

“BEFORE AND AFTER”: OLD WINE IN NEW BOTTLES

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THE CONSTITUTIONAL COURT RULING ON THE ELECTION DATE

On Friday 31st May, 2013 the newly established Constitutional Court¹ issued its first judgment, that is the case of *Jealousy Mbizvo Mawarire v Robert Gabriel Mugabe N.O. and Ors* CCZ1/13. The judgment concerned an urgent application by Mr. Mawarire, brought on the basis of a claim that the President was constitutionally obliged to set the dates for Zimbabwe’s next general election no later than the day after the 29th June, 2013 when Parliament reaches the end of its constitutionally prescribed five year term.² The failure to do so, Mr. Mawarire maintained, was a breach of his constitutional rights³ and would have the unconstitutional effect of the country being governed without a Parliament.

The case had various bizarre and curious facets even before the judgment was delivered. President Mugabe had repeatedly stated his desire to hold elections as soon as possible after the passage of the new constitution into law on the 22nd May, 2013⁴ and well before October 29th, 2013, the date the MDC formations had contended was the latest possible constitutional date for the poll.⁵

Thus the immediate question which arose was, if this was the President’s desire, why did he not exercise his presidential prerogative⁶ to dissolve Parliament and announce the earlier election date? Since Parliament was required to bring the new constitution into being, the dissolution of Parliament could not take place before the passage of the Constitutional Bill. But this could not have prevented proclamation for the dissolution of Parliament at a future date that allowed ample time for the legislature to pass the Constitutional Bill.⁷

However, the MDC formations and SADC all insisted that elections needed to await various reforms to Zimbabwe’s democratic terrain and that a later election date was thus desirable in order to allow sufficient time for these reforms to be implemented. There was also the difficulty that, prior to the adoption of the new constitution; it was a constitutional requirement that the MDC-T Prime Minister, Morgan Tsvangirai, had to be consulted on the date of the dissolution of Parliament, if it were to be dissolved by proclamation rather than by automatic dissolution through the passing of time.⁸

¹ Although the provisions of the new constitution establishing the Constitutional Court are yet to come into operation, the Constitutional Court may sit in the interim in terms of Paragraph 18(8)(a) of Part Four of the Sixth Schedule, which sets out various transitional provisions.

² In terms of section 63(4) of the constitution – see below.

³ For reasons that are obscure the Court determined the issue on the basis of section 18(1a) of the old constitution which is no longer in effect. Although the new Declaration of Rights was not extant at the time the application was brought, one would have thought the matter should be determined on the basis of the Applicant’s rights as they now stand rather than as they once stood.

⁴ See a *A Date With Mugabe* D. Matyszak RAU April, 2013.

⁵ The view that 29th October, 2013 was the latest date for the election was also advanced by RAU and the respected legal monitoring group Veritas amongst others.

⁶ Section 63(1) of the Constitution.

⁷ Parliament reconvened on the 6th May, 2013 and the Constitutional Bill was passed on the 22nd May, 2013.

⁸ Mugabe had ignored the constitutional requirement of consulting the Prime Minister when making various statutory and constitutional appointments and it is thus probable that he likewise would have ignored this

A Constitutional Court ruling that the President was legally obliged to call elections prior to the dissolution of Parliament on the 29th June, 2013 would, however, provide the necessary legal fig leaf for the President to do that which he wanted anyway. The President could have approached the Courts with some confidence on the matter. The Courts had allowed his breach of the Electoral Act and the Constitution in failing to call by-elections, which had been due since 2009, to pass without repercussion despite numerous court applications in this regard. If the Courts had failed to compel the President to convene by-elections as and when they were legally due, they might well compel elections to be held when they were not. In granting frequent postponements sought by the President to an order to hold by-elections, the Court had already displayed a willingness to accommodate the President's electoral timetable.⁹

It would not have been politically expedient for the President to have brought the application before the Constitutional Court himself. Fortuitously, we would have to believe, Mr. Mawarire, a member of an obscure non-governmental organisation, the Centre for Election Democracy in Southern Africa, stepped up to the plate and obligingly brought the application "against" the President. The NGO was believed by some to be a front for Zimbabwe's intelligence agency.¹⁰ Unsurprisingly, the President's "opposing" paper, rather than disputing the Applicant's case, as is usual, wholeheartedly agreed with his argument, though it did not seem, having agreed with the Applicant's interpretation of the law, offer any reasons why he had then failed to comply with it.

