

Statement on the Pre-election Conditions for the 2013 Harmonised Elections, from a special meeting of the SAPES Policy Dialogue Forum, 30th July 2013

We, the organisations meeting as the SAPES Policy Dialogue Forum, wish to state our deepest concerns about the very serious problems that have emerged in the run-up to the 2013 Harmonised Elections to be held tomorrow, 31st July 2013.

At the outset, we wish to point out that SADC itself had reservations that there was sufficient time for the holding of credible elections. As was stated in the communique from the Extraordinary SADC Summit in June 2013:

8.4. Summit endorsed the report of the Facilitator and its recommendations which includes, among others, the following issues

- 1. Media Reform;*
- 2. Upholding the Rule of Law;*
- 3. The role of the Joint Monitoring and Implementation Committee (JOMIC);*
- 4. Election Date, Validity of Electoral Regulations; and*
- 5. Deployment of SADC observers*

8.5 Summit acknowledged the ruling of the Constitutional Court of Zimbabwe on the elections date and agreed on the need for the Government of Zimbabwe to engage the Constitutional Court to seek more time beyond 31 July 2013 deadline for holding the Harmonised elections.

8.6 Summit urged the three parties of the GPA to undertake immediate measures to create a conducive environment for the holding of peaceful, credible, free and fair elections

Against this background, we wish to make the following statement about the credibility of the elections to be held tomorrow.

We note that the SADC Principles and Guidelines Governing Democratic Elections lay down explicit conditions to be adhered to by member states, as well as explicit criteria for the observation of elections in member countries by SADC Observer Missions (see Appendix 1). We note here the SADC Facilitator's report to the Summit (that was accepted by all parties to the Global Political Agreement) made explicit reference to the need for adherence to the SADC Principles and Guidelines Governing Democratic Elections.

We would assert in the strongest possible terms that the conditions that currently apply to the elections violate the SADC Principles in a number of ways that we will detail below. Furthermore, we would equally assert that these violations are already observable under the Guidelines for the Observation of elections.

1. We would point out that, contrary to the wishes of the SADC Summit in June 2013, the possibility of an extension to the time period for the elections was undone by the decision of the Constitutional Court, and that, to date, this decision has yet be graced by a detailed judgement from the Court. Given the serious constitutional and legal problems occasioned by the Presidential Proclamation, and the likelihood that the subsequent use of the Presidential Powers

(Temporary Measures) Act to make a number of electoral amendments in violation of the Constitution, the legal basis for this election is highly dubious to say the least.

2. The precipitate proclamation of the election date for the 31st July 2013 has resulted in a continuous number of illegalities on the part of ZEC, and these have been “cured” through decisions of the Constitutional Court (see Appendix 3). Again this has been by decision without detailed judgement, as was the case for the dilemma created by the confusion over the Special Voting process.

3. There seems to have been a bias towards the registration of rural voters in the intensive voter registration process that concluded on 19th July 2013 with many more registration centres being provided rural citizens, and that the uneven distribution of the registration centres creates a *prima facie* bias towards one political party. Furthermore, this distribution of registration centres is in conflict with Constitutional Provision 155 (2), which states unambiguously that:

The State must take all appropriate measures, including legislative measures, to ensure that effect is given to the principles set out in subsection (1) and, in particular, must—

(a) ensure that all eligible citizens, that is to say the citizens qualified under the Fourth Schedule, are registered as voters;

(b) ensure that every citizen who is eligible to vote in an election or referendum has an opportunity to cast a vote, and must facilitate voting by persons with disabilities or special needs;

(c) ensure that all political parties and candidates contesting an election or participating in a referendum have reasonable access to all material and information necessary for them to participate effectively;

4. There are extreme concerns over the state of the Voters’ Roll, as indicated by a number of audits of the June 2013 Roll, and these concerns have been conveyed to the Zimbabwe Electoral Commission (ZEC), but ZEC has yet to offer any explanation for these. Amongst the concerns are the following:

1. The large discrepancy between the numbers of persons on the Voters’ Roll and the numbers indicated for each Constituency;
2. The very large numbers of young persons (under 30 years) that do not seem to have been registered as voters;
3. The large differences between the number of citizens registered in rural areas as opposed to in urban areas, with an overwhelming bias towards older persons again being more represented.

Additionally, there are serious concerns about duplicate voters on the roll as indicated by the statement by Mr Dumiso Dabengwa. Similar concerns have been raised by civil society, but without response from ZEC. The concern here is that these duplicates all have valid National IDs and that this cannot arise through error.

