7 An Overview of the Practice and Procedure When Litigating Election Petitions in Zimbabwe

Tarisai Mutangi[*]

1 Introduction

For as way back as elections existed, disgruntled candidates have always sought to reverse the result of an election they thought they had won.[1] The manner and form taken by these challenges have changed and evolved over time depending on jurisdictions. For instance, in England, "jurisdiction over disputed elections was exercised by the Monarch personally, then by the courts, and then by Parliament until finally, in the 1860s, Parliament ceded its power to the courts in the form of the election petitions jurisdiction".[2] By the time Britain colonized Zimbabwe, it appears jurisdiction over elections was already exclusively a judicial issue. Electoral petitions in Zimbabwe appear to have been the domain of courts of law, which continues to be the case today.

In contemporary electoral systems, the 'free, fair, and regular elections' matrix has become entrenched in many constitutions as the yardstick for a functioning representative democracy. In this sense, assumption of public office is based on the ballot as opposed to discretionary political appointments or unconstitutional changes of government. The matrix above speaks to the existence of the possibility that elections may not be free, fair, regular or credible. Once this status quo obtains, the law invariably provides for procedures and institutions mandated to deal with disputes arising from the conduct of elections. These disputes are known as 'electoral disputes' or 'electoral challenges'.

As is the case with elections, electoral disputes fall into three distinct but corollary phases, namely, the pre-election, election and post-election phases. Every general election goes through a pre-election phase, the actual election phase as well as the environment that follows the aftermath of polling. Electoral disputes are associated with the phase during which they occur thereby prefixing them with 'pre' or 'post' election identity. Needless to state that electoral disputes manifest in different forms and species depending on the phase during which they arise. This paper deals with the post-election period and in particular with the resolution of disputes that evolve around electoral returns or results.

Once disputes have manifested, procedures are kick-started through which these disputes are resolved. In Zimbabwe, Section 93 of the Constitution provides for election petitions that deal with the election to the office of the president and vice president. On its part, the Electoral Act[3] establishes the Electoral Court, a specialist division of the High Court,[4] which exclusively presides over all manner of electoral disputes in the country. Presumably in a bid

---

[*] Human rights lawyer, law lecturer, doctor of international law and senior consultant.
[1] C. Morris, 'From "Arms, Malice, and Menacing" to the Courts', 32:2 *Legal Studies* (2012) p. 226.
[2] *Ibid.*
[3] Electoral Act [Chapter 2:03].
[4] *See* section 161 of the Electoral Act, which provides that the Electoral Court is a division of the High Court, departing from the earlier position that it was a specialised court with jurisdiction as provided in the Act.

to efficiently regulate these processes, the Electoral Court Rules of 1995 (hereinafter 'Electoral Court Rules') were promulgated and remain in force to this day to regulate the conduct of election petitions before this Court. The Constitution, Electoral Act, Electoral Court Rules and the Constitutional Court Rules[5] read together constitute a compass that guides the Electoral Court and the Constitutional Court in relation to procedure in electoral petitions before these Courts, the form which the petitions themselves must adopt as well as the miscellany incidental to the prosecution of an election petition in Zimbabwe.

2 The Place of Elections in a Democracy

While free, fair and regular elections have largely become the yardstick for measuring state performance in terms of consolidating democratic values within its borders, elections generally promote democracy in a number of ways. First, elections are a vehicle by which the general public vests state power to govern in an elected government. In other words, through this representation, the electorate governs through elected representatives. It must be noted that in an election, the public expresses itself in terms of selecting representatives to advance their interests in government by voting them into public offices, while part of that public, over and above selecting office bearers, makes itself available to be voted into public office by offering candidature.

However, as Hatchard *et al.* argue, "the fact that elected members of parliament are *representatives* of the people does not mean that they are necessarily *representative* of the people".[6] This means that the possibility always exists for those elected to run the democratic and constitutional errands of the electorate to abandon the mandate and pursue self-serving agendas. In many cases political party preferences trump upon electorate preferences especially in systems where 'whipping' of representatives is allowed. On its part, the electorate may lack effective measures to hold their agents accountable to them, and to rein them in for going on a frolic of their own. This is because the same persons elected to represent the people often pursue a legislative policy that continues to whittle down the electorate's power to recall or withdraw mandate.

The problem of hijacking representative democracy has led to some states adopting strategies to restore this representation as much as possible. One of the strategies include the inclusion of representatives of special groups such as people living with disabilities, minorities, youth and women who have largely become beneficiaries of the quota system strategy.[7] Nonetheless, there are guarantees that such specialised assigned individuals will not divert from the mission. However, where true representative democracy remains, elections guarantee institutionalisation of transparency, accountability and participatory democracy especially in Africa where states continue to emerge from the scourge of colonisation.

---

[5] Published as Statutroy Instrument 61 of 2016.

[6] J. Hatchers *et al.*, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (2004) p. 124.

[7] The gender-based quota system in legislatures has been introduced many African states with a view to encouraging and guaranteeing the participation of women in decision-making and politics in light of the adversities they have to confront on account of male dominance in most legislatures.

Second, elections are a way to ensure constitutional and peaceful change of governments the world over. It has been argued that there is need to entrench a "political culture of change of power based on holding of regular, free, fair and transparent elections conducted by competent, independent and impartial national electoral bodies" in Africa.[8] Unconstitutional changes of government have been identified as the key drivers of insecurity, instability and violent conflict in Africa. In fact the African Union Assembly of Heads of State and Government (hereinafter 'AU Assembly') has recently criminalised unconstitutional change of government upon adopting the Protocol on the Amendments to the Statute of the African Court of Justice on Human Rights (hereinafter 'Malabo Protocol').[9] This development buttresses the proposition that unconstitutional change of government is inimical to democracy. To that end, free, fair and regular elections are regarded as the ultimate antidote to the pandemic of *coups de tat* as they serve to refresh the mandate to rule over people.

Third, elections that are regular, free and fair confirm legitimacy on the elected government as having the mandate to govern. At its core, democracy insists that the power of a government to exercise its power is driven from the people. This power is bequeathed by way of elections after which any government could claim that it exercises governmental power at the instance and or behalf of the people. In fact all arms of state such as the executive,[10] judiciary[11] and legislature[12] derive their legitimacy from the people although the judiciary suffers from contrary claims more than its two counterparts do. Without elections as a way to establish a government, any authority is divested of governmental credentials. So is the government that assumes power by way of a contested election. It often resorts to tyranny and rule by law in order to 'mobilise' legitimacy and recognition by the electorate.

Similarly, the election dispute resolution mechanism must be of unquestionable integrity and fairness so that the outcome of that process could be accepted as fair and justice otherwise questions of illegitimacy will always linger throughout the lifetime of a particular political administration.

2.1 *International Legal Framework on Elections Relevant to Zimbabwe*

This sub-section deals with the international framework on elections with relevance to Zimbabwe. As is trite law now, the consensual nature of international law follows that only those legal obligations a state has accepted by way of ratification or any other method of acceptance will bind that state. Accordingly, this discussion will only involve legal

---

[8] Preamble to the African Charter on Democracy, Elections and Governance (2007). A copy is available in C. Heyns and M. Killander (eds.), *Compendium of key Human Rights Documents of the African Union* (2010) pp. 131–142.