The issue before the nine member bench of the Constitutional Court¹¹ was to determine the chronological parameters mandated by the constitution for the holding of a general election following the dissolution of Parliament. The dissolution of parliament can take place in one of two ways, either pursuant to a proclamation to this effect by the President, or through the passing of time when the five year term of Parliament ends. The determination of the issue revolved around the interpretation of subsection 58(1) of the old constitution, as read with subsections 63(4) and 63(7), which are still to apply until the new constitution becomes fully operational.

Section 58(1) provides as follows:

58 Elections

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

The judges of the new Constitutional Court seized with the matter were not fresh judicial appointees who had been through the selection process set out in section 180 of the new Constitution, which potentially curbs presidential influence over judicial appointments. In negotiating the new Constitution the MDC formations had surprisingly agreed that rather than new Constitutional Court comprising especially appointed judicial offices, for a period of

constrain upon his powers. This factor is thus unlikely to have been a cause of his failure to set an early election date.

⁹ See *A Date with Mugabe?* supra and *The President of the Republic of Zimbabwe v Bhebe and Ors* HH 400/12.

¹⁰ *CIO Sponsored NGO Suing Mugabe* <http://nehandaradio.com/> 18.05.13.

¹¹ The bench comprised Chidyausiku CJ, Malaba DCJ, Ziyambi JA, Garwe JA, Gowora JA, Patel JA, Hlatshwayo JA, Chiweshe AJA & Guvava AJA

seven years after the adoption of the constitution, the “new” Constitutional Court will simply comprise members of the Supreme Court sitting as the Constitutional Court. Thus those adjudicating this matter were members of the Chidyausiku Court with whose judgments on constitutional matters we are familiar, joined by Justices Barat Patel and Ben Hlatshwayo recently promoted to the Supreme Court bench by the President, without the consent of the Prime Minister as the Constitution required. To make up the increased number required when sitting as the Constitutional Court, Judge President George Chiweshe and Antonia Guvava were, seconded from the High Court.

Justices Chiweshe and Hlatshwayo were both likely to comfortably complement the jurisprudence of the Chidyausiku Court. Both judges are known in legal circles for their jurisprudentially astounding judgments in favour of the executive, with outcomes usually according with those desired by ZANU PF. Justice Chiweshe, for example, in 2011 dismissed an application¹² which pointed out that the Constitution provides that there “shall” be 31 Ministers and that Mugabe had appointed 41, ruling that 41 “does not outrageously exceed” the stipulated 31; that he would take a “broad approach”¹³ to constitutional interpretation; that (in his opinion) the purpose of the then constitution was to create stability; and that (in his opinion) that stability was not to be achieved by complying with the requirement of appointing only the constitutionally mandated number of ministers as the legislature had determined, but would (in his opinion) on the contrary be undermined if he declared the “admittedly anomalous” appointments unconstitutional. While this ruling was heard on appeal nine months ago, the Supreme Court, seemingly perplexed as to what to do about the matter, has yet to issue a ruling and may not do so before a new government is formed.

So, while the court is new, the judges are not. As is often the case in the Supreme Court with matters of political import, the Chief Justice penned the judgment for the majority. The only visible jurisprudential contribution of all but two of remaining members of the bench was likewise in keeping with past precedent which most often consists of appending the words “I agree” to Chidyausiku CJ’s judgements.

Chidyausiku CJ’s judgments in favour of the executive at least exhibit a modicum more subtlety than those of Chiweshe JP.¹⁴ Rather than simply commencing with a statement that he intended to take a “broad” or “wide approach” to constitutional interpretation, the Chief Justice more correctly decided that such an approach cannot be adopted unless the provisions of the Constitution are ambiguous and assistance is needed to interpret the supreme law of the land.

