alleviate these challenges, but despairingly they remain unchecked.

---

<sup>29</sup> Which has been defined as a period of 18 months before an election.

<sup>30</sup> High Court Authorises CCC Gokwe Rally 26 February 2022

<sup>31</sup> Zimbabwe Broadcasting Corporation

<sup>32</sup> <https://www.zbcnews.co.zw/polad-comes-up-with-electoral-reform-recommendations/>

<sup>33</sup> Stanford G. Mukasa, Press and Politics in Zimbabwe, Volume 7, Issues 2 & 3 2003 Published by the Center for African Studies, University of Florida. ISSN: 2152-2448 Press and Politics in Zimbabwe

### iii. Electoral System and Processes

The preceding discussion focused mainly on the substantive rights on elections; however **Chapter 7 of the Constitution** deals with the actual procedure for elections. One caveat though is that procedural justice and substantive justice in elections are intertwined concepts. For the first time in **section 155 (1)(d) the Constitution** directly addresses electoral violence, which has been a dent in the electoral history of Zimbabwe. Electoral violence can be traced back to 1980, through the years to date. This has been a major cause for many electoral petitions and disputes in Zimbabwe. The foremost examples of electoral violence are the mass petitions of 2002, which included the gory and brutal **Buhera North violence**.<sup>34</sup> Scholars have noted that: the general election held in June 2000 and the presidential elections in March 2002 were the most violent in Zimbabwe's electoral history. These developments raise significant questions relating to constitutionalism and the electoral process in Zimbabwe. It was an admission that both constitutional and electoral reforms were imperative and indeed overdue.<sup>35</sup> The sentiments expressed above are as accurate now as they were two decades ago when they were made. The Constitution further makes provision for the enactment of an Act of Parliament to regulate elections, by so providing the Constitution in referring to the Electoral Act.<sup>36</sup>

### iv. The Electoral Act

The Electoral Act contains elaborate rules and procedures for conducting elections. This Act of Parliament outlines prohibited conduct before and during election and further provides the right forum for determination of such conduct. Since the thrust of this research is on pre and intra poll dispute resolution therefore this section will be limited to that timeline. Most disputes in the electoral disputes are either administrative and they are or ought to be solved by the ZEC, while others are strictly legal thus falling under the purview of the Courts. Strictly speaking, in Zimbabwe this administrative-legal demarcation of roles is not clearly demarcated, as a result this conflation has led to confusion. The most outstanding pre election themes are as follows:

#### i. Voter registration

The first step for one to exercise their right to vote is registering with the Zimbabwe Electoral Commission. Political Parties and individual alike have a keen interest in the

---

<sup>34</sup> [http://swradioafrica.com/Documents/summaries%20petitions.htm#\\_ftn2](http://swradioafrica.com/Documents/summaries%20petitions.htm#_ftn2)

<sup>35</sup> Lloyd Sachikonye Constitutionalism, the Electoral System and Challenges for Governance and Stability in Zimbabwe African Journal for Conflict Resolution 2004/2

<sup>36</sup> Section 157 (1) of the Constitution of Zimbabwe Amendment (No.20) 2013

registration as it has a direct bearing on the election, the more registers their supporters the better are their chances of winning. While voters themselves are showered with promises of trinkets if they register to vote, for example, a local newspaper reported that, Non Governmental Organisations were dishing out money to people in order to encourage them to register.<sup>37</sup> Therefore, in these circumstances voter registration and keeping clean and accurate voters' rolls are issues that have continued to cause disputes whenever an election is proclaimed. Under section 17 of the Act, the ZEC is required to conduct voter registration as a continuous process. Issues such as non-existent addresses, multiple voters on one address and unexplained removal of names from the voters' rolls have always been cited in many electoral petitions. In terms of the **Electoral Act** the competency to hear issues to do with registration is with what is termed "designated magistrate".<sup>38</sup> **Section 29 of the Act** outlines the procedure for instituting action challenging registration or removal from the register, this procedure is fairly straightforward but is time consuming.

## ii. Nomination of candidates

Nomination of candidates is a process whereby aspiring candidates undergo a vetting process in a special court set up for that process. Jurisdiction resides with the Electoral Court.<sup>39</sup> Most nomination cases are brought by aggrieved candidates who have had their nomination papers declined by a nomination agent. In the **Daniel Shumba** case,<sup>40</sup> the applicants sought to impugn a decision by a nomination officer who wrongly, in their view, refused to accept their papers for failing to comply with the provisions of the electoral Act. The nomination officer in this case, had instructed the first applicant to wait for the second applicant while he completed his form, as such the time lapsed while waiting, notwithstanding the fact that the applicant complied with the order, the applicants' papers were rejected. Thus they approached the courts. The matter was argued before **GUVAVA J at the High Court**, she dismissed the Chamber application on the basis that the High Court had no jurisdiction to entertain the application and that it was the Electoral Court that had jurisdiction to deal with the matter in terms of **s 46(19) of the Electoral Act [Cap. 2:13] ("the Act")**. Thereafter, the application found its way to the Electoral Court in terms of s 46(19) of the Act. The application was dismissed on the ground that the matter had prescribed. In terms of **s 46(19)(b) of the Act**, a candidate has a right of appeal against a decision of the nomination officer to a Judge of the Electoral Court. In terms of s 46(19)(c) the right of appeal lapses after four days and the decision of the nomination officer becomes final. In summation the Court held that, in terms of

---

<sup>37</sup> The Chronicle, ZEC exposes voter registration scam, 21 January 2022

<sup>38</sup> See section 28 of the Act and See section 27 of the Electoral Act

<sup>39</sup> Electoral Act, Parts XIA and XII

<sup>40</sup> **Shumba and Another v Zimbabwe Electoral Commission and Another (SC 11 of 2008, Constitutional Application 77 of 2008) [2008] ZWSC 9 (31 July 2008)**

s 46(7) of the Act, a candidate who is within the nomination court at close of business is entitled to have his nomination papers accepted by the nomination court. This case exemplifies the confounding nature of the election litigation in Zimbabwe; there is no clear procedure for someone who has had his papers wrongly rejected in terms of section 46(7). One is left wondering if this is the case where the High Court has to exercise its original jurisdiction on all matters or the Electoral Court assumes its inherent jurisdiction on electoral matters.

### iii. Campaign disputes or violations

Violence and intimidation can be isolated as the foremost forms of electoral malpractices and violations in Zimbabwe. These vices have manifested overtly or covertly, from the echelons of power to the ordinary man in the villages. This has led to the criticism that Zimbabwe only accepted the democracy in form and not substance. Over the years, ZANU-PF has approached elections as mere formality rather than as the source of political legitimacy and mandate to run the country. Instead, it conceives its legitimacy as deriving from the party's liberation credentials.<sup>41</sup> In essence since 1980 Zimbabwe has enjoyed only a pseudo democracy (S.J Ndlovu-Gatsheni: 2012).<sup>42</sup> (Larry Diamond: 1999) defines pseudo-democracies as consisting of regimes that 'have legal opposition parties and perhaps many other features of electoral democracy, but fail to meet one of its crucial requirements: a sufficiently fair arena of contestation to allow the ruling party to be turned out of power'.<sup>43</sup> This is the context within which Zimbabwean elections have been conducted. As such in the coming chapter the researcher will recommend ways to mitigate such electoral malpractices in Zimbabwe.

**PART XVIII A of the Electoral Act** deals with intimidatory practices which include violence and threats of violence. The electoral discourse in Zimbabwe is littered with contraventions of this section which have held sway in elections. For example, in the run up to the 2008 Presidential election re-run Major-General Engelbert Rugeje told a rally in Masvingo that: 'This country came through the bullet, not the pencil. Therefore, it will not go by your X of the pencil' (*Financial Gazette*, 19 June 2008) an abhorrent sentiment which should have been dismissed but ironically found support from the late President R.G Mugabe when he swore that: "You can vote for them [MDC], but that would be a wasted vote. I am telling you. You would be cheating yourselves. There is no way we can allow them to rule this country. Never, ever. We

---

<sup>41</sup> S J Ndlovu-Gatsheni Elections in 2011: The Solution or Complication to Zimbabwe's Political Impasse? Paper presented at the Institute of Justice and Reconciliation (IJR) Workshop on Assessing Zimbabwe's Electoral Readiness, Harare: Monomotapa Crowne Plaza Hotel, Zimbabwe, 21 October(2010)

<sup>42</sup> S J Ndlovu-Gatsheni: Elections in Zimbabwe: a recipe for tension or a remedy for reconciliation? 2012

<sup>43</sup> L Diamond Developing Democracy: Towards Consolidation. Baltimore and London, (1999), Johns Hopkins University Press



have a job to do, to protect our heritage. The MDC will not rule this country. It will never, ever happen. We will never allow it.” (cited in *Solidarity Peace Trust Weekly 2008b*). These statements cannot be viewed as mere political posturing but history has proven that they can be backed up, in 1980 there was violence against opponents, the 1985 elections were preceded by *gukurahundi*, similarly all elections up to 2013 have been punctuated by episodes of unconscionable violence. Curiously, the jurisdiction to hear these electoral matters has been placed under the purview of the Director of Public Prosecution through the Magistrates Court and the High Court,<sup>44</sup> seemingly through the established Criminal Procedure route and not the expedited route.<sup>45</sup> This is undesirable since some cases which may have the effect of nullifying elections may then be concluded after the election itself.

