

BRIEFING  
ZIMBABWE'S 2013 ELECTIONS  
*Two Constitutional Controversies and Comments on Some  
Structural Matters*

***Greg Linington***

Greg Linington is a lecturer in Constitutional Law in the Department of Political and  
Administrative Studies at the University of Zimbabwe.  
e-mail: sgl@zol.co.zw

ABSTRACT

*Zimbabwe's 2013 elections were tainted with illegality. This article focuses on two constitutional issues: the election date controversy and the use of the Presidential Powers (Temporary) Measures Act to effect amendments to the Electoral Act. It is argued that the language of the Constitution was not followed. An artificial interpretation of the relevant constitutional provisions undermined the rule of law and the separation of powers. This is disturbing, since the meaning of the constitutional provisions concerned is not obscure. The article also describes some of the 'structures' under which the election was conducted. The powers and composition of the Zimbabwe Electoral Commission, the impact of proportional representation on the legislature and the rules governing the election of the president are therefore outlined and explained.*

INTRODUCTION

This article has two main purposes. The first involves examining the correctness of the Constitutional Court's decision concerning the date of the 2013 elections. The second is to consider the constitutionality of the use of the Presidential Powers (Temporary) Measures Act to amend the Electoral Act. These are both vital issues because they are at the heart of the debate about whether the 2013 elections really were free and fair. Of course, the elections were adversely affected by a number of irregularities, but it is not possible to discuss them all in a short article like this one.

In addition to addressing the controversies referred to above I have thought it necessary to say something about three 'structural' matters. These are the

Zimbabwe Electoral Commission (ZEC), the body that administers elections; proportional representation and the rules concerning the election of the president. The advent of proportional representation is a new development in Zimbabwe's electoral history. An understanding of the structure and functions of the ZEC and of how proportional representation affects the composition of Zimbabwe's legislature is helpful in forming a picture of the country's electoral framework. In the previous presidential election, in 2008, there was considerable controversy over whether the rules relating to the election of the president were complied with. Indeed, the controversy extended into a debate over what those rules were. Accordingly, I thought it necessary to state the current rules clearly.

### THE ZIMBABWE ELECTORAL COMMISSION

The Zimbabwe Electoral Commission, in its current form, was established by section 238 of the new Constitution. It consists of a chairperson and eight other members (s 238(1)). The chairperson is appointed by the president, who must first consult the Judicial Service Commission (JSC) and the Committee on Standing Rules and Orders (a parliamentary committee (s 238(1)(a)). The other eight members are chosen by the president from a list of at least 12 nominees produced by the Committee on Standing Rules and Orders (s 238(1)(b)). The committee cannot, however, simply put any names it likes on the list. It must first advertise the positions and 'invite the public to make nominations' (s 237 (1)(a) and (b)). The committee must then interview prospective candidates in public (s 237(1)(c)). Only then will the committee be entitled to come up with a list for the president (s 237(1)(d) and (e)).

Both the committee, in preparing the list, and the president, in appointing the members, must be mindful of the fact that ZEC members have to be Zimbabwean citizens (s 238(4) of the new Constitution). In addition, they must be 'chosen for their integrity and experience and for their competence in the conduct of affairs in the public or private sector' (s 238(4)). Members of Parliament, provincial or metropolitan councils, local authorities and 'government controlled entities' (s 320(3)) are not entitled to become members of the ZEC (s 320(3)). Also excluded are public officers (but not judges) and employees of state or state-controlled bodies (s 240).

The president's discretion with regard to the appointment of the chairperson is limited by the fact that the appointee must be a person who is, or was, a judge, or is entitled to be appointed as one (s 238(2)). In making the appointment the president is not bound by any recommendation made by the JSC. This is the effect of the words 'after consultation', as they appear in s 238 (1)(a) of the new Constitution. However, if the president does not adopt such a recommendation,

he 'must cause the Committee on Standing Rules and Orders to be informed as soon as practicable' (s 238(3)). The committee is not given specific powers to take any action in such a situation. The implication appears to be that where a recommendation is not followed the committee may 'question' the president's decision. This may 'embarrass' the president, so that normally he will only ignore a recommendation if he has good reason to do so.