So the first step in Justice Chidyausiku’s judgment was to construe section 58(1) so that its meaning became ambiguous. This was done by violating some very basic rules of grammar and in the following way. Thus the judgment:

READING "A"

58(1) A general election and elections for members of the governing bodies of local authorities shall be held on: such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or, as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the Gazette, fix."

¹² *Kufa & Anor v The President of the Republic of Zimbabwe & Ors* HH 86/11.

¹³ P9 of the judgment.

¹⁴ Indeed, during argument in the Kufa case, no attempt was made by counsel for the President or the Chief Justice to support the reasoning of Justice Chiweshe.

READING "B"

58(1) A general election and elections for members of the governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after:

1. the issue of a proclamation dissolving Parliament under section 63(7) or, as the case may be, the dissolution of Parliament under section 63 (4) as the President may, by proclamation in the Gazette, fix."

There could be any number of other variations the section 58(1) text can be broken into, but the two scenarios above will suffice for the purpose of this case. Both Reading "A" and Reading "B" answer to the question when elections are to be held but with one putting the emphasis on the preposition "on" and the other on "after". Both interpretations are compelling. Adopting one interpretation or the other results in starkly different outcomes. In one case elections must be held within the life of Parliament. In the other case, elections may be held up to four months after the dissolution of Parliament.

A Court faced with competing possible interpretations of a constitutional provision must call into aid principles or canons of construction.

Justice Chidyausiku inserts colons into the section (where none exist in the original) ostensibly to clarify the ambiguity, but in practice creates an ambiguity where none existed before.

The insertion of punctuation can dramatically change the meaning of a sentence, for example:

'While the mother was cooking the baby her brother and the dog were sleeping.'

When punctuated, the sentence is easier to read.

'While the mother was cooking, the baby, her brother and the dog were sleeping.'

But leave out a comma and the text becomes more sinister

'While the mother was cooking the baby, her brother and the dog were sleeping.'

By inserting a colon after "on" in section 58(1), Chidyausiku CJ alters the meaning of the provision to read:

58(1) A general election and elections for members of the governing bodies of local authorities shall be held on:

- i) such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or,*
- ii) as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the Gazette, fix.*

This has the effect of removing the application of the phrase "within a period not exceeding four months after" from the portion of the section referring to dissolution under 63(4) which is

the provision providing for the automatic dissolution of Parliament. The sense is then that the election must be held on the automatic dissolution of Parliament, that is, 29th June, 2013.¹⁵

However, the legislature did not place any colon where the Chief Justice would like to read one. The sentence must thus be read without it and in accordance with the usual rules of grammar.

The grammar is clear. Implied meaning is carried from that meaning immediately preceding it. If one has the sentence:

'The witness saw the accused clearly. The accused was crossing the street. He was carrying an axe and looked frantic.'

The 'he' is understood as applying to the accused, and not to the witness. If the 'he' does apply to the witness, it is the job of the writer to say so or he is misinforming the reader. Hence a grammatical reading of the sentence requires that the phrase “within a period not exceeding four months after” applies to that portion of the section relating to automatic dissolution. The sense is thus that an election need only be held with a period not exceeding four months after the automatic dissolution on the 29th June, 2013, that is, by the 29th October, 2013.

As with the example of the mother cooking her baby given above, Justice Chiyausiku thus creates a new meaning for section 58(1) and one which accords with the Applicant's (and ZANU PF's) desire.

The effect in sum is that the sentence is read to mean that the President must set the election date within a period four months *before* the dissolution of Parliament. Yet the provision quite clearly uses the word “*after*” and we must assume deliberately so. Furthermore, this meaning also implies that where the election is pursuant to the automatic dissolution of Parliament, the election must be held on such dissolution and not within a period of four months thereafter. The date then is not fixed by the President, a requirement to which the relevant sections repeatedly make reference, but is fixed by the term limit of Parliament. And there is no point in the President issuing a proclamation concerning a date for an election which is already known and determined.