The **Electoral Act** also prohibits corruption in all its forms, such as vote buying or buying out opponents. The most common cases of malpractice are contained in **sections 147, 148 and 149 of the Electoral Act. Section 147 prohibits** intra-polling campaigning near the polling station, which may equate to undue influence on voters. Nevertheless it is common cause that mostly in rural areas, particularly in Mashonaland East Uzumba, Maramba and Pfungwe areas and some parts of Masvingo Chiefs are known to lead their villagers in single files to vote. This is subsequently followed by operation “who have you voted for”. This all has an effect of negating free choice as a tenet of democracy. Further to that, it is reported that: In Buhera North traditional leaders have debarred opposition parties from campaigning while aggressively campaigning for Zanu-PF. In Guruve South, a headman was seen tearing posters of all opposition parties.<sup>46</sup> He had earlier been seen openly distributing Zanu-PF fliers at a local MDC rally. In Hurungwe West, a headman asked villagers to disclose whether they will be voting and to provide their voter registration slips.<sup>47</sup> There has been litigation to that effect where the Electoral Resource Centre sued Chief Fortune Charumbira for campaigning for ZANU PF.<sup>48</sup>

The intra poll dispute resolution in relation to polling and counting, no specific complaints process is set out in the Electoral Law, although a political party or candidate may request a recount under **Section 66A of that law**. The First Schedule to the Electoral Act also sets out a Code of Conduct for election agents and observers

---

<sup>44</sup> Section 133 E of the Electoral Act

<sup>45</sup> Section 133 K (4) Where a magistrates court convicts a person of an offence involving politically-motivated violence or intimidation committed during an election period, the court may adjourn the case in terms of section 54(2) of the Magistrates Court Act [Chapter 7:10] and, if the case is thereafter transferred to the High Court for sentence in terms of section 224 of the Criminal Procedure and Evidence Act [Chapter 9:07], the High Court may...

<sup>46</sup> Contravening Section 152 of the Electoral Act [Chapter 2:13] (Act No. 25 of 2004)

<sup>47</sup> Rodrick Fayayo Zimbabwe's 2018 Elections: The Changing Footprints of Traditional Leaders, 26 July 2018

<sup>48</sup> Election resource Centre v Charumbira & 2 Ors (HH 270 of 2018, HC 1718 of 2018) [2018] ZWHHC 270 (23 May 2018)

but does not set out an enforcement mechanism for breaches of the code. Simmering under the surface in Zimbabwe have been fears of the abuse of the system of assisted voters. This suspected abuse manifests chiefly in two ways, firstly it takes the form of people who don't need assistance getting assisted in order to make sure they vote "correctly". Secondly, there are people who genuinely need assistance because of illiteracy, these people enlist the assistance of the polling officials, who in some cases contradicts the voters choice and place a vote for a preferred candidate. As such, the secrecy and sanctity of the vote is undone.

### **Conclusion**

The purpose of this chapter was to outline the major themes for pre and intra election disputes. As has been exposed above, the major areas of conflict are premised on campaigning and the actual voting. These are key areas which demand maximum attention of all stakeholders in order to mitigate conflict and post election petition. It is the researcher's view that proper identification of causes of conflict will inform the identification of the right forum for resolution, which in turn leads to satisfactory and speedy resolution of conflict. It is an accepted fact that what happens prior to a poll predominantly affects the result of an election.

## **Chapter III**

### **The law on pre and intra poll malpractices and dispute resolution**

#### **3.0 Introduction**

It has been noted in the introductory chapter that the electoral period is generally divided into three phases, which is the pre poll, intra poll and the post poll period. All these phases have a bearing on the credibility of elections, thus there is need to have a clear expeditious, effective and ascertainable procedures for dealing with malpractices and grievances in each and every phase. However, it can be argued that what happens before the polls either good or bad will affect the outcome of the elections, which in turn will affect the acceptance of the results by people. Thus, the

pre and intra poll procedure for dealing with malpractices and grievances is critical, as it has a direct nexus with the outcome of the election. **Section 3 (2) (b) (ii) of Chapter 1 of the Constitution** provides that the electoral system in Zimbabwe is based on “free, fair and regular elections”. Therefore, effective EDR mechanisms, through which fundamental rights and freedoms are protected, are essential components to determining whether the election can truly be considered *genuine* and a *reflection of the will of the people*.<sup>49</sup> This observation buttresses supports the view that pre and intra polling procedural and substantive justice is critical to a free and fair outcome of an election, which in turn minimises the frequency of electoral petitions.

In recognition of the importance of a strong pre and intra poll procedure for dealing with malpractice and grievances, Zimbabwe has established institutions and procedures to cater for same. Some of these institutions and mechanisms are as follows: the Electoral Courts and Constitutional Court : The Electoral Court which is established in terms of **Section 161 of the Electoral Act**, Multiparty Liaison Committees, Electoral code of conduct, the Zimbabwe Republic police officer and Designated Magistrates. Further the Constitution gives the Zimbabwe Electoral Commission power to receive and consider complaints as well as doing everything necessary to ensure a resolution is found.<sup>50</sup> This therefore makes ZEC one of the pivotal institutions in dispute resolution; it is curious how the Zimbabwe Electoral **Commission Act and the Electoral Act** do not provide for such powers. Notwithstanding, each of the mechanisms above will be dealt with in this chapter, analysing the strengths and weaknesses of each and every one of the above mechanisms. However, prior to that, it is prudent for one to outline the main sources of pre and intra-polling disputes to which the mechanisms under discussion apply.

### 3.1 Sources of Electoral Conflict

The previous chapter dealt with sources of conflict which are worth reproducing, in order to give context to the following argument. Election period is generally a tense atmosphere characterised by heightened contestation. The desire to win often motivates contestants to adopt ingenious and often illegal antics to edge their competition. In Africa, politics have become a promise for acquisition of resources and influence, as opposed to democracy and service. As such competition for positions is fierce and in most cases blood is always spilt, for example, in Angola there was a prolonged conflict between the ruling Party MPLA and the Opposition UNITA led by Jonas Savimbi, the underlying reason apart from power was a desire to control the

---

<sup>49</sup> IICPR art 25 (b); African Union Declaration on the Principles Governing Democratic Elections in Africa, (Adopted at the 38th Ordinary Session of the Organization of African Unity, 8 July 2002, Durban, South Africa)

<sup>50</sup> Section 239 (k) of the Constitution

resources in Angola.<sup>51</sup> It is therefore, apparent that there is need for strong conflict management in order to avert such conflicts. In Zimbabwe the following reasons have been suggested as the foremost reasons: unstable political system, and absence of intraparty democracy, selfish personalistic interests, and weak regulatory oversight. Lack of trust of the Electoral Management Body and weak institutions that support democracy further complete the above list.<sup>52</sup> Apart from these structural criticisms of the electoral jurisprudence in Zimbabwe, there are some statutory governed malpractices, such as, *inter alia* registration disputes, candidates nomination, campaign disputes or violations and campaign expenditures to which established institutions and procedures apply.

### **3.2 Statutory Mechanisms available in dealing with pre and intra-poll malpractices and disputes**

The **Constitution of Zimbabwe and the Electoral Act [Chapter 2:13]** provide for several mechanisms for dealing with electoral disputes specifically and disputes in general which may or may not include electoral disputes. Some of the institutions set up to deal with electoral disputes include the Courts, Multi Party liaison Committees and the Independent Commissions set up by the Constitution. The choice of institution is informed by the nature of the dispute concerned. There are also a number of key obligations found chiefly in the ICCPR<sup>53</sup> and regional treaties that can be the cornerstone of our understanding of international legal principles for Electoral Dispute Resolution mechanisms. In addition reliance has been trusted on General Comments 31 and 32 of the United Nations Human Rights Committee,<sup>54</sup> the Venice Commission's Code of Good Practice.

While international instruments documents do not explicitly address issues related to electoral dispute resolution mechanisms per se and are focused on more general rights such as the right to an effective remedy, the right to a fair and public hearing and others, it can be argued that they provide firm foundational principles and a standard for the assessment of electoral dispute resolution mechanisms.<sup>55</sup> In this light, the researcher at this point will interrogate each institute's and the attendant law's suitability for the intended purpose.

#### **i. The Electoral Court**

---

<sup>51</sup> Britannica, The Editors of Encyclopaedia. "Jonas Savimbi". Encyclopedia Britannica, 18 Feb. 2022, <https://www.britannica.com/biography/Jonas-Savimbi>. Accessed 9 May 2022.

<sup>52</sup> <https://www.zesn.org.zw/wp-content/uploads/2019/03/Conflict-resolution-in-electoral-processes.pdf>

<sup>53</sup> International Covenant of Civil and Political Rights

<sup>54</sup> United Nations Human Rights Committee (UNHRC), General Comment No. 31, Nature of the General Legal Obligations on States Parties to the Covenant, U.N. Doc

<sup>55</sup> INTERNATIONAL OBLIGATIONS FOR ELECTORAL DISPUTE RESOLUTION DISCUSSION PAPER1 February 24 -25, 2009

The Electoral Court is established as a division of the High Court in terms **section 161 of the Electoral Act** as a court of record. It was established as an extension of the High Court by an amendment **the Electoral Act of 2018**. The Electoral Court is a division of the High Court, and judges are appointed by the Chief Justice after consultation with the Judicial Service Commission and Judge President of the High Court.<sup>56</sup> Until then, even though the judges of the Electoral Court were drawn from the High Court and the staff of the High Court serviced the Electoral Court, the Act is silent regarding the relationship between the High Court and the Electoral Court. The Electoral Court has exclusive jurisdiction to adjudicate appeals, applications and electoral petitions and to review decisions made by ZEC or any other person or any decisions made in terms of the Act.<sup>57</sup> The Electoral Court hears all cases from nomination of candidates,<sup>58</sup> voter and candidate conduct, media coverage, electoral fraud, voter and candidate intimidation; political violence and all things elections-related.

The establishment of the Electoral Court has been hailed by most as a positive step in attaining electoral justice; this addition to our courts harbours a promise of expeditious and meticulous dealing with electoral cases. According to IFES, the establishment of a permanent Electoral Court is a positive step in terms of specialist expertise and timely adjudication of complaints.<sup>59</sup> The establishment of a specialized court to deal with electoral cases has a dual impact, firstly it decongests the High Court, thus enhances expediency. On the other hand the establishment of the Electoral Court, facilitates for special and expert attention to be set aside specifically for electoral law, which in turn enhances jurisprudence in Electoral Law.