[9] Article 28E of the Statute of the African Court of Justice and Human Rights provides for the crime of unconstitutional change of government as prosecutable before the future African Court of Justice and Human and Peoples' Rights subject to the ratifications of the Malabo protocol to trigger its coming into force and operationalisation of the court it creates.

[10] Section 88(1) of the Constitution provides that: "Executive authority derives from the people of Zimbabwe and must be exercised in accordance with this Constitution."

[11] Section 162 of the Constitution of Zimbabwe provides that: "Judicial authority derives from the people of Zimbabwe and is vested in the courts …"

[12] *See* section 117(1) of the Constitution which provides that "legislative authority is derived from the people and is vested in and exercised in accordance with this Constitution by the Legislature".

obligations whose source Zimbabwe has accepted as legally binding. It is not an open-ended discussion on international human rights law pertaining to elections.

It is unfortunate to note that electoral law is a discipline of law international law has very little to say or regulate. This branch of law is predominantly regulated through constitutional law and attendant institutions such constitutions establish. In all this, international law and supervisory institutions have always 'deferred' to national authorities to adopt a political system that fits their respective context, albeit with a proviso that whatever system is adopted it must be compatible with a state's international legal obligations engaged by the electoral law.[13]

The International Covenant on Civil and Political Rights (hereinafter 'ICCPR') provides in Article 25 as follows:[14]

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.
> …

On its part, Article 13 of the African Charter on Human and Peoples' Rights (hereinafter 'African Charter') vests in every citizen "the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law".

The United Human Rights Committee (hereinafter 'UN Human Rights Committee'), the treaty body that oversees the implementation of the ICCPR, adopted General Comment No. 25 on Participation in the public affairs and the right to vote[15] (hereinafter 'General Comment 25'). By their nature, general comments or recommendations by treaty-bodies serve as authoritative interpretations of treaties by institutions so established to oversee implementation.[16] The UN Human Rights Committee commented that "citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office",[17] or during the constitution making process when they adopt same by way of referendum or election.[18] However, participation through representatives is by way of elections and such representatives are expected to only exercise power as has been conferred upon them in accordance with constitutional provisions.[19]

---

[13] UN Human Rights Committee General Comment No. 25, para. 21.

[14] The International Covenant on Civil and Political Rights (1969).

[15] United Nations, *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* HRI/GEN/1/Rev.8, 8 May 2006, p. 207.

[16] The ICJ has stressed that interpretations by institutions established to do so must be given deference over any other interpretations.

[17] UN Human Rights Committee General Comment No. 25, para. 6.

[18] *Ibid.*

[19] UN Human Rights Committee General Comment No. 25, para. 7.

Further, "genuine periodic elections ... are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them".[20]

General Comment 25 then goes on to deal with processes inherent to elections such as registration of voters, the need for voters to express themselves and associate freely for purposes of effective participation. However, the underlying principle is that all measures expected to be adopted by states are designed to ensure effective participation, directly or otherwise, by citizens in the public affairs of the state.

Whereas the African Commission on Human and Peoples' Rights[21] [hereinafter 'African Commission') is yet to have an occasion to issue a general comment on the African perspective of the right to participate in the public affairs of a state and right to vote, it has rendered a number of decisions in which the right was contested as having been violated by state parties to the African Charter. In *Jawara* v. *The Gambia*, the banning of certain individuals from standing for political office was found to be a violation of Article 13 of the African Charter.[22] *Lawyers for Human Rights* v. *Swaziland*[23] was a case in which a proclamation banning political parties in Swaziland was declared contrary to the African Charter, while in *Gorji-Dinkav Cameroon* a unilateral act of removing voters from the voter's register was also found by the UN Human Rights Committee to be a violation of Article 25 of the ICCPR.[24]

Though not binding, the African Union Declaration on the Principles Governing Democratic Elections in Africa (hereinafter 'AU Declaration') set the tone in Africa in terms of the increasing importance of holding free, fair and regular elections.[25] As regards election petitions, it provides in Part III that states must:

> Establish impartial, all-inclusive, competent and accountable national electoral bodies staffed by qualified personnel, as well as *competent legal entities including effective constitutional courts to arbitrate in the event of disputes arising from the conduct of elections* (emphasis added))

The above provision was quoted verbatim in subsequent regional and sub-regional principles on the conduct of elections and election observation. Article 7.3 of the SADC Principles and Guidelines Governing Democratic Elections and paragraph 1 of the Guidelines for African Union Electoral Observation and Monitoring Missions have restated the principle verbatim.[26]

On its part, the African Charter on Democracy, Elections and Governance (hereinafter 'African Charter on Democracy') introduces a new dimension to the need to establish competent institutions to deal with election disputes. In Article 17(2), this Charter provides for an obligation for states to "establish and strengthen national mechanisms that redress election related disputes in a timely manner". The new aspects added to the element of dispute

---

[20] *Ibid.*, para. 8.
[21] This is an 11 member treaty body that oversees the implementation of the African Charter, a treaty that establishes the institution in terms of Part 111 thereof.
[22] *Jawara* v. *The Gambia* (2000) AHRLR 107 (ACHPR 2000) paras. 70 and 75. *See also Modise* v. *Botswana* (2000) AHRLR 25 (ACHPR 1997).
[23] *Lawyers for Human Rights* v. *Swaziland* (2005) AHRLR 66 (ACHPR 2005).
[24] *Gorji-Dinka* v. *Cameroon* (2005) AHRLR 18 (HRC 2005) para. 5.6.
[25] AHG/Decl.1 (XXXVIII), 2002.
[26] EX.CL/91 (V) Annex II.

resolution are the need to 'strengthen' these mechanisms as well as ensuring that these institutions determine election-related disputes 'timely'. It then follows that it is not sufficient to establish special courts to deal with election-related disputes while the rules of procedure thereof do not emphasise on the need for urgency in resolving such disputes.

The cumulative principle enshrined in the text of treaties and consequent interpretations in general comments and case law is that effective participation is the only way that justifies exercise of governmental power by elected representatives in society including voters themselves. It also justifies exercise of executive and legislative power in accordance with the constitution, which in turn is also adopted by a process in which citizens effectively participate. Governance is largely predicated on the electoral processes; hence we argue here that contestations of election results are fundamental processes that go beyond the interests of the candidate involved, but represent the aggregated interest of voters who voted for or against the candidate and whose preference is threatened by the electoral dispute.

3 Election Petitions and Fundamental Rights

In view of the revelations above on the international legal framework vis-à-vis rights to public participation and vote, we have made a case for the link between election petitions and human rights. Much as general comments and case law did not specifically address the issue of election petitions, it is common cause that petitioning election results is a process that affects the outcome of voters' freedom of expression exercised by way of the ballot; hence it is fundamental to both direct and indirect participation in public affairs and to voting. The ICCPR reiterates that any election system in place in a given state "must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors".[27]

Therefore it must follow that, first, where an electoral malpractice has had the effect of defeating the outcome of voters' free expression, then the electoral dispute resolution in place must be of such a nature that it preserves the actual outcome of the voting process. This objective is dependent on the procedure as well as the integrity of the institutions that handle the disputes. It is submitted here that in the result electoral dispute resolution is an integral part of exercising the rights to public participation, right to vote and freedom of expression in the context of electing representatives or adopting a constitution by way of a referendum.