Where there are two possible interpretations of a provision, the Chief Justice held, the one which does not lead to an absurdity must be chosen. The above absurdities were ignored in favour of ones summoned forth by the Chief Justice and his agreeing colleagues, and which had been suggested by the Applicant. These absurdities required the majority judges to display a hitherto undisclosed enthusiasm for the principle of the separation of powers and abhorrence of the possibility of the President ruling by what was now derisively called “decree”. The principle of separation of powers, we were piously and correctly told, requires that legislation is to be done by the legislature, and not by the executive, and part of the duty of the legislature is precisely to keep the executive in check and ensure it rules in accordance with the legislation which it has passed.

The absence of a legislature for four months after automatic dissolution, allowing the President legislative powers and to rule by decree would be so strange, the Chief Justice averred, as to cause his mind to boggle.¹⁶

¹⁵ Read with section 63(7) this would mean that the election must be held the day after dissolution.

¹⁶ At about p10 of the judgment – the formal printed version of the judgment is not in my possession at the time of writing.

However, this intrusion of the President into the legislative realm and ability to rule by decree has long been a part of our old Constitution and is carried over into the new. The Chief Justice's mind has, however, remained resolutely unboggled in the face of these clearly egregious and undemocratic provisions. The old and the new constitution both provide that the legislature consists of both Parliament *and* the President. It is difficult to find a more blatant instance of statutory executive intrusion into the legislative realm. Furthermore, the "decrees" referred to by the Chief Justice are in fact Regulations issued in terms of the Presidential Powers (Temporary Measures) Act.¹⁷ This unsavoury piece of legislation allows the President to make laws which override those of Parliament whenever he, the President, considers the exigencies of the situation so require.¹⁸ It is specifically designed to do that which the Chief Justice now claims to find so abhorrent – to allow the President to make law in the absence of Parliament. Not only has this law been upheld by our courts, but the powers given to the President in the Act have been given an overly generous and expansive interpretation.

In 2007, the legislature agreed to amend the Electoral Act so as to exclude police officers from polling stations, as the opposition felt that their presence was intimidatory.¹⁹ Although the Presidential Powers (Temporary Measures) Act is only supposed to be used in matters of extreme urgency, the President took advantage of the fact the Parliament was dissolved and, shortly before the March 2008 elections, reinserted the offending provision into the Electoral Act that the legislature had expressly wanted expunged and had removed but a few months before. When this undemocratic behaviour came before Gubbay J as an urgent application, none of the apparent deep antipathy to rule by decree (expressed by association in the "I agree" of Gubbay J and appended to Chidyausiku CJ's judgment in this issue) is apparent. The application to set aside the President's subversion of the legislature's will was dismissed by the learned judge without comment²⁰.

Thus, far from it being an absurdity that the country should be run by decree without a Parliament, our legislative architecture is specifically designed to facilitate this possibility. This was alluded to by Patel JA, in dissent, who pointed out that section 31E(2) of the constitution provides:

No person shall hold office as Vice-President, Minister or Deputy Minister for longer than three months unless he is a member of Parliament: Provided that if during that period Parliament is dissolved, he may continue to hold such office without being a member of Parliament until Parliament first meets after the dissolution.

This section thus clearly contemplates the possibility of Parliament being dissolved for periods of more than three months even though there is a functioning executive during this period.

It is difficult to understand how Chidyausiku CJ's reply to this point addresses the issue:

this provision [31E] presupposes the prior existence of Parliament and not its wholesale absence and caters for a few desired members of the Executive who may not have made it to Parliament.

¹⁷ Chapter 10:20.

¹⁸ Section 2.

¹⁹ The provision allowed police officers to assist disabled voters.

²⁰ *Kuchera & Ors v the President of the Republic of Zimbabwe* 1727/08.

Furthermore, the Constitution, in fact, specifically allows for Parliament to be prorogued for periods of as much as 180 days,²¹ and the power to prorogue Parliament for such an extended period lies with the President under the current constitution.²²

And far from it being absurd that there should be no Parliament in the hiatus between dissolution and elections, in the past the date for an election has *always* been announced after, and not before, dissolution. The position, as Malaba JA, dissenting, pointed out,²³ is common in other jurisdictions with, for example, Malaysia, Ireland, Bulgaria, and Canada all allowing several months between the dissolution of Parliament and the election. Zimbabwe would only be unusual in that the period is somewhat longer at four months. The executive continued to function without legislative oversight for five months between the dissolution of Parliament for the March 2008 election and the start of the seventh Parliament in 2008 without anyone's mind being boggled or any ruling of absurdity.