The establishment of the Electoral Court however has been marred by statutory inconsistencies which have been compounded by allegations against the Court of being too procedural over being substantive. This has created what are termed as procedural tripwires which have confounded even the most astute of lawyers. It was aptly noted in **Ian Muteto Makone & Anor v The Chairperson of the Zimbabwe Electoral Commission & Anor**<sup>60</sup> that; the court noted that due to recent amendments, the electoral laws are not fully understood by lawyers. The above cited observation was made over a decade ago, but it has not lost its accuracy.

Chief among these tripwires is the apparent or perceived conflict between the inherent jurisdiction of the High Court, on all civil and criminal in terms of the

---

<sup>56</sup> Electoral Act, Sections 161 and 162

<sup>57</sup> Electoral Act Section 161 as amended by Act 3 of 2012

<sup>58</sup> Electoral Act, Parts XIA and XII

<sup>59</sup> **ELECTORAL JUSTICE/ELECTION DISPUTE RESOLUTION** [www.ifes.org/issues/electoral-justice-election-dispute-resolution](http://www.ifes.org/issues/electoral-justice-election-dispute-resolution)

<sup>60</sup> 2008 (1) ZLR 230 (H).

Constitution<sup>61</sup> and the Electoral Court's original jurisdiction in electoral matters.<sup>62</sup> This apparent conflict has caused a lot of confusion in the past on which court to approach, particularly in interlocutory proceedings where the Electoral law had no jurisdiction.<sup>63</sup> In as far as legally astute people are concerned the issue has been settled by the amendments to **section 161 of the Electoral Act** and providing for exclusive jurisdiction over all matters related to elections upon the Electoral Court. The amendment is far from providing clear demarcation between the High Court and the Electoral Court. Currently, in terms of the Electoral Act, the High Court still has jurisdiction over cases of electoral malpractices referred to it by the designated magistrates.<sup>64</sup> However, the most glaring lacuna in the Electoral Court is the absence of up to date rules in the same mould as the High Court rules. This has left the procedure in the Electoral Court somehow shrouded in mystery, the only rules applicable are the Rules of the Electoral Court published in a 1995 Statutory Instrument and have not been amended since.

A cursory reading of Section 165 of the Electoral Act, prima facie gives an impression that there are no rules of the Electoral Court. The relevant section reads as follows: 'Until rules of court for the Electoral Court are made in terms of this section, the rules of the High Court shall apply, with such modifications as appear to the Electoral Court to be necessary, with respect to election petitions and other matters over which the Electoral Court has jurisdiction.' (emphasis mine). On the other hand the Electoral Courts have made reference to the same rules, thus proving their validity.<sup>65</sup> Be that as it may, the Electoral Court rules need amendment in order to bring them into conformity with the Electoral Act, the burden of aligning the High Court Rules to electoral matters is too onerous a task which may plunge the procedure of electoral litigation into realms of subjectivity thus making the procedure uncertain and more precarious to a litigant.

In sum, it can be submitted that the establishment of the Electoral Court is a step in the right direction. Unfortunately there has not been much follow up in terms of fully equipping the Court with the necessary tool set such as up to date rules. This absence of specific rules has made the procedure for lodging a case akin to navigating a mine infested field. Further to that, the court's religious adherence to procedure has left many cases unsolved and this has stalled the development of electoral jurisprudence. These observations made above, in the researcher's view, makes the Electoral Court a

---

<sup>61</sup> Section 171(1) (a) of the Constitution, on the other hand provides that 'the High Court has original jurisdiction over all civil and criminal matters throughout Zimbabwe.'

<sup>62</sup> section 161(2) Electoral Act provides the Electoral Court with exclusive jurisdiction to hear all matters that have to do with elections including petitions, applications, appeals and reviews in terms of the Electoral Act

<sup>63</sup> Muteto Makone & Anor v The Chairperson of the Zimbabwe Electoral Commission & Anor 2008 (1) ZLR 230 (H).

<sup>64</sup> Section 133K (4) of the Electoral Act

<sup>65</sup> Temba Mliswa v The Chairperson (ZEC) & Others HH 586/15

very unpredictable and unreliable forum for solving disputes. There is need for a wholesome augmentation of the Electoral Court accompanied by impartiality on behalf of adjudicators.

## ii. Multi-Party Liaison Committees

These Multi Party Liaison Committees are established at national, provincial, and local levels for consultation and cooperation between the commission and registered parties on all electoral matters however their operations are limited to election period and national level.<sup>66</sup> These Multi Party Liaison committees are established at national, provincial, and local levels as mediums for consultation and cooperation between the Zimbabwe Electoral Commission and political parties on all electoral matters. Their operations are limited to election period. Their purpose is to promote transparency through consultation and dialogue, to promote trust between parties and between parties and the ZEC. The jurisdiction of Multi Party Liaison Committees extends to campaign disputes or violations as set out in the Code of Conduct. Committees can submit disputes to the ZEC, oddly the law is silent on what action the ZEC may take upon reference of the matter. This lacuna defeats the purpose of setting up of the Multi Party Liaison Committees, as it does not give the Committee any power to resolve a dispute and neither does it confer same on the ZEC.

The MLPs are set up six months before the election, with respect this is too short a time for the Committees to be effective. History has shown that electoral malpractices stretch way beyond six months prior to an election. The pre-election period is roughly described as from 18 months prior to an election until the commencement of the official election campaign period. Correlatively, the MLPs should be in existence for a similar period in order to adequately deal with cases of misconduct. As it stand the activation of MLPs 6 months prior to elections seems to be a procedural formality which is only activated as an appeasement to the political parties. This lack of serious power behind MLPs, leaves those ought to be protected at the whims of perpetrators.

Another impediment to the total effectiveness of the MLPs is that lower structures are not properly resources and are not fully functional. ZESN makes a similar point regarding the MLPs when it says: “the challenge is that these are not well developed all levels including provincial, constituency and ward levels hence local issues are not resolved at the local levels such as the allegations of traditional leaders appointed as party agents however they have not served that function due to lack of trust and

---

<sup>66</sup> Multi Party Liaison Committees are established by the ZEC six months prior to an election to assist with conflict management and to support compliance with the Code of Conduct under the Fourth Schedule of the Electoral Act

confidence in the impartiality of ZEC”.<sup>67</sup> Conversely, European Union observer mission to the 2018 elections, argued that: that these committees functioned well at the district and constituency levels, they were less effective at the higher levels, for reasons that included inadequate ZEC leadership<sup>68</sup>. Notwithstanding the contradictions in the above observations, what is clear is that there are structural challenges at all levels of the MLPs.

While the researcher is in no way opposed to the setting up of MLPs, it can be argued that the political environment in Zimbabwe is too polarised and the political discourse too partisan. This impacts this sincerity and impartiality of the Committees notwithstanding the presence of ZEC; at best these forums could foster collusion among political parties. Further to that, the whipping system in Zimbabwean politics hinders the independence of MLPs, because one must toe the Party line in the deliberations or face expulsion from the Party. A clear example is that of Killer Zivhu, the Chivi legislator was expelled from ZANU PF for calling for dialogue between the President of Zimbabwe who is also the President and First Secretary of ZANU PF and Adv Nelson Chamisa.<sup>69</sup> In this light, it is difficult to envision a situation where one openly participates in a case where their Party is implicated of which it is always the case inevitably, in fact representatives to the MLPs might actually be Party agents to defend their Party in case the later is implicated, added to that is the requirement that decisions should be by consent which is highly unlikely in Zimbabwean politics.

### **iii. The Code of Conduct**

The Code of Conduct is established similarly like the MLPS in terms of the 4<sup>th</sup> Schedule of the Electoral Act. The Multi Party Liaison Committees are in charge of administering the Code of Conduct. While the Code as read in conjunction with the Electoral Act is very comprehensive in terms of prohibited acts, one issue is glaring, the Code is not justiciable. Only consensus binds the Parties to the Code, while signing the Code is a pre-requisite for Nomination, there are no further enforcement mechanism, which renders the code nugatory. This is quite unfortunate because the Code actually captures pre and intra poll misconduct in detail, and were there firmer enforcement mechanisms the electoral environment would improve dramatically in the positive.

### **iv. Designated Magistrates**

---

<sup>67</sup> Zimbabwe Electoral Support Network: “Conflict resolution in electoral processes: the case of Zimbabwe” <https://www.zesn.org.zw/wp-content/uploads/2019/03>.

<sup>68</sup> European Union Election Observation Mission (EU EOM) Final Report, [https://eeas.europa.eu/sites/eeas/files/eu\\_eom\\_zimbabwe\\_2018\\_-\\_final\\_report.pdf](https://eeas.europa.eu/sites/eeas/files/eu_eom_zimbabwe_2018_-_final_report.pdf), pages 10 and 19

<sup>69</sup> ‘Zanu-Pf Mp Killer Zivhu Expelled from Parliament’ , New Zimbabwe, 8 June 2020



The Electoral Act does not provide an informative definition of the term “designated Magistrate”. The Act provides that ‘designated magistrate means a magistrate designated for the purposes of Part VI by the Minister to whom the administration of the **Magistrates Court Act [Chapter 7:10]** has been assigned. The provisions relating to Designated Magistrates entail is that within every district and constituency where voter registration is taking place, the Judicial Service Commission is enjoined to assign magistrates as designated magistrates to deal with voter registration objections.<sup>70</sup> It is trite that voter registration is a continuing process, therefore it logically follows that unlike other dispute resolution mechanisms that only kick in when an election is proclaimed, the assignment of designated magistrates should be systematic and continuous to correspond to the continuous registration. While the provision of the designated magistrates is a welcome route, one questions whether this is not a waste of judicial resources and time. Registering of votes is an administrative process which should be administered by the ZEC, whose processes are provided for in the Constitution and the Electoral Act. An alternative would be to allow ZEC to deal with the objections, while the right of appeal will be to the Electoral Court.

