

A FUDGE RECIPE: DETERMINING AND DECLARING THE RESULT OF ZIMBABWE'S 2013 PRESIDENTIAL ELECTION

After the poll in the elections of the 29th March, 2008, the populace eagerly awaited the result of the crucial presidential election. Although the Electoral Act¹ then did not stipulate any period within which the results had to be released, the Act did require that each step of the tabulation process was to be completed expeditiously, deploying phrases and words such as “immediately thereafter”, “without delay” and “forthwith”.² Advancing various excuses believed by few, these provisions were ignored by the Zimbabwe Electoral Commission, which took a full 33 days to release the result. Many believed that the intervening period was used to doctor the results, to bring the total votes of MDC-T President, Morgan Tsvangirai, below the 50% plus one vote threshold required to avoid a run-off poll. Ignoring the time limits set in the Electoral Act (21 days), ZEC set the poll for a further two months hence. The 28th June 2008 poll date allowed sufficient time for the electorate to be cowed in a wave of endemic violence of such brutality that Tsvangirai was compelled to withdraw from the poll. There was no possibility of the result being credible, and it was not.

With the wisdom gleaned from this experience, there was an attempt to reconsider, streamline, refine and tighten the law relating to the tabulation and declaration of results. However, the precipitous proclamation of the election dates³ left the attempts half baked. The amendments to Electoral Act and Electoral Regulations were drawn in haste without proper consideration and care. As a result, the very area of the legislation it was sought to improve, in fact became further confused due to the incomplete drafting process. The legislation thus is ill-conceived in part and contains numerous omissions and contradictions pertaining to process of tabulation and the declaration of the result of the all important presidential election.

In the category of the ill-conceived falls an amendment to the Electoral Act which requires that the result of the presidential election⁴ must be released within five days.⁵ The provision is meaningless, if not worse than useless⁶ - though it may provide a false sense of security for some. If ZEC claims to encounter logistical difficulties and the result is not announced within five days as required, recourse to the courts will inevitably simply result in a ruling that the Commission declare the results “as soon as possible” – which is what the law more sensibly required before the amendment anyway. And ZEC itself may apply to the Electoral Court for the five day period to be extended,⁷ a request which is unlikely to be denied unless it can be clearly shown that the delay is mala fides.

The validity of these amendments to electoral law is open to question. Section 157(1) of the Constitution provides that:

¹ Chapter 02:13.

² See D. Matyszak *Law, Politics and Zimbabwe's "Unity" Government* RAU 2010 (Chapters 2 and 3) for a full discussion of this issue.

³ See D. Matyszak *The Domino Effect: Special Voting and Zimbabwe's 2013 Election* RAU July 2013 for further consideration of this.

⁴ The provision only applies to the presidential election.

⁵ Section 110(3)(h)(i) of the Electoral Act.

⁶ The provision to some extent undermines the requirement in section 110(3)(g)(iii) that the result must be announced “forthwith”.

⁷ See the proviso to section 110(3)(h).

An Act of Parliament must provide for the conduct of elections and referendums to which this Constitution applies

The purported amendments to the Electoral Regulations were made by the ZEC, claiming the power under Section 192⁸ of the Electoral Act to do so, and not by an Act of Parliament. Similarly, the purported amendments to the Electoral Act were made, not by an Act of Parliament, but by Presidential Regulations. Furthermore, the Regulations state that they are made under the Presidential Powers (Temporary Measures) Act.⁹ Yet that Act itself stipulates that Regulations made in terms of the Act may not provide:

for any other matter or thing which the Constitution requires to be provided for by, rather than terms of, an Act¹⁰

Section 157(5) of the Constitution also provides that:

After an election has been called, no change to the Electoral Law or to any other law relating to elections has effect for the purpose of that election

The apparent changes to the Electoral Act were made in terms of S.I. 85 of 2013, numerically ahead of the proclamation of the election date under S.I. 86 of 2013. The apparent changes to the Electoral Regulations were made under S.I. 87 of 2013. However, they were all gazetted on the same day, the 13th June, 2013 and thus, under the Interpretation Act,¹¹ are all deemed to have come into operation simultaneously.

