

IN THE CONSTITUTIONAL COURT OF ZIMBABWE

CASE NO CCZ____/18

HELD AT HARARE

In the matter between.

NELSON CHAMISA

APPLICANT

And

EMMERSON DAMBUDZO MNANGAGWA

1ST RESPONDENT

And

JOSEPH BUUSHA

2ND RESPONDENT

And

MELBAH DZAPASI

3RD RESPONDENT

And

NKOSANA MOYO

4TH RESPONDENT

And

NOAH MANYIKA

5TH RESPONDENT

And

PETER WILSON

6TH RESPONDENT

And

TAURAI MTEKI

7TH RESPONDENT

And

THOKOZANI KHUPE

8TH RESPONDENT

And

DIVINE MHAMBI

9TH RESPONDENT

And

LOVEMORE MADHUKU

10TH RESPONDENT

And

PETER MUNYANDURI

11TH RESPONDENT

And

AMBROSE MUTINHIRI

12TH RESPONDENT

And

TIMOTHY JOHANNES CHIGUVARE

13TH RESPONDENT

And

JOICE MUJURU

14TH RESPONDENT

And

KWANELE HLABANGANA

15TH RESPONDENT

And

EVARISTO CHIKANGA

16TH RESPONDENT

And

DANIEL SHUMBA

17TH RESPONDENT

And

VIOLET MARIYACHA

18TH RESPONDENT

And

BLESSING KASIYAMHURU

19TH RESPONDENT

And

ELTON MANGOMA

20TH RESPONDENT

And

PETER GAVA

21ST RESPONDENT

And

WILLIAM MUGADZA

22ND RESPONDENT

And

ZIMBABWE ELECTORAL COMMISSION

23RD RESPONDENT

And

THE CHAIRPERSON OF THE ELECTORAL COMMISSION

24TH RESPONDENT

And

THE CHIEF EXECUTIVE OFFICER

OF THE ELECTORAL COMMISSION

25TH RESPONDENT

founding affidavit

(a) The deposition

I NELSON CHAMISA make oath and state as follows:

- 1.1 I am an adult male Zimbabwean and an applicant in this matter. I was the MDC Alliance presidential candidate in the recently held presidential elections. I depose to the facts of this matter in my personal capacity and my deposition is true and correct. Where I refer to legal matters, I rely on the advice of counsel and my entire legal team.

(b) The respondents

- 1.2 First respondent is **EMMERSON DAMBUDZO MNANGAGWA** an adult male Zimbabwean and the current president of the Republic of Zimbabwe. First respondent participated in the just ended elections as a presidential candidate and was declared the winner by the twenty fourth respondent. His return is in issue.
- 1.3 Second respondent is **JOSEPH BUUSHA** an adult male Zimbabwean who also participated in the just ended elections as a presidential candidate.
- 1.4 Third respondent is **MELBAH DZAPASI** an adult female Zimbabwean who too participated in the just ended elections as a presidential candidate.
- 1.5 Fourth respondent is **NKOSANA MOYO** an adult male Zimbabwean who also participated in the just ended elections as a presidential candidate.
- 1.6 Fifth respondent is **NOAH MANYIKA** an adult male Zimbabwean who participated in the just ended elections as a presidential candidate.
- 1.7 Sixth respondent is **PETER WILSON** an adult male Zimbabwean who participated in the just ended elections as a presidential candidate.

- 1.8 Seventh respondent is **TAURAI MTEKI** an adult male Zimbabwean who too participated in the just ended elections as a presidential candidate.
- 1.9 Eighth respondent is **THOKOZANI KHUPE** an adult female Zimbabwean who also participated in the just ended elections as a presidential candidate.
- 2.1 Ninth respondent is **DIVINE MHAMBI** an adult male Zimbabwean who also participated in the just ended elections as a presidential candidate.
- 2.2 Tenth respondent is **LOVEMORE MADHUKU** an adult male Zimbabwean who also participated in the just ended elections as a presidential candidate.
- 2.3 Eleventh respondent is **PETER MUNYANDURI** an adult male Zimbabwean who also participated in the just ended elections as a presidential candidate.
- 2.4 Twelfth respondent is **AMBROSE MUTINHIRI** an adult male Zimbabwean who also participated in the just ended elections as a presidential candidate.
- 2.5 Thirteenth respondent is **TIMOTHY JOHANNES CHIGUVARE** an adult male Zimbabwean who also participated in the just ended elections as a presidential candidate.
- 2.6 Fourteenth respondent is **JOICE MUJURU** an adult female Zimbabwean who also participated in the just ended elections as a presidential candidate.
- 2.7 Fifteenth respondent is **KWANELE HLABANGANA** an adult male Zimbabwean who also participated in the just ended elections as a presidential candidate.
- 2.8 Sixteenth respondent is **EVARISTO CHIKANGA** an adult female Zimbabwean who also participated in the just ended elections as a presidential candidate.
- 2.9 Seventeenth respondent is **DANIEL SHUMBA** an adult male Zimbabwean who also participated in the just ended elections as a presidential candidate.
- 3.1 Eighteenth respondent is **VIOLET MARIYACHA** an adult female Zimbabwean who also participated in the just ended elections as a presidential candidate.
- 3.2 Nineteenth respondent is **BLESSING KASIYAMHURU** an adult male Zimbabwean who also participated in the just ended elections as a presidential candidate.
- 3.3 Twentieth respondent is **ELTON MANGOMA** an adult male Zimbabwean who also participated in the just ended elections as a presidential candidate.

- 3.4 Twenty-first respondent is **PETER GAVA** an adult male Zimbabwean who also participated in the just ended elections as a presidential candidate.
- 3.5 Twenty-second respondent is **WILLIAM MUGADZA** an adult male Zimbabwean who also participated in the just ended elections as a presidential candidate.
- 3.6 Twenty-third respondent is the **ZIMBABWE ELECTORAL COMMISSION** a constitutional commission tasked with overseeing the conduct of elections in Zimbabwe.
- 3.6.1 Twenty-fourth respondent is the **CHAIRPERSON OF THE ELECTORAL COMMISSION** who is cited in her official capacity. She is cited because her actions in her official capacity are in issue.
- 3.6.2 Twenty fifth respondent is the **CHIEF EXECUTIVE OFFICER OF THE ELECTORAL COMMISSION**. He is cited because the relief sought requires his execution.
- 3.7 The addresses for service for all the respondents appear in the notice attached hereto.