5. The final Voters’ Roll has not been made available as required by Section 21 of the Electoral Act, as amended, and the grounds for this unavailability are unacceptable on the eve of an election.

6. The publication of the full list of polling stations and their placement has been excessively delayed to the disadvantage of the voters, and in violation of Section 155 (2) of the Constitution.

7. There are numerous reports by civil society organisations monitoring the pre-election climate of intimidation and increasing violence, predominantly by supporters of ZANU PF.

For these reasons, we believe that the credibility of the election is already severely compromised according to the standards laid down by SADC and agreed to by Zimbabwe. Hence, we assert very strongly that, according to the criteria for observation for SADC (and other) Observer groups, there can be no other conclusion for Observer groups than there are already substantial violations of the Principles and Guidelines, and that it is very doubtful that the elections tomorrow can be free and fair. Absence of violence is not the only criterion by which Zimbabwe elections should be judged, and this flawed process is likely to lead to violence in the post-election period.

Ends/

30 July 2013

Appendix 1
SADC PRINCIPLES AND GUIDELINES GOVERNING DEMOCRATIC ELECTIONS

2. PRINCIPLES FOR CONDUCTING DEMOCRATIC ELECTIONS

2.1 In the event a Member State decides to extend an invitation to SADC to observe its elections, this shall be based on the provisions of the Protocol on Politics, Defence and Security Cooperation.

2.2 SADC Member States shall adhere to the following principles in the conduct of democratic elections:

2.1.1 Full participation of the citizens in the political process;

2.1.2 Freedom of association;

2.1.3 Political tolerance;

2.1.4 Regular intervals for elections as provided for by the respective National Constitutions;

2.1.5 Equal opportunity for all political parties to access the state media;

2.1.6 Equal opportunity to exercise the right to vote and be voted for;

2.1.7 Independence of the Judiciary and impartiality of the electoral institutions; and 2.1.8 Voter education.

2.1.9 Acceptance and respect of the election results by political parties proclaimed to have been free and fair by the competent National Electoral Authorities in accordance with the law of the land.

2.1.10 Challenge of the election results as provided for in the law of the land.

4. GUIDELINES FOR THE OBSERVATION OF ELECTIONS

4.1 SADC Member States shall be guided by the following guidelines to determine the nature and scope of election observation:

4.1.1 Constitutional and legal guarantees of freedom and rights of the citizens;

4.1.2 Conducive environment for free, fair and peaceful elections;

4.1.3 Non-discrimination in the voters' registration;

4.1.4 Existence of updated and accessible voters roll;

4.1.5 Timely announcement of the election date;

4.1.6 Where applicable, funding of political parties must be transparent and based on agreed threshold in accordance with the laws of the land;

4.1.7 Polling Stations should be in neutral places;

4.1.8 Counting of the votes at polling stations;

4.1.9 Establishment of the mechanism for assisting the planning and deployment of electoral observation missions; and

4.1.10 SADC Election Observation Missions should be deployed at least two weeks before the voting day.

Appendix 2
Section 21 of the Electoral Act, as amended.

21 Inspection of voters rolls and provision of copies

(1) Every voters roll shall be a public document and open to inspection by the public, free of charge, during ordinary office hours at the office of the Commission or the constituency registrar where it is kept.

(2) A person inspecting the voters roll for a constituency may, without removing the voters roll, make any written notes of anything contained therein during office hours.

(3) The Commission shall within a reasonable period of time provide any person who requests it, and who pays the prescribed fee, with a copy of any ward or constituency voters roll, either in printed or in electronic form as the person may request.

(4) Within a reasonable period of time after the calling of an election, the Commission shall provide, on payment of the prescribed fee, to every political party that intends to contest the election, and to any observer who requests it, one copy of every voters roll to be used in the election, either in printed or in electronic form as the party or observer may request.

(5) Fees prescribed for the purposes of subsection (3) or (4) shall not exceed the reasonable cost of providing the voters roll concerned.

(6) Within a reasonable period of the time after nomination day in an election, the Commission shall provide -

(a) free of charge, to every nominated candidate, one copy in electronic form of the constituency voters roll to be used in the election for which the candidate has been nominated; and

(b) at the request of any nominated candidate, and on payment of the prescribed fee, one copy in printed form of the constituency voters roll to be used in the election for which the candidate has been nominated.

(7) Where a voters roll is provided in electronic form in terms of subsection (3), (4) or (6), its format shall be such as allows its contents to be searched and analysed:

Provided that—

(i) the roll may be formatted so as to prevent its being altered or otherwise tampered with;

(ii) the Commission may impose reasonable conditions on the provision of the roll to prevent it from being used for commercial or other purposes unconnected with an election.