Finally, in this regard, it should be noted that even if the judgment were correct (which it is not), the consequent court order cannot be so. The order was that since there could no longer be compliance with the June 29th deadline, that the election must be held before the 31st July, 2013. This order has created the possibility that the President may not be able to comply with both the court order and the Constitution. The reason for this lies in the fact that the provisions of the new constitution, which are effective from the date of publication, stipulate that there must be at least 44 days between the proclamation of the election dates and the election day itself.

But the new constitution also provides that the Electoral Act cannot be changed once the election dates have been announced. The effect of these two provisions does not appear to have been considered by any of the justices seized with the matter. Since the Electoral Act must be amended to bring it into line with the new constitution, especially in regard to the introduction of a system of proportional representation, the President may not proclaim the election dates until the amendments to the Electoral Act have been finalised. There is no guarantee that the MDC formations will agree to the amendments at least 44 days before the 31st July, 2013. The President will then either have to violate the constitutional requirement that 44 days elapse between the electoral proclamation and the election itself, or fail to meet the 31st July, 2013 deadline.

Furthermore, the 44 days is the minimum period between the proclamation and the election. The last amendment to the Electoral Act, responding to a request from the Zimbabwe Electoral Commission which believed the previous 42 days too brief for logistical purposes, extended the minimum period to 56 days.²⁴ If this or a similar period is retained, the President will not be able to comply with the Constitutional Court order and the Electoral Act simultaneously.

It thus would have been more appropriate for the Constitutional Court to have ordered that the Elections be held within a minimum period after the passage of the amendments of the Electoral Act into law and in line with whatever provisions are set in regard to election timing in the amended Act. However, if the amendments to Electoral Act are only agreed shortly before the automatic dissolution of Parliament, then even if the amended Electoral Act

²¹ Section 62(2) of the Constitution.

²² Section 63(1) of the Constitution.

²³ At approximately page 25 of the judgment.

²⁴ Section 38(1)(i) & (ii) of the Electoral Act Chapter 02:13.

follows the minimum 44 day period of the Constitution, the election could not then take place before mid-August, 2013. The UNWTO Conference would then be just two weeks away, and many politicians have stated that it would not be politically desirable to hold an election in this period.²⁵ One certainly hopes that it was not this political consideration which prevented the Court from considering the point and caused it to issue the order in the form that it did.

Rather than bemoaning his “loss” in the court action, and being remorseful at having been reprimanded by the Court for his failure to uphold the Constitution, Mugabe continued the chastisement by ecstatically engaging in a bit of purging self-flagellation and *mea culpas*:

“They [the judges] were reasonable enough to give us time. They could have ordered us because we²⁶ have violated the Constitution right, left and centre and say do elections now and we would have trampled and said: ‘but we can’t do the elections now give us more time’

“So, the court is fair to make judgment on defaulters and we have been criminals on this one,” he said. “So, there it is, we are now going to be cleaner people and get exonerated and say let bygones be bygones, the future will see us clean.”

In finding that the latest constitutional date for elections is June 29th rather than October 29th, the majority located an ambiguity and absurdity when none existed. Since the new court comprises old judges, it may have been naive to expect jurisprudence different from that of the Supreme Court to emerge. But it is jurisprudence of this ilk through which the new Declaration of Rights in the new Constitution will be filtered. This is a direct consequence of negotiating a new Constitution which did not provide for a fresh and reconstructed court to adjudicate upon constitutional matters, but rather the current Supreme Court operating, under a different name albeit with a few more judges.

Perhaps, then, someone could remind me why the new Constitution was accepted so enthusiastically by the populace...it keeps slipping my mind.

Derek Matyszak
RAU
03.06.13

²⁵ See *Elections won’t disrupt UNWTO — Mzembi* on the Zimbabwe government website <http://www.gta.gov.zw/index.php/component/content/article/115-december-news/6745-elections-wont-disrupt-unwto-mzembi>

²⁶ Since Mugabe claimed sole authority to announce the election date, the “we” here seems to be a royal one.