Members of the ZEC may serve for a maximum of two six-year terms (s 238(5)). A member may only be removed from office for:

- (a) inability to perform the functions of the office, either because of physical or mental incapacity;
- (b) gross incompetence;
- (c) gross misconduct; or
- (d) becoming ineligible for appointment to ZEC (s 237(2)).

A special tribunal must be established in order to determine whether any of these grounds exists. The tribunal is appointed by the president, who may only do so if he receives advice to that effect from the JSC (s 187(3)). The procedure adopted is, in fact, identical to that used to consider whether a judge ought to be removed from office. If the tribunal recommends that a member be removed, the Minister of Justice must submit copies of the tribunal's report and advice to each house of Parliament 'as soon as practicable ... and ... no later than seven sitting days of whichever House meets first after the date on which the report and advice were delivered to the president' (s6A of the Electoral Act). It is the president who formally removes a member, but he must act in accordance with the recommendation of the tribunal (s 187(8) of the new Constitution).

Commissioners must disclose any pecuniary or property interests that may be in conflict with their duties as members of ZEC (ss 237(3) and 187 of the new Constitution). This measure is, of course, designed to enhance the independence of the ZEC. In fact, the ZEC is one of the commissions described as 'independent' by section 232 of the new Constitution. Section 235 of the new Constitution stipulates that:

1. The independent commissions
  - (a) are independent and are not subject to the direction of control of anyone;
  - (b) must act in accordance with this Constitution;
  - (c) must exercise their functions without fear, favour or prejudice; although they are accountable to Parliament for the efficient performance of their functions.

2. The state and all institutions and agencies of government at every level, through legislative and other measures, must assist the independent commissions and must protect their independence, impartiality, integrity and effectiveness.
3. No person may interfere with the functioning of the independent commissions.
4. Members are precluded from acting in a 'partisan manner' when exercising their functions (s 236(1)(a)) and must not 'further the interests of any political party or cause' (s 236(1)(b)). The rights, freedoms and lawful interests of persons and political parties must be respected by members (s 236(1)(c) and (d)).

The functions assigned to the ZEC are set out in section 239 of the new Constitution. Basically, its task is to 'prepare for, conduct and supervise elections' (s 239(a)). This means ensuring that elections are conducted 'efficiently, freely, fairly, transparently and in accordance with the law' (s 239(b)). Voter registration and the compilation of voters' rolls fall under the control of the ZEC, as does voter education and dealing with complaints from members of the public (s 239(c), (d) and (e)). The ZEC must report to Parliament on the conduct of every election (s 241). Part 1 of Schedule Six of the new Constitution confers certain additional powers on the ZEC for the purpose of enabling it to perform its functions effectively. The commission is also empowered to carry out and facilitate research into matters concerned with elections (s 5(a) of the Electoral Act). It must also inform the public about where to register as a voter, and related matters (s 5(d) of the Electoral Act).

#### PROPORTIONAL REPRESENTATION AND THE STRUCTURE OF ZIMBABWE'S PARLIAMENT

The new Constitution restructured Zimbabwe's Parliament. This, of course, meant that amendments had to be made to the Electoral Act. The bicameral legislative system was retained, but membership of the two houses – and the way in which members are elected – was changed. Some senators and members of the National Assembly are now elected through a system of proportional representation.

According to section 120 of the new Constitution:

1. The Senate consists of 80 senators, of whom
  - a. six are elected from each of the provinces into which Zimbabwe is divided, by a system of proportional representation conforming with subsection (2);
  - b. sixteen are chiefs, of whom two are elected by the Provincial

- Assembly of Chiefs from each of the provinces, other than the metropolitan provinces, into which Zimbabwe is divided;
- c. the President and Deputy President of the National Council of Chiefs; and
  - d. two are elected in the manner prescribed in the Electoral Law to represent persons with disabilities.
2. Elections of Senators must be conducted in accordance with the Electoral Law, which must ensure that the Senators referred to in subsection (1) (a) are elected under a party-list system of proportional representation which is based
- a. on the votes cast for candidates representing political parties in each of the provinces in the general election for members of the National Assembly; and
  - b. in which male and female candidates are listed alternately, every list being headed by a female candidate.

