

Zimbabwe: Questions and Answers (Q & A) about the petition challenging the conduct of the July 2018 Presidential Elections

On 30 July Zimbabwe held elections for President, for members of both houses of Parliament¹, and representatives for local authorities. The elections were organized and administered by the Zimbabwe Election Commission (ZEC), the constitutional body mandated to run elections in Zimbabwe. As the elections are held in a single day for all of these different office bearers, they are popularly referred to as harmonized elections.²

The presidential election results were announced by the Commissioners of ZEC on 2 August 2018. The ZEC chairperson indicated that Emmerson Mnangagwa of ZANU-PF received 2,460,463 votes, constituting 50.8 percent of the total valid votes cast, while Nelson Chamisa of the Movement for Democratic Change-Alliance had received 2,147,436 votes, constituting 44.3 percent of the total. Accordingly, the ZEC chairperson declared that Emmerson Dambudzo Mnangagwa was the duly elected President of the Republic of Zimbabwe with effect from 2 August 2018 in terms of section 93(4)(b) of the Constitution of Zimbabwe as read with section 111(2)(b) of the Electoral Act (*Chapter 2:13*)

On 10 July, Nelson Chamisa, the leader of the opposition Movement for Democratic Change Alliance (MDC-Alliance) filed an application ("Petition")³ in the Constitutional Court challenging the presidential result announced by the Zimbabwe Elections Commission (ZEC) on 2 August 2018. In this Q & A the International Commission of Jurists (ICJ) aims to provide a concise response to some of the frequently asked questions about the legal processes that have followed the elections.

What was the political context of the elections?

The elections came at time of sweeping political transition following the end of the era of President Mugabe, the dominant figure in politics since the 1980 establishment of independent Zimbabwe from colonial rule. President Mugabe was ousted in November 2017 following the intervention of the country's military that brought to power Mugabe's former deputy, Emmerson Mnangagwa.

There are several other reasons why this election is particularly momentous in the country's broader socio-political context:

- It was the first election since 1980 that did not have former President Mugabe as a presidential candidate. Additionally, it was the first since 2000 in which the late opposition leader Morgan R. Tsvangirai did not contest.

¹ The Senate and the House of Assembly

² The Electoral Act provides that "election" means— (a) the election of a member of Parliament; or (b) an election to the office of President; or (c) an election for the purposes of the Rural District Councils Act [Chapter 29:13] or the Urban Councils Act [Chapter 29:15]; as the case may be;

³ The application shall be referred to in equal measure throughout the Q & A as either the "application" or the "petition".

- It was the first election to be held following the military intervention that occurred on 14 November 2017, which led to the ouster of former President Robert G. Mugabe on 21 November, and can be seen as a test of successful transition from authoritarian to democratic governance under the rule of law.
- It was numerically the most contested election with 23 presidential candidates, four of whom were women. The leading contestants for these elections were Emmerson Mnangagwa of the Zimbabwe African National Union – Patriotic Front (ZANU-PF) and Nelson Chamisa of the Movement of Democratic Change - Alliance.
- The 2018 polls were the first election using a biometric voter registration system, which was adopted in 2017.

How was the pre-election environment?

The pre-election environment was observed by a number of domestic and international observer missions. According to reports from the [Election Resource Centre \(ERC\)](#) and a joint report by the [International Republican Institute \(IRI\) and the National Democratic Institute \(NDI\)](#) the environment preceding the elections was relatively peaceful and inclusive. The opposition campaigned without interference from the government. The government did not prevent regional and international media observers from monitoring the elections.

In Zimbabwe, elections after 2000 have been accompanied by significant incidents of violence and gross human rights violations. The period before the 2018 elections was relatively free of such violence. One exception to the relatively peaceful situation in the run up to the present election, was the assassination attempt on President Emmerson Mnangagwa on 23 June 2018 at White City Stadium in Bulawayo.

What was the environment on polling day and immediately after?

The environment during the polling day was peaceful with no significant disturbances being reported.

According to ZEC, there was a relatively high voter turnout at the polls, averaging at above 70 percent compared to the 2008 and 2013 Presidential elections whose average voter turnout [was 50.8%](#). The majority of international observers in their preliminary reports commended ZEC for the manner in which it handled the election⁴ and the peace that surrounded the polling day. Vote tallying and counting started immediately after the close of polls on the 30th of July 2018, and results for council, parliament and president were meant to have been posted outside each polling station, in accordance with the law.