Second, election petitions, which are predominantly of a civil nature, are part of legal proceedings anticipated in the context of the right to a fair hearing.[28] Thus, once a candidate has well-founded grounds that an electoral fraud or any other malpractice was deployed by the 'winning' candidate leading to his or her defeat in that election, the law must provide for a procedure to approach courts of law or any other equally impartial and competent forum to enable the exercise of rights. Accordingly, the election petition procedure is for all intents and purposes inextricably linked to the exercise or enjoyment of fundamental rights and any law

[27] UN Human Rights Committee General Comment No. 25, para. 21.

[28] *See* Article14(1) of the ICCPR and Article 7(1) of the African Charter. Both instruments provide that the right to fair trial includes legal proceedings for the determination of civil rights between parties. The contention is that an election petition is a civil proceeding that seeks to determine the rights of the petitioner regarding the outcome of an election and that aspect alone links it to fundamental rights.

that regulates such process is subject to interpretation during which the constitution is the ultimate benchmark.

4 Election Petitions in Zimbabwe – The Legal Framework and Brief Historical Perspective

Historically, elections in Zimbabwe were regulated by a number of pieces of legislation as a result of the dichotomy between local government, parliamentary and presidential elections being maintained prior to the adoption of the 2013 Constitution.[29] Section 158 of the Constitution now provides that "general elections to local authorities must take place concurrently with presidential and parliamentary general elections". It follows that it is no longer a possibility for any one of the three levels of election to be held at a different time from the other two unless in the case of by-elections to fill vacant seats. Yet on their part, election petitions have been regulated by consistent pieces of legislation such as the Electoral Act and much later the Electoral Court Rules (1995), and Constitutional Court Rules were enacted and added to the substantive legal framework.

Election results have always been contested before courts of law in Zimbabwe, be they local authority, parliamentary or presidential. The first reported case was that of *Pio* v. *Smith*,[30] which involved a challenge to a parliamentary election result of elections held on 27 June 1985. It is intriguing to note that the grounds of contesting the election result were more or less similar to the bases of petitions in recent years, as will be demonstrated in this contribution. In other words the courts are continually called upon to interpret the same provisions over and over again. This study will reveal whether courts have been consistent in their interpretation and the basis upon which they found such interpretation. While the number of petitions was in drips and drabs in the 1980s, they reached influx levels at the turn of the millennium. It is submitted here that the Zimbabwean political landscape was dominated by one political party to the extent of being akin to a one-party state although the legal framework was receptive to multi-party democracy.

The proliferation of political parties on the political landscape resulted in meaningful contestation during election and the temptation to win at all costs gathered momentum one election after another. The political paradigm shifted in the late 1990s with the arrival of the Movement for Democratic Change (MDC) in 1999. It posed realistic challenges to ZANU-PF establishment beginning with the 2000 and 2002 parliamentary and presidential elections, respectively, which saw ZANU-PF losing its two thirds majority in parliament for the first time since 1980.[31] Thereafter, the number of election petitions soared in every general election. The reason could be that winning elections is becoming more and more challenging with more players entering the fray. In some instances players have even resorted to election-related violence which reached catastrophic levels in the 2008 harmonised elections. In terms of numbers, in all probability the 2013 general election produced the greatest number of

[29] Statutory Instrument 155A of 1985; Urban Councils (Election) Regulations, 1987 (SI 210 of 1987); the Presidential Powers (Temporary Measures) (Urban Councils) Regulations 1995 (SI 148A of 1995) were promulgated in terms of the Presidential Powers (Temporary Measures) Act [Chapter 10:20]; The Electoral Act, 1979.

[30] 1986 (3) SA 145 (ZH).

[31] MDC won 57 seats, ZANU PF 62 and one for independent candidate.

petitions.[32] At least 100 electoral petitions were filed to challenge parliamentary results. A presidential election petition was also filed and later withdrawn before it could be determined by the Constitutional Court of Zimbabwe (hereinafter 'CCZ').[33]

4.1 *The 2013 Constitution and Electoral Petitions*

Before venturing into the specific constitutional provisions on electoral petitions, it is necessary to make brief comments on provisions on the right to vote. Section 67 of the 2013 Constitution provides for political rights. This is the section that largely deals with the right to vote as well as freedom of association and expression in relation to participation in political party activities related to the right to vote. The framers of the 2013 Constitution clearly took into account the circumstances in which the Constitution was adopted. Prior to its adoption, there had been widespread incidences of people forced to attend political meetings against their will and inability to freely take part in the political activities and causes of their parties. Harassment of opposition political parties was widespread and in many cases they were prevented from holding political meetings to strategize for on-coming elections. Therefore, the Constitution being a largely politically negotiated document, it became critical that section 67(2) thereof restates some aspects associated with the full exercise of the right to vote.

Section 93 of the Constitution deals with the 'challenge to presidential election'. In other words it is the primary provision regarding the manner in which the challenge must be processed and prosecuted. A presidential election challenge is initiated 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".[34] Once a challenge is lodged the CCZ must dispose of it within 14 days after the petition or application was lodged, and the Court's decision is final'.[35] On determining the challenge, the CCZ is empowered to make an order from a wide range. Section 93(4) empowers it to declare a winner, nullify the election and trigger a fresh election within 60 days, or "make any other order it considers just and appropriate". As to the form the pleadings must take, such is governed by Rule 23 of the CCZ Rules. In essence, therefore, section 93 of the Constitution must be read together with the relevant CCZ Rules to get a full picture of the principles and procedure to be followed in dealing with a presidential petition.

On a more general note, section 155 of the Constitution provides for 'principles of the electoral system'. By and large the provision restates the need for a system that facilitates free, fair and regular election as provided for in section 67. It goes further to underscore the need for participation by the electorate including special groups such as people with disabilities.[36] Candidates and political parties contesting an election are entitled to access voting materials as well as private and public media on equal basis. Regarding election

---

[32] The MDC filed 95 petitions challenging parliamentary election results, a single presidential election petition while ZANU PF filed six petitions to challenge parliamentary election results. Therefore, a total of 101 election petitions were filed in the aftermath of the 2013 harmonised elections.

[33] *Tsvangirayi* v. *Robert Mugabe and Others*, Application No. CC/13. The petitioner resolved to withdraw the petition upon failing to obtain an order in the Electoral Act that would have enabled him to access voting information contained on sealed ballot boxes. He argued that such information would have enabled him to better prosecute the petition by relying on official information from the voting process.

[34] Section 93(1) of the Constitution.

[35] *See* Section 93(3) of the Constitution.

[36] *See* Section 155(2)(b) of the Constitution.

dispute resolution, section 155(2)(e) imposes an obligation on the state to take all necessary measures to "ensure the timely resolution of electoral disputes".

To conclude a few remarks on the legislative, historical and political context to section 155 of the Constitution are warranted. The call to government to ensure speedy resolution of electoral disputes resonates well with Article 17(2) of the African Charter on Democracy. However, from a national and historical perspective that informs the inclusion of these provisions in the Constitution, the objective was to confront and address a pandemic of overly protracted electoral petition proceedings in Zimbabwe. It may sound unrealistic to state as a matter of fact that there are electoral petitions lodged in the aftermath of the 2008 general election that still await determination to this day. Such delay unduly limits the right "to a fair, speedy and public hearing within a reasonable time" protected by section 69(2) which applies to determination of civil rights.