(c) **Nature of the application**

- 3.8 This application challenges the results of the presidential election announced irregularly by the 23rd and 24th respondents on the 2nd of August 2018. It also challenges the declaration by the twenty third respondent that first respondent is the duly elected presidential candidate for the presidential election that took place on the 30th of July 2018.
- 3.9 I will in this application place reliance on the affidavits of **MORGEN KOMICHI** and **JAMESON TIMBA** which are attached hereto. The gentlemen were my Presidential and Chief Election Agents respectively. I will also place reliance on some other supporting affidavits, reports, videos and photographs. I will have two bundles of evidence. the first relates to the documents attached to this affidavit. The second relates to a bundle, separately bound but filed herewith.
- 4.1 My challenge to both the result of the election and the declaration of first respondent as the winner is primarily based on procedural and statistical/mathematical grounds. I will however, and for purposes of completeness, refer to certain background issues which have a material bearing on the application particularly in so far as the conduct of the twenty third respondent is concerned. That background is also called in aid as a subsidiary basis for the challenge.

(d) **Background issues**

4.2 The background to this challenge is set out below.

4.3 As already indicated, I contested for the office of the President of Zimbabwe in the recently concluded elections. In the run-up to the elections, twenty-third respondent involved itself in a litany of constitutional and electoral law violations all of which had the effect of undermining the just conduct of the elections. Loud protests against those violations went unheeded with twenty-third respondent taking an attitude which vacillated between arrogance and obduracy. In all that, twenty-third respondent took positions which were biased in favour of the first respondent. At the end of the day, it was clear that twenty-third respondent had no intention of conducting a proper election. In the event, it did not.

4.4 It is important that I relate to those violations since they show that no proper election was conducted. The main basis upon which I impugn the election result announced and the declaration of first respondent as the President will however, be dealt with separately. For the avoidance of doubt, these background issues are also part of the substantive challenge. The evidence to these background issues is contained in the separately bound volume of evidence which I will call "123 series".

CONSTITUTIONAL LAW BREACHES

i. **Lack of Independence of the Zimbabwe Electoral Commission**

4.5 An independent Electoral Commission goes to the very heart of a free, fair and credible election. The twenty-third respondent clearly lacked independence and the situation was not helped by the conduct of its chair which is articulated below. The lack of independence, transparency and accountability was meant to and did benefit first respondent. Not only were blatant violations committed by the twenty-third respondent but it also turned a blind eye to those which it should have condemned.

ii. **Failure of State owned media of communication to comply with Section 61(4)**

4.5.1 The Constitution requires the state media to be impartial and objective. This was not so with the ZBC, The Herald and The Chronicle and yet not once did the twenty-third respondent speak about the violations. The ZBC, which is a State-owned broadcaster created by statute, was a propaganda arm of first respondent and brazenly breached

section 61(4) of the Constitution for the entire duration of the Election Campaign. The relevant footage will be played in court and the relevant newspapers placed before it.

4.5.2 Furthermore the Herald and the Chronicle, directly State-owned media of communication, were likewise in breach of this provision. Given that there are no other television stations in the country and that the Herald by its own admission is the largest circulation daily in the nation this was a serious breach of the Constitution which also went to the heart of the election. It should also be pointed out that well over 60% of the electorate in the rural areas only receive their information from the ZBC so this breach had, likewise, a profound effect on the electorate's outlook and their ability to understand the divergent views and dissenting opinions offered by parties and candidates other than ZANU PF and first respondent.

4.5.3 The conduct of the public broadcasters articulated above is also in breach of the Electoral Act. ZEC was obliged to call the public broadcasters to order over these violations but refused to do so. The failure by ZEC to ensure that there was an impartial and fair coverage of the election goes to the root of the election, particularly when regard is had to the relevant constitutional provisions.

iii. **Conduct of members of security forces**

4.5.4 There is a substantial body of evidence which shows that the military were deployed throughout the country prior to the vote and acted to promote the interests to ZANU PF and Mnangagwa. Relevant reports are attached and form part of the separate bundle.

4.5.5 Prior to the announcement of the results the actions of the military in the streets in Harare on the afternoon on Wednesday the 1st August 2018, where they fired live ammunition on defenceless civilians, demonstrated the partisan nature of the military. Given that it is only first respondent who could have deployed them, the link between the two becomes stark. It shows where their allegiances lie.

ELECTORAL ACT BREACHES

4.5.6 For the sake of convenience, the Act will be considered sequentially.

i. **General principles affecting conduct of elections**

4.5.7 Section 3 (a) of the Electoral Act states that elections are to be conducted "freely, fairly and transparently. Section 3 (c) (v) states that every political party has the right to

have “reasonable access to all material and information for it to participate in every election”.

4.5.8 During the election campaign two events happened which demonstrate the unfairness of ZEC in favour of ZANU PF/Mnangagwa and which were prejudicial to my interests.

4.5.9 It is common cause that Mnangagwa obtained access to the unique combination of voters’ ward details and cellphone numbers. The SMS’s were sent out to voters’ cellphones encouraging them to vote for ZANU PF. When challenged about this ZANU PF said that they had got this data from their own sources from people who had indicated an interest in supporting ZANU PF. There were numerous reports at the time by people in response to that stating that they had never given such information to ZANU PF nor had they ever expressed any interest in supporting ZANU PF. Others pointed out that their addresses had only changed recently and that the only organization which had their addresses were ZEC. Cellphone service providers denied that they had given out the information to ZANU PF or anyone else for that matter. In other words the only possible source with the unique combination of ward details and cellphone numbers could have come from was ZEC. All voters who registered were required to give their current address and their cellphone numbers to ZEC who held that information. It is apparent from this that ZEC released that information to ZANU PF unfairly and in a discriminatory fashion in favour of ZANU PF and Mnangagwa. There are court records on this issue which will be placed before the court.