In terms of the Electoral Act, designated magistrates also adjudicate issues of electoral violence and intimidation. In this light they work hand in glove with the Zimbabwe Republic Police special liaison officer appointed by the Commissioner General.<sup>71</sup> This special police officer is charged with investigating such cases, upon completion of the said investigation, the issue is referred to the designated magistrate who must adjudicate the matter expeditiously as a priority. The Act used a curious phrase “as expeditious as possible” to refer to the treatment of cases under investigation, this phrase is vague and counterproductive. In the context of the electoral process the desirable term is “expeditious” which means that the investigations up to hearing take place within days or weeks, rather than weeks or months as has been the situation in Zimbabwe.<sup>72</sup> The motif in the electoral period is speed; there is no room for a reasonable time, which the legislature clumsily put as “expeditious as possible”. This gives a leeway to investigating officers to have a lethargic approach to investigations. Again the same undesirable phrase “as soon as possible” is used with regards to prosecuting electoral violence and intimidation. Paradoxically, the Electoral Act is very clear when imposing a duty to comply on a litigant, it has fixed timelines, as such one would expect the same strictness to be shown to State institution, but surprisingly the Act in this case is permissive.

---

<sup>70</sup> Section 133J (3) of the Electoral Act provides that: Immediately after an election is called, the Judicial Service Commission shall designate one or more magistrates in each province in which the election is to be held, to try cases involving politically motivated violence and intimidation, and the magistrates so designated shall give priority to all such cases and ensure that they are brought to trial and completed as expeditiously as possible.

<sup>71</sup> Section 133J of the Electoral Act

<sup>72</sup> Venice Commission, Code of Good Practice, para 95; Merloe and Young (2005) p.878

The Electoral Act outlaws many actions during the electoral process and imposes heavy sanctions. However, because prosecutions for these offenses are subject to criminal procedure under the Criminal Procedure and Evidence Act,<sup>73</sup> many offenses never go to trial either due to insufficient evidence or because a prosecution is forfeited after the electoral process is completed. This culminates in a culture of impunity and could be mitigated by the disaggregation of administrative offenses that are easier to prosecute and sanction in a timely manner.

The procedure for prosecuting electoral violence and intimidation is hamstrung by time constraints. According to the Electoral Act, the special police liaison and designates magistrates are activated once an election is declared. On 30<sup>th</sup> May 2018, the President of Zimbabwe proclaimed the 30<sup>th</sup> of July as the Election day, meaning the period in between will be the electoral period. Be that as it may, a period of roughly 3 months has proven inadequate to investigate prosecute and adjudicate cases of electoral intimidation and violence. As such, many cases go unpunished in most cases, while in a handful of cases the cases are then raised in electoral petitions where the outcomes have been predominantly in favour of upholding an election. With such in mind, it can be argued that due to the imprecise and permissive language used by the Act in the context of the limited time within which to conclude the cases, this avenue for solving intimidation and violence cases does not offer much respite to litigants.

#### **v. The Zimbabwe Electoral Commission**

The Zimbabwe Electoral Commission is established in terms of Chapter 12 Part II Section 238 of the Constitution of Zimbabwe. This Commission is constitutionally charged with the administration of elections. Section 239 of the Constitution sets out functions of the ZEC, which include most importantly for this research paragraph (k) which enjoins ZEC to receive complaints from the public and make such action in regard to the complaints as is appropriate. Paragraph (k) is an interesting provision because it gives ZEC the power to decide and provide a remedy, this is a serious departure from how other commissions operate. Most Commissions are usually enjoined to recommend to the police, which basically is no remedy, since recommendations are not binding. ZEC however can actually make a judgment of the situation and Act appropriately. However, neither the Zimbabwe Electoral Commission Act nor the Electoral Act has been aligned to reflect the position in the Constitution. Internationally, it is provided that administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations

---

<sup>73</sup> Criminal Procedure and Evidence Act [Chapter 9:07]

of violations promptly, thoroughly and effectively through independent and impartial bodies.<sup>74</sup>

The administration of the Code of Conduct for political parties practically is the domain of ZEC, even what designated magistrates deal with can be dealt with much more expediency by ZEC. Currently, the Zimbabwe Electoral Commission does not have power to make any meaningful intervention to any electoral malpractice. In most cases any act of misconduct reported to ZEC is further reported to the police or the complainant is referred to the courts. As will be discussed below, this emasculation of ZEC is a serious departure from the norm in many jurisdictions where the Electoral Management Body has quasi-judicial power and some punitive jurisdiction as well.

The Zimbabwe Electoral Commission has been on record admitting that there are legal impediments to its proper functioning.<sup>75</sup> The Chairman of the Chairperson of the Zimbabwe Electoral Commission, Justice Priscilla Chigumba claims that her organization have no power to perform functions that the public demands in the running and supervision of elections.<sup>76</sup> However, this apparent or perceived lack of power, presents an untenable situation and subject the electoral cycle to the caprices of the partisan executive. Indeed a perusal of the Zimbabwe Electoral Commission Act will show that ZEC is reduced to implementation of administrative duties only.<sup>77</sup> That being said the Constitution provides a platform for which the Zimbabwe Electoral Commission can consolidate its functions and take control of electoral processes. Acts of Parliament as provided for in section 321 of the Constitution, have not fully given effect to the Constitution. This is a manifestation of the Executive's reluctance to guarantee substantive independence to the Zimbabwe Electoral Commission.

The main challenges impacting the ZEC's role in legal and electoral reform processes in Zimbabwe concern its mandate, administration, and financial capacity. Firstly, it has no legal mandate to initiate reforms, nor the power to draft legislation. Its role is limited to policy input, to that end currently there are proposals on the Electoral Act which ZEC drafted and submitted to the Ministry of Justice and Parliamentary affairs.. Therefore, it cannot initiate the process without being authorized by government, thus as a part of government and cannot be seen to act against it. On the administration side, decision making has been centralised in the national structures, meaning the subordinate structures of the ZEC have not had a well-defined mandate.

---

<sup>74</sup> United Nations Human Rights Commission General Comment 31, para. 15

<sup>75</sup> Voice of Africa, "Zec 'We-Have-No-Power-To-Control-Election-Campaigns' 730847254714332/

<sup>76</sup> <https://spikedmedia.co.zw/zec-has-broad-powers-to-ensure-a-free-fair-and-credible-election/>

<sup>77</sup> Section 5 of the Electoral Act

The ZEC has no independent source of funding it is currently funded in a similar manner as line ministries and gets allocations from the Ministry of Finance. Historically, ZEC has always been allocated a working budget enough to get by, but inadequate to fulfill its Constitutional mandate. Last year the Minister of Finance Mthuli Ncube presented the national budget for the fiscal year 2021, and ZEC was allocated 19% of their budgetary proposal. The Election Resource Centre (ERC) described the allocation of only 19% to the Zimbabwe Electoral Commission (ZEC) for 2021 budgetary requirements as a “mockery”.<sup>78</sup> Therefore apart from the legal obstacles that hinder the works of ZEC, there is no financial support for the Commission, which is one of many ways in which the Executive has exerted control over ZEC.

## **Conclusion**

The research goal for this chapter was to outline the legislative framework which sets up institutions and a procedure for pre-election and intra poll adjudication of complaints. As can be gleaned from the discussion above Zimbabwe’s Electoral system is bloated with too many institutions and haphazard procedural rules. Further to that, there are many legal inconsistencies and gaps regarding these institutions, for example, the Code is not justiciable and the MLPs don’t have any power whatsoever, the best they can do is refer the matter to ZEC who will further report the matter to police and afterwards a protracted investigation. As such, the essence of expediency and promptness associated with elections is lost. Another glaring omission is the exclusion of ZEC from actual deliberations of misconduct as is the case in most Southern African countries. These deficiencies have led to a culture of violation of electoral law with impunity, knowing that the system is too fragmented. It is the researcher’s firm belief that there is need for harmonisation of these procedures under ZEC and the Electoral court, in order to bring legal certainty to the dispute resolution processes and to make sure that the election outcome is truly the will of the people born out of freewill as opposed to coercion or force.

---

<sup>78</sup>NewsDay Zimbabwe; Under Funding ZEC A Mockery - ERC by Munashe Makuwe 18th December 2020

## Chapter IV

### COMPARATIVE ANALYSIS OF ELECTORAL DISPUTE RESOLUTION FROM OTHER JURISDICTIONS

#### 4.0 Introduction

The preceding chapters have captured the perceived inadequacies of the Zimbabwean pre and intra election dispute resolution. That being said, there is need to place the Zimbabwean jurisprudence together with its African counterparts, to ensure the former is not being judged unfairly so as to proffer a balanced critique. Regionally there are standards for electoral governance that have been set, which countries in the region are expected to adopt and apply. For instance, **the Electoral Institute for Sustainable Democracy in Africa** came up with the conflict management committee model for SADC countries, which was initially deployed in South Africa and proved a success.<sup>79</sup> While, international obligations related to dispute resolution have not specifically been addressing the electoral process, public international law seems to provide guidance regarding the resolution of disputes. **The International Covenant on Civil and Political Rights (ICCPR)**<sup>80</sup> and regional treaties<sup>81</sup> stipulate a number of obligations upon States parties which provide a broad framework for the resolution of disputes. However, these obligations are not explicitly linked to the resolution of electoral disputes. While these instruments do not directly address issues of electoral dispute resolution mechanisms and are focused on broader, more general rights such as the right to an effective remedy, the right to a fair and public hearing and others, it can be argued that they provide firm foundational principles for the assessment of

---

<sup>80</sup> Innovations for Successful Societies: 'Creating Avenues To Resolve Election Disputes: Conflict Management Committees In Zambia', 2001 - 2011

<sup>81</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), (European Convention on Human Rights) (adopted 4 November, 1950, entered into force 3 September 1953, amended by Protocol No 11, European Treaty Series No. 155, entered into force on 1 November, 1998 which replaced Protocols 2, 3, 4, 5, 8, 9, 10 and repealed articles 25 and 46 of the Convention); American Convention on Human Rights (AmCHR), (adopted 22 November, 1969, entered into force 18 July, 1978) OAS TS 36 (Pact of San Jose, Costa Rica); Commonwealth of Independent States Convention on the Human Rights and Fundamental Freedoms (CISCHRFF) (adopted 16 May, 1995, entered into force 11 August, 1998); Copenhagen Document (Copenhagen Document), - Second Conference on the Human Dimension of the CSCE (Copenhagen, 5 June - 29 July, 1990), Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE ; African Union Declaration on the Principles Governing Democratic Elections in Africa (AUDPGDE) (adopted at the 38th Ordinary Session of the Organization of African Unity, 8 July 2002, Durban, South Africa) AHG/Decl.1 (XXXVIII), 2002; Inter-American Democratic Charter (IADC) (adopted 11 September, 2001, Lima Peru).