A period of ten years without courts determining a dispute is a practice that does not belong to modern consciousness of justice delivery. In fact, a delay that encroaches into another election period defeats the whole essence of an electoral dispute resolution framework. It might be argued that the petitioners did not prosecute their petitions to finality. Or it might be that they have abandoned these lawsuits having realised that the remedy would be empty and lacking effectiveness taking into account the lapse of time. It is such exposure of the situation to speculation that must nudge the courts need to 'clear their name' by ensuring that, one way or the other, a process that would trigger the finalisation of such pending lawsuits is adopted even at the instance of the courts. For as long as the petitions remain unresolved, public confidence in the ability of the courts to independently and decisively deal with electoral petitions continues to tumble on a free fall.

Another issue is that of access by candidates and political parties to voting materials including the voters' roll. Before the 2013 Constitution, preparation and custody of the voters' roll has been a prerogative of the registrar general. This is a public official on whom the constitutional responsibility to prepare and keep this important document was vested. However, in sheer disregard of the principles of equality and fairness of candidates, access to the voters' roll used to be so unduly restricted such that opposition political party candidates had to approach courts of law to access the voters' roll. Such unreasonable and unlawful administrative conduct produced numerous and needless lawsuits before the Electoral Court. It therefore came with no surprise that a provision, not only reinforcing the right of access to voters' roll, but now vesting in the Zimbabwe Electoral Commission (hereinafter 'ZEC') the stewardship of this document, was included in the Constitution clearly as a political concession.

In the circumstances, a constitutional requirement in section 155 that a law must provide for accelerated dispute resolution process is a positive development. However, noble as the proposition could be on the face of it, a period of two weeks to resolve a challenge to a presidential election is unrealistic on account of the national nature of information required to prosecute such claims. One must also take into account the level of difficultly there is to gather information in Zimbabwe. In *Makamure* v. *Mutongwiza & Ors,* Devitte J (as then he was) made the following observations

> As the citizens of this country begin to exercise their democratic rights in the arena of electoral law, it is more than likely that there will be a dramatic increase in the number of election petitions. They will require,

for their just resolution, the holding of election trials *spanning several days and even weeks and to be heard expeditiously*.[37]

4.2 *The Electoral Act and Challenges for Petitioners*[38]

We have already made reference to sections 67, 69, 93 and 155 of the Constitution to the extent that these provisions cumulatively provide for the principles of Zimbabwe's electoral system as well as the procedure for dealing with election petitions. Section 155 enjoins the state to adopt measures including legislative to give effect to the principles including the one on speedy resolution of electoral disputes. The Electoral Act must, therefore, be the law to provide for the principles.

The Electoral Act almost exclusively provides for the electoral legal framework in Zimbabwe. It provides for every aspect of the exercise of the right to vote. It is the implementation framework for constitutional provisions on the electoral system. It is no wonder that its elaborate legislative objective as captured in the long title provides as follows:

> to provide for the terms of office, conditions of service, qualifications and vacation of office of members of the Zimbabwe Electoral Commission, the procedure at meetings of the Zimbabwe Electoral Commission and the appointment of the Chief Elections Officer; to make provision for the registration of voters and for the lodging of objections thereto; to provide for the preparation, compilation and maintenance of voters rolls; to prescribe the residence qualifications of voters and the procedure for the nomination and election of candidates to and the filling in of vacancies in Parliament; to provide for elections to the office of the President; to provide for local authority elections; to provide for offences and penalties, and for the prevention of electoral malpractices in connection with elections; *to establish the Electoral Court and provide for its functions; to make provision for the hearing and determination of election petitions;* and to provide for matters connected with or incidental to the foregoing (emphasis added).

As the focus of this paper is election petitions, it should be noted that Part XXII establishes and provides for the Electoral Court as one of "exclusive jurisdiction to hear appeals, applications and petitions in terms of this Act'.[39] Of interests in this Part is section 165 that provides for 'Rules of the Electoral Court'. In essence this provision anticipates the adoption of rules that will govern the conduct of proceedings in this Court, and until such a time that the rules are adopted, the High Court Rules apply.[40] It must be noted that this section was introduced after 1995 (adoption of the Electoral Court Rules)

On its part, section 193 of the Electoral Act provides for 'saving provisions'. It provides in subsection 3, paragraph (d) that 'any … rule … immediately before the fixed date, had or was capable of acquiring legal effect shall continue to have or to be capable of acquiring legal effect" as if it had been made in terms of the Electoral Act.

---

[37] 1998 (2) ZLR 154 (H). Emphasis added.

[38] The current version of the Electoral Act incorporates the amendments made by the General Laws Amendment Act (No. 3 of 2016) the Electoral Amendment Act (No. 6 of 2014) and the National Prosecuting Authority Act (No. 5 of 2014] as well as amendments previously made by the Electoral Laws Amendment Act, 2007 (No. 17 of 2007), the Local Government Laws Amendment Act, 2008 (No. 1 of 2008) and the Electoral Amendment Act, 2012 (No. 3 of 2012).

[39] *See* Section 161(1) of the Electoral Act. This designation has triggered debate as to whether the Electoral Court is in fact an independent court or a specialized division of the High Court since its judges and registrar, before the adoption of the 2013 Constitution, were drawn from the pool of High Court judges.

[40] Section 165(4) of the Electoral Act.

In essence sections 165 and 193 of the Act pitch the possibility of a conflict or at least confusion as to validity of the 1995 Electoral Court Rules. Such confusion confronted to Electoral Court in *Mutinhiri* v. *Chiwetu*.[41] This was an election petition proceeding. The Court entertained the idea that the Rules could have been repealed and therefore invalid, or at least there was need to clarify the potential conflict between sections 165 and 193 of the Act. The Court, per Bhunu J, noted that "the two sections given their natural and grammatical meanings are clearly in conflict and repugnant to each other".

The Court went on to state that:

> It is however, not strange or unusual through inadvertence or lack of attention to detail, for Parliament or its draughtsman to enact two contradictory sections in the same enactment as appears to have happened here. When that happens, it is left to the Court to resolve the contradiction through time honoured legal interpretation techniques meant to suppress the mischief and advance the remedy for which the law was intended.[42]

In the end, relying on Sir Rupert Cross, *Statutory Interpretation* (1976), the Court adopted the 'last resort' approach to statutory interpretation which effectively provides that where provisions of the same statute are in conflict, these could be harmonised by enforcing the last or latter provision. The rationale is that when the legislature enacted the latter provision, it must be accepted that it was aware of the former conflicting provision, and hence enacting the latter provision with such knowledge clearly means that it intended to contradict the former and rest on the latter.

5 Provisions on Electoral Petitions

Part XXIII of the Electoral Act exclusively deals with election petitions. As briefly discussed in the beginning, an election petition is a dispute that arises in the context of the exercise of the right to vote, whether before or after the actual polling day. Ironically this Part does not define what an 'election petition' is. The only definition in this Part is that of a 'respondent' who is restrictively defined as the president, a Member of Parliament or councilor whose election or qualification for holding the office is complained of in an election petition.

The import of the definition is to list persons who may carry the title of 'respondent' during the adjudication of an election petition. To that end the definition accords with section 155 of the Constitution to the extent that both provisions envisage three tiers of election in Zimbabwe, namely, presidential, parliamentary and local government elections, hence reference to president, member of parliament and councilor.