4.5.10 In direct contrast to this I requested the full BVR version of the Voter’s Roll generated in terms of Section 20 (2) of the Act as read with section 9 of the Electoral (Voter Registration) Regulations SI 85/2017 but my request was turned down for no apparent reason.

ii. **ZEC’s responsibility to compile voter’s rolls**

4.5.11 Section 18 of the Act gives ZEC the responsibility to register voters who are qualified to register and to vote in terms of section 1 of the Fourth Schedule of the Constitution of Zimbabwe. It is trite and common cause that only voters who are eligible should be registered and that no duplicate entries are allowed by law.

4.5.12 It is also common cause that the voter registration exercise was done in the course of the few months leading up to the calling of the election, in other words was done recently and one would expect that all the details would be up to date. A variety of audits of the voters roll prepared by ZEC were done. The audits conducted show that 11% of voters could not be found, which, when extrapolated, amounts to some 625 000 voters. In other audits done by civic organizations the voters roll was found to have serious discrepancies including duplicate voters, false I.D. numbers and false surnames. The reports form part of the separate bundle.

4.5.13 The conduct of ZEC was in breach of the law in that it registered people who were ineligible to be on the roll.

iii. **Wearing of partisan clothing**

4.5.14 It is common cause that the Chairperson of ZEC, Judge Priscilla Chigumba was appointed by first respondent on the 1st February 2018. On or about the 5th February 2018 Judge Chigumba was given and allowed herself to be photographed in regalia which was used by one of the candidates in the election: Emmerson Mnangagwa. The scarf was used in all first respondent's promotional material and became symbolic of his campaign. Judge Chigumba was accordingly guilty of wearing an article of clothing associated with a candidate in breach of the law.

4.5.15 The conduct of the Chairperson of the twenty-third respondent makes it clear that the umpire in this election had decided to pitch camp with one of the contestants. Such conduct is with respect unforgivable. It is that kind of conduct which explains the many irregularities that are related to in this affidavit.

iv. **Failure to provide a complete Voter's Roll**

4.5.16 Section 20(2)(c) of the Electoral Act states that "Voter's Rolls shall specify that such other information as may be prescribed or as the Commissioner considers appropriate". The voters roll supplied to me did not contain any biometric data on it, such as photographs and fingerprints. Section 9(c) of the Electoral (Voter Registration) Regulation SI 85/2017 states that the voter's photographs" is to be included in the voters poll. This information was not supplied to me. No explanation for the failure to supply the information exists.

v. **Voter Education**

4.5.17 The function to provide unbiased voter education is that of the commission. It is common cause that ZANU PF asked for permission to use sample ballot papers to engage in its own voter education process. ZEC Commissioner Dr Qhubhani Moyo issued a statement that ZANU PF made this request which permission was denied by ZEC to ZANU PF.

4.5.18 It is however, common cause that on Thursday the 26th July and Friday the 27th 2018 several ZANU PF candidate MPs were found in possession of reams of sample presidential ballot papers which ZANU PF had printed and packaged and distributed to its candidate MPs in breach of the law. The relevant evidence forms part of the bundle of evidence. ZEC did nothing by way of dealing with these violations.

4.5.19 There is however, no assurance that the material related to above was simply educational material. The use of such material provided fertile ground for rigging through ballot swapping and stuffing.

vi. **Alphabetical order of surnames on ballots**

4.5.20 The ballot paper designed by ZEC was designed in breach of the law and in a manner meant to benefit first respondent. Section 57 (a) states that every ballot paper shall be “in the form prescribed” and in terms of Section 57 (a) (i) the names “of all the duly named candidates” are to be in “alphabetical order of surnames”.

4.5.21 In terms of the first schedule, Form V10, of the Electoral Regulations set out in Statutory Instrument 21/2005, updated on the 1st June 2018 – The Presidential Ballot Form – it is prescribed that the Presidential Ballot is to be on one page. In addition in terms of Section 3 (11) of the same regulations horizontal segments “shall equate to the number of candidates nominated for the election” and there shall be four vertical segments containing the names of the candidates, name of the party, the symbol of the party and passport sized photograph of the candidate.

4.5.22 It is common cause that ZEC produced a presidential ballot that was not on a single page with four vertical columns as described in the Act and Regulations but with some ten vertical columns and designed in such a way to give a preference to one candidate, namely Mnangagwa, in itself a breach of both the alphabetical order of the surnames required in terms of Section 57 (a) (i) of the Electoral Act and section 235 (1)(c) and 236 (1) of the Constitution which requires ZEC not to act without fear, favour or

prejudice or to favour the interests of any political party or prejudice the interests of any other political party.

4.5.23 The breach of the law in this regard was meant to afford first respondent a material advantage and also speaks to the lack of impartiality of the umpire.

vii. **Fixing of polling station returns on the outside of polling stations**

4.5.24 Section 64(1) (c) states that presiding officers of polling stations are obliged to “affix a copy of the polling station return on the outside of the polling station so that it is visible to the public who wish to do so may inspect it and record its contents”.

4.5.25 This provision was however, only complied with at 79% of polling stations. In other words at 21% of polling stations presiding officers did not post polling station returns on the outside of polling stations. The relevant evidence of this violation forms part of the bundle of evidence.

4.5.26 This irregularity was meant to and did assist in twenty-third respondent rigging the election on behalf of the first respondent. The materiality of the irregularity is stark.

viii. **Postal Ballots**

4.5.27 Section 73 (2)(b)(ii) states that a member of the disciplined forces may apply for a postal ballot but such application can be sent as part of a batch by the Commanding Officer on behalf of that member of a disciplined force.

4.5.28 In terms of section 74(3) once an application for a postal ballot has been received by the Chief Elections Officer and approved The Chief Elections Officer of ZEC shall deliver it to “the nearest post office and dispatched by registered post” or “a commercial courier for delivery to the applicant”. Accordingly this section mandates that all postal ballots are to be addressed individually to the applicants as members of the disciplined forces, not to that applicants’ Commanding Officer or his station.