**Electoral Dispute Resolution mechanisms.**<sup>82</sup> As such, it is against this plumb line of Regional and International practices that Zimbabwe’s electoral jurisprudence of dispute resolution will be evaluated.

#### **4.1 South African Pre and Intra-electoral dispute resolution**

South African being inarticulately the inspiration for most of the legislation in Zimbabwe and sharing the same legal systems from the colonial past, is a perfect candidate to draw examples from. As noted in the introduction South Africa is one of the first countries to adopt the electoral conflict resolution mechanisms and on a comparative basis South Africa has fared relatively well. In 2020 South Africa was ranked fourth on the **Democracy index in Sub-Saharan Africa in 2020**<sup>83</sup>, some of the factors influencing this ranking is South Africa’s dispute resolution mechanism which minimises electoral challenges. Comparatively Zimbabwe was ranked 33 out of the 50 countries, with the regime describe as authoritarian. Likewise the contributing factor is the history of disputed election stemming out of unresolved electoral disputes which at the end lead to people feeling as if leadership has been foisted on them. In this vein, the researcher will consider the South African Election Commission first, with other institutions to follow.

#### **The South African Electoral Commission**

The South African Electoral Commission is established in terms of **section 190 of the South African Constitution**. While the functions of the Commission are almost similar to those of the Zimbabwean Electoral Commission, the South African Commission however has powers to “**adjudicate disputes which may arise from the organisation, administration or conducting of elections and which are of an administrative nature**”.<sup>84</sup> The ZEC does not have such powers to adjudicate; as such many cases end up in courts. While in South Africa, there is potential for speedy resolution of disputes of an administrative nature. Had the same powers been granted to the ZEC cases such as the **Gift Konjana V Dexter Nduna**<sup>85</sup> case would not have ended in a stalemate as is the case now, for the ZEC would have just amended their mistake instantly without reference to the Electoral Court, since the mistake was administrative. The South African approach minimises the occasion of electoral petitions in courts as many disputes would have been solved the Commission, ensuring that only legitimate issues go before the court. On the other hand, this approach leaves the Courts ample time to deal with cases exhaustively as they will not be inundated by administrative issues.

---

<sup>82</sup> Avery Davis-Roberts : ‘International Obligations For Electoral Dispute Resolution: Discussion Paper’ February 24 -25, 2009

<sup>83</sup> <https://www.statista.com/statistics/1204750/democracy-index-in-sub-saharan-africa-by-country/>

<sup>84</sup> Section 5(o) of the South African Electoral Act 1996

<sup>85</sup> SC 05/2021

The term “administrative” might need elaboration in order to understand the full scope of the powers of the South African Electoral Commission. The Supreme Court of appeal of South Africa tried to define the administrative issues. The court said that the power to adjudicate disputes arising from ‘the organisation, administration or conducting of elections and which are of an administrative nature’ envisaged in s **5(1)(o) of the Electoral Commission Act**, means that the Commission ‘may adjudicate disputes regarding the mechanics of an election.’<sup>86</sup> A reading of the South African Electoral Act provides an understanding of the legislature’s predilection when the word administrative is employed. **Sections 41, 48, 49, 53 and 55** provide voters with rights to object to sorting of ballot papers, objection to voting, sorting of results and objection to the final result, all these complains lie squarely in the purview of the Commission. This is a double edged sword in that, while it gives real time solutions to intra poll grievances the procedure correlatively delays the process. However in light of what is sought to be achieved by the election, the delay may be deemed a necessary impediment. Zimbabwe does not have these procedures so one is left with only the petition procedure for intra-poll grievances.

### **The Electoral Court South Africa**

The Electoral Court oversees the South African **Electoral Commission (EC)** and the conduct of elections. It was established by the **Electoral Commission Act, 1996** to replace a Special Electoral Court which presided over the **1994 elections**, and ranks *pari passu* with the Supreme Court<sup>87</sup> and is only subordinate to the Constitutional court.<sup>88</sup> Unlike the Zimbabwean Electoral Court, the South African Electoral Court is a permanent feature of the South African judiciary, which has 5 permanent judges who sit and adjudicate electoral matters. In terms of the Electoral Act,<sup>89</sup> it appears that there is no appeal or application for review from decisions of the Electoral court, except of cause it is a constitutional matter. This is important and well in place since only issues of law find their way to the Electoral Act, this injects the process with the expediency it demands. Further to that, unlike in Zimbabwe, it is clear in South Africa that the Electoral Court has the sole jurisdiction in Electoral matters. This gives structure and coherence to the adjudication process as all procedures are centred. This feature may be useful in Zimbabwe where the forums for litigating electoral malpractices are scattered and sometimes they seem to have concurrent jurisdiction.

---

<sup>86</sup> Electoral Commission of South Africa v Democratic Alliance and Others (1068 /2019) [2021] ZASCA 103 (23 July 2021)

<sup>87</sup> Electoral Commission Act South Africa, Section 18 ‘There is an Electoral Court for the Republic, with the status of the Supreme Court’

<sup>88</sup> EISA South Africa: Electoral Court". [www.eisa.org](http://www.eisa.org) 7 October 2021

<sup>89</sup> Section 96 of the South African Electoral Act of 1996

The South African Electoral Court enjoys original and inherent jurisdiction on electoral matters. This extends to making its own rules to govern the conduct of cases,<sup>90</sup> which is a far cry from the Zimbabwean situation where there is a lacuna in terms of the rules applicable to the electoral cases. Secondly the Electoral Court in Zimbabwe does not enjoy powers vested in the South African counterparts. A reading of the judgments in Zimbabwe points to the fact that the Electoral Court is confined to the four corners of the Act. As such procedural irregularities and formalities are kept to a minimum in electoral proceedings which allow the court to deal with the actual merits of the case. **Rule 10 of the South African electoral rules**, allows the court to condone non adherence to the set time limits on good cause shown.<sup>91</sup> In Zimbabwe conversely, failure to adhere to strict time lines is fatal to any proceeding, and this has been the pitfalls of many electoral cases. Not only that, the Electoral Rules<sup>92</sup> are not adequate such that High Court Rules have to be employed, which confuses even the seasoned of lawyers as to where the jurisdiction of the Electoral Rules start and where they end.<sup>93</sup>

The South African Electoral Act makes it categorically clear that the Electoral Court has original and inherent jurisdiction on all electoral matters in South Africa.<sup>94</sup> This clarity vastly simplifies the dispute resolution process as the jurisdiction is centralised in one institution. As noted in the previous chapter, it is not clear how the High Court's inherent jurisdiction relates to the Electoral Court's jurisdiction on electoral matters.<sup>95</sup> This matter was topical in the case of **Chiokoyo v Richard Ndlovu & Others**.<sup>96</sup> This case involves the noticeable conflict between **section 161(2) of the Electoral Act and section 171(1)(a) of the Constitution of Zimbabwe, 2013**. Section 161(2) provides the Electoral Court with exclusive jurisdiction to hear all matters that have to do with elections including petitions, applications, appeals and reviews in terms of the Electoral Act. **Section 171(1)(a) of the Constitution**, on the other provides that 'the High Court has original jurisdiction over all civil and criminal matters throughout Zimbabwe.' This apparent conflict poses a threat to legal certainty in electoral litigation.<sup>97</sup> The doctrine of legality, which is essential to the

---

<sup>90</sup> Rule 2 of the Rules Regulating The Electoral Court **Conduct** of the Proceedings of the Electoral Court Notice 794 Of 1998

<sup>91</sup> **Failure to comply with time limits or directives of Court R 10**. Failure to comply with the prescribed time limits or directives of the Court will, by the mere fact thereof, result in a party being barred, unless the Court, on good cause shown, directs otherwise

<sup>92</sup> Electoral (Applications, Appeals and Petitions) Rules 1995 Statutory Instrument 74A of 1995

<sup>93</sup> Section 165(4) reads: 'Until rules of court for the Electoral Court are made in terms of this section, the rules of the High Court shall apply, with such modifications as appear to the Electoral Court to be necessary, with respect to election petitions and other matters over which the Electoral Court has jurisdiction.'

<sup>94</sup> Section 96 (1) South African Electoral Act

<sup>95</sup> Constitution of Zimbabwe Section 171 **Jurisdiction of High Court** 1. The High Court "has original jurisdiction over all civil and criminal matters throughout Zimbabwe";

<sup>96</sup> 2014 (1) ZLR 473 (H)

<sup>97</sup> **Ian Muteto Makone & Anor v The Chairperson of the Zimbabwe Electoral Commission & Anor** 2008 (1) ZLR 230 (H), the court noted that the electoral laws are not fully understood by lawyers



proper functioning of the rule of law, requires clarity in the law. The legislature must express its intention with irresistible clearness as is the case in South Africa.

### **Multi Party liaison committees**

In South Africa the Party Liaison Committee (PLC) was introduced during the early 1990s as a measure to deliberate and resolve electoral issues that have the potential for conflict. Multi party committees play a pivotal role in ensuring the proper functioning of the electoral processes, assisting in ensuring electoral justice and supporting the approval of election results. These committees are essentially first-aid instruments within the electoral discourse especially “When you are observing bribery, vote buying, violence, [the committees] offer on-the-spot solutions. You are aggrieved, and immediately you rush to them. You deliberate, and a solution is found. You don’t have to wait for the results [of the election] to petition”.<sup>98</sup> The South African Party Liaison Committees are established in terms of the Electoral Commission Act and are governed by their own regulations.<sup>99</sup> The South African Committees perform mainly three functions, being rule-making, adjudication and implementation function. This is markedly different to the Zimbabwean counterparts who are mainly limited to dialogue and lobbying for consensus.<sup>100</sup> In this light the South African liaison committees have an edge over the Zimbabwean counterparts in that, the former can make a binding decision, whereas the later is limited to recommendations.