In practice however, this provision has caused untold difficulty in litigating election petitions challenging the result of an election. Petitioners have often complained about the unjustified departure from the common law principle often resorted to when choosing respondents in an action. The principle is generally stated; thus any person from whom some conduct or action to give effect to the relief given by the court must be joined as a respondent in legal proceedings. Such citation accords the respondent an opportunity to defend oneself from the allegations adumbrated in the petition.

---

[41] *Mutinhiri* v. *Chiwetu, Makanyaire* v. *Mliswa* EC 32/13.
[42] *Mutinhiri* judgment, p. 3.

In the several petitions filed to challenge parliamentary results after the 2013 general elections, many of the petitioners had to withdraw citation of ZEC based on the definition of a respondent in the Electoral Act. This was notwithstanding the clear fact that certain relief and allegations made in the petitions, especially those to do with prejudicial management of elections, which fall within exclusive responsibility of ZEC, would have required ZEC to appear and respond to the same.

A close analysis only shows evidence of oversight of the law by legal practitioners involved in those cases. Had it been not for the urgency under which petitions are filed, such negligent oversight was so costly on petitioners so as to deserve costs *de bonis*. The issue of ZEC as a respondent to election petitions seems to have been resolved with finality in *Muzenda* v. *Kombayi & Anor*.[43]

However, ZEC could be properly cited as a respondent in respect of pre-polling petitions especially in respect of actions only ZEC may execute. Part XXIII only applies to petitions challenging election results. The Act provides thus:

> petition complaining of an undue return or an undue election of a member of Parliament by reason of want of qualification, disqualification, electoral malpractice, irregularity or any other cause whatsoever …[44]

Unsurprisingly, section 167 only makes reference to "undue return or undue election of a member of Parliament". By so doing, it dispenses with the custom of referring to the three tiers of elections in Zimbabwe. It appears as if, in terms of this provision, it follows that a petition may only be filed in respect of a parliamentary election. This is clearly the position because presidential election petitions are governed by Part XVII of the Electoral Act, and in particular section 111, which essentially reproduced section 93 of the Constitution verbatim.

5.1 Locus standi *to File a Petition*

Generally stated, the *locus standi* rule provides that only persons with 'direct and substantial interest' in the outcome of legal proceedings have the right to bring such action before a court of law.[45] This proposition has become trite in Zimbabwean jurisprudence. However, the advent of the 2013 Constitution has revolutionised this principle when it comes to enforcing the Declaration of Rights. It is imperative that we briefly discuss this provision to the extent that election petitions are a human rights issue, and are in the public interest.

Section 85(1) of the Constitution now vests standing in at least five categories of persons:

First, any person acting on their own behalf. This is clearly a restatement of the common law understanding of *locus standi*. Such a person must in the least demonstrate personal injury as a result of a violation (including potential injury where violation is regarded as imminent).[46]

---

[43] *Muzenda* v. *Nkombayi and Anor* (EP 119/08) [2008] ZWHHC 47 (9 June 2008).
[44] *See* section 167 of the Electoral Act.
[45] *See* section 85(1)(a) of the Constitution on requirements that need to be satisfied when a person is lodging a complaint with the court allegaing violation of human rights and or freeedoms including political rights contained in section 67 of the Constitution.
[46] *See Zimbabwe Teachers Association* v. *Minister of Education and Culture*, 1990 (2) ZLR 48 (HC) at 52-3; *Amalgamated Engineering Union* v. *Minister of Labour*, 1949 (3) SA 637 (A) at 659.

Second, a person acting on behalf of another[47] has standing to do so upon demonstrating a number of issues such as identity of the injured person; authority to represent them; direct and substantial interest in respect of the person unable to appear; and probably the cause of inability to appear in person. This could be due to incarceration, hospitalization, deportation or any other analogous ground.

Third, a person "acting as a member, or in the interests, of a group or class of persons" may enforce the bill of rights. This ground needs to be read in the context of the Class Actions Act,[48] which provides for the procedure to be followed when one intends to file a class action. Even though the Class Actions Act could be regarded as the implementation framework of section 85(1)(c), it appears manifestly inconsistent with the Constitution to the extent that it unduly restricts access to courts by a person acting on behalf of a class of persons. For instance section 6 envisages the possibility that the High Court may order security for costs. Further, section 22 regards the Act 'as additional to' to any other law under which a person may bring action on behalf of another. Taken cumulatively, such provisions would impose unreasonable and therefore unjustifiable restrictions on the exercise of rights in the Constitution.

Fourth, a person acting in public interest may approach a court of law to enforce the bill of rights. Perhaps to date, the case of *Mudzuru & Another* v. *Minister of Justice & Ors* represents the most elaborate judicial pronouncement on the 'public interest' as a ground to approach courts of law in the aftermath of the adoption of the 2013 Constitution.[49] In that judgment the CCZ per Malaba CJ went into detail, quoting South African jurisprudence in approval, on the requirements to be met for a person to rely on the ground of public interest. The Court was alive to the difficulty inherent in proving a matter to be in public interest or that the public has interest in an issue. It is interesting to note that our courts have, as far back as the mid-1980s, made a link between election petitions and public interest. In *Pio* v. *Smith*,[50] the Court held that:

> This is in the public interest because the institution and determination of election petitions, with their potential for disrupting the business and changing the composition of one of the chief organs of State, ie Parliament, can hardly be anything else. Hence any provisions designed to speed up the process, as the limitation of time is, must be in the public interest requiring strict compliance.

However, it does not necessarily follow that the interest the public has in the 'institution and determination' of election petitions for the reasons given by the Court above would vest in any person the competence to file cases as envisaged in section 85(1)(d). The only effect there is to ensure that whoever is involved in prosecuting an election petition must comply with the law regulating the process in such a way that the process is expedited. This is where public interest lies.

Fifth, any "association acting in the interest of its members" has standing to enforce the bill of rights. In *Zimbabwe Teachers Association* v. *Minister of Education & Culture*, the Court had little difficulty in accepting that a teachers association had direct and substantial interest in

---

[47] Section 85(1)(b) of the Constitution.
[48] Class Actions Act [Chapter 8:17].
[49] CCZ 12/2015.
[50] 1986 (3) SA 145 (ZH).

pursuing the interest of teachers (its members) who had been summarily dismissed. At a basic level, the person must demonstrate that the applicant is an association and that the proceedings seek to vindicate the common interest of the members of the association.

As regards election petitions, section 167 is clear on persons with standing to bring such action to the Electoral Court. It provides that "[a] petition complaining of an undue return or an undue election" may be filed "by any candidate at such election". This prescription needs no further interpretation. Only a person who stood in the election the result of which is being challenged could file a petition challenging the election of another person. Persons who were not candidates clearly lack standing. However, it is lawful for more than one candidate to file a single petition challenging an election result or undue election.[51]

5.2 *The Form of an Election Petition*

In Zimbabwe, legal proceedings to determine the private rights of parties may take one of the two forms, namely, action or application (motion) proceedings. The former is depicted in the form of a summons commencing action, which process eventually matures into a court sitting to conduct a trial wherein evidence is proffered through verbal testimony of witnesses and other forms of evidence. On the other hand, action or motion proceedings are commenced by filing a court application usually on notice (served on the respondent) to which testimony is in the form of an affidavit sworn under oath to which supporting documents (evidence) may be attached. In these proceedings, all evidence must be sworn to and documents attached because there is no other opportunity for a party to present evidence other than through affidavits. To this end, application proceedings suit lawsuits that do not carry serious dispute of facts which cannot be resolved on papers filed of record.[52] Courts are required to take a robust approach to any factual dispute that may arise, failing which such proceedings are invariably referred to the action procedure.