The National Assembly is made up of 'two hundred and ten members elected by secret ballot from the two hundred and ten constituencies into which Zimbabwe is divided' (s 124(1)(a) of the Constitution). In addition there are 60 women members, six from each of Zimbabwe's provinces, 'elected through a system of proportional representation based on the votes cast for candidates representing political parties in a general election for constituency members in the provinces' (s 124(1)(b)). However, the membership of these additional women will not extend beyond the life of the first two parliaments following the commencement of the new Constitution (s 124(1)(b)).

The introduction of an element of proportional representation into the Zimbabwean electoral system is a novelty. All previous post-independent legislative elections have been based exclusively on the first-past-the-post constituency system. The proportional representation formula used for the election of party list candidates was<sup>1</sup> set out in the Eighth Schedule to the new Constitution. Section 45C (5) of the Electoral Act stipulated that the formula was 'calculated on the basis of the total number of valid votes cast for all the constituency candidates in the electoral province concerned'. However, votes cast for constituency candidates who did not belong to a political party were excluded, as were votes cast for such candidates belonging to a party that did not field any party list candidates (s 45C 5)).

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1 The past tense is used because the provisions relating to proportional representation, having been brought into force through the Presidential Powers (Temporary) Measures Act, have now expired.

## THE ELECTION OF THE PRESIDENT

In order to qualify for election as president (or vice-president) a person must be a citizen by birth or descent (s 91(1)(a) of the new Constitution). So a person who has acquired citizenship through registration or naturalisation will not qualify. In addition, he or she must be at least 40 years old, a registered voter and ordinarily resident in Zimbabwe (s 91(1)(b)). Unlike the old Constitution, the new Constitution contains a term limits provision. A person who is elected president may serve a maximum of two five-year terms (s 91(2) as read with section 95 of the new Constitution). However, this provision only applies *prospectively* (s 91(2) as read with section 95). In other words, time spent serving as president under the old Constitution is not taken into account.

Section 92 of the new Constitution is headed 'Election of President and Vice-Presidents'. It is contained in Chapter 5 of the new Constitution, a chapter that was in operation during the 2013 election. In spite of this, however, most of section 92 was overridden by paragraph 14 of the Sixth Schedule of the new Constitution. Subparagraph (1) states that

notwithstanding section 92, in the first election and any presidential election within ten years after the first election, candidates for election as President do not nominate persons in terms of that section to stand for election as Vice-Presidents.

Paragraph 14(2) of the Sixth Schedule maintains the situation that prevailed under the old Constitution, whereby the person elected as president must 'without delay' appoint up to two vice-presidents. The vice-president holds office 'at the pleasure' of the president (para 14(2)). This simply means that the president is free to dismiss the vice-president at any time.

A presidential election is only required where two or more candidates are validly nominated (s 109(1) and (2) of the Electoral Act). Where this is the case, a poll will be held in each constituency (s 110(2) of the Electoral Act). The previous presidential election, held in 2008, was marred by (among other things) the presence in the same Electoral Act of two conflicting provisions concerning the number of votes a candidate had to obtain in order to win. One provision required the successful candidate to obtain more than half the votes cast. The other stipulated that the winner simply needed more votes than the next candidate (see Linington 2009, pp 98-118 for a discussion of this issue).

The new Electoral Act has at least dealt with this problem. Section 110(f)(i) of the Act provides that 'where there are two candidates ... the candidate who has received the greater number of votes [will be] elected president.' If there are

more than two candidates, the one who received more than half the votes cast will be president (s 110(f)(ii)). If no candidate receives more than half the votes cast, a run-off election will be required. This was a controversial issue in the 2008 election but in 2013 the need for a run-off did not arise.

