IN THE CONSTITUTIONAL COURT OF ZIMBABWE

HELD AT HARARE

CASE NO CCZ42/18

In the matter between:

NELSON CHAMISA	APPLICANT
AND	
EMERSON DAMBUDZO MNANGAGWA	1ST RESPONDENT
AND	
JOSEPH BUSHA	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	

REGISTRAR CONSTITUTIONAL COURT 20 AUG 2018 P.O. BOX 873, CAUSEWAY ZIMBABWE TEL: 04-798634/8

SHERIFF OF ZIMBABWE 20 AUG 2018 P.O. BOX CY 275, CAUSEWAY ZIMBABWE

DATE: 20-08-18
TIME: 09:05hrs
SIGNED: IKENNA Sonaa

KWANELE HLABANGANA

AND — 15TH RESPONDENT

EVARISTO CHIKANGA

AND — 16TH RESPONDENT

DANIEL SHUMBA

AND — 17TH RESPONDENT

VIOLET MARIYACHA

AND — 18TH RESPONDENT

BLESSING KASIYAMHURU

AND — 19TH RESPONDENT

ELTON MANGOMA

AND — 20TH RESPONDENT

PETER GAVA

AND — 21ST RESPONDENT

WILLIAM MUGADZA

AND — 22ND RESPONDENT

ZIMBABWE ELECTORAL COMMISSION

AND — 23RD RESPONDENT

THE CHAIRPERSON OF THE ELECTORAL COMMISSION

AND — 24TH RESPONDENT

THE CHIEF ELECTIONS OFFICER OF THE ELECTORAL COMMISSION — 25TH RESPONDENT

23RD; 24TH & 25TH RESPONDENTS' HEADS OF ARGUMENT

PRECIS

i. There is no application duly lodged in terms of s93 of the Constitution of Zimbabwe so as to invoke the jurisdiction of this Honourable Court to hear and determine the matter placed before the court by the applicant herein. The matter ought to be struck off the roll with an appropriate order for costs.

ii. Since the inception of the Constitution of Zimbabwe (Amendment No. 20 of 2013), in May of 2013, there has been one challenge to the election to the office of President of the Republic in terms of s93 of the Constitution i.e. the matter of ***Morgan Tsvangirayi v Robert Gabriel Mugabe & 3 OrsCCZ71/13***, determined in 2013 by this Honourable Court, the reasons for which were furnished in judgment number CCZ20/17.

iii. The matter of ***Morgan Tsvangirayi v Robert Mugabe & 3 Ors***, supra, was determined when rules governing the procedures and processes of the Constitutional Court were yet to be enacted. These rules have since been enacted and are cited as the Constitutional Court Rules, 2016, (the rules of court).

iv. The 23rd; 24th and 25th respondent's heads of argument will, therefore, be anchored on the reasoning and principles enunciated in CCZ 20/17,as read with the relevant provisions of the Constitution of Zimbabwe and the rules of court, to the extent all three relate and are relevant to the hearing and determination of this matter.

v. Onus of proof on all issues that arise in this matter lies with the applicant and the standard of proof that he must meet to discharge such onus is as set out in CCZ 20/18, which standard, it is contended, the applicant has failed to meet and hence has failed to discharge.

vi. Consequently, that his application, if deemed to be such, ought to be dismissed with costs.

IN DETAIL

1. ***IN LIMINE: Whether an application has been lodged in terms of s93(1) of the Constitution of Zimbabwe as read with r23 of the Constitutional Court Rules, 2016***

1.1. Section 93(1) of the Constitution of Zimbabwe makes the following provision with regard to the lodging of a petition or application challenging the validity of an election of a President;

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

1.2. The seven-day period, being a time prescribed in terms of statute, does not, therefore, enjoin the exclusion of Saturdays, Sundays or public holidays in its reckoning. It expired on the 10th of August 2018.

1.3. In CCZ 20/17, this Honourable Court, relating to the interpretation of s93 of the Constitution, found that;

"Section 93 of the Constitution must be considered as one whole and all other provisions which have a bearing on its true meaning must be brought into view and considered so as to enforce the spirit and underlying values of the Constitution." Pg 15 of the cyclostyled judgment.

1.4. Section 167(4) of the Constitution provides that;

"An Act of Parliament may provide for the exercise of jurisdiction by the Constitutional Court and for that purpose may confer the power to make rules of court."

1.5. Subparagraph (4)(a) of paragraph 18 of the Sixth Schedule of the Constitution in turn provides that;

"Until different provision is made by or under an Act of Parliament rules may be made under the Supreme Court Act [Chapter 7:13] to regulate the procedure of the Constitutional Court"

1.6. Such rules were made in terms of subparagraph (4)(a) of paragraph 18 of the Sixth Schedule to the Constitution in the form of the Constitutional Court Rules, 2016.

1.7. The provisions of s167(4) of the Constitution, as read with subparagraph (4)(a) of paragraph 18 of the Sixth Schedule to the Constitution thus have a direct bearing upon the true meaning of s93 of the Constitution, particularly in the construction of the word ***"lodging"*** as it appears in s93 of the Constitution.