It is important though to note that the two procedures are not mutually exclusive of each other. This assertion is based on the fact that application procedures may follow action proceedings, especially where a litigant needs to seek a court order authorising them to take certain measures incidental to the action proceedings underway, thereby becoming facilitator in nature. Such requests include authority to depart from the usual procedure for service of summons, application to require the other party to produce a document; application for a quick determination of action proceedings where the defendant has no plausible defence, among other things.

5.3 *The Form of a Presidential Petition*

As already discussed, the key legal framework for this petition are sections 93 and 94 of the Constitution, CCZ Rules and section 111 of the Electoral Act (this provision essentially copies verbatim section 93 of the Constitution) and provisions of Part XXIII of the Electoral Act that are not excluded from application by section 111(4) of the same Act. As is the norm, the Constitution defers to implementing legislation to responsibility to provide for form.

---

[51] Section 168(1)(b) of the Electoral Act.

[52] *See* the following cases on the point of serious dispute of facts: *Masukusa* v. *National Foods Ltd & Another*, 1983 (1) ZLR 232 (S) at 235A; *Zimbabwe Bonded Fibreglass* v. *Peech*, 1987(2) ZLR 338 (S) at 339C-D; *Ex-Combatants Security Co.* v *Midlands State University*, 2006 (1) ZLR 531 (H) at 534E-F.

Section 93(1) of the Constitution provides that a presidential result may be challenged "by lodging a petition or application with the Constitutional Court". As is the case with the Electoral Act, there is no definition of a 'petition' in the Constitution. Presumably, such should be found in the implementing legislation including the CCZ Rules.

Rule 23(1) of the CCZ Rules decisively settles the debate as to the nature of court proceedings to challenge a result in a presidential election. It provides that the "application where the election of a President or Vice President is in dispute shall be by way of court application". A court application takes the form of CCZ1Form. This form resembles an ordinary court application on notice. Rule 23 does not deal with the form of a 'petition' or defines what a petition is.

Once filed, the court application (petition) has to abide by the timelines enjoined by the Constitution, namely, that the petition must be filed within seven days of the election result, any notice to oppose the relief being sought must be filed and served by the respondent (winning presidential candidate) within three days,[53] within the same period of time the petitioner may file answering affidavit together with heads of argument,[54] again within three days the respondent files own heads of argument, thereafter the matter must be set down for hearing so that it is determined within 14 days required by the Constitution. Notwithstanding that the petition must be a court application, the Electoral Act anticipates that a presidential election is 'tried' as opposed to being heard.[55] A finding that the president was not lawfully elected shall not have a retrospective effect. Anything already done by that person in the capacity of president shall be allowed to stand as if he or she had been lawfully elected.[56]

5.4 *Form of Other Petitions*

The key provisions regarding the form of other petitions is the Electoral Act and Electoral Court Rules. The Act does not specify the form of a petition. The best it does is to require it to be "signed by the petitioner or all of the petitioners if more than one".[57] Further still, the Act does not specify where the petitioner must sign the petition. Rule 21 of the Electoral Court Rules provides that "an election petition shall be generally in the form of a court application". This prescription seems to auger with Rule 23(1) of the CCZ Rules which also envisages a court application as the form in which a presidential petition must take.

Simple as it may sound, the practice has always been to file petitions as court applications. However, the bone of contention has been the requirement that the 'petitioner signs the petition'. This is not a simple problem as the majority of petitions filed in the aftermath of the 2013 parliamentary elections were dismissed by the Electoral Court citing the reason that the petitioner did not sign the petition.

Neither the Electoral Act nor the Rules stipulate with precision the part of the petition where the signature must be appended. Unlike the CCZ Rules, both these instruments do not provide for a list of prescribed forms, which petitioners must use as a template. This aspect alone

---

[53] Rule 23(3) of the CCZ Rules.
[54] Rules 23(4) of the CCZ Rules.
[55] Section 111(2) of the Electoral Act.
[56] Section 111(3) of the Electoral Act.
[57] Section 168(1)(b) of the Electoral Act.

speaks to the outdatedness of Electoral Court Rules thereby making them absolutely unsuitable to regulate important processes such as election petitions. Court rules in Zimbabwe always have schedules which provide for a list of prescribed forms so that there be no doubt as to the form a particular pleading must take thereby justifying penalization for non-compliance.

However, what we see in Zimbabwean electoral jurisprudence is judicial obsession with strict-compliance approach when dealing with election petitions. There is no basis in law or fact that a petitioner, as the Electoral Court dealt with post 2013 election petitions, must sign on the front page of the petition. There is no provision requiring such conduct. In any event, all the dismissed petitions had valid affidavits appended to them, which affidavits, by practice, were sworn to and signed by each petitioner. Therefore, if what the mischief section 168(1)(b) of the Electoral Act seeks to address is preventing people other than the petitioner from filing petitions without the knowledge of the actual losing candidate, then such fears are decisively allayed once the petitioner swears to an affidavit appended to the petition. Not in a single occasion was the authenticity of the affidavits, and therefore the petition itself, ever challenged. In final analysis, dismissal of petitions based on non-compliance with section 168(1)(b) is and remains bad law that undermines the exercise of the right to vote in terms of section 67 and the right to losing candidates to be heard in terms of section 69 of the Constitution.

5.5 *Other Requirements*

Further and above to being signed, Rule 21 requires, again without stating with precision as to where in the court application this must be located, that the petitioner must assert their right to lodge an application in terms of section 167 of the Act.[58] The dates on which polling took place and the result was announced in the election concerned, including the constituency, must be indicated. This detail is clearly critical to assist the respondent in opposing the petition and the court in determining whether the petition was filed within the prescribed time. Further, Rule 21(e) specifically demands that the 'grounds' upon which the petitioner relies to 'sustain the petition' must be given. These grounds are provided for in Part XVIIIA (intimidatory practices), XIX (corrupt practices), XX (illegal practices), and XI (further provisions on illegal and corrupt practices) of the Electoral Act. Such grounds must be clearly stated as they have a bearing on the nature of evidence required to prosecute the petition.
With similar force, the petitioner must state the 'exact relief' they are seeking.[59] Invariably though, the essence of an election petition challenging the result of an election logically prays for a declaration that the malpractice concerned had the effect of inducing a wrong result and therefore the 'winner' must be declared unduly elected. Depending on circumstances, the petitioner may pray to court that they instead be declared the winner, or that a re-election be ordered to give effect to the true expression of the electorate.

Again the issue of where grounds for the petition and relief being sought must be located in a petition suffers in obscurity. One would expect that, the petition being an application, the relief being sought must be incorporated into the draft order. In the same vein, it would appear

---

[58] However, the Rules still make reference to the repealed section 125 of the Electoral Act. This again shows the extent to which these Rules, which are extensively used during election time, have remained outdated while the principal act has gone through several amendments.

[59] *See* Rule 21(g) of the Electoral Court Rules.

acceptable that grounds for the petition be stated and elaborated in the founding affidavit of the petitioner since this is a matter of facts that must be presented under oath.