4.5.29 Section 75 of the Act states that once the postal ballot has been received by the member of the disciplined forces, that member has the right in terms of section 75 (1)(a) to vote secretly and then, in terms of section 75(1)(d), to “dispatch the covering envelope by registered post or by a commercial courier service, back to the Chief Elections Officer.” In other words, a postal ballot is to be dealt with secretly by the member of the disciplined forces at a time and place of his or her choosing and then posted back to ZEC by such member of the disciplined forces.

4.5.30 It is common cause that members of the Police were summoned by their Commanding Officers and ordered to vote collectively and to place their ballots in boxes which would then be returned collectively by such Commanding Officers to ZEC. The evidence of that malpractice is in the bundle of evidence. ZEC breached the law by posting the postal ballots, not to the individual applicants, but to their Commanding Officers in batches. This was done throughout the country. Approximately 7 500 ballots were processed in this manner.

4.5.31 The effect is to invalidate the entire postal vote.

ix. **Counting of Presidential Ballots**

4.5.32 The manner in which the collation and verification of the presidential results was done at the National Command Centre was in breach of statute. It is common cause that my agents were not notified of the date and place of verification, were not given an opportunity to make notes of the contents of each constituency return and were not present when the number of votes in each constituency return was counted.

4.5.33 Indeed the entire process of collating, verifying and counting the presidential ballots was done under a cloud of secrecy.

x. **Undue influence, threats to voters, injury, damage, harm or loss**

4.5.34 Section 134 (1) of the Electoral Act prohibits people from making use of threats or threatening any "injury, damage, harm or loss". Throughout the campaign both soldiers and ZANU PF operatives threatened rural inhabitants with injury or the loss of their landholdings or the loss of food aid if they and their communities did not vote for Mnangagwa and ZANU PF. The evidence of such threats is part of the bundle.

4.5.35 Despite widespread reports of such threats being made ZEC took no action to speak out against it, to investigate the same or to report the same to the ZRP for prosecution. There is accordingly no assurance that people in the rural areas cast their votes freely and voluntarily. What compounds this is the soft violence perpetrated through SMS messages in terms of which people were effectively told that the president knew and was watching them.

xi. **Bribery : provision of seeds and fertiliser packs**

4.5.36 Section 136 (1) (c) makes it an offence for any person who, directly or indirectly, by himself or herself or by any other person makes "any gift" to any person in order "to

induce such person to procure the return of a candidate in the election or the vote of a voter at an election”.

4.5.37 It is common cause that in the weeks prior to the election Mnangagwa and ZANU PF candidates systematically distributed seed packs and fertilizer, purchased using public monies, to rural communities to induce them to vote for Mnangagwa and ZANU PF candidates.

4.5.38 Notwithstanding the fact that these practices were widespread and well reported and ZEC failed to take any action to prevent such practices or to report the breaches to the ZRP for the prosecution of those responsible for such practices.

4.5.39 All these violations affect with respect the credibility of the election under challenge and have the effect of invalidating it.

LEGITIMACY

4.4.40 As a participant in the electoral process, I am aware that the most critical output of an election is legitimacy of government and that this legitimacy is based upon consent. It is from consent of the electorate that government acquires authority and legitimacy. Indeed, our Constitution, the supreme law of the country codifies this principle in various provisions where it is reiterated that authority to govern derives from the people.

4.4.41 For this reason, the process by which this consent is given, that is, the election, must be conducted in a free, fair, transparent and credible way. I am advised and believe that adherence to and fulfilment of electoral procedures as provided for by law is critical to the legitimacy of the election and its outcome. I am also advised and believe this confers a type of legitimacy known as procedural legitimacy.

4.4.42 For reasons that are outlined herein, the twenty-third respondent has failed and/or refused to adhere to or follow all the procedures as required by law or at any rate conducted itself in a fair, impartial and transparent manner. This conduct undermines the foundations of procedural legitimacy which is critical to the proper realisation of consent which is necessary for overall input legitimacy. These failures by twenty-third respondent must be viewed not as singular failings but in aggregate form so that the totality of their effect is to severely undermine the legitimacy of the election, including its outcome.

4.4.43 The breaches accordingly yield the invalidity of the election. Such an invalid election cannot confer either political or legal legitimacy. The people of Zimbabwe deserve a clean and credible process. They only have one chance in five years.

(e) **The main challenge**

4.6 At the close of polling at or around 19:00hrs on the 30th of July 2018, sample results from all over the country in the form of completed v11 forms were released and were all over social media. I attach the relevant v11 forms and mark them the “A series” Those results showed that I had in excess of 60% of the vote cast. The results were released from around 20:00hrs to 01:00hrs.

4.7 After it became apparent that first respondent was in a state of deep bother, twenty third respondent immediately stopped the counting in many polling stations and the completion of the necessary returns. The polling station returns v11 forms were not completed until the next day on the 31st of July 2018 when they once again started trickling at or around midday.

4.8 On the 31st of July 2018 ZEC started announcing the results of the parliamentary elections. For some strange reasons, no results from the cities were announced although one would have thought that ZEC had access to those first. Indeed, the last results to be announced were from Harare where the National Command Centre is stationed. This was deliberate and calculated on the part of the twenty-third respondent. Twenty third respondent is under no statutory obligation to manage the manner in which results are announced. The conduct of the twenty-third respondent was hardly surprising given the violations set out above and the attitude exhibited by it whenever issues of concern were raised.

4.9 Another day then passed by without the presidential results being announced. That was of concern. At the close of polling, it is the presidential ballots which are counted and accounted for first. In addition, our system is constituency based so in effect, twenty-third respondent had two hundred and ten results to announce.

5.1 On the 1st of August 2018 twenty third respondent started what it called a verification process and which it asked Messrs Komichi and Timba to witness. The process involved a group of people, in excess of twenty, punching in what was identified as v11 data into an excel spreadsheet. For close to two days that process continued. I defer to the affidavits of the two gentlemen which explain the manner in which that process was being conducted.