### THE ELECTION DATE CONTROVERSY

Section 158 of Zimbabwe's new Constitution deals with the timing of elections. However, the provision only came into force *after* the 2013 election.<sup>2</sup> Accordingly, the date of the election was to be determined by s 58(1) of the old Constitution, which stated:

A general election and elections for members of the governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63 (7) or, as the case may be, the dissolution of Parliament under section 63 (4) as the president may, by proclamation in the Gazette, fix.

Section 63 (4) provided that:

Parliament, unless sooner dissolved, shall last for five years, which period shall be deemed to commence on the day the person elected as president enters office in terms of section 28 (5) after an election referred to in section 28 (3) (a), and shall then stand dissolved: provided that, where the period referred to in this subsection is extended under subsection (5) or (6), Parliament, unless sooner dissolved, shall stand dissolved on the expiration of that extended period.

Section 63 (7) stated:

Subject to the provisions of subsection (4), any prorogation or dissolution of Parliament shall be by proclamation in the Gazette and, in the case of a dissolution, shall take effect from the day preceding the day or first day, as the case may be, fixed by proclamation in accordance with section 58 (1) for the holding of a general election.

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<sup>2</sup> Paragraph 3(1)(e) of the Sixth Schedule of the new Constitution expressly states that it did not come into force with the bulk of the new text, on 22 May 2013.

The 'life' of Parliament came to an end on 29 June 2013. In other words, Parliament was automatically dissolved on that date because it could not continue beyond the five-year period stipulated in section 63(4). In the opinion of the present author, s 58(1) was not a difficult provision to understand. It did not give rise to any ambiguity. The purpose of the provision was to establish when elections had to take place. The date chosen, however, had to be '... within a period not exceeding four months after the ... dissolution of Parliament.' Moreover, it has been argued (Veritas Court Watch 7/2013) that the president's discretion was limited by article 20 of the Inter Parties Agreement, incorporated into the old Constitution by constitutional amendment number 19.<sup>3</sup> That provision stipulated, '... by implication if not by express words' (Veritas Court Watch 7/2013) that the prime minister's consent was necessary when deciding the election date. In other words, the president and the prime minister had to agree on the election date. A further limitation on the president's discretion was the fact that various steps mandated by law had to be taken before an election could lawfully be held. These concerned the preparations necessary to hold the elections. What needs to be made clear is that these steps precluded the holding of an early election. Thus, the election would have had to be held in the latter part of the four-month period.

Notwithstanding all these considerations, a Mr Jealousy Mawarire filed a constitutional application in the Supreme Court on 2 May 2013 (before the automatic dissolution of Parliament on 29 June), in which he argued that the meaning of sections 58(1) and 63(4) were ambiguous. The objective of the proceedings was to secure a court order compelling the president to call an election that would have to take place on 30 June at the latest. The hearing – it was an urgent matter – took place on 24 May, two days after the gazetting of the new Constitution. Obviously it was now too late to hold an election on 30 June. Mr Mawarire therefore amended his application so that the order sought now requested that the election take place by no later than 25 July.

The applicant based his constitutional application on the assertion that his right to the protection of law contained in section 18(1) of the old Constitution had been violated. The essential core of the applicant's argument is reproduced on pages 5-6 of the Constitutional Court's<sup>4</sup> judgment in *Mawarire v Mugabe N.O. and Others* (not yet reported, judgment no. CCZ 1/13). The applicant said:

The first respondent [i.e. the president] for reasons that I am not clear about, has not carried out his functions in fixing a date for

3 Act 1 of 2009, which came into force on 13 February 2009. Article 20 is contained in Schedule 8 of the old Constitution.

4 By the time of the hearing, the bulk of the new Constitution had come into force. In accordance with the provisions of that Constitution, the case was dealt with by the new Constitutional Court instead of by the Supreme Court.



the elections, even as the expiry of Parliament looms dangerously close. His inaction will lead to a state where Zimbabwe may, in fact, run unconstitutionally. The misleading signals that have been sent by some of the respondents cited herein have been the cause for great concern and may be an indication, coupled with [the] first respondent's inaction, that come June 29, 2013, a general election will not have been called, and Zimbabwe will be hobbling along illegally, without a Parliament.