1.8. At the time CCZ 71/13 was lodged, heard and determined, no legislative action had been taken in terms of s167(4) of the Constitution or subparagraph (4)(a) of paragraph 18 of the Sixth Schedule to the Constitution. No rules of court regulating the procedure for lodging a petition or application in terms of s93 were thus in place at that time. Such procedure is however, now clearly spelt out in the current rules of the Constitutional Court, primarily in terms of r23 of those rules.

1.9. Rule 23(1) and (2) make provision as follows;

> *"(1) An Application where the election of a President or Vice President is in dispute shall be by way of a court application.*
>
> *(2) The application **shall** be filed with the Registrar and **shall** be served on the respondent **within seven days** of the date of the declaration of the result of the election." (Emphasis added).*

1.10. When s93 of the Constitution is construed in conjunction with the provisions of s167(4) of the Constitution and subparagraph (4)(a) of paragraph 18 of the Sixth Schedule to the Constitution and the resultant rules of court emanating therefrom, the meaning of ***"lodging"*** a petition or application, as the word

appears in s93, constitutes of the act of filing and serving a court application in form CCZ1 within seven days of the declaration of the result of the presidential election, i.e. on or before the 10th of August 2018. The rules of court are peremptory in this respect.

1.11. Where an applicant under s93 of the Constitution fails to either file and/or serve his application within seven days of the date of the declaration of the result in the presidential election, that applicant consequently fails to ***lodge*** a petition or application in terms of s93 of the Constitution.

1.12. Service of process in the Constitutional Court is governed by the provisions of r9(7) which provides that;

> *"All process initiating litigation in the Court **shall** be served by the Sheriff."* (Emphasis added)

1.13. An application in terms of s93 of the Constitution is process initiating litigation and ought, therefore, by peremptory dictate of the rules of court, to be served by the Sheriff.

1.14. Upon this legal backdrop it is necessary to consider the factual situation in this matter. The common cause facts in the present matter on this issue are these:

i. The applicant issued out an incomplete application with the Registrar of the Constitutional Court on the 10th of August 2018;

ii. The applicant purported to serve part of his application on the 23rd; 24th and 25th respondents through his legal practitioners in the evening of the 10th of August 2018;

iii. The purported service of the 10th of August 2018 was not done by the Sheriff as required by the rules of court;

iv. The purported service of the 10th of August 2018 amounted to delivery of applicant's main bundle, i.e. that containing his founding affidavit and no other bundles or compact discs, or photographs referred to in the founding papers as having been filed simultaneously with the main bundle;

v. The purported service of the 10th of August 2018 related to the delivery of one copy of the applicant's main bundle at the 23rd respondent's offices, there was no purported service or proper service with respect to the 24th and 25th respondents on the 10th of August 2018, they were simply not served with anything;

vi. The single bundle purportedly served on the 10th of August 2018 did not contain the court application by the applicant in terms of s93 of he Constitution in form CCZ1. No form CCZ1, defective or otherwise, formed part of the bundle purportedly served on the 10th of August 2018. The bundle was thus a conglomeration of a cover, an index, notices of addresses of service and a founding affidavit with such annexures as were physically bound to the affidavit;

vii. On the 11th of August 2018, the eighth day after the declaration of the result in the presidential election, the Sheriff of Zimbabwe served three copies of the applicant's main bundle at the 23rd respondent's offices. The three bundles were not accompanied by any of the separate bundles referenced in the applicant's founding papers or the compact discs and photographs similarly referenced in the founding affidavit. The three copies of the main bundle now did contain form CCZ1 with the title thereon reading ***"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 2016"***. The applicant, by his own papers, thus accepts that s93 of the Constitution is given effect to by r23 of the rules of court, compliance with which is peremptory;

viii. The 23rd; 24th and 25th respondents do not have any of the bundles, compact discs and photographs referenced by the applicant as having been simultaneously filed with his application and forming part of the said application.

1.15. Three perspectives arise from these common cause facts and the applicable law expounded above, which perspectives lead to the inevitable conclusion that what is before the Court in this matter is an incurably defective attempt at filing a s93 application. These three perspectives are:

a. The applicant has failed to file and serve his application within seven days from the date of declaration of the result in the 2018 presidential election;

b. Because the applicant has failed to file and serve his application within the seven-day period prescribed, he has failed to lodge a petition or application in terms of s93 of the Constitution of Zimbabwe;

c. Because there is no petition or application duly lodged in terms of s93 of the Constitution before this Honourable Court, the correlative obligation placed upon the Court to hear and determine a petition or application lodged in terms of s93 does not arise. For one to place reliance upon that obligation one must

first establish that there is a duly lodged petition or application. No petition or application has been duly lodged in the circumstances of the present case. The jurisdiction of the court has thus not been invoked and no relief can be granted as prayed for by the applicant.