Another perceived advantage of the South African liaison committees is that the code that they enforce is justiciable unlike the Zimbabwean one which is more like a social contract or a gentleman’s agreement.<sup>101</sup> The South African Electoral Act and the Code of Conduct are enforceable by law in a court of law, including an Electoral Court in terms of **section 96 of the Electoral Act**, established in terms of **Chapter 5 of the South African Electoral Commission Act of 1996**.<sup>102</sup> This makes the deliberations of the liaison committee more effective as they command power of compulsion. Further to that, the liaison committees in South Africa have power to co-legislate regulations governing their operations. **Section 100 (2)** of the South African Electoral Act

---

<sup>98</sup> Innovations for Successful Societies: Zambia Electoral Management Committees, Princeton University, accessed at <http://www.princeton.edu/successfulsocieties>

<sup>99</sup> Electoral Commission Act, Act 51 of 1996, Section 5(1)(g), one of the functions of the EC was to, “establish and maintain liaison and co-operation with parties” and Regulations on Party Liaison Committees, 1998.

<sup>100</sup> SA Electoral Act s160C Functions of multiparty liaison committee

(1) The functions of a multiparty liaison committee shall be—

(a) to hear and attempt to resolve any disputes, concerns, matters or grievances relating to the electoral process, including in particular any disputes arising from allegations concerning noncompliance with the Code...

<sup>101</sup> S96 of the SA Electoral Act

<sup>102</sup> Clive J Napier, ‘Political Party Liaison Committees As Conflict Resolution Mechanisms The South African Experience’, December/Desember 2015

stipulates that the Electoral Commission can make regulation in consultation with the liaison committees. It is apparent from the discussion that the liaison committees in South Africa are an active stakeholder in the electoral cycle as they are involved at every stage. Further to that the SA liaison committees are always active and they meet monthly or bi-monthly outside of electoral periods, during election time they meet much more frequently. Cumulatively, this makes the liaison committees in South Africa more effective.

### **Lessons from other African Countries**

The current trend in Africa is that the Electoral Management Bodies play both an administrative role and a limited judicial role. Minor electoral disputes are predominantly resolved by the EMBs without resort to courts. This provides the disputing parties the real time solutions as opposed to having a court deal with the case using normal procedure. In Uganda the Electoral Commission has power to resolve disputes that arise at any time in the electoral period, which means that even intra-poll disputes.<sup>103</sup> Similarly the Zambian Commission has power to adjudicate electoral disputes, though only those of an administrative nature.<sup>104</sup> This is a progressive provision since most disputes in elections emanate from administrative procedures. What is clear is that real electoral dispute resolution starts with the Electoral Management Body being a key player in adjudicating on disputes of an administrative nature.

### **Conclusion**

The discussion above shows that the South African Electoral dispute resolution mechanisms are more effective than the Zimbabwean ones. One of the reasons for this disparity is that the South African EMB has power to settle disputes like other EMBs in Africa. This process ensures smart and speedy remedies to administrative issues thus leaving ample time to the court to deal with difficult cases. Further to that the dispute resolution regime in South Africa is streamlined and clear, the Electoral Court has original jurisdiction on electoral matter and is the final arbiter. On the other hand, the Party Liaison committees in South Africa they are operational throughout, this allows for consensus building which translates into reduced disputes. In this light it is the researcher's contention that Zimbabwe could benefit a lot from emulating their neighbours.

---

<sup>103</sup> The Electoral Commission Act, Cap 140 Section 15. **Power of the commission to resolve complaints; appeals;** (1) Any complaint submitted in writing alleging any irregularity with any aspect of the electoral process at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided by the commission; and where the irregularity is confirmed, the commission shall take necessary action to correct the irregularity and any effects it may have caused.

<sup>104</sup> Article 76 of the Zambian Constitution as read with **THE ELECTORAL COMMISSION OF ZAMBIA ACT, 2016 section 4 (2) (f):** adjudicate disputes that may arise from the organisation, administration or conducting of elections, which are of an administrative nature;

## **CHAPTER V**

### **Recommendations and summation**

#### **5.0 Introduction**

The premise for this research was to argue for an improvement of the pre and intra poll dispute resolution regime in Zimbabwe. The main argument is that once the pre and intra electoral dispute resolution mechanism are improved on, this will significantly reduce the proliferation of electoral petitions. Most electoral petitions are a result of unsolved pre and intra poll disputes. In Zimbabwe, we have noted that the pre and intra elections dispute resolution mechanisms, are fragmented in some cases and in extreme cases not provided for totally. The law itself is unclear on the jurisdictional boundaries of several forums established for the purposes of resolving electoral disputes. Further to that, there is need for a clear demarcation of what malpractices are administrative and which ones are legal. This again will inform the procedure to be taken for the relevant malpractice or complaint. In this light the researcher will make recommendations on how to improve on electoral dispute resolutions legally for issues that arise before announcement of results.

#### **5.1 International conventions governing election dispute resolution**

The international jurisprudence on electoral dispute resolution is lagging behind despite the fact that electoral disputes are fast emerging as the foremost challenges to peace particularly in Africa. Recent manifestations of electoral disputes include the disputed and violent elections in Kenya, Nigeria and Zimbabwe, where the legitimate pursuit of redress of electoral disputes through existing channels both official and unofficial has, altogether, been frustrated.<sup>105</sup> Nevertheless within the existing international treaties and conventions, there are useful general rules which, if applied to electoral dispute resolution jurisprudence will vastly mitigate conflict. To that end this research will interrogate each Treaty in turn in order to extract some valuable examples for Zimbabwe:

Article 21 of the Universal Declaration of Human Rights states that,

---

<sup>105</sup> For example, the resort to the election petition tribunals and courts, in the Nigerian case, has raised more questions than answers. So many obstacles, including the huge cost of seeking electoral justice, the near impossible conditions of the 'burden of proof' imposed on the litigant, the undue protraction of litigation, and the seeming lack of independence of the judiciary, have served to limit the reach of electoral justice. In Kenya and Zimbabwe, the struggle for power sharing between the highly 'illegitimate' governments and the oppositions has not been able to bring stability to the countries. Rather, it tends to portray the opposition in negative light as those only interested in power sharing, not minding the implications. Else, why should an opposition, which claimed to have won an election, be prepared to share power with the 'electoral robber', which dispossessed them of their 'victory' in the first instance?

‘[t]he **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**’

This provision implies that the State and all its institutions must ensure that freedom of choice is respected in an election. One way of ensuring that this is attained is making sure that citizens are protected from vices that negate their freedom, this could be in the form of violence, threats and bribery. In Zimbabwe, since 1980, these have been recurring themes in elections, which has often led to the winning candidate being labelled illegitimate. However, if the pre-election and intra election malpractices are effectively solved in pursuit of freedom of choice, this will facilitate acceptability of the results. This is a recommendation influenced by the jurisprudential reasoning that, institutions must be inclined to upholding human rights more than protecting the status quo.<sup>106</sup> In similar fashion the International Covenant on Civil and Political Rights seeks to provide and protect the same rights.<sup>107</sup>

Further to the above there is the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). This Treaty was adopted in 1966 and entered into force in 1969. In addition to the ICCPR’s civil and political rights, the ICERD explicitly guarantees State protection against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.<sup>108</sup> The generality of this provision allows for its extension to issues of political violence. The State can ensure that electoral violence in this regard is curbed through setting up, financing and capacitating robust institutions which safeguard human rights, thus protecting the freedom of the vote. This however must cater not for petitions but for pre election malpractices.

In light of corrupt practices, vote buying and abuse of state resources, there is the **United Nations Convention against Corruption**. The United Nations Convention against Corruption (UNCAC) was adopted in 2003 and entered into force in 2005. UNCAC binds State Parties to take up appropriate legislative and administrative

---

<sup>106</sup> Although it is the foundational document of human rights law, the UDHR remains a declaration, and as such lacks binding legal force. It does, however, carry substantial moral and political force

<sup>107</sup> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: 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;

<sup>108</sup> Boda, M. D., ‘Judging Elections by Public International Law: A Tentative Framework’, *Representation*, 41/ 3 (2005), pp. 208–29

measures regarding election to public office, and to take appropriate legislative and administrative measures to enhance transparency in the funding of political parties and candidates for elected public office. Funding of political parties and expenditure has been topical in elections in Zimbabwe, since 1980 where ZANU PF accused UANC of vote buying. Conversely now ZANU PF is now facing accusation of vote buying and over spending thus making the campaigning unequal. As a result, if these disgruntlements are not addressed transparently before polling, the acceptability of the whole process might be problematic.

The above are some of the international instrument which can be interpreted to inform electoral dispute resolutions. Issues to do with freedom of choice, freedom from violence and freedom from corruption are some of the main conflictual themes in Zimbabwe. As such the existing institutions must be able to address these issues to ensure that the polls are not tainted.

## **5.2 Specific forum related recommendations**

Having established the deficiencies in the dispute resolution mechanisms in Zimbabwe, while the international instruments set the plumb line for assessing electoral dispute resolution for cases arising before the announcement of results, this research will now offer solutions on how the Zimbabwean jurisprudence can be improved.