No interpretation whatsoever of the Constitution could ever validate the existence of a situation of the State without the legislative arm of government. Such an unprecedented situation would be a crippling negation of a fundamental tenet of our democracy which is a *sine qua non* of our constitutional order.

So, according to the applicant, it was unacceptable – and unconstitutional – for Zimbabwe to be without a Parliament at any time. One Parliament must immediately follow another in order to avoid any ‘gap’. The president, therefore, had to set an early election date. The applicant attempted to reinforce this aspect of his argument by referring to section 18(1a)<sup>5</sup> of the old Constitution, which read: ‘Every public officer has a duty towards every person in Zimbabwe to exercise his or her functions as a public officer in accordance with the law and to observe and uphold the rule of law.’ Section 115 (1) of that Constitution defined ‘public office’ as ‘a paid office in the service of the state’, while a ‘public officer’ was ‘a person holding or acting in any public office’. The president was (and is) – obviously – a ‘public officer’ and was therefore bound by section 18(1a). Therefore, in terms of the applicant's argument, if an early election date was legally required, the president was bound to uphold and comply with that requirement.

The applicant's argument about the need for something like a continuous Parliament was not – as will be made clear later – a good one. However, before one even gets to that issue, it is important to understand that the applicant's case depended on a particular interpretation of section 58(1). This must now be addressed.

As I have indicated above, section 58(1) was not a difficult provision to understand. Its meaning was clear. However, a majority of the Constitutional Court arrived at a different conclusion. They adopted the stance that there were *two* possible ways of reading the section, which they referred to as ‘Reading A’

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5 A subsection inserted by s 4 of Act No. 1 of 2009, Constitutional Amendment No. 19, which came into force on 13 February 2009.

and 'Reading B'. In accordance with this approach the majority judgement sets out the text of s 58(1) in two formats, both of which are different from the layout used in the Constitution itself. The two readings are set out below.

*Reading A*

- (1) A general election and elections for members of the governing bodies of local authorities shall be held on:
- (i) such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7), or,
  - (ii) as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the Gazette, fix.

*Reading B*

- (1) A general election and elections for members of the governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after:
- (i) the issue of a proclamation dissolving Parliament under section 63(7), or,
  - (ii) as the case may be, the dissolution of Parliament under section 63 (4) as the President may, by proclamation in the Gazette, fix

Judgment no. CCZ 1/13, pp 10-11

Commenting on the two readings, the majority judgement said (p 11):

Both Reading 'A' and Reading 'B' answer the question when elections are to be held but with one putting the emphasis on the preposition 'on' and the other on 'after'. Both interpretations are compelling. Adopting one interpretation or the other results in starkly different outcomes. In one case elections must be held within the life of Parliament. In the other case, elections may be held up to four months after the dissolution of Parliament.

Because of the – supposedly – 'competing' readings, the majority proceeded to cast about for 'principles' to assist in arriving at the 'correct' interpretation. One of these was that 'S 58 (1) must be examined, not in isolation, but having regard to the overall context in which it appears' (Judgment no. CCZ 1/13, p 12). A number of other constitutional provisions were then referred to for the purpose of providing a 'context' that would give section 58(1) its true meaning.

The majority also decided that an interpretation that would result in Zimbabwe being without a Parliament for up to four months would be an 'absurdity' that would create a 'deformed state' (Judgment no. CCZ 1/13, p 15). For all these reasons the majority held that 'Reading B' would lead to such an absurdity. 'Reading B' was therefore rejected and 'Reading A' adopted as the correct enunciation of the meaning of section 58(1).