- 5.2 I was also aware that twenty-third respondent had received, as it should do, results from all the polling stations in real time and stored them into its sever.
- 5.3 Given the unexplained delays, I despatched the head of my legal team to the National Command Centre with instructions to request access to the server. Confirmation was made with ZEC (twenty third respondent) officials that the server did exist. Indeed it does exist. A letter was written making the request for my team to access the server. The letter is attached hereto and marked as "B" and its contents are fully prayed in aid.
- 5.4 That letter has still not been responded to by ZEC to this very day. There is obviously a reason ZEC will not respond to the letter much as there is a reason, they will not allow us access to the sever.
- 5.5 In the meantime the punching in of the v11 data at the National Command Centre ended. This was at or around 21.00 P.M on the 2nd of August 2018. It is at that stage that the verification process was supposed to start. We were to verify:
- a. The details of the constituency returns, v23b forms and see how they compared to the details on the excel spreadsheet.
 - b. What had been punched into excel and see how it compared to the v11 forms that we all had.
 - c. The tally yielded by the process which ZEC had preferred and how that total compared to what we had.
 - d. What was on the server was to be compared and if need be contrasted with what was on the V23b forms, the V11 forms and what had been punched into excel.
- 5.6 My agents demanded that the verification process take place. It had to take place by operation of law at any rate. It had to take place for all the issues set out above to be dealt with. The ZEC CEO Mr Salaigwana accepted that position and assured my agents that the results would not be announced without that process taking place and to that end, Mr Komichi was going to be called in for the verification process. Indeed, in terms of that process, Messrs Komichi and Timba had to sign off on the results before they were announced.
- 5.7 An indication had previously been given that there was to be an announcement of the presidential results at 22.00hrs. As at 21:55hrs Mr Komichi had received no call from the CEO, no verification had taken place and no signing of the papers to signify the

fact that there had been a verification had also taken place. He accordingly visited the CEO's office who told him that he was still going to contact him as he was still working on some processes. On his part, Mr Komichi was to patiently wait for that call.

5.8 As Mr Komichi was still waiting for the call, ZEC started announcing the results on live television. Mr Komichi had been sold a ruse. There was something that ZEC wanted to hide. It is those results that are challenged. It is the declaration made by the Chairperson pursuant to that announcement that is in issue and whose validity the court ought to look into.

(e.i) **The remit of the challenge**

5.9 I have already indicated that all my complaints are relevant to my challenge. The main basis of the challenge is however, narrow and is twofold. The two grounds upon which that challenge is premised are the following:

- a. There was a failure by ZEC to follow processes relating to the collation and announcement of the results and which processes are meant to establish the credibility of any results to be announced. The integrity of the result announced is therefore in issue for want of adherence by ZEC to that process. The process being both constitutional and statutory, there could be no departure from its demands nor is the court in a position to dispense with strict adherence to statute.
- b. The actual results announced by ZEC are themselves afflicted by gross mathematical errors in a manner which affects their validity. The errors are material and materially affect the declaration made by the chairperson of the twenty-third respondent. So patent are the inconsistencies it is clear that they were deliberately engineered by ZEC to favour the first respondent.

6.1 I deal with those in turn.

(f) **Failure to follow processes**

6.2 I contend that ZEC failed to follow mandatory legal processes and that such failure invalidates its processes which have to do with the announcement of the results and the declaration of a winner. The following are the respects in which ZEC deliberately flouted statutory processes bearing on a credible outcome;

(i) **No verification of the results**

6.2.1 In terms of the law, a presidential election is constituency-based. What is collated and verified at the National Command Centre are the v23b forms which show the constituency totals. Those were never made available to me or my agents prior to the announcement of the so called results and the purported declaration of a winner. Those were never verified. Indeed the constituency totals were not even announced by ZEC. What ZEC purported to do was to announce provincial results in a manner that sought to and did mask the many mathematical irregularities afflicting the results. The announcement of results by province does not itself have any known statutory parentage.

Accurate elections results are those that are declared and announced at the Polling Stations and contained in the Forms V11 and collated in v23a forms. Elections cannot be said to be verifiable if the primary source documents are not delivered and confirmed by the person making the final declaration of results.

6.2.2 For results to have any validity, they must be verified by all the players concerned. Queries must be raised and attended to. This is the statutory design. That process was not followed. The results announced not having gone through this process cannot be saved.

(ii) **No verification of relevant data**

6.2.3 Any verification process would have entailed the verification of the data on v23, v11 forms and the details punched into the ZEC sever. That process did not take place. In addition, there was not even any verification of the excel data and the totals allegedly produced by the figures inputted. That failure led to some glaring irregularities that will be related to later on. Indeed Excel sheet cannot form a basis for the announcement of results or a declaration. Excel sheet is the most insecure document that that can be deployed in elections. Its contents can be so easily manipulated and changed by the person making the entries or at a later time once the entries are made.

Failure to refer to the V11 Forms and the results posted on the servers would mean the elections are not verifiable. Adopting the use of technology in the elections was in furtherance of constitutional principles of transparency, accountability and verifiability. Sending results in advance to the servers was to protect against tampering with results once a declaration is made at the

polling station. If those results cannot be accounted for then the elections fail the test of verifiability and accountability

6.2.4 I point out that the most important stage of an election is the process of ascertaining the votes cast. The law has evolved certain safeguards that must be followed when a result is being ascertained. The process preferred by ZEC was meant to murky the waters, lacked transparency and credibility and ought to be interfered with.

(iii) **No signing off on results**

6.2.5 My agents were not afforded the opportunity to sign off on the results before they were announced. After the results had been announced, Mr Salaigwana tried in vain to have my agents sign the returns. It is of concern that this request was made after the announcement of results. This should have taken place before the announcement. As it stands, what is contained on Mr Salaigwana's returns is disputed and is even at variance with the figures his commission announced.