On 31 July, the ZEC Chairperson Priscilla Chigumba announced the results of the National Assembly votes at a press briefing. She further stated during the briefing that

⁴ The African Union, SADC, SADC Parliamentary Forum, the Common Market for East and Southern Africa (Comesa) all expressed satisfaction with the way ZEC handled the polls. European Union Election Observer Mission chief observer Elmar Brok, noted that there were improvements in the political climate and in particular the peace prevailing during the election, however said “un-level playing field, intimidation of voters and lack of trust in the process undermined the pre-election environment”. The International Republican Institute (IRI) and National Democratic Institute (NDI) international observer mission felt that the elections were not properly conducted.

the Presidential results would only be announced when all votes had been returned from over 10'000 polling stations. The results announced indicated that ZANU-PF had won 145 of the 210 National Assembly Elected Seats, while the MDC Alliance had won 63. An additional 60 seats were reserved for women, six per province on a proportional representation basis.

On the 1 August, clashes broke out between security services and opposition supporters who were demonstrating against ZEC. This resulted in at least six civilians dying after soldiers opened fire during the protests. The post-election violence was condemned by all of the observer missions⁵ in a joint statement and the ICJ also issued its own [statement](#).

What is the legal framework of elections in Zimbabwe?

Elections in Zimbabwe are mainly guided by the [Constitution](#), [the Electoral Act](#) and relevant case law. Chapter 7 of the Constitution of Zimbabwe provides for the electoral systems and processes. Section 157 of the Constitution provides that an Act of Parliament must provide for the conduct of elections and referendums. This particular Act is not yet in place. In terms of challenging election outcomes, Parliamentary and other elections are challenged in terms of provisions of the Electoral Act. Section 93 as read with Rule 23 of the Constitutional Court Rules are instructive on challenging the election of a President and/or Vice-President. [Tsvangirai v Mugabe and 3 Others CCZ 20/17](#) being the only case in which a Presidential petition was heard under the current Constitution is arguably the most instructive domestic case law available on Presidential petitions.

What are Zimbabwe's obligations under international Law?

Zimbabwe is a party to various international and regional treaties which provide standards on conducting elections. Of particular note are the obligations under [article 25 of the ICCPR](#)⁶ which have been elaborated on by the Human Rights Committee under [General Comment 25](#)⁷. The provisions of article 25 of the ICCPR can be found in various international instruments to which Zimbabwe is a party e.g. [article 7 of CEDAW](#)⁸, [Article 29 of the CRPD](#)⁹ and [article 5 of CERD](#)¹⁰. Being a state party to the African Union and Southern Africa Development Commission, Zimbabwe is also guided by regional and sub-regional declarations on elections.

⁵ African Union Election Observation Mission (AUEOM), the Commonwealth Election Observation Mission, SADC Election Observation Mission, SADC Parliamentary Forum Election Observation Mission, ECF – SADC, COMESA Election Observation Mission, European Union Election, Carter Centre Election Observation Mission and Joint International Observation Delegation of IRI and NDI

⁶ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171,

⁷ UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7

⁸ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13,

⁹ UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, article 29

¹⁰ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195,

What were concerns raised about the fairness of the elections?

Even before the elections, there were some concerns raised by the MDC Alliance to ZEC. These pertained to the parity and fairness of the political playing field. The concerns raised included that -

- All parties, and candidates (and or their representatives) participating in the election, needed to be furnished with an electronic copy of the provisional voters' roll as is required by section 21 of the Electoral Act [Chapter 2:13].
- That ZEC, needed to allow an inspection period of the voters' roll pursuant to fresh registration during the voter inspection period held between 19 May to 29 May 2018.
- That an independent, external audit of the voters' roll needed to be done immediately after the inspection period mentioned above, with the auditors to be agreed by all stakeholders and shareholders.
- That there needed to be full and proper agreement by all stakeholders on the procurement, security, quality and movement of all ballot material, in particular, the ballot paper.
- That the ZEC needed to immediately retire from its secretariat, any security personnel whether currently employed or formerly employed by the security services as defined in Chapter 11 of the Constitution.
- That ZEC needed to immediately disband the present national logistics committee and that there is agreement in the composition, recruitment, training and deployment of the new members of the national logistics committee.
- That the current accreditation committee needed to be disbanded and that there needed to be agreement on the recruitment, training and deployment of the new members of the accreditation committee.
- That there needed to be full disclosure with regards to the custody and location of the BVR Servers and that all stakeholders needed to be allowed access to validate the legitimacy of the data in those servers.
- That the additional 1500 newly created polling stations needed to be abandoned and that there needed to be discussion and agreement on additional polling stations if required.
- That all military personnel believed to be deployed in the rural areas needed to be recalled and that full and complete de-militarisation of the rural areas was needed.
- That all international observers and monitors needed to be allowed immediate access to Zimbabwe to monitor the election pursuant to the proclamation of the election on the 30th of May 2018.
- That forthwith, there needed to be equal access to and equal coverage of all political parties in the public media, in particular, the Zimbabwe Broadcasting Corporation.