However, as Derek Matyszak (2013) has shown, 'Reading A' is in fact a complete distortion of the meaning of section 58(1). He notes that Chief Justice Chidyausiku (who wrote the majority judgement) 'inserted colons into the section (where none existed in the original), ostensibly to highlight what he claimed was the ambiguous nature of the provision, but in fact creating an ambiguity that did not exist before' (Matyszak 2013, p 2). In this way, s58(1) was given a new meaning. 'That meaning is that the president must have set the election date within a period of four months *before* the dissolution of Parliament and that an election should be held upon the dissolution of Parliament' (Matyszak 2013, p 2). However, the ordinary – and correct – reading of s 58(1) leads inescapably to the conclusion that the election was to take place during the four-month period after the automatic dissolution of Parliament (Matyszak 2013, p 2).

A word now about the majority judgement's view that it would be an 'absurdity' to be without a Parliament for up to four months. This issue has also been dealt with emphatically by Matyszak. As he notes, 'The date for an election has *always* been announced AFTER, and not BEFORE, dissolution of Parliament which has meant that the president previously has continued to be in office without a parliament' (Matyszak 2013, p 2). So the absence of Parliament for a few months – at most – does not constitute an absurdity.

Deputy Chief Justice Malaba produced a strong, well-argued dissenting judgment. He emphasised that the date of the election was something the executive was supposed to determine. Section 58(1) vested the power to make the decision in the executive, so that the executive had a discretion (*Mawarire*, p 3 of the dissenting judgement). Malba (*Mawarire*, p 3) said:

The court cannot get involved in determining for the president the manner in which he should exercise his discretion. It cannot tell the president which day or days he should fix or that he was wrong in fixing a certain day. It is not the function of a court of law to substitute its own wisdom and discretion for that of the person to whose judgment a matter is entrusted by the law. Whilst a court can review a public officer's action for legality it cannot act as if it were the executive.

He dismissed the applicant's argument that the absence of Parliament for a few months after the automatic dissolution would be a constitutional absurdity. He cited examples (*Mawarire*, p 7) from other countries where a dissolution meant the absence of a legislature for a short period. It was therefore not an unusual situation. He said (*Mawarire*, pp 7-8):

It is clear ... that the principle that there can be a period following automatic dissolution of Parliament when the affairs of a country are run by the executive and judiciary is recognised. It is interesting to note that whilst the applicant is concerned about the fate of Parliament he does not seem to be interested in the need to comply with the requirements of the new Constitution designed to ensure that the electorate plays a meaningful role in the electoral process.

There is no doubt in my mind that these requirements of the new Constitution are designed to ensure that the first elections are truly a legitimate democratic instrument for the people to choose and control the authorities that will act in their name. Taking into account the importance of the elections the new Constitution tries to guarantee the democratic character of the decision making on the date of the election.

Judge of Appeal Patel also wrote a dissenting judgement in which he arrived at the same conclusion as Malaba. Justice Patel said (*Mawarire*, p 32):

Elections must be held within a period not exceeding four months after the dissolution of Parliament. [They] ... need not be held immediately after such dissolution, so long as they are held on a day or days within the four month period after dissolution.

But the decision of the majority was in favour of the applicant. As indicated above, the applicant's amended application sought an order that the election take place no later than 25 July 2013. However, the chief justice added six days to that date, so that the order stipulated that the election must take place before 31 July 2013. This was '... to compensate for the period between the hearing of [the] appeal and the handing down of [the] judgment' (*Mawarire*, p 24). This led the deputy chief justice to comment as follows in his dissenting judgement (p 8):

Once it is accepted that the date of the first election can be fixed to take place after 29 June 2013, the whole basis of the applicant's argument collapses. He then clearly falls in the 'within four months after the automatic dissolution of Parliament argument'.

It also defeats logic for the majority to find that the president has broken the supreme law of the land and at the same time authorise him to continue acting unlawfully. That is a very dangerous principle to apply as it has no basis in law. The principle of the rule of law just does not permit such an approach.<sup>6</sup>

To say that the tight deadline imposed by the Constitutional Court created difficulties would be an understatement. The pressure to get everything ready in time obviously had an adverse impact on the fairness and efficiency of the election. The curious behaviour of the first respondent in the case (President Mugabe) also deserves comment. In fact, it is only with some hesitation that I describe him as a 'respondent' at all. This is because, far from opposing the application, he (or at least his lawyer) argued in favour of it! Of course, the outcome suited the president, who was anxious for the election to be held at an early date. Moreover, getting the court to set the election date (or at least the period within which the election must be held) relieved the president of the need to secure the agreement of the prime minister (or anyone else).