### **5.2.1 The Electoral Court**

The Electoral Court is established as a division of the High Court by the Electoral Act.<sup>109</sup> It is established as ‘a court of record’. Its establishment as ‘a division of the High Court’ was achieved through an amendment the Electoral Act of May 2018. Section 2 of section 161 of the Electoral Act gives the Electoral Court exclusive jurisdiction over all electoral matters. However, it has been noted that the Act sometimes provides that other matters be heard in the High Court which then confuses the process. In South Africa, the Electoral Act and the Electoral Commission Act are explicit that the Electoral Court hears all election related matters, there is no difference of some cases to the Constitutional Court and any other court as the case is in Zimbabwe. The South African approach is smarter and compact, which facilitates the court’s accessibility to everyone. In South Africa there is no confusion as to where the Electoral Court’s jurisdiction begins and where it ends. In Zimbabwe however, the Constitution provides for the inherent jurisdiction of the High Court on all matters,

---

<sup>109</sup> section 161

while subordinate legislation provides for the original jurisdiction of the Electoral court an electoral matters, thus leaving the interpretation to the court.<sup>110</sup>

Further to the above, the Electoral Court operates under a set of rules which are inadequate and obsolete in some cases. Thus to cover this lacuna, the Electoral Act provides for the use of the High Court rules where the Electoral rules are silent. To compound this situation, the Electoral Court does not have the power to regulate its own processes, despite the fact that it ranks *pari passu* with the High Court. In this case the South African set up is useful as a template, where the Electoral Court has power to regulate its own processes. This makes the process of litigation less rigid, and allows the court the freedom to make sure that justice is substantially despite formalities. It is also prudent, to recommend that the Electoral Court be established as a permanent court of law as opposed to being seasonal courts, particularly in light to the recent phenomena of recalls and by-elections.

### 5.2.2 Multi Party Liaison Committees

With regards to the multi-party liaison committees, it is recommended that there be established as a permanent feature of the Electoral jurisprudence as opposed to being seasonal structures. The constant meeting and engagement in these committees facilitate better tolerance which leads to problem solving efficiency. The socio-political situation prevailing in Zimbabwe where political tension is a constant, it is prudent to adopt the South African model where the party liaison committees frequently even outside election period. This has allowed constant dialogue thus building more consensus among Parties. At the time of writing there was a widely publicised case of political violence in Chitungwiza, Zimbabwe, where members of Citizens Coalition for Change and ZANU PF clashed. This is a typical case where the MLPs would have been effective, but since there has not been a proclamation the MLPs were not activated. The violence which occurs after the proclamation is a culmination of unsolved conflicts and simmering tensions.

Further to that, if Zimbabwe adopts the South African model, it means that MLPs will cease to be passive participants in dispute resolutions. What compounds the situation in Zimbabwe is that the MLPs, which are powerless, are supervised by the ZEC which is powerless while they both enforce the Electoral Code of Conduct which is not justiciable. Thus it is ineffectiveness compounding ineffectiveness in this case. It shows a complete lack of desire to implement real electoral **discipline**. **From the**

---

<sup>110</sup> Section 161(2) provides the Electoral Court with exclusive jurisdiction to hear all matters that have to do with elections including petitions, applications, appeals and reviews in terms of the Electoral Act. Section 171(1)(a) of the Constitution, on the other provides that 'the High Court has original jurisdiction over all civil and criminal matters throughout Zimbabwe.'

foregoing, it is recommended that the MLPs should have power, as is the case in South Africa to recommend punishment in cases of breach of the Code. This however, can only be effective if the Zimbabwean Code of conduct ceases to a gentleman's agreement and attains the full force of law.

### **5.2.3 The Zimbabwean Electoral Commission**

The trend in Southern Africa is that the Electoral Management Bodies are not mere administrators of elections on behalf of government. The EMBs are full stakeholders and custodians of the elections and other processes. Their role encompasses planning, preparation, administration and enforcing electoral laws. The Zimbabwe Electoral Commission however is the exception to the general rule, it has no power whatsoever in terms of the Electoral Act and the Zimbabwe Electoral Commission Act. The ZEC cannot do a simple arithmetic correction on a return form in order for the form to represent the accurate results of an election. The Gift Konjana case is a painful reminder of ZECs lack of power. In Zambia, Malawi, Kenya and South Africa, the EMBs have powers to adjudicate over election related disputes. The only caveat to this power is that, the disputes must be of an administrative nature. Notwithstanding, the power to adjudicate is a very useful tool for an EMB as it facilitates for real time resolution of disputes and queries while limiting the number of cases which are placed before the courts. Secondly, this adjudicating power will fill the lacuna in the Zimbabwean electoral law with regards to real time intra voting queries.

It is also useful at this point to recommend that, ZEC should also be given the power to register political parties. This correlatively means the power to deregister as well. It is the researcher's view that this move will give the Zimbabwe Electoral Commission more power over political parties, while making the political parties more responsive to the dictates of ZEC. The registration of political parties will make the enforcement of the Code of Conduct more effective as there will be attendant punishments to any infractions. Punishments for infractions of the Code may range from refusal to register to subtraction of votes or even deregistration in extreme cases. However, there are still fears among the political parties that ZANU PF may manipulate this process to victimise its political adversaries.

The Zimbabwe Electoral Commission needs to advocate for a clearer legal mandate. ZEC must advocate for clarity regarding its role in the electoral law reform processes. An EMB is both an implementing agent and stakeholder in the process, as such it is better placed to recommend useful reforms to the process. The Commission is reposed with substantial experience and information regarding electoral management and regulation; further an EMB has first-hand insights into the technical and operational implications of existing laws. It could thus play a more substantive role if allowed more room in policy formulation and legislation.

The financial dependency in the Ministry of Finance compromises the independence of the Commission. When an EMB's financial independence is in question, it ought to lobby the government and parliament to ensure an adequate funding framework. Devoid of such independence, ZEC's engagement in reform processes is severely constrained. In this vein, different models could be useful. One could be for the ZEC to develop its own independent budget and timeline. Then it receives funding directly from Parliament, which would exercise oversight and scrutiny and not the Ministry of Justice, which is conveniently manned by ZANU PF's Chief Election Agent.

#### 5.2.4 Harmonisation of Electoral Dispute resolutions

Currently the dispute resolution jurisprudence in Zimbabwe is not harmonised, some procedures are provided for in other laws other than the Electoral Act. For example prosecution of electoral violence has to adopt the normal channels as provided for in the Criminal Procedure and Evidence Act, this has led to delays in concluding cases. More so, there are too many forums set up to deal with electoral malpractices in Zimbabwe which has led to confusion among those looking for help. Issues such as registration should by right be dealt with the ZEC and not designated magistrates since registration of voting rests in the domain of the ZEC. As such, it is the EMB which is able to render real time assistance to an aggrieved Party. In some instances of malpractices, the Electoral Act gives jurisdiction to the High Court instead of the Electoral Court, notwithstanding the provisions of section 161 (2) of the Electoral Act.<sup>111</sup> Further to that, the Act clumsily presents the Zimbabwe Human Rights Commission as having concurrent jurisdiction with ZEC with regards to electoral violence cases, which is unnecessary and may cause further delays.<sup>112</sup> Therefore, it is recommended that the institutions which handle electoral issues be streamlined in order to promote efficiency.

#### 5.3 The Rule of Law in electoral dispute resolution

This is a basic concept of jurisprudence but it is very helpful in restructuring the Zimbabwean Electoral dispute resolution regime. The UDHR preamble provides that

---

<sup>111</sup> **Section 133K (4) of the Electoral Act** : (4)Where a magistrates court convicts a person of an offence involving politically-motivated violence or intimidation committed during an election period, the court may adjourn the case in terms of section 54(2) of the Magistrates Court Act [Chapter 7:10] and, if the case is thereafter transferred to the **High Court** for sentence in terms of section 224 of the Criminal Procedure and Evidence Act [Chapter 9:07], the High Court may, in addition to any other penalty it imposes on the convicted person, declare him or her to be incapable, for a period not exceeding five years from the date of the conviction... and **Section 138 Additional penalties for corrupt practices** Any person convicted of a corrupt practice by the **High Court** may, in addition to any other punishment, be declared to be incapable, for a period not exceeding five years from the date of his or her conviction, of— (a) being registered as a voter or voting at an election; or (b) filling a public office, other than a public office the tenure of which is regulated exclusively by or in terms of the Constitution, and, if he or she holds any such office, the **High Court** may declare that that office shall be vacated by him or her as from the date of his or her conviction.



‘human rights should be protected by the rule of law’ to prevent recourse ‘as a last resort, to rebellion against tyranny and oppression’. This is a clear admission at the international level that failure to satisfactorily uphold the rule of law leads to chaos and infighting. That is the reason why the Zimbabwean electoral history is marred with violent episodes, from the Gukurahundi in the 1980s, the 2008 atrocities and up to the August 1 shootings in 2018. It is the failure of the system to abide by the law through punishing electoral malpractices decisive and failure to exhibit impartiality. (Stockholm: International IDEA, 2010) reports that; ‘the obligation to uphold the rule of law entails equal accountability before the law, the fight against impunity for human rights violations, legal certainty and predictability, as well as the independence and impartiality of the judiciary’.<sup>113</sup> These virtues if implemented religiously will mitigate violence in Zimbabwean elections thus decreasing the occasion of disputed elections.

The Zimbabwean pre and intra election dispute resolution mechanism must be guided by the desire to provide an effective and lasting remedy. As it stands some remedies for electoral malpractices might come after the election, however in some cases the remedy may not come at all. As a result people will seek to resort to self help in most cases. At times the remedy which one may get will be ineffective in the circumstances, for example, there is a tacit agreement in Zimbabwe that elections in 2008 were marred by violence, but the results of that runoff subsisted, notwithstanding the fact that some perpetrators were arrested. In this vein, it is clear that the electoral dispute resolution mechanisms have to be structured in a way that brings real time remedies. The ICCPR provides that, State Parties shall undertake ‘to ensure that any persons whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity’. Effectiveness of the remedy connotes a timely and relevant remedy by the appropriate administrative, legislative or judicial authorities. This intimately applies to intra-voting interventions, in South Africa a person can object or raise concern over voting procedures in real time and have the issue addressed there and then by the Electoral Commission, without further reference to courts, unless the issue is not administrative. Zimbabwe will do well to adopt a similar model, where one has a query or issue during polling, the ZEC should deal with the issue and not differ it to the petition process.<sup>114</sup>

---

<sup>113</sup> International IDEA, ‘Electoral Justice: The International IDEA Handbook’ (Stockholm: International IDEA, 2010)

<sup>114</sup> General Comment 32 GC 32, ‘[a]n important aspect of the fairness of a hearing is its expeditiousness’, which encompasses ‘access to judicial review (or other equivalent processes) of the voting and counting so that electors have confidence in the security of the ballot and the counting of the votes’. A particular concern regarding election-related claims, given the limited time frames in which electoral processes are held, is the need for all claims and appeals to be processed in a timely or expeditious manner in order to be fully effective.