The amendments to the Electoral Regulations seek to clarify the collation of returns and the aggregation of the results, and amends the forms used for the entries in this regard so as to more closely reflect the process. Unfortunately the procedure to be adopted is spread between the Electoral Regulations and the Electoral Act and several provisions detailing the process are incoherent and obscure.¹²

The count at polling station level is entered on a “V.11” form, (the polling station return) which is then forwarded to the ward tabulation centre. The ward elections officer completes the ward V.11 form aggregating the results from each polling station return (there will be an average of about five per ward), adding in any postal and special votes, and forwards the ward return with the aggregated figures to the constituency election officer. The constituency election officer aggregates the ward returns (there will be an average of about 9 per constituency) and declares the winner of the National Assembly seat.¹³ He or she then forwards the constituency returns to the provincial command centre. The provincial elections officer aggregates the constituency returns (the constituencies per province vary widely in number from 29 in Harare to 12 in Bulawayo), declares candidates elected as a result of the poll in accordance with the system of proportional representation and party lists. The provincial returns are then forwarded to the National Command Centre. At each step in the process the candidates, their election agents and observers are given copies of the returns and

⁸ Section 192 (1) of the Act provides: *The Commission may by regulation prescribe all matters which by this Act are required or permitted to be prescribed or which, in its opinion, are necessary or convenient to be prescribed for carrying out or giving effect to this Act*

⁹ Chapter 10:20.

¹⁰ Section 2(2)(c).

¹¹ Section 20 of the Interpretation Act Chapter 01:01 as read with the proviso, and see Section 192(6) of the Electoral Act providing that Regulations made by ZEC come into effect after approval by the Minister of Justice and gazetting.

¹² Section 10 of the Regulations and sections 37C, 64, 65, 65A and 65B of the Act.

¹³ Section 65A(3)(b).

the returns are posted outside the polling station or relevant centre.¹⁴ A separate return must be compiled for each election, - Local Authority, National Assembly and Presidential.¹⁵

Section 37C(4), in addition, provides that copies of polling station returns in relation to the Presidential and National Assembly gathered at the ward centres, and copies of the presidential constituency returns gathered at provincial command centres, must also be sent directly to the National Command Centre.

If this were all the legislation provided in this regard it would be reasonably clear. Unfortunately it is not. The provisions outlined imply that the Presidential result will be determined at the national command centre by aggregating the totals on the ten provincial returns, one from each province, for each of the five candidates. This conclusion is, however, gainsaid by both section 110(3) and section 37C(4)(f)(ii), which set out entirely different procedures for the tabulation of the presidential result.

In terms of section 110(3) the constituency elections officer is to prepare the presidential return immediately:

*after the number of votes received by each candidate as shown in each **polling-station return** has been added together in terms of section 65(3)(i) and the resulting figure added to the number of postal votes received by each candidate.*

This process of tabulation is thus founded upon “section 65(3)(i). There is no such section in the Act, and it is difficult to determine what is intended as the correct cross reference. More importantly, this tabulation process contradicts the process outlined previously, as set out in section 37C(4)(c)(i) that the constituency elections officer aggregates the ward returns and not the polling station results.

Then after aggregating the polling station returns, rather than transmitting the presidential constituency return to the Provincial Command Centre for aggregation with others and onward transmission, as the Act earlier stipulates in section 37C(4), section 110(3)(ii) requires the return to be transmitted to the Chief Elections Officer. The Chief Elections Officers is then to add the totals of the 210 constituency returns to determine the result of the presidential poll. The act thus contains two contradictory and incompatible processes for tabulating and determining the presidential result.

Further complicating matters is that is also uncertain as to when and how the result is to be declared. There are two kinds of difficulty here.

Firstly, it is unclear whether a candidate must have a majority of 50% plus one vote of the *total* votes cast, or 50% plus one vote of the total *valid* votes cast. In March 2008, 1.58% of the presidential poll, or 39 975 votes, consisted of spoiled ballots. In an extremely tight contest whether the percentage is calculated as a percentage of the total votes cast or only total valid votes cast, could be determining.¹⁶ In 2008 only valid votes were counted to determine the result, but that is because section 110(3) specifically required an outright winner to receive “*a majority of the total number of **valid** votes cast*”.¹⁷ The equivalent provision (section 110(3)(f)(iii)) in the “amended” Act stipulates that an outright winner must

¹⁴ It is also unhelpful that section 64 detailing this process refers to the polling station return (singular), when there are clearly to be three returns, one for each election at polling station level, and other sections dealing with the procedure thus refers “returns”.

¹⁵ Section 37C(4).

¹⁶ It would have reduced Tsvangirai’s percentage by 0.75%.

¹⁷ It was clear from the section which followed that majority here meant an absolute majority, that is more than half the votes, and not, where there are more than two candidates, merely the most votes.

simply receive “*more than half the number of votes*”. Matters are not helped in that the very next paragraph, section 110(3)(g), provides that, where no candidate has received more than half the votes and a run-off election is required, the run-off shall be contested by “*only the two candidates who received the highest and next highest numbers of **valid** votes*”. It is arguable that since this section, and section 110(3) under the old Act, specifically refer to “valid votes cast”, the omission to state that the 50% plus one vote must be from *valid* votes cast in the current provision is deliberate and that the calculation must thus be based upon total votes cast. It is equally probable that in the haste to pass the amendment, which sought to clarify the wording to make it clear that an absolute majority is required, the word “valid” was inadvertently omitted. It would be wise for ZEC to let the electorate know in advance of the poll how it intends to approach this issue.