#### THE AMENDMENTS TO THE ELECTORAL ACT

Because the 2013 election was to be held under a new Constitution, extensive changes were required to the Electoral Act. However, the required changes were not effected through a Bill passed by Parliament. Instead, the president used the powers conferred upon him by the Presidential Powers (Temporary) Measures Act to amend the Electoral Act. The constitutionality of the procedure adopted by the president is doubtful.

Before proceeding further it is necessary to say something about the structure and purpose of the Temporary Measures Act (to use its abbreviated title).<sup>7</sup> As set out in the preamble of the Act, which came into force in 1986, the purpose is to 'empower the president to make regulations dealing with situations that have arisen or are likely to arise and that require to be dealt with as a matter of urgency'. Basically this is a statute that confers upon the president the power to enact unilaterally *primary* legislation (ie, legislation equivalent in status to an Act of Parliament) when this is necessary to deal with an urgent situation.

Regulations<sup>8</sup> created by the president under the Act are temporary in nature. They expire after 180 days and may not be re-enacted until after the passage of a further 180 days (s 6(1) of the Act). If there is any inconsistency between a presidential regulation and an existing Act of Parliament, the regulation will override the Act concerned (s5 of the Act).

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6 A subsequent application to change the date of the election to a later date was unsuccessful.

7 For a more detailed analysis of the Act see Linington 2001, pp 79-84.

8 A regulation is usually a form of subsidiary legislation. However, in the context of the Temporary Measures Act, regulations are primary legislation.

In 1994 the constitutionality of the Temporary Measures Act was challenged before the High Court in *S v Gatzi and Rufaro Hotel (Pvt) Ltd 1994 (1) ZLR 7 (H)*. It was argued that the Act was inconsistent with the separation of powers doctrine built into the fabric of the Constitution. Parliament alone, it was argued, has the power to create *primary* legislation, although it may delegate the power to enact *subordinate* legislation to other persons and bodies. The court did not accept this view. In arriving at its decision the court noted (*Gatzi*, p 17) that presidential regulations have to be laid before Parliament ‘no later than the eight[h] day on which Parliament sits next after the Regulations were made’ (s4 (1) of the Act). Section 4(2) of the Act stipulates that ‘if Parliament resolves that any regulations that have been laid before it ... should be amended or repealed, the president shall forthwith amend or repeal the regulations accordingly.’

The presiding judge, Justice Adam, held that the ‘tabling procedure’ was a mandatory, not a directory, requirement. Thus, the failure on the part of the president to ‘table’ a regulation would automatically result in the invalidity of the regulation concerned. The court therefore decided that Parliament had not abrogated or abandoned its legislative duties. The tabling procedure meant that it still retained – in an overall sense – control of the legislative function (*Gatzi*, p 17). The constitutionality of the Temporary Measures Act was therefore upheld.<sup>9</sup>

Zimbabwe’s new Constitution contains a provision – section 134 (9) – which prohibits Parliament from delegating its primary law-making power. Thus, although the Temporary Measures Act is still in force, it is clearly unconstitutional. However, s 134 was one of those constitutional provisions which came into force at a later date than the bulk of the new Constitution. It was not in force during the election. Nevertheless, the constitutionality of the president’s *use* of the Temporary Measures Act to amend the Electoral Act is, as stated above, doubtful. Section 157(1) of the new Constitution states that ‘an *Act of Parliament* must provide for the conduct of elections’ (author’s emphasis; a similar provision existed in the old Constitution [s 58(3) and (4)]). An ‘Act of Parliament’ is defined in section 332 of the new Constitution as ‘an enactment that has been passed by Parliament and then assented to and signed by the president in accordance with this Constitution’. Section 157 also refers to ‘the Electoral Law’. According to section 332, ‘Electoral Law’ is ‘the Act of Parliament that regulates elections in terms of this Constitution’.