(iv) **Irregular announcement**

6.2.6 In terms of the law, the results of a presidential election must be announced on a constituency by constituency basis. The results challenged were for reasons that have not been stated and which are alien to law announced on a province by province basis. The motivation behind that violation was to conceal the blatant changes which had been effected to the relevant totals. No explanation was given by the twenty third respondent for that irregularity. It seems twenty-third respondent simply decided to turn the law on its head because it could do so. The failure to follow the law in that regard is inexcusable.

The point must be emphasized that presidential elections are constituency based and hence declaration of results are also constituency-based. The national figure merely tallies the results as declared for each constituency. Departure from this position affected the manner in which the elections were conducted and final declarations made.

(v) **Announcement process contrary to Act**

6.2.7 By our law, results of a presidential election must be announced by the Chairperson. In casu, the chairperson delegated, in her presence, the task to all the Commissioners. This was in breach of mandatory statutory provisions. No explanation exists for this breach.

6.3 For all these reasons, I submit that the relevant processes were not followed. That failure to follow processes means that the integrity of the result announced cannot be vouched for. The court has no assurance that the correct result was announced. Indeed wrong results were announced as will be demonstrated below. This is sufficient to yield the vacation of the entire process. Zimbabwe cannot be governed by a person who did not win the election.

(g) **Glaring mathematical errors, no win for first respondent**

6.4 I must at the outset indicate that on ZEC's own results, first respondent went above the statutory threshold by 0.8%. In real terms that means if thirty eight thousand (38 000) votes are knocked off from his total, he would have failed to scale the statutory tariff. On ZEC's own results there would be need for a run off. It is in that context that I raise the issues below;

(i) **Wrong results announced**

6.4.1 I will deal with this issue on a province by province basis for no other reason than that this is the process which twenty third respondent preferred in announcing the results. I intend to make it clear that twenty third respondent announced wrong results, which are at variance with its own data.

6.4.2 The results announced by ZEC claim that I garnered _____ in Harare and that first respondent had _____. The v11 forms which are separately bound as annexure "D series" show that I actually garnered _____ and first respondent garnered _____.

6.4.3 In SET OUT ALL THE PROVINCES

6.4.4 The results announced by ZEC do not tally with what ZEC has. In addition, this is what a verification process would have eliminated before a wrong result was announced. On that basis, the result cannot stand. The discrepancies are material. They put in issue the integrity of the entire computation process.

(ii) Figures do not tally

6.4.5 The total registered voters for the purposes of this election was given by ZEC as slightly over 5 600 000-00. It was announced by ZEC that the total votes cast were 72% of the registered voters-SEE "Annex E". The effect of that is that the votes cast should be slightly above 4 032 000-00 on that computation. The votes announced by ZEC however, give a total, depending on whether one considers the announcement or the data on the CD, some 4 775 640.00 and 4 774 878 respectively. That means from the results announced by ZEC, more than 700 000 votes cannot be accounted for. Obviously that huge figure materially affects the outcome of the election.

6.4.6 In addition, ZEC has made available on disc what it calls the relevant figures relating to this election. The data provided by ZEC on that disc is at variance with the figures it announced as already shown above. I attach hereto and mark as "F series" a comparative schedule showing the discrepancies between what ZEC announced and what it gave us as the data on the basis upon which the announcement was made.

(iii) No tally between parliamentary votes and presidential

6.4.7 The law and the process during voting is that every voter gets all the three ballot papers. If the voter does not want to vote for a House of Assembly representative or a Councillor, they are still required to cast that ballot which will however, be considered spoilt. The net effect is that the total votes cast for the presidential candidates must tally with those cast for the house of assembly candidates.

6.4.8 On the results announced by ZEC, the presidential tally was in all provinces higher than the house of assembly one. What that means is that by some unlawful and illicit process, the presidential tally was modified. The result announced is accordingly unfounded. I attach hereto and mark as "G" the relevant analysis that bears this out. It shows _____NUMBERS

(iv) Differences between v11 and v23-inflation and deflation

6.4.9 There are also instances where ZEC altered the data on its own returns. I attach hereto and mark as the "H1 and H2 series" evidence which shows that my votes were being reduced and those of first respondent being increased. The margin

is _____. The discrepancies come to light when the v11 and v23 data is considered which I also place before the court as “H3 series”.

6.5.1 Further, ZEC also gave some of the contestants votes which they did not garner. I make reference in this regard to _____ RELATE TO ALL THAT.

6.5.2 Once there is such evidence, the credibility of the entire result cannot be vouched for. What is important is that these irregularities are apparent from ZEC’s own returns and have an invalidating effect of ZEC’s own pronouncement and declaration.

(v) **More voters than those registered**

6.5.3 The evidence attached hereto and marked as the “I series” shows that more people than were registered voted. In some instances, more than a thousand people voted per polling station and yet there could only be a maximum of a thousand registered voters per station. In yet other instances, although the votes recorded are below one thousand, there are still higher than the number of registered voters at those polling stations. That is what created ghost votes which were given to first respondent. The result announced, based as it is on ghost votes can have no validity and that circumstance materially affects the outcome of the election.

6.5.3 It is important to point out that in all instances in which more votes were cast than those registered, it is the first respondent who would amass the bulk of the vote. My vote would always remain within the acceptable range. What that shows with respect is that there was an illegitimate stashing of votes. That also explains why no results were posted at 21% of the polling stations.

6.5.3.1 Further, there are polling stations where ZEC claims there was a plus 90% turnout. This is unimaginable. In those areas where there was a plus 90% turnout, first respondent was given a total of 352 897 votes. I attach hereto the analysis and mark it “Ii”. I also make reference to the affidavits of the experts attached hereto.

(vi) **No tally between people who voted and results announced**

6.5.4 The results as announced by ZEC are fundamentally different from the actual votes cast. A case in point is that of Mashonaland Central. ZEC announced that

the total votes were _____. The correct position as shown in the "J series" hereto attached is that only _____ people voted. The effect therefore is that _____ votes were created. The other affected areas are _____. The analysis is attached hereto as the "J1 series"

6.5.5 The case of Mashonaland Central is quite intriguing. At 17:30hrs on the polling day, ZEC announced that 105 000 people had cast their votes by 17:00hrs. See annexure "K" attached hereto. The results announced by ZEC allege that 444k_____ people voted. The effect is that 370 000 people voted in two hours. That takes everyone for granted. It means in reality that ___persons voted per second in the last two hours. That is simply ridiculous.