1.16. More needs to be said in respect of the last of the three perspectives identified above. CCZ20/17 goes at length in defining how s93 of the Constitution operates. It is, however, a judgment that relates to a matter that was determined prior to the enactment of the Constitutional Court Rules, 2016. That notwithstanding, CCZ 20/17 predicates all its findings on one fundamental factual position that applied in that matter i.e. a petition or application had been duly lodged in terms of s93 of the Constitution, the Court's jurisdiction had been invoked.

1.17. The present matter presents a different factual situation on this score i.e. the very lodging of the petition is at issue. CCZ 20/17 will thus only apply to the present matter in as far as it relates to the issue of hearing and determination of a s93 application, once it is found, and only if it is found, that a s93 application was in fact lodged.

1.18. It is contended, on the premise of the foregoing submissions, that no s93 petition or application was duly lodged by the applicant in this matter. As such the present matter ought to be struct off the roll with costs.

MERITS

2. The Missing Bundles; Compact Discs and Photographs

2.1. As part of his application, the applicant refers to separate bundles of evidence that he avers were filed simultaneously with his application in the Constitutional Court Registry. The applicant bases much of his case on the evidence he avers is contained in these separate bundles of evidence.

2.2. It is common cause that these separate bundles were not and have not been served on the 23rd; 24th and 25th respondents.

2.3. It is also common causeS that the 23rd; 24th and 25th respondents prepared and filed their opposing papers in this matter without having had sight of any of the separate bundlesreferred to by the applicant in his founding affidavit.

2.4. In these circumstances, the 23rd; 24th and 25th respondents have met and pleaded to the applicant's case as defined in those founding papers that were served upon them.

2.5. As these are proceedings by notice of motion, an applicant is enjoined to make out his full case in the founding papers and to present whatever evidence he has in his possession buttressing his case, in his founding papers. A case cannot be made out in answering papers and an applicant cannot rely on evidence not forming part of his founding papers.

2.6. In the present matter, what ought to be considered as the applicant's founding papers, are those papers that were in fact served on the 23rd; 24th and 25th respondents by the Sheriff of Zimbabwe. Anything outside what was served cannot form part of the founding papers in this matter as it is not known to the 23rd; 24th and 25th respondents and was, therefore, not part of the case that these respondents were called upon, by the applicant, to meet.

2.7. It would be extremely prejudicial to the 23rd; 24th and 25th respondents if they were asked, in the determination of this matter, to difine what was contained in the applicant's unserved, (and possibly unfiled), separate bundles in the determination of this matter. Such bundles, not having been served, no longer form any part of the founding papers and ought, by that score, not to be allowed as evidence in the present matter.Litigation is not an ambush sport.

3. <u>Opposing papers filed by other respondents</u>

3.1. Save for the 23rd, 24th and 25th respondents herein, all other respondents in this matter were candidates in the 2018 presidential election, save for the first respondent, being the successful candidate and the validity of his election to the office of President of the Republic being the subject of the present application.

3.2. All candidate-respondents had a right in terms of the Constitution to challenge the results of the 2018 presidential election in terms of the provisions of s93 of the Constitution. They had seven days to do so. None of them did. The

right to make such challenge thus expired in respect of the candidate-respondents herein.

3.3. The right given under s93(1) of the Constitution is given to ***any aggrieved candidate***. It is afforded to and exercised by a candidate in their individual capacity. It is not a right conferred or exercised as a conglomerate of candidates and it is a right that must be positively pursued to be enjoyed i.e. a candidate must lodge a petition or application.

3.4. A candidate cited as a respondent in a s93 application, who has him/herself not pursued their rights in terms of s93(1) of the Constitution, cannot, in response to the petition or application, indirectly mount his/her own challenge to the presidential election return. His/her response can only be in two respects, either to indicate that he/she abides the decision of the court in the matter or to oppose the relief sought in the application.

3.5. To allow such a candidate-respondent to support the application and file evidence in pursuit of that support, is to negate the seven-day prescription made in both the Constitution and the rules of court such as to effectively allow a respondent that has opted out of the provisions of s93 to still motivate those provisions before this Honourable Court. That could not have been the legislative intent of the framers of the Constitution. The Court has alluded to the mischief behind the provisions of s93 of the Constitution in CCZ 20/17 as follows:

> *"The framers of the Constitution understood that in this world of men and women there are those unscrupulous enough and skilful enough*

to use falsehood disguised as a genuine challenge of the validity of an election of a President as an effective tool to undo an otherwise free, fair and credible election.

A petition or application challenging the validity of an election of a President may be a predatory action aimed at preventing ascendency into power by the winner. The use of a known lie as a tool for political ends to undo the outcome of an otherwise valid election is at odds with the premises of democratic government and the orderly manner in which political change is effected. See Mcdonald v Smith 472 US 479 (1985) at 488"Pg 26 of the cyclostyled judgment.

3.6. The adoption of a seven-day period within which to act in challenging a presidential election return is one of the tools created by the Legislature to curb the mischief cited herein above. A party that has not acted within those seven days in his or her own right can only find themselves involved in the substance of a petition or application in terms of s93 by way of a supporting affidavit forming part of the founding papers and not by way of a supporting affidavit disguised, under a notice of opposition, as an opposing affidavit. The real prejudice that a respondent, such as the 23rd, 24th and 25th respondents, would suffer in such a scenario is that they would have no opportunity to respond to the averments made and evidence placed before the court by a respondent that seeks to support the petition.