(8) For the purposes of any election the Chief Elections Officer shall, through the appropriate constituency elections officer, supply sufficient copies of the ward voters roll to every polling station.

(9) Any person who, having been provided with a voters roll in terms of this section—

(a) alters the voters roll, that is to say, excises any name from, adds any name to or otherwise alters the voters roll with intent to misrepresent to any person that the altered voters roll is the authentic voters roll for any election; or

(b) makes use of the voters roll for commercial or other purposes unconnected with an election;

shall be guilty of an offence and liable to a fine not exceeding level ten or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

Appendix 3

ZIMBABWE'S 2013 ELECTION –

NOTES ON ILLEGALITIES UP TO 30.07.13

1. On 31.05.13 Zimbabwe's Constitutional Court, in a legally questionable judgment, determined that Zimbabwe's next general election had to be held before the dissolution of Parliament, that is, 29.06.13. Since this date was no longer feasible, the court ordered that the election be held as soon as possible, that is, by the 31.07.13. In making this order, the court appears not to have been alive to other time constraints set by the Electoral Act, or the logistical difficulties caused by the deadline for the Zimbabwe Electoral Commission. This, and other factors, resulted in a failure to comply with several provisions of the Electoral Act and Constitution.
2. The Electoral Act had to be amended before the election to bring it into line with the provisions of Zimbabwe's new constitution. While a draft amendment Bill had been produced ahead of the Constitutional Court ruling, it had not been finalised. In order to meet the Constitutional Court deadline, the multiparty Cabinet hastily finalised the amendments. They were thus done without the diligence required when proposing amendments to legislation. The agreed final version contained numerous inconsistencies and omissions in key areas.
3. These problems might have been resolved ahead of passing the amendments into law, had the Bill been presented to Parliament as required.
4. However, on 13.06.13, the President purported to use bring the amendments into law by way of Regulations (S.I. 86 of 2013) under the Presidential Powers (Temporary Measures) Act, claiming that it was necessary to do so as there was insufficient time to bring the Bill before Parliament and to meet the 31.07.13 deadline imposed by the Constitutional Court.
5. It was unlawful to do so for several reasons:
 - a) Section 157 of the Constitution clearly stipulates that Electoral Law must be provided for by an "Act of Parliament" and no other legal instrument. The same provision specifies that this is particularly so in relation to:
 - i. the registration of voters, and requirements for registration on particular voters' rolls; and

- ii. the (re) introduced partial system of proportional representation.

The Regulations made by the President, which purported to make electoral law, and purported to make electoral law which deal with the registration of voters and the system of proportional representation are thus invalid as they are not an Act of Parliament.

- b) The Presidential Powers ((Temporary Measures) Act itself does not allow regulations to be made for this purpose, providing that the Act may not be used to legislate any measures which must be done “by, rather than in terms of” an Act of Parliament.
 - c) Section 31H of the still extant provisions of the old constitution requires the President, when utilising his powers under the Presidential Powers ((Temporary Measures) Act, to act on the advice of Cabinet. The President introduced a version of an amending Bill which was not the one Cabinet had agreed was to be adopted and which Cabinet had advised be put to Parliament.
 - d) Section 157(4) of the new Constitution provides that no changes may be made to electoral law or any subsidiary legislation “*unless the Zimbabwe Electoral Commission has been consulted and any recommendations made by the Commission have been duly considered*”. The President thus purported to change Electoral Law without consultation with ZEC. Had ZEC been afforded the opportunity to consider the legislation as required, it might have advised that several changes were impractical and that it would be unable to meet the deadlines imposed by the amended Act. In this latter regard, ZEC had previously motivated a change to the legislation so that a period of at least 42 days intervened between the sitting of nomination court and the election. This was to afford ZEC sufficient time to carry out its duties and make the necessary logistical arrangements required by law. The President’s purported amendment, without the consultation of ZEC, reduced the 42 day period to 30 days. ZEC was thus unable to fulfil its duties timeously, resulting in several breaches of Electoral Law.
6. The new constitution provides that there had to be a 30 day period of intensive voter registration and inspection of the voters roll ahead of the election. The Electoral Act provided that registration must end the day before the nomination court sits. The nomination court had to sit 30 days before the election, that is, before the 1st July, 2013. In order to

accommodate this constitutional requirement and the provisions of the Electoral Act, the Presidential Regulations extended voter registration so that it was to end 12 days after nomination day, rather than the day before.