Finally, Rule 21(f) of the Electoral Court Rules requires that in instances where a petition is based on grounds of corrupt or illegal practices (Parts XIX and XX of the Electoral Act), the "full name and address, if known, of every person whom the petitioner alleges was guilty of such practice" must be provided in the petition. This does not mean that they are to be joined as parties, but that they be notified and given a chance to defend themselves. The rationale of this requirement was stated by the Court in the *Mutinhiri* case as follows:

> that the *audi alteram patem* rule, that is to say, the need to be heard before anyone can be condemned is paramount and the bedrock upon which our justice system is founded. Thus, in enacting r 21 (f) Parliament intended that such people like … and … would not be condemned of threatening to throw people into … dam and of stabbing others without being given a chance to be heard. It would therefore be anomalous and unjust for the petitioners to assert their right to be heard while actively denying others the same right by omission.[60]

While the mischief to be eliminated by the identification requirement is clear and plausible, the problem is that it appears that the courts expect in all cases and take for granted that petitioners may not genuinely be aware of the full names and addresses of the perpetrators. This requirement is further complicated where several persons are implicated in corrupt or illegal practices. Surely the legislature would not have intended to saddle petitioners with such onerous onus to provide addresses of such multitudes. We submit here that provision of names and addresses is conditional to the petitioner having knowledge of such detail also taking into account restrictive timelines within which petitions have to be filed once an election result has been announced.

5.6 *Service of Petitions*

This is another aspect that has drawn controversy in prosecuting petitions. Service of a presidential petition attracts few difficulties due to the fact that only a single person to be elected to this office at any given election. Accordingly, their whereabouts or place of residence or business is common knowledge. However, the problem arises when dealing with parliamentary and or other election petitions.

Section 60 of the Electoral Act provides thus:

> Notice in writing of the presentation of a petition and of the names and addresses of the proposed sureties, accompanied by a copy of the petition, shall, within ten days after the presentation of the petition, *be served by the petitioner on the respondent either personally or by leaving the same at his or her usual or last known dwelling or place of business.*[61]

Two issues have dominated service of a petition. The first issue is whether or not the ten-day service period maybe extended in exceptional circumstances, and second is the question as to which places fall into the category of "usual or last known dwelling or place of business". Notwithstanding the painful timelines within which petitions have to be immaculately prepared and filed in compliance with statutory provisions discussed above, the courts have

---

[60] *Mutinhiri* judgment, p. 7.
[61] Emphasis added.

insisted that the service period may not be extended in any circumstances. In fact the courts have declared that departure from statutory requirements is not possible.

It would appear the *locus classicus* in terms of compliance with statutory provisions in electoral disputes is the *Pio* case. It dealt with the issue of whether a petitioner who files notice of petition out of time becomes non-suited. The Court reviewed numerous case law from several jurisdictions including England and South Africa with comparable statutory provisions. In final analysis, the Court departed from the traditional approach of interpreting peremptory provisions as such, and adopted the substantial compliance approach even in electoral law.[62] In the words of the Court:

> The part of s 141 dealing with the limitation of time is peremptory and must be complied with either exactly or so substantially that the act could stand on its own, as would be the case, for instance, in a situation where the notice was served within 10 days but without the list of proposed sureties; in other words defects in the notice would not invalidate it.[63]

In that case the petitioner had served the petition outside of the ten-day period, among other forms of non-compliance with several provisions of the then Electoral Act. This case law triggered a series of similar of pronouncements confirming and restating the various findings of the *Pio* judgment especially with the proliferation of election petitions since 2000. Probably the most telling judgment to review and revive the ground breaking findings of the *Pio* judgment is that of *Chabvamuperu & Ors* v. *Jacob & Ors*.[64]

The *Chabvamuperu* judgment was a consolidation of five petitions for administrative convenience as they all dealt with more or less the same issues, namely, the effect of service of notice of petition outside of the ten-day period as well as serving such notice at respondent's political party headquarters. Among other things the judgment restated the proper approach to interpretation as held in the *Pio* judgment – the substantial compliance approach.[65]

This judgment is important in that it added a level to statutory interpretation in electoral cases. The Court incorporated the four stage approach to interpreting peremptory statutes guided by the Supreme Court decision in *MDC and Another* v. *Mudede and Others*.[66] The test essentially requires the court sitting to determine whether a provision requires strict compliance or substantial compliance would suffice. The Court held thus:

> that the approach necessitates that I first establish what had to be done in terms of section 169 and secondly, the object of the section. In the third step, I have to establish what was actually done and finally, assess whether what was actually done can stand alone and be objectively viewed as amounting to substantial compliance with the requirements of the section. In the event that I find substantial compliance, I then have to consider whether there was any prejudice as a result of the non-compliance.

---

[62] *Pio* judgment, p. 156. *See also Shalala* v. *Klerksdorp Town Council and Another*, 1969 (1) SA 582 (T) and *Zantsi and Others* v. *Odendaal and Others*; *Mtoba and Others* v. *Sebe and Others*, 1974 (4) SA 173 (E) on this proposition.

[63] *Pio* judgment, p. 165.

[64] Electoral Petition No. 78/2008.

[65] *Chabvamuperu* judgment, p. 6. Per Makarau J citing with approval *Quinell* v. *Minister of Lands, Agriculture and Rural Resettlement*, SC 47/04; *MDC and Another v. Mudede and Others,* 2000 (2) ZLR 152 (SC); *Sterling Products International Ltd* v. *Zulu*, 1988 (2) ZLR 293 (S); *Kutama* v. *Town Clerk Kwekwe*, 1993 (2) ZLR 137 (S); *Chitungo* v. *Munyoro and Another*, 1990 1 (ZLR) 52 (HC).

[66] 2000 (2) ZLR 152 (SC).

With due respect to the Court in the *Chabvamuperu* case, it appears that the test was better articulated by Kudya J in *Muzenda* v. *Nkombayi & Another*.[67] The Court gleaned the test from the *Pio* and *Mudede* judgment and articulated the test as follows:

> Step 1: The relevant legislation
> Step 2: What actually happened
> Step 3: Whether the provisions of the relevant legislation were substantially complied with
> Step 4: Whether there was any prejudice as a result of non-compliance.[68]

Needless to add that the Court found non-compliance with service of notice of petition 11 days after the due date, and that service at respondent political party headquarters was in violation of section 169 of the Electoral Act mainly because non-compliance in both instances resulted in significant prejudice on the respondent in that he was prevented from promptly preparing his defence in view of the speedy resolution of the petition as required by public interest.[69]

5.7 *Service of Proof of Costs*

The same provision, section 169 of the Electoral Act, requires that the "[n]otice in writing of the presentation of a petition and of the names and addresses of the proposed sureties, accompanied by a copy of the petition …" must be served on the respondent within ten days of presentation or filing of the petition. The issue as to whether the notice and list of names and addresses of sureties must be peremptorily served together in terms of the provision has found itself standing for determination by the Electoral Court. The Court expressed a view on this in the *Pio* and *Chabvamuperu* judgments.