3.7. For instance, the 20th respondent herein has filed two separate volumes before this Honourable Court, under cover of a notice of opposition and "opposing affidavit". At page 12 of Volume 1 of the two volumes filed, the 20th respondent does something very curious, he prays for relief against the other cited respondents in the matter. He avers thus;

> *"I accordingly pray as follows:*
>
> *(a) The Presidential election of 2018 was not conducted in accordance with the laws of Zimbabwe and was not credible and fair;*
>
> *(b) In terms of section 93(4)(b) an election to the office of the president of the republic of Zimbabwe shall be held within sixty (60) days of this order;*
>
> *(c) The 23rd, 24th and 25th Respondents be ordered to pay costs of the petition on a higher scale."*

3.8. He makes this deposition despite having previously averred that;

> *"I wish to place it on record that I did not file a petition of my own because I believe that I did not earn reasonably sufficient votes to warrant making a petition."Pg 9 of his Volume 1.*

3.9. His prayer for relief prescribed under s93 of the Constitution, which includes a prayer for costs on a higher scale against the 23rd, 24th and 25th respondents, bellies the true intent behind his "opposition" to the application. The 20th

respondent has presented, by form of opposing papers, his own petition against the return in the presidential election.This despite being beyond the seven-day period prescribed by the Constitution and the rules of court.The 23rd, 24th and 25th respondents against whom the 20th respondent purports to seek costs, have no opportunity to oppose his averments made under the guise of a notice of opposition. The prejudice is manifest.

3.10. It is not even clear whether the costs purportedly sought by the 20th respondent are sought on his own behalf or he makes the prayer on behalf of the applicant, something he in any event cannot do as a respondent especially when he is not tendering the applicant's costs but actively seeks relief that they be levied against another respondent.

3.11. It is also curious why the 20th respondent saw it fit to attach the entirety of the bundles that he claims were served on him by the applicant. If those bundles were indeed served on him by the applicant, the presumption by the 20th respondent ought to be that those bundles were also filed with the court and served on all other respondents. Reference to them, therefore, by a party that is confident of their filing and service on all respondents need not have been by reproducing them in their entirety at significant expense no doubt, (considering the number of parties to this application), but by merely incorporating them by refence into his own depositions.This is even more curious when the 20th respondent, at case management, raised concern over the directive to serve all

papers through the Sheriff citing the paucity of funds available to him and his political party.

3.12. The 20th respondent's filing is, therefore, not legally competent, and the Court ought to disregard all documents he has filed in this respect.

3.13. Similar shortcomings can be attributed to the opposing papers filed on behalf of the 17th respondent herein, Dr. Daniel Shumba. Dr. Shumba, by agency of his opposing papers, seeks to lay out his own basis upon which he believes the 1st respondent's election ought to be interfered with. He thus, indirectly pleads a s93 application of his own as a respondent in the applicant's s93 application. Again, this is not legally competent. The 17th respondent, holding as he does, the belief that there are grounds for the pursuit of a s93 application, ought to have taken steps to file his own challenge within the prescribed seven-day period. His failure to do so bars him from making averments to the effect that he supports the applicant's cause and placing his own evidence before the court to buttress those averments.

3.14. Any respondent similarly situated ought to have his/her papers disregarded in the determination of this matter. A respondent in a s93 application cannot petition the court for any relief other than the dismissal of the s93 application in which he/she is cited as a respondent. To allow such a respondent a right to petition the court for relief other than a dismissal, as the 20th and 17th respondents have done, would amount, in some respect, to allowing them to be

joined as co-applicants in the matter notwithstanding the expiry of the seven-day period prescribed under s93.

3.15. Further, the applicant cannot rely on any filing by a respondent which purports to support the application and presents evidence in pursuit of that application. Opposing papers do not found a cause before this Honourable Court even where the contents of the opposing papers read more like a founding affidavit than an opposing affidavit. The application does not stand by the depositions of respondents or the evidence produced by respondents. The applicant's onus in a s93 application is not discharged through the respondents. The applicant's founding papers, and any opposing papers, must be enough to sustain the applicant's cause and entitle him to relief.

3.16. Nothing of moment can, therefore, arise from the affidavits filed by candidate-respondents in support of the application. Those affidavits are irrelevant to the determination of this matter and the rule of evidence is that irrelevant evidence ought to be disregarded by the court as a matter of course.

4. Standard of Pleading: Precision.

4.1. In relating to this matter, it is important to set out the procedural standards that have been set for pleadings that initiate challenges to an election return. It will then be against those set standards that the applicant's founding papers must be evaluated to determine the merit or otherwise of his challenge.