Secondly, section 110(3)(f)(i) provides that after the Chief Elections officer has aggregated the 210 presidential constituency returns, the Chair of the Zimbabwe Electoral Commission must “forthwith” declare the result.¹⁸ This requirement does not sit well with section 37C(4)(f)(ii) which provides that:

*provincial returns for the presidential election gathered from every provincial command centre shall be transmitted to the National Command Centre, where the provincial returns shall be collated to obtain the **initial results** of the presidential election and the **final result**¹⁹ of the presidential election shall, after reconciling the provincial returns with the polling station returns and presidential constituency returns ...be reflected in a return that distinctly reflects number of votes cast for each presidential candidate at every polling station, ward centre,²⁰ presidential constituency centre and provincial command centre.*

This provision thus requires that the National Command centre must audit the provincial returns to ensure that the numbers thereon reconcile with the numbers on the polling station returns and returns at all other levels sent directly to the National Command Centre, as indicated above, and that it prepares a spread sheet reflecting the reconciled results at all levels. While this “return” will be very useful in ensuring that no manipulation or change of results has occurred in the transmission process between the various centres or to expose it if it has, it unfortunately blurs the question of when the result is to be declared.

This provision may be interpreted²¹ to imply that the presidential result cannot be declared until the reconciliation has been done. Such an interpretation directly contradicts the requirement of section 110(3)(f)(i) that the result is to be declared “forthwith” after the constituency returns have been aggregated. So when is the result of the presidential election to be declared? After the presidential constituency returns have been aggregated by the Chief Elections Officer?²²; or after the aggregation of the presidential provincial returns reveal the

¹⁸ Section 110(3)(f)(i).

¹⁹ It is unclear why at first results (plural) is referred to and then “result” singular immediately thereafter. “Results” might be held to refer to the final tallies of the five candidates and result may mean whether and who a person is declared elected as president, or whether a run-off must take place on account of no person having received an absolute majority.

²⁰ There does not appear to be a requirement, unlike the polling station and other returns, that the presidential ward returns are copied to the National Command Centre.

²¹ On asking several lawyers for their interpretation of this section, this is the one I have been given by each.

²² Recall that it is not even clear if this aggregation should be done, as the process is contradicted by the process set out in section 37C(4) of the Act.

“initial” results? Or after the “final result” has been audited and reflected in the required spread sheet return?

The lack of clarity in regard to this crucial stage in the procedure of the presidential election is unwise. By the time the results in the presidential election have been aggregated at a constituency level, a small amount of arithmetic will make it apparent which candidate has garnered the most votes. While the winning candidate may demand that his²³ victory is declared “forthwith”, as section 110(3)(f)(i) requires, the disappointed candidate or candidates may insist that the declaration is not made until the “final” result is known after reconciling the polling station and other returns at the National Command Centre.

One needs to bear in mind that the election officer at each polling station and centre will have to make multiple copies of the returns in each election for distribution, all of which, certainly in the rural areas, in the absence of photocopiers, will need to be done by hand or using carbon paper with frequently indistinct results. There will be about 9 670 polling stations. With five candidates there will be 48 350 polling station entries on the spread sheet return, to match the data on 1 958 ward returns (9 790 entries), 210 constituency returns (1050 entries) and 10 provincial returns (50 entries). There is some doubt as to whether ZEC has had sufficient time to train its staff and to acquire the necessary physical infrastructure.²⁴ In sum, there is ample room for error and disputes which ZEC may find intractable and impossible to resolve, and certainly not within the stipulated five days. The National Command Centre may become a black hole into which the results from the Provincial Command Centre are absorbed never again to emerge - although the electorate will have a very good idea as to who won the poll from the running tallies. The resultant acrimony could cause the unpleasant events following of the March 2008 poll to be repeated.

It is thus suggested that ZEC urgently issue a clarifying statement stating exactly the procedure to be followed to determine the result of the presidential election, which figures will be used in this regard, whether the calculation will be based upon valid or total votes cast, and most importantly, when and at what stage of the tabulation, the declaration of the result will be made.

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²³ All candidates are male.

²⁴ *The Case for an Efficient and Transparent Results Management System* Election Resource Centre, 23.07.13.