6.5.6 I however, make reference to the attached affidavits of _____ which show that no increase in the number of voters towards the close of poll was noted on the day. The plus three hundred thousand voters simply do not exist.

(vii) **Civil servants who did not vote**

6.5.7 A total of _____ civil servants did not vote on account of their being on duty on the polling day. I have established that of that number 40 000 teachers did not vote. The issue had arisen prior to the election and despite promises being made, nothing was done to attend to the problem. It is disheartening that notwithstanding the clear provisions of the law on the matter, government was at the forefront of violating rights of employees.

6.5.8 It is an open secret that civil servants have always voted against the administration. The attempt to disenfranchise them was meant to affect the opposition vote and on the available evidence, my vote in particular.

6.5.9 In this regard, I make reference to the affidavit of _____ showing the actual numbers of state employees who were disenfranchised. I once again make the point that the numbers involved materially affect the outcome of the election.

(viii) **Postal vote**

6.6.1 It was advised by the twenty third respondent that a total of some 7500 police officers had applied to vote by postal ballot. The postal voting process is set out in the Act and is not what twenty third respondent superintended over. The video evidence attached hereto and marked as "L series" shows that a mock

polling day voting was conducted without even the knowledge of the contesting candidates. The officers were made to vote in the presence of their superiors. Whilst that forms the backdrop, the crux of the matter is that there was no proper voting process in respect of the 7500. The number involved when taken together with the other numbers set out above cannot be ignored and would have a definite effect on the outcome of the election.

(ix) Assisted votes

6.6.2 A disconcerting aspect of this election is the number of assisted voters. A total of voters _____ from areas _____ were assisted to vote. That represents an increase of _____ from 2013, of _____ from 2008 etc. This being in the context of voter intimidation and the SMS which were being sent to prospective voters had a huge effect on the election. This kind of irregularity cannot be ignored without the court condoning serious electoral malpractices.

(x) Collated twice

6.6.2.1 There is also evidence showing that ZEC collated results at some polling stations twice that is to say polling stations were counted twice. I refer the court to annexure "L1". This created an increase of 9035 votes. Of those, first respondent was as is the case where all irregularities are apparent the beneficiary. The mathematics shows that he got 7703. The 7703 votes do not exist and must be subtracted from his total.

(xi) Missing Polling stations

6.6.2.1 On voting day 21 polling stations went missing. The details of the missing polling stations are set out in annexure "L2" attached hereto. The aggregate number of registered voters for those polling stations is _____.

(xii) No tallies posted

6.6.2.2 At the close of counting the valid votes taken at every polling station the law requires that the results per polling station be affixed to a notice board. The purpose of this is to preserve the integrity of the vote and ensure that the election officials report the truth. At 21% of the polling stations, the relevant results were not affixed. This accounts for more than 2000 polling stations. More than that the breach gave ZEC the opportunity to manipulate the vote, it is one which is totally unpardonable. What is even more interesting is that this

21% is in _____. I refer to the attached report which I mark as “L3” which deals with the failure by ZEC to post the relevant results.

(xiii) **Identical results**

6.2.2.3 Further clear evidence of fraud is apparent in certain results which are identical. Candidates would get the same number of votes at different polling stations. There chances of that happening in life are next to zero.. The analysis attached here and marked as “L4” which draws from ZEC’s own tally bears that out. There can be no doubt that these results are man made and nothing can depend on them.

(xiv) **Percentages not adding up**

6.2.2.4 The results which are on ZEC’s CD do not add up to 100% as they should. They instead add up to 98.4%. Further, a consideration of that data also reflects first respondent with 50.67% and not the 50.8% announced by ZEC. This also goes on to show the lack of both reliability and credibility of the results announced.

(xv) **No voters roll**

6.6.3 All these irregularities took place under circumstances where I did not have the final voter’s roll. The roll used for polling is one that I have never had, one that I had not seen prior to the 30th of July 2018 and indeed one that I still do not have to the present day. That an election could take place under such circumstances is deeply disturbing. This gave the twenty third respondent the opportunity to illegitimately assist the first respondent.

(xi) **After the fact**

6.6.4 Even after the declaration of the result, twenty third respondent has involved itself in malpractices which are meant to correct the glaring anomalies that I have referred to above. Polling Agents are being forced to change v11 forms. I attach hereto some sample affidavits dealing with the issues and mark it “M series”. My technical team is being harassed amidst so many threats of arrests over trumped up charges. The environment has been heavily militarised and shows an administration which is afraid. The question to ask is why would first respondent behave in such a desperate manner if he won the election?

(h) **Other violations**

6.7 There are a series of other violations and discrepancies which are bound together in annexure “N series” hereto attached. I draw the court’s attention to them. The violations are material and affect the figures in a big way.

(i) **The materiality**

6.8 It is important that these mathematical violations be considered together with the constitutional and statutory violations that I have already referred to. There is one constant. It is that all irregularities were meant to and did unduly favour the first respondent. The violations go to the root of a proper and credible electoral process. These are accordingly irregularities that cannot be ignored. These are irregularities that do not arise from mistakes.

6.9 In addition, it is submitted that these mathematical irregularities have a material bearing on the outcome of the election. The figures show _____ votes given to first respondent and _____ given to _____. The figures show that some 500 000 cannot be accounted for _____. The 0.8% given to first respondent does not therefore exist.

7.1 For all these reasons, what ZEC announced does not reflect the will of the people of Zimbabwe. On that basis, the result must be set aside. So too must the declaration relating to first respondent being the winner and accordingly the president elect of the republic.

(j) **Our votes**

7.2 Although I am not the one on trial, I point out that my tally of votes is 2 674 032 as against 2 008 639 for the first respondent. That is in terms of what is on the ZEC sever. I will by separate process subpoena those results. I point out that these are the entries made in real time by ZEC before it connived to change the results.