7. Section 21 of the Electoral Act provides that a digital copy of the roller roll *to be used in the election* must be provided to those requesting it within a reasonable time after nomination day. ZEC initially claimed that they were unable to meet this requirement as, due to the extended voter registration period introduced by the President, they had not finished making the data entries. This excuse can no longer be sustained, as the final roll has now been distributed to election officers, while ZEC has still refused to make the final copy available as provided for by law.
8. The new constitution restored the Zimbabwean citizenship of many people who had been deprived of this as their parents had origins within countries in the region, rather than Zimbabwe. In order to register as voters, the affected individuals first had to apply to have their Zimbabwean citizenship restored, before applying to register as voters. Due to the precipitate election date, insufficient time was available to do this within the time limits set by the Electoral Act.

9. Section 155(2) of the Constitution provides that:

The State must take all appropriate measures, including legislative measures, to ensure that effect is given to the principles set out in subsection (1) and, in particular, must—

- (a) ensure that all eligible citizens, that is to say the citizens qualified .. are registered as voters;*
- (b) ensure that every citizen who is eligible to vote in an election or referendum has an opportunity to cast a vote, and must facilitate voting by persons with disabilities or special needs.*

When ZEC was unable to meet the constitutional requirement that all those eligible to cast a vote did so in relation to special voters (see below), it brought an application to the Constitutional Court asking that provisions of the Electoral Act be suspended to facilitate this.

However, when ZEC was unable to meet the constitutional requirement that all those eligible to register be afforded an opportunity to do so, it took no similar action, and in fact stated categorically that it would apply the provisions of the Electoral Act in relation to the cut off date, leaving many disenfranchised.

10. Section 81 of the Electoral Act allows a special vote for any person who *“will be unable to vote at a polling station in his or her constituency because he or she is a member of a disciplined force who will be performing security duties during the election”* It is clear from other provisions of this part of the Act, that this inability must be on account of performing such duties *outside* the constituency in which he or she must vote.

11. ZEC granted just over 63 268 applications for a special vote, which according to Zimbabwe Republic police officials themselves, constitutes almost the entire police force. It is not conceivable that every single member of the police force will be deployed away from his or her voting constituency on election day. ZEC should thus not have granted such a vast number of applications which were clearly based on false information. Voting for members of the police performing security duties preventing them from voting was dealt with by way of postal votes in the March 2008 election. For that election only 4 350 postal votes were granted.
12. In terms of the Electoral Act all applications for special votes should have been numbered and made available to the public for inspection. This was not done, violating the provisions of the Act in this regard (section 81C(3)).
13. The Act requires that special voting takes place no later than 16 days before polling on the 31.07.13. It thus had to be completed by the 15.07.13. It reportedly spilled over into the 16.07.13, for the reasons indicated below.
14. The procedure for special voting requires individual customised envelopes to be prepared for each of the 63 268 applicants and for these to be dispatched, ahead of the vote, to the correct polling station for collection by the voter.
15. Due to the precipitate elections date, the ballots were not printed timeously nor the envelopes prepared timeously for the special voters, despite the best efforts of ZEC staff who worked late into the night delivering ballots piecemeal, sporadically leaving voters waiting at polling stations for extended periods and beyond the cut off time for voting. In the event, 26 160 police officers were still without ballot papers and unable to vote.
16. ZEC then issued a statement that those unable to cast their special vote, would be allowed to vote on 31.07.13. However, the only basis upon which they could have been granted a special vote was on the ground that they were unable to vote on that date. This then constituted an admission from ZEC that the applications for a special vote had been wrongly granted.
17. Furthermore, section 81H(1) of the Electoral Act makes it an offence for any person who has been granted a special vote, whether it has been used or not, to cast a vote on 31.07.13. ZEC then successfully applied to the Constitutional Court to be allowed to ignore this provision of the Electoral Act, raising the question as to why it had not done likewise when unable to perform its duties in relation to registration.
18. Those stationed at foreign embassies etc are entitled to a postal vote which must be cast no later than 14 days before of the election. Ballots in this

regard were only collected from ZEC on the day the deadline expired (17.06.13), breaching this requirement of the Act.

19. Section 21(4) of the Act requires that the voters roll to be used in the election must be made available in a searchable digital form within a reasonable time after nomination day. This has not been done and ZEC has unlawfully refused to release the final copy of the roll.
20. Paragraph 8 of Part III of the Sixth Schedule provides that the elections “*must be conducted in terms of an Electoral Law in conformity with this Constitution*”. Several aspects of the electoral process to date have not been conducted in accordance with Electoral Law, thus violating the Constitution.
21. The Constitution (section 239(b)) requires that ZEC ensures that *elections are conducted efficiently and in accordance with the law*. The precipitate election date has prevented ZEC from meeting this constitutional requirement.