Chapter 12 of the Constitution of Zimbabwe provides for Independent Commissions, of which Zimbabwe Electoral Commission is one.<sup>115</sup> However, in practice it has been noted that the ZEC has not exhibited this independence, thus it has affected its impartiality. This is the other reason that elections in Zimbabwe are always controversial, as ZEC has shown proclivity towards the incumbent ZANU PF, the withholding of results in 2008, transposition of numbers and refusal to give the voters' roll to the opposition have been all manifestations of the perceived bias.<sup>116</sup> Instead of being the arbiter of electoral disputes ZEC is often implicated as an instigator of pre-poll and intra-poll disputes due to its perceived inclination towards ZANU PF. As such, to avert disputed election ZEC must be independent and also be seen as being independent, this can only be achieved by redressing the following;

- I. The Zimbabwe Electoral Commission has officials from the uniformed forces as their staff, the Chief Elections Officer being a retired soldier. In Zimbabwe the uniformed forces are perceived as partisan beyond a shadow of doubt. On the face of it the employment of security agents in an Independent Body compromises its impartiality and becomes a source of conflict. This situation has been compounded by the seemingly partisan appointments to the Commission itself. Prominent Zimbabwean journalist, Hopewell Chin'ono has on several occasions berated the Government for appointing ZANU PF officials' relatives to the Commission, for example, Commissioner Jasper Mangwana has been linked to ZANU PF's Paul Mangwana because of the last names. Most recently was the appointment of the Vice-President KCD Mohadi's daughter as a Commission, with only months left to harmonised elections.<sup>117</sup>
  
- II. Financing: The conduct of elections is a complex yet expensive process and the elections can only be properly managed if ZEC is adequately financed well in advance of the election date and not at the last minute. Adequate funding is what will allow MLPS to be fully functional at all level, full funding will also allow the MLPs to be continuously active in order to avert conflict. Section 305(3) of the national Constitution requires that the Zimbabwe Electoral Commission be granted government funds in a separate vote by Parliament as a representatives body of all people as opposed to a

---

<sup>115</sup> Section 235 Independence of Commissions

(1) The independent Commissions—

(a) are independent and are not subject to the direction or control of anyone;

<sup>116</sup> <https://bulawayo24.com/index-id-news-sc-local-byo-220299.html>

<sup>117</sup> <https://www.zimbabwesituation.com/news/ed-appoints-mohadis-daughter-as-zec-commissioner/>; The appointment of Zanu PF vice-president Kembo Mohadi's daughter, Millicent, as Zimbabwe Electoral Commission (Zec) commissioner has torched a storm with critics saying this dents the credibility of the electoral body

single Minister who is a representative of a political party. The Parliament is the preferred supervisor owing to the checks and balances as represented by various political parties as represented.<sup>118</sup>

Lastly, the electoral jurisprudence in Zimbabwe is highly technical, this has often caused confusion to lawyers themselves and even judges of the High Court, thus one shudders to contemplate the effect on a lay person. As an illustration, in **Ian Muteto Makone & Anor v The Chairperson of the Zimbabwe Electoral Commission & Anor**<sup>119</sup>, the court noted that due to recent amendments, the electoral laws are not fully understood by lawyers. As such, it is recommended that the electoral jurisprudence in Zimbabwe be vastly simplified. One way of doing it is to have all electoral matters consolidated into the Electoral Act, the current procedure where some procedural aspects of electoral law are governed by the Magistrates Court Act, High Court Act and the Criminal Procedure and Evidence Act is untenable and will only yield confusion and uncertainty.

## Conclusion

Elections can make or break a nation; it is all in how they are handled. By their nature elections are disruptive they are tense and extremely competitive, especially in Africa where elections have become a means to control resources. As such, the law and procedure must be crafted in such a way that they mitigate or avoid such conflicts. Electoral conflicts are a direct consequence of what is done before the polling date, as such if the relevant institutions manage to have a firm grip on procedures before and after elections, conflicts will invariably be averted. The electoral dispute resolution in Zimbabwe particularly before and during polling is seriously lagging behind, one major reason is that most mechanisms are limited to the actual electoral seasons, thus they may have limited time to exhaustively deal with issues. There is need for a paradigm shift in the thinking that elections are a even as opposed to being a process, in which each and every step leading to the goal must be meticulously be dealt with. If one retrospectively analyses the Zimbabwean election,

---

<sup>118</sup> Zimbabwe Electoral Commission Act [CHAPTER 2:12] Section 9 Funds and finances of Commission —

(1) In addition to the funds appropriated in terms of section 61(6) of the Constitution, the funds of the Commission shall consist of

(a) ...

(b) fees, charges and other income accruing to the Commission from things done by it in terms of this Act or the Electoral Act; and

(c) the proceeds of any monetary penalties imposed by the Commission under this Act or the Electoral Act; and

(d) deposits forfeited by candidates under the Electoral Act; and

(d1) donations or grants from any local or foreign source whatsoever, which have been approved by the **Minister**;

<sup>119</sup> 2008 (1) ZLR 230 (H).

they get the impression that it was a process undertaken to legitimize a predetermined position.

Four years after the 2018 election Zimbabwe is as politically polarised country, and this has had economic ramifications. There is a sector of the population claiming that President Emmerson Mnangagwa is illegitimate, thus they go out of their way not to support anything by the government. As a result Zimbabwe is stuck in the electoral mode. However, it is the researcher's contention that transparent, impartial, sincere and legitimate dispute resolution can change the narrative. ZANU PF members who break the law, must be seen to be penalized as will be any other Party who flouts the regulations. The strength of any legal system is not on the volume of laws in that system, but the dedication to impartially and religiously enforcing existing ones.

## **Bibliography**

### **Articles and Journals**

1. Bacharach, S.B. and Lawler, E.J. **'Bargaining: Power, Tactics and Outcomes'**, (1981), Jossey-Bass, San Francisco, CA.
2. Boda, M. D., **'Judging Elections by Public International Law: A Tentative Framework'**, Representation, 41/ 3 (2005), pp. 208-29
3. Booyesen. S and Toulou. L: **"In Denis Kadima and Susan Booyesen Compendium of Elections in Southern Africa 1989-2009: 20 Years of Multiparty Democracy"**, EISA, Johannesburg, (2009) Chapter 15: 632-635
4. Catholic Commission for Justice and Peace and Legal Resources Foundation: **"Breaking Silence, Building True Peace: A Report on the Disturbances in Matabeleland and the Midlands Regions" 1980-1988; (1997) Harare**
5. Clive J Napier, **'Political Party Liaison Committees As Conflict Resolution Mechanisms The South African Experience'**, December/Desember 2015
6. Cropley E: **" Zimbabwe calls South African report on its 2002 election 'rubbish'/Khampepe Report on 2002 Presidential Election in Zimbabwe"**, 2014
7. Deutsch, M. and Krauss, R.M. **"Studies of interpersonal bargaining"**, (1962), Journal of Conflict Resolution, Vol. 6, pp. 52-72.
8. Diamond L: **'Developing Democracy: Towards Consolidation'**. Baltimore and London, (1999), Johns Hopkins University Press.
9. European Union Election Observation Mission (EU EOM) Final Report, [https://eeas.europa.eu/sites/eeas/files/eu\\_eom\\_zimbabwe\\_2018\\_final\\_report.pdf](https://eeas.europa.eu/sites/eeas/files/eu_eom_zimbabwe_2018_final_report.pdf), pages 10 and 19
10. International Foundation for Electoral Systems: **"Addressing Election Disputes and Election Offenses in Zimbabwe"**, 2019
11. Innovations for Successful Societies: **'Creating Avenues To Resolve Election Disputes: Conflict Management Committees In Zambia'**, 2001 - 2011
12. International IDEA, **'International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections'** (Stockholm: International IDEA, 2002)
13. International IDEA, **'A Practical Guide to Constitution Building'** (Stockholm: International IDEA, 2011)
14. Kriger N: **'ZANU (PF) Strategies in General Elections, 1980-2000: Discourse and Coercion. African Affairs'**, 2005 104(414): 1-34
15. Ndlovu-Gatsheni S.J : **"Nationalist-Military Alliance and the Fate of Democracy in Zimbabwe African Journal on Conflict Resolution"**, (2006) 6(1): 40-80

16. Ndlovu-Gatsheni S.J : **Elections in Zimbabwe: “A recipe for tension or a remedy for reconciliation”**, 2012
17. Zimbabwe Election Support Network **Report on the Zimbabwe 29 March 2008 Harmonized Elections and 27 June Presidential Run-Off**. Harare: (2008)
18. Mack, R.W. and Snyder, R.C. (1957), **“The analysis of social conflict - toward an overview and synthesis”**, Journal of Conflict Resolution, Vol. 1, pp. 212-48.
19. Stanford G. Mukasa, **‘Press and Politics in Zimbabwe’**, Volume 7, Issues 2 & 3 2003 Published by the Center for African Studies, University of Florida. ISSN: 2152-2448 Press and Politics in Zimbabwe.
20. Sachikonye L, **‘Constitutionalism, the Electoral System and Challenges for Governance and Stability in Zimbabwe’** African Journal for Conflict Resolution 2004/2
21. Ndlovu-Gatsheni SJ Elections in: **‘The Solution or Complication to Zimbabwe’s Political Impasse?’** Paper presented at the Institute of Justice and Reconciliation (IJR) Workshop on Assessing Zimbabwe’s Electoral Readiness, Harare: Monomotapa Crowne Plaza Hotel, Zimbabwe, 21 October(2010)
22. Ndlovu-Gatsheni S J: **‘Elections in Zimbabwe: a recipe for tension or a remedy for reconciliation?’** 2012
23. Zimbabwe Electoral Support Network: **“Conflict resolution in electoral processes: the case of Zimbabwe”** <https://www.zesn.org.zw/wp-content/uploads/2019/03>.