(k) **Relief**

7.3 I submit that the evidence placed before the court shows gross irregularities which affect the validity of the election and its outcome. That being the case, I submit that the entire process must be declared invalid and accordingly set aside.

7.4 As is borne out by the results on the ZEC sever, I won the election and won it resoundingly. The court is therefore in a position in which it can declare the fact of

my victory. This is also clear when the manufactured results given to first respondent are excluded from the final computation.

7.5 Alternatively, the court has to order a fresh poll simply because the data that ZEC has is just too compromised to be made the basis of anything.

7.6 I also pray for costs such costs being borne by the twenty-third respondent, jointly and severally with such other respondents as choose to join with him in opposing this application.

7.7 In the premises, I pray for an order in terms of the draft hereto attached.

THUS DONE AND SWORN TO AT HARARE THIS ____ DAY OF AUGUST 2018

SIGNED

NELSON CHAMISA

BEFORE ME

COMMISSIONER OF OATHS

IN THE CONSTITUTIONAL COURT OF ZIMBABWE

CASE NO CCZ____/18

HELD AT HARARE

In the matter between:

NELSON CHAMISA

APPLICANT

And

EMMERSON DAMBUDZO MNANGWAGWA

1ST RESPONDENT

And

JOSEPH BUUSHA

2ND RESPONDENT

And

MELBAH DZAPASI

3RD RESPONDENT

And

NKOSANA MOYO

4TH RESPONDENT

And

NOAH MANYIKA

5TH RESPONDENT

And

PETER WILSON

6TH RESPONDENT

And

TAURAI MTEKI

7TH RESPONDENT

And

THOKOZANI KHUPE

8TH RESPONDENT

And

DIVINE MHAMBI

9TH RESPONDENT

And

LOVEMORE MADHUKU

10TH RESPONDENT

And

PETER MUNYANDURI

11TH RESPONDENT

And

AMBROSE MUTINHIRI

12TH RESPONDENT

And

TIMOTHY JOHANNES CHIGUVARE

13TH RESPONDENT

And

JOICE MUJURU

14TH RESPONDENT

And

KWANELE HLABANGANA

15TH RESPONDENT

And

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And

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ELTON MANGOMA

20TH RESPONDENT

And

PETER GAVA

21ST RESPONDENT

And

WILLIAM MUGADZA

22ND RESPONDENT

And

ZIMBABWE ELECTORAL COMMISSION

23RD RESPONDENT

And

THE CHAIRPERSON OF THE ELECTORAL COMMISSION

24TH RESPONDENT

And

THE CHIEF EXECUTIVE OFFICER

OF THE ELECTORAL COMMISSION

25TH RESPONDENT

draft order

Harare, the of 2018

Before the full court

_____ for the Applicant

_____ for the Respondent

WHEREUPON after reading documents filed of record and hearing Counsel

IT IS DECLARED THAT:

- 1 The election results announced by the Commissioners of the Zimbabwe Electoral Commission on the 2nd of August 2018 and the concomitant declaration of that same date by its chairperson to the effect that Emmerson Dambudzo Mnangagwa was to be regarded as the duly elected President of the Republic of Zimbabwe with effect from the 2nd of August 2018 is in terms of section 93(4)(b) of the Constitution of Zimbabwe as read together with section 111(2)(b) of the Electoral Act (Chapter 2:13) declared unlawful, of no force or effect and accordingly set aside.
- 2 The applicant, Nelson Chamisa is in terms of section 93(4) of the Constitution of Zimbabwe declared the winner of the presidential election held on the 30th of July 2018.

CONSEQUENTLY IT IS ORDERED THAT:

- 2 Twenty-fifth respondent shall publish in the Government Gazette this order and the declaration of the election of the applicant to the office of the president of the republic of Zimbabwe.

ALTERNATIVELY

- 3 In terms of section 93(4)(b) an election to the office of president of the republic of Zimbabwe shall be held within sixty days of this order.
- 4 Costs of this application shall be borne by the Zimbabwe Electoral Commission.

BY THE JUDGES

BY THE REGISTRAR

IN THE CONSTITUTIONAL COURT OF ZIMBABWE

CASE NO CCZ____/18

HELD AT HARARE

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NELSON CHAMISA

APPLICANT

And

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THE CHAIRPERSON OF THE ELECTORAL COMMISSION

24TH RESPONDENT

And

THE CHIEF EXECUTIVE OFFICER

OF THE ELECTORAL COMMISSION

25TH RESPONDENT

**APPLICATION IN TERMS OF SECTION 93(1) OF THE CONSTITUTION OF
ZIMBABWE, 2013 FILED PURSUANT TO RULE 23 OF THE CONSTITUTIONAL
COURT RULES SI 61 OF 2006**

TAKE NOTICE that the applicant intends to apply to the Constitutional Court for the Order in terms of the Draft Order annexed to this notice and that the accompanying Affidavits and documents will be used in support of the application.

If you intend to oppose this application you will have to file a Notice of Opposition in Form CCZ 2, together with one or more opposing affidavits with the Registrar of the Constitutional Court at Harare within 3 days after the date on which this notice was served upon you. You will also have to serve a copy of the Notice of Opposition and affidavits on the applicant at the address for service specified below. Your affidavits may have annexed to the documents verifying the facts set out in the affidavits.

There is no need for an order granting direct access of leave to approach the court.

DATED AT HARARE THIS ____ DAY OF AUGUST 2018

ATHERSTONE & COOK

Applicants' Legal Practitioners

119 J. Chinamano Avenue

HARARE (Mr Chagonda)

AND TO THE REGISTRAR

Constitutional Court of Zimbabwe

HARARE

AND TO THE RESPONDENTS AS SET OUT IN THE ATTACHED NOTICE

HARARE

IN THE CONSTITUTIONAL COURT OF ZIMBABWE

CASE NO CCZ____/18

HELD AT HARARE

In the matter between.

NELSON CHAMISA

APPLICANT

And

EMMERSON DAMBUDZO MNANGWAGWA

1ST RESPONDENT

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