4.2. In CCZ20/17, this Honourable Court made the following observation viz. the standard of pleading;

> *"There is a presumption of validity of the election. For that reason, the grounds on which the petition or application is based must be* ***clearly and precisely*** *pleaded to bring out the alleged invalidity of the election and its basis." (Emphasis added)* Pg12 cyclostyled judgment.

4.3. In the matter of ***Charan Lal Sahu&Ors v Singh [1985] LRC (Const) 13***, as quoted with approval in the matter of ***Tsvangirai v Mugabe & Anor 2005 (2) ZLR 398 (H)***, the Indian Supreme Court put the standard thus;

> *"The importance of* ***specific pleading*** *in these matters can be appreciated only if it is realised that the absence of a specific plea puts the respondent at a great disadvantage. He must know what case he has to meet. He cannot be kept guessing whether the petitioner means what he says, 'connivance' here, or whether the petitioner has used that expression as meaning 'consent'. It is remarkable that, in their petition, the petitioners have furnished no particulars of the alleged consent, if what is meant by the use of the word connivance is consent.* ***They cannot be allowed to keep their options open until the trial and adduce such evidence of the consent as seems convenient and comes handy. That is the importance of precision in pleadings, particularly in election petitions.*** *Accordingly, it is impermissible to*

substitute the word 'consent' for the word 'connivance' which occurs in the pleading of the petitioners." (Emphasis added) Pg411B-C

4.4. The court in the ***Tsvangirayi v Mugabe & Anor*** matter, supra, went further to cite with approval the decision of the Indian Supreme Court in the matter of ***MitileshKumah v Venkataraman &Ors [1989] LRC (Const) 1*** commenting thus;

"Again in,MitileshKumah v Venkataraman &Ors [1989] LRC (Const) 1, the petitioner had failed to ***set out in a succinct and clear narrative from all the facts necessary to enable the respondents and the court to understand the petitioner's case.*** *There was neither an allegation that the first respondent had committed an act of undue influence nor that others had committed it with the consent of the first respondent. the petition was dismissed as disclosing no cause of action." (Emphasis added) Pg* 411D-E

4.5. In the case of ***Hove v Gumbo (Mberengwa West Election Petition) 2002 (1) ZLR 23 (H), Hlatshwayo J,*** stated thus;

"My brother Devitte in Mutoko South Election Petition 2001 (1) ZLR 308 (H) at 310, emphasised this point as follows:

'Procedure lies at the heart of the law. It's aim is to guarantee ***precision*** *in order that the ends of justice may be achieved and*

5.3. Similar perspectives arise from the cases of ***Hove v Gumbo, Matamisa v Chiyangwa*** and ***Morgan Tsvangirayi v Robert Mugabe & 3 Ors***, *(supra)*.

6. The Standard of Proof

6.1. The standard of proof, to which the applicant's onus attaches, must similarly be defined and thereafter applied to the applicant's founding papers to determine whether the applicant has reached the set threshold that entitles him to relief.

6.2. In CCZ 20/17, this Honourable Court, in relating to the standard of proof that must be met in a s93 application, stated thus;

> *"The exercise of the right is also restricted as to the subject matter the petition or application can address. It can only be based on grounds which* ***materially affect*** *the validity of the election. There is a presumption of the validity of the election. For that reason, the grounds on which the petition or application is based must be* ***clearly and precisely pleaded*** *to bring out the alleged invalidity of the election and its basis." (Emphasis added) Pg* 12 of the cyclostyled judgment.

6.3. The court found further that;

"Section 93 of the Constitution enacts the principle that an election can only be declared invalid and set aside upon ***clear proof*** *of facts of commission of prohibited conduct which* ***materially affects*** *the validity of an election." (Emphasis added)*Pg 12 cyclostyled judgment.

6.4. In the matter of ***Col. (Rtd) Dr.Kizza Besigye vs Museveni Yoweri Kaguta & The Electoral Commission(Election Petition No. 1 of 2001) [2001] UGSC 3*** the Ugandan Supreme Court found that;

"An election is not to be upset for ***informality or for a triviality.*** *It is not to be upset because the clock at one of the polling booths was 5 minutes too late or because some of the voting papers were not delivered in a proper way. The objection must be something* ***substantial, something calculated to affect the result of the election****...so far as it appears to me the rational and fair meaning of the section appears to be to prevent an election from becoming void by trifling objections on the ground of informality, but the Judge is to look to the substance of the case to see whether the informality is of such a nature as to be fairly calculated in a rational mind to produce a substantial effect." (Emphasis added)*

6.5. Further, in the matter of ***Hove v Gumbo (Mberengwa West Election Petition Appeal) 2005 (2) ZLR 85 (S)*** the Supreme Court found that;

7.1. Using the legal parameters set out herein above, the applicant's founding papers will now be analysed to demonstrate that they do not meet the standard of pleading required in election petitions; they do not meet the standard of proof required in election petitions and consequently they do not discharge the onus placed upon an applicant in a s93 application.

7.2. At the outset the question of the applicant's missing bundles must be placed into sharp focus. This question has been dealt with hereinabove in the context of justifying the exclusion of any evidence that may be contained in those separate bundles, compact discs and photographs from the consideration and determination of this matter. Having established the basis of such exclusion, the fact that such bundles are missing from the founding papers becomes material to the applicant's ability to prove any of his allegations.