In the former judgment, the Court interpreted the provision in such a way that it split the two aspects (service of notice and service of names and addresses of sureties) as peremptory and directory, respectively.[70] In essence the finding was service of notice of presentation of petition was peremptory admitting no derogation while names and addresses of sureties could be done after the ten-day period. The *Chabvamuperu* Court held as follows:

> It appears to me that the petitioners have erroneously interpreted section 169 to intrinsically link the furnishing of security with the presentation of the petition such that one cannot exist without the other. It is clear that the presentation of the petition, a thing in the exclusive domain of the petitioner has no direct link to the furnishing of security for the costs of the respondent, the fixing of which is under the control of

---

[67] *See supra* note 43.
[68] *Ibid.*, p. 4.
[69] Later in *Gore* **v.** *Chimanikire* HH 47/2008, the Court held as follows: "The electoral law sets out in specific and clear language the proper manner of serving election petitions. Service has to be personal or at the residence or place of business of the first respondent. In the view of this court, service of the petition at the party headquarters of the first respondent, does not constitute service at any of the places contemplated by s 169 of the Act. This court sitting as an Electoral Court has no powers to condone any breach of the requirements as to time frames or as to manner of service that are stipulated in the Act." *See also Nath* v. *Singh and Ors*, [1954] SCR 892; *Kunju* v. *Unni,* 1984 (3) SCR 162; *Robinson* v. *Minister of Lands and Anor*, 1994 (2) ZLR 171 at 175 A-C; *Barrows and Anor* v. *Chimphonda*, 1999 (1) ZLR 58 (S) at 62G-63A; and *Mthinkhulu* v. *Nkiwane and Anor*, S-136-01 at 3.
[70] *Pio* judgment.

> persons other than the petitioner, save that the law requires the two to be served together. The fact that the two are to be served at the same time does not make them so intrinsically linked one to the other that service of one could not be effected in the absence of the other.

The reasoning of the Court was that service of details of sureties could be done later. It is admits of substantial compliance where it is served as soon as it becomes available. The other grounds were that such knowledge is not a critical to the preparation of defence such that no prejudice is suffered by the respondent. Therefore litigants must not fret if they are unable to serve notice and proof of security.

5.8 *Whither to Strict or Substantial Compliance in Electoral Petitions*

It appears beyond doubt that the proper position is that substantial compliance is part of our electoral jurisprudence. It is no longer part of our law that electoral proceedings are *sui generis* to the extent that courts' hands are tied and may not condone any departure from all conduct required by statute. This undisputed clarity of the law then revives the debate on the approach of the Electoral Court in respect of electoral petitions predominantly filed concerning the 2013 parliamentary elections.

As indicated above, nearly all of them were declared non-suited on account of the fact that petitioners did not sign the petition while other suffered from other defects which the court also regarded as fatal and therefore incurable. Only a single petition made its way to trial. What is discouraging is that those dismissed petitions were never given a reasoned analysis of the new approach to statutory interpretation in Zimbabwe – the four stage interpretation enunciated in the *Pio* judgment and reiterated in the *Chabvamuperu* and other judgments decided during that time. We will attempt to apply the test to section 167(1)(b) of the Electoral Act.

Step 1: The relevant legislation

Section 168(1)(b) provides that "an election petition shall be … signed by the petitioner or all of the petitioners if more than one". On the face of it this is a peremptory provision on account of the use of terms such as 'shall'. If the legislature intended it to be directory it could have used the word 'may' in order to convey the meaning that someone else could sign the petition instead.

Step 2:What was done?

As far as many of the election petitions were concerned, they had fairly complied with requirements in Rule 21 of the Electoral Rules serve for non-compliance with section 168(1)(b) above. This is the case because the petitions contained affidavits that had been signed by the petitioners themselves notwithstanding that the top of the petitions were signed or 'issued' by petitioners' legal practitioners. In recollection we have already proffered the reason that the requirement to have a petition signed by the petitioner is to ensure that it is in fact the person with the right to file a petition in terms of section 167 of the Electoral Act who in fact has presented it taking into account the public interest in not interrupting parliament as one of the critical arms of government. This is the legislative objective or the governmental purpose of the law. Compliance, be it strict or substantial, therefore, must give effect to this legitimate purpose that the legislature clearly intended.

Step 3: Whether the provisions of the relevant legislation were substantially complied with

In this part of the inquiry, the court would be required to be alive to the facts of each case. It being an issue of whether the petitioner signed or not the petition, all facts were before the court. Here the court ought to have recourse to section 168(1)(b) as to where on the petition the petitioner must sign. We have already made the point that Electoral Court Rules do not have a list of forms or templates which petitioners must follow or replicate in order for their pleadings to conform to the legal requirements. We also underscored the point that Rules 23 and 21 of the Constitutional Court and Electoral Court, respectively, envisage that a petition takes the form of a court application. Consequently, and this ought to have been apparent, the only occasion an applicant is required to sign is the founding affidavit, which, among other things, carries all the averments that need to be made in order for the relief being to be granted.

We therefore submit that to the extent that all petitions before the court had affidavits properly sworn to by respective petitioners, and that the law does not require affixing of a signature at any particular part of a petition, there was, as a matter of fact, strict compliance with section 168(1)(b) of the Electoral Act. In the result all petitions dismissed on this basis were improperly dismissed and everything must be done to correct the perpetuation of this wrong precedent in the future.[71]

Step 4: Whether there was any prejudice as a result of non-compliance with the legislation

Once a court concludes that there was strict or substantial compliance that gives effect to the legislative intention that alone dispenses with the need for the court to run the full errand of the test. This is because once a petitioner complies with requirements, such compliance cannot conceivably result in prejudice to the respondent. The petitioner would have fulfilled legal requirements, which are what the respondent stands to benefit from most.

However, it suffices to mention that failure by petitioners to sign the top page of the petition resulted in zero prejudice to the respondent. Once the respondent was confronted by a properly sworn affidavit, he or she had all the facts and averments necessary to prepare for the defence. To that end, the raising of preliminary points such as failure to sign a petition was an act of desperation and a ploy to deprive the petitioner (and the public) of the opportunity to be heard on the merits. It was so unfortunate that the court fell for it thereby setting off a dark period in the electoral jurisprudence of this country.

6 Conclusion

This paper has made a number of conclusions pertaining to electoral dispute resolution in Zimbabwe. First, Chapter 7 of the Constitution provides for the complete code in terms principles governing the electoral system for Zimbabwe. The principles include expeditious

[71] It must be stated categorically that the negligence of lawyers who handled the petitions added to the maladministration of justice. In the majority of the pleadings, no attempt was made to direct the court to the correct approach to statutory interpretation and the adoption of the substantial compliance approach even to electoral litigation in Zimbabwe. Nonetheless, for the few petitions where the court was directed to abundant electoral jurisprudence some of which was discussed in this paper, the result, unfortunately, was the same.

resolution of electoral disputes, including disputes challenging the result of an election. Second, electoral petitions implicate political rights that go beyond the parties prosecuting a petition to include rights of the electoral who voted for the feuding candidates. They also extend to the general voters in relation to their interest in preserving the integrity of the electoral system so that it is able to yield a result that reflects the free will of voters. Third, our courts have treated electoral petitions as *sui generis* thereby triggering a general approach to entertain petitions as highly technical proceedings with very few of them being dealt with on the merits. Fourth, of all statutes that regulate electoral petitions, the Electoral Court Rules have suspiciously been sidelined since 1995, yet such revision would reform electoral dispute resolution in terms of the Constitution. Finally, the paper made a case for the need to interpret electoral law in terms of the new constitutional principles, which loathe a great deal overreliance on technicalities when dealing with constitutional issues, of which electoral law is part of.