This shows that ‘Electoral Law’ can *only* be created by an Act of Parliament. Thus the president cannot use the Temporary Measures Act to amend the Electoral Act. Only Parliament can make ‘Electoral Law’. The Temporary Measures Act itself states in s2(2)(c) that ‘regulations ... shall not provide for ... any ... matter

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<sup>9</sup> But see *Executive Council of the Western Cape Legislature and Others v president of the Republic of South Africa and Others 1995 (10) BCLR 1289 (CC)*, a decision of the Constitutional Court of South Africa, where the court, faced with similar facts, arrived at a completely different conclusion.

or thing which the Constitution requires to be provided for by, rather than in terms of, an Act.’

In 2002 Zimbabwe’s Supreme Court was faced with a similar – but not identical – issue to the one discussed in the preceding paragraphs. At that time section 158 of the then Electoral Act conferred upon the president the power to unilaterally amend Electoral Law. In *Tsvangirai v Registrar General and Others 2002 (1) ZLR 268 (S)* Judge of Appeal Sandura said (p 278):

It was submitted by counsel for the applicant that in terms of the Constitution Parliament did not have the power to delegate to any person its constitutional function to make the Electoral Law, and that the power given by Parliament to the president to amend the Electoral Law by regulations in terms of s. 158 of the Electoral Act was unconstitutional. I think there is merit in counsel’s submission.

Although that case did not involve the Temporary Measures Act, the principle enunciated by Justice Sandura – that Electoral Law must be made by an Act of Parliament – applies equally to the Temporary Measures Act.

On 24 June 2013 the then prime minister, Morgan Tsvangirai, submitted an application to the Constitutional Court challenging both the constitutionality of the Temporary Measures Act and its use to amend the Electoral Act. The matter was argued on 4 July. Later the same day the court issued an order dismissing the application. No reasons were given for the decision. At the time of publication of this article a reasoned judgement had still not been handed down.

It is hard to see how the court managed to uphold the use of the Temporary Measures Act to amend the Electoral Act. For the reasons given above the adoption of this procedure was blatantly unconstitutional. The issue is an important one because if the amendment of the Electoral Act was unlawful then the election itself – carried out under the ‘amended’ Act – must also have been unlawful.

## CONCLUSION

This article has argued that the Constitutional Court ‘got it wrong’ with regard to the election date issue and the question of whether the president was entitled to use the Temporary Measures Act to amend the Electoral Act. What does this mean? Well, it would appear to mean that the legality of the election is questionable. Although only parts of the Electoral Act were amended by the president, the parts concerned were not unimportant. Elections can only be lawful if conducted in accordance with the law. But if the electoral provisions governing the election are not valid laws, how can the election itself be valid?

## — REFERENCES —

**Books, articles & other publications**

- Linington, G. 2001. *Constitutional Law of Zimbabwe*. Harare: LRF.
- Linington, G. 2009. 'Illegality and Zimbabwe's 2008 presidential Elections'. In E Masunungure (ed). *Defying the Winds of Change*. Harare: Weaver Press.
- Matyszak, D. 2013. "'New Bottles – old wine" – An Analysis of the Constitutional Court Judgment on Election Dates'. RAU, 5 June 2013. Available at: [www.researchandadvocacyunit.org](http://www.researchandadvocacyunit.org)
- Veritas Court Watch 7/2013 of 11 June 2013. Available at: [www.vertiaszim.net](http://www.vertiaszim.net)

**Legal Cases**

- Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (10) BCLR 1289 (CC)
- Mawarire v Mugabe N.O. and Others* (not yet reported, judgment no. CCZ 1/13)
- S v Gatzi and Rufaro Hotel (Pvt) Ltd* 1994 (1) ZLR 7 (H)
- Tsvangirai v Registrar General and Others* 2002 (1) ZLR 268 (S)