7.3. Much of the applicant's evidence, as noted in the 23rd, 24th and 25th respondents' opposing papers, is referenced in the founding affidavit as being contained in separate bundles of documents and in certain compact discs and photographs. By the authorities cited under the discussion on standard of proof required of the applicant, above, it was pointed out that a petitioner must present all his evidence in support of his petition to the court upon presentation of the said petition. It is not open to the petitioner to present a deficient petition and thereafter to attempt to augment same through further depositions, such as his answering affidavit to which he has attached further evidence grounding his

challenge. The general rule applies in this instance that an applicant must make out his entire case in his founding affidavit.

7.4. Where, therefore, much of the evidence that the applicant relies upon in support of his founding affidavit does not form part of the record, by virtue of the events/ circumstances discussed *in limine* herein above, all allegations and averments in that founding affidavit that hinge upon the production of such absent evidence must naturally be deemed unproven and indeed unprovable in the context of the applicant's challenge.

7.5. On all allegations and averments that rely upon the absent evidence, therefore, the applicant must, from the outset, be deemed to have failed to plead with necessary precision and detail.It is impossible for a respondent to understand the case made out by the applicant with any degree of precision when it is hinged upon material that does not form part of the founding papers served on the respondent.

7.6. The applicant must also be deemed to have failed to meet the standard of proof as required in election petitionson all allegations that rely on the absent evidence in as far as he has failed to present all his evidence upon the lodging of his application, (should the court find that indeed there is an application that was duly lodged in terms of s93 of the Constitution). That which has been presented before the court is not enough to premise the vacation of the presidential election return and to grant the relief that is sought by the applicant.

7.7. Having failed to plead with requisite precision and to meet the standard of proof with respect to all allegations that rely upon the absent evidence, it must be concluded that the applicant has failed to discharge the burden of proof that is placed upon him with respect to those matters.

7.8. **The Main Challenge**

7.8.1. The applicant's main challenge is described in his founding affidavit as being based on statistical/ mathematical grounds. This part of the applicant's founding affidavit appears from paragraph 4.6 through to paragraph 6.6.4. Not all these paragraphs relate to statistical/mathematical issues but nonetheless they shall be dealt with,under the formulation set out above, together.

7.8.2. The factual allegations made by the applicant in these paragraphs have been exhaustively responded to in opposition and need not, for purposes of these heads of argument, be repeated ad seriatim. What will be demonstrated herein is the imprecision of the applicant's main allegations under his main challenge and the correlative lack of evidence to substantiate his allegations and consequently his inability to discharge his onus as defined herein above.

7.8.3. As part of the opposing papers filed by the 23rd, 24th and 25th respondents, there is a statistical report marked Annexure Z which report debunks all the mathematical/ statistical evidence alluded to by the

applicant in his founding papers and concludes that there were no mathematical errors made by the 23rd respondent material enough to alter the result of the presidential election.

7.8.4. The value of Annexure Z as opposed to any evidence presented by the applicant in his petition, lies in the fact that the analysis done in Annexure Z emanates from a study of the full data set from the 2018 presidential election and access to the original V11 forms that form the basis of the said data.

7.8.5. The applicant's evidence however, in particular that of the two experts that he relies upon in attempting to demonstrate the mathematical errors that he alleges to be gross and warranting vacation of the election result, arises from sampling of data from the presidential election.The shortcomings of this method, where one is not dealing with theoretical situations but with an actual and available data set, are made clear in Annexure Z.

7.8.6. For instance, Dr.Otumba Edgar Ouko relies on V11s provided to him by the applicant and his party. It is not stated whether the V11s relate to all polling stations operating during the 2018 general election or to those where the applicant had polling agents and thus access to V11 forms. The said V11s used in the analysis are also not made available together with the application as evidence.They form part of the absent evidence discussed herein above.

7.8.7. Further, Dr.Otumba Edgar Ouko makes assumptions such as that all voters were obliged to receive and, in some way, use the three ballots that were available at every polling station for the three elections that were being run concurrently. This ignores the provisions of the law, (s56(3)(3a) of the Electoral Act [Cap 2:13]), viz. the choice every voter has to decline a ballot for any election they do not wish to vote in.

7.8.8. Further, Dr.OtumbaEdgar Ouko relies for his analysis on what he terms voting behaviour anomalies and prescribes an unexplained figure of "305784+ potentially affected". The figure, much like the figures expressed in his entire report, are not attributed to either the applicant or the 1st respondent.They are also presented as postulations and not hard facts. The figures indicated in Annexure Z however represent the actual data available and not hypothesis or projections. Thus, reliance must be placed on Annexure Z, which concludes that there arises no material change in the results of the presidential election when the clerical data capture errors identified are corrected.