What are the issues raised in Nelson Chamisa's petition?

The issues in the petition

Despite highlighting various irregularities in the conduct of the elections by ZEC (23rd Respondent), ZEC Chairperson (24th Respondent) and Emmerson Mnangagwa (1st Respondent), in paragraph 4.1, the Applicant (Nelson Chamisa) makes it clear that the petition is based on procedural grounds and mathematical errors in the computation of results by ZEC. These grounds are as follows;

Procedural Irregularities

1. Lack of verification of the V23b forms, which show constituency totals, available to the Applicant and/or his agents.¹¹
 - Lack of verification of the relevant data, with no attempt being done to cross check the data on the V23 and V11 forms with that which was recorded on ZEC's servers.
 - Failure to sign off of on results, the allegation being that the Applicant's agents were denied an opportunity to sign off the results prior to their official announcement.
2. Irregular procedure for announcing the results, in that the ZEC announced Presidential results by provinces as opposed to Constituency as is required by the law.
3. Announcement of results by ZEC Commissioners instead of the Chairperson of ZEC.

Statistical/ Mathematical Errors

Among other errors noted, the Applicant allege that;

1. The results announced by ZEC do not tally with what ZEC has in terms of V11 and V23 forms.
2. The Presidential election votes announced add 700000 votes which cannot be accounted for, as they do not tally with ZEC's assertion of percentage of voters that voted.
3. The sum total of the Presidential votes counted exceeds the total of parliamentary votes. The election was a harmonised election therefore all votes must tally.

What outcome does the Applicant request?

According to the draft order attached to the Petition the Applicant is asking the Constitutional Court to declare that the presidential elections of 2018 were not conducted in accordance with the law and was not free and fair as required by section 155 of the Constitution. Furthermore, that the results announced by ZEC on 2 August be set aside and Nelson Chamisa (Applicant) be declared the winner.

The applicant in his draft order also requests an alternative from of relief. He seeks to have the court invalidate the presidential election, which would prompt a fresh election to be held within sixty days of the determination.

NB: It should be noted that the courts are also seized with cases involving parliamentary results. However, the application filed by Nelson Chamisa is concerned solely with results in the presidential elections.

What power does the court have in deciding election petitions?

In terms of section 93(4) the Constitutional Court has the power to;

¹¹ The V11 form is an original document carrying results from a polling station and is signed by agents of all contesting parties. After the signing of the V11 form, information is then recorded on the V23 form, a collation of polling station results within a ward.

- (i) declare a winner,
- (ii) invalidate the election, in which case a fresh election will have to be held within 60 days
- (iii) make any order as it considers just and appropriate

What are the timelines for challenging procedures and results of elections in Zimbabwe?

The Constitutional Court in *Tsvangirai v Mugabe CCZ2-/17* held that section 93 of the Constitution of Zimbabwe is the "complete code" when it comes to election petitions challenging the outcome of presidential elections. Rule 23 of the Constitutional Court Rules also provides guidance on how a Presidential petition is to be filed. A contestant in the presidential election has standing to challenge the outcome in terms of section 93(1) within 7 days of the announcement of the results.

In terms of section 93(3) of the Constitution (2013), the Constitutional Court must conduct a hearing and determine an election petition within 14 days after the petition has been lodged.¹²

Section 94 of the Constitution (2013) states that the President-elect cannot assume office if a presidential election petition is pending. The inauguration of President Emmerson Mnangagwa which was scheduled for Sunday 12 August 2018 could therefore not take place by law.

In terms of section 94(1)(b) of the Constitution 2013, where there is a challenge, the inauguration takes place within 48 hours after the Court has declared a winner unless another order is made.

¹² Section 93(1) of the Constitution states that the court must hear and determine within 14 days after the petition or application is lodged. The rules seem to have a conflicting position as Rule 23 (7) states that the Registrar must set down the matter within 14 days of the filing of the application. This seems contradictory, however it can be argued that due to the supremacy of the Constitution (section 2 of the Constitution), the Registrar is enjoined to set the matter down soon after it is filed so that the 14 days begin to run. In a situation such as the current one, where the filing has coincided with a weekend and a public holiday, nothing in the Constitution or the Act suggests that the 14 days can run through the weekend. An argument can however be made that the nature of a Presidential petition is such that it must be disposed of with haste therefore, the weekend and public holidays cannot suspend the running of the 14 days.