7.8.9. The precision that is required in an election petition is thus not achieved by the applicant's evidence which arises from sampled data, hypothesis and projections when the full data set was available to the applicant had he sought to have access to the election residue or, if he doubted the vote tallies by the 23rd respondent, had requested a recount of the votes

within forty eight hours of the declaration of the winner. He did neither and thus relies on imprecise averments to make out his case.

7.8.10. Consider also the computation done by the applicant in paragraph 6.4.5 of his founding affidavit which, as was demonstrated in the opposing affidavit filed by the 23rd, 24th and 25th respondents, was based on use of an incorrect voter turnout percentage by the applicant of 72% instead of the actual turnout percentage of 85.1%.

7.8.11. The allegation by the applicant that the absence of a tally between parliamentary and presidential votes again finds no clear and precise expression in his founding depositions. The applicant makes the bald and bare allegation that the votes for both elections must match but fails to account for variant voter behaviour that is indicated in the 23rd, 24th and 25th respondent's opposing papers which would produce different tallies for the presidential and parliamentary elections.

7.8.12. Averments relating to lack of tallying between parliamentary and presidential election results present a phenomenon that is incapable of pure statistical analysis and falls more appropriately within the ambit of behavioural science.

7.8.13. Further, the allegation that more voters than those registered voted at certain polling stations was clearly and conclusively dispelled by 23rd, 24th and 25th respondents' Annexure 'V'as well as the analysis done in the statistical report attached to those opposing papers as Annexure 'Z'.The

source of the data that was used by the applicant in making the allegation is again not specified or made available as part of his founding papers.

7.8.14. His averments viz. the allegation that there are no tallies between people who voted, and the votes announcedusing the case study of Mashonaland Central, (paragraph 6.5.4 of the founding affidavit), also comes with no precision, detail or evidence as to allow the respondent's to fully and effectively plead to it.

7.8.15. The basis of his analysis in that paragraph is a single roving agent that visited a handful of the more than 900 polling stations in Mashonaland Central province on polling day and, without participating in the vote count for any of these polling stations and based on his naked-eye observation,determined that less than 200 000 people voted in Mashonaland Central Province. This is the height of imprecision and lack of cogent evidence.

7.8.16. The allegation that there was systematic disenfranchisement of civil servants by the 23rd respondent to benefit the 1st respondent is again made without any substantiation.

7.8.17. The 23rd, 24th and 25th respondents have placed before the court marked Annexure 'X' and Annexure 'Y' respectively affidavits from members of the civil service clearly indicating that their right to vote was not affected by any action by the 23rd respondent and that in fact the 23rd respondent

facilitated the enjoyment of that right. They also aver, in some instances, that they voluntarily opted to forgo their right to vote.

7.8.18. The affidavits referred to by the applicant as showing the actual numbers affected by the alleged disenfranchisement contain nothing more than postulations based on no imperial evidence or data. Not a single affidavit from a single civil servant that alleges that he/she was prejudiced by the 23rd respondent in exercising his/her right to vote on polling day to the detriment of the applicant is attached to the founding papers. The allegation is bald and imprecise, lacking in all evidence to substantiate it and based on the assumption that all civil servants were going to vote for the applicant despite the secrecy of the vote.

7.8.19. On postal voting, again the applicant falls into the trap of imprecision and use of incorrect information. He alleges that 7500 police officers voted through the postal vote. The actual figure is however just above 4000 as demonstrated in the 23rd, 24th and 25th respondents' opposing affidavit. Further, the applicant relies in this respect on video evidence that is absent in this matter as discussed hereinabove.

7.8.20. Further, no affidavit by a single police officer alleging violation of his/her right to vote by secret ballot to the detriment of the applicant and ultimately materially affecting the election return is placed before the court.

7.8.21. Further still, the question of the validity of the postal vote was determined by a court of competent jurisdiction such that the issues that the applicant raises in the present matter cannot ground any basis for relief. The details of the matter that dealt with the question of the postal vote are found in the 23rd, 24th and 25th respondent's opposing affidavit.

7.8.22. The question of assisted voters also fails the test of precision, (paragraph 6.6.2 of the founding affidavit). The applicant makes the bald averment that the assistance of voters together with an SMS message being sent to voters, (details unspecified), and voter intimidation, (instances of which are not enumerated, or evidence provided), had a "huge" effect on the election. The effect is not quantified. No evidence is presented to show that a voter was assisted against their will and thus made to vote for a candidate not of their choosing and further prejudicing the applicant to an extent material enough to vacate the election return for the presidential election.

7.8.23. The question of collation of polling stations twice is related to by 23rd, 24th and 25th respondents' Annexure Z.In the very few instances that it occurred it firstly, had no material effect on the overall result of the electionand secondly it was across the board for all candidates and thus cannot be viewed as being systematically designed to benefit 1st respondent and prejudice the applicant. No evidence of a nefarious intent

on the part of the 23rd respondent against the applicant is presented in the founding papers.

7.8.24. On the question of alleged missing polling stations and creation of new polling stations, the applicant firstly does not state in his founding papers, the names and locations of the polling stations he claims to have gone missing on polling day. Secondly the polling stations he alleges to have been created by the 23rdrespondent, (1HRDC and 4HRDC), have already been shown to not be polling stations but to be the names of wards i.e. ward 1 Hurungwe Rural District Council and ward 4 Hurungwe Rural District Council. No evidence is thus presented with the application to substantiate the claims made by the applicant. Any attempts to introduce new evidence through answering papers cannot avail to the applicant as the standard is that the evidence capable of sustaining the application ought to be presented in the founding and not answering papers.

7.8.25. The allegation that no returns were posted outside more than 2000 polling stations, (paragraph 6.6.2.2 of the founding affidavit), is also made in very general terms with no indication of the names of the 2000 polling stations alleged.

7.8.26. The correlative allegation that the alleged failure to post returns, (for which no evidence apart from the applicant's averment is given), gave the 23rd respondent the opportunity to manipulate the vote, is made without any description of how the applicant alleges the 23rd respondent

manipulated the voteand/or how the applicant alleges that this had a material effect on the presidential election result.

7.8.27. The allegation that there could not have been identical results at different polling stations, (paragraph 6.6.2.3 of the founding affidavit), is made in the same imprecise manner as the other allegations by the applicant upon which he bases his application. He contends, by conjecture, that such a result can never be produced. He does not produce the V11 forms for the polling stations he lists as having identical results in his annexure N to show that the 23rd respondents datashowing the identical nature of the results is wrong. In fact, the 23rd, 24th and 25th respondents have presented, as part of their opposing papers, V11 forms for two sets of the polling stations listed bythe applicant in his annexure N showing that contrary to his belief, (a belief based on no real evidence), such polling patterns occurred. Again, this is where the value of the real data as opposed to postulations and hypothesis by the applicant is apparent.

7.8.28. Similar considerations apply with respect to the allegations by the applicant that the 23rd respondent did not comply with the processes and procedures set out in the Electoral Act for the verification of results for the presidential election.

7.8.29. The 23rd, 24th and 25th respondents' opposing papers have gone at length to show that the applicant's election agents were in fact part of the verification process as prescribed under s110 (3)(d) of the Electoral Act.

7.8.30. Besides the bald averments that no verification was done, which have been refuted by evidence from the 23rd, 24th and 25threspondents, no evidence is proferred establishing beyond reasonable doubt, the allegation that no verification was done. Even on a preponderance of probabilities, the evidence that the 23rd respondent has placed before the court, points to the fact that verification of presidential election results was done with the involvement of the applicant's election agents.

7.8.31. The allegation that there was an irregular announcement of results contrary to the provisions of the Electoral Act, is made with no mention of the specific statutory provision(s) that the 23rd respondent is alleged to have violated. In fact, the provisions applicable to the declaration of a winner in the presidential election, s110(3)(f)(ii), were duly followed.

7.8.32. The rest of the applicant's founding papers follow the same pattern of imprecision and lack of evidence.

8. Conclusion

Considering the examples enumerated above against the legal criteria for pleading; presentation of evidence and discharge of onus set out in this affidavit, it is demonstrable that the applicant's petition does not meet the standard required. It is entirely composed of imprecise allegations of electoral malpractice. It gives no evidence meeting the standard of proof required in matters of this nature and thus the applicant fails to discharge the onus imposed upon him in such matters and cannot, with respect, be entitled to any relief sought before this Honourable Court.

BRYN TAURAI MTEKI
7th Respondent
Independent
HARARE

THOKOZANI KHUPE
8th Respondent
Movement for Democratic Change-T
HARARE

DIVINE MHAMBI-HOVE
9th Respondent
National Alliance of Patriotic and Democratic
HARARE

LOVEMORE MADHUKU
10th Respondent
National Constitutional Assembly
348 Herbert Chitepo Avenue
HARARE

TENDAI PETER MUNYANDURI
11th Respondent
New Patriotic Front
HARARE

AMBROSE MUTINHIRI
12th respondent
National Patriotic Front
Newton Farm
MARONDERA

TIMOTHY J. TONDERAI MAPFUMO CHIGUVARE
13th Respondent
People's Progressive Party of Zimbabwe
HARARE

JOICE TEURAI ROPA MUJURU
14th Respondent
People's Rainbow Coalition
HARARE

KWANELE HLABANGANA
15th Respondent
Republican Party of Zimbabwe
HARARE

EVARISTO WASHINGTON CHIKANGA
16th Respondent
Rebuild Zimbabwe
HARARE

DANIEL KUZOVIRAVA SHUMBA
17th respondent
United Democratic Alliance
HARARE

VIOLET MARIYACHA
18th Respondent
United Democracy Movement
HARARE

BLESSING KASIYAMHURU
19th Respondent
Zimbabwe Partnership for Prosperity
HARARE

ELTON STEERS MANGOMA
20th Respondent
Coalition of Democrats
Cnr 3rd Street/ Kwame Nkrumah Avenue
HARARE

PETER MAPFUMO GAVA
21st Respondent
United Democratic Front
HARARE

WILLIAM TAWONEZVI MUGADZA
22nd Respondents
Bethel Christian Party
HARARE