

THE INCONVENIENT TRUTH (PART II)

A complete guide to the recount of votes in Zimbabwe's "harmonised" elections

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*"The Inconvenient Truth"*¹ analysed the various explanations given by the Zimbabwe Electoral Commission (ZEC) for releasing the results of the presidential poll from the harmonised elections that took place in Zimbabwe on the 29th March, 2009. Votes were cast in four elections, Presidential, the House of Assembly, the Senate and Local Government. While the results for the parliamentary elections were released (eventually) by ZEC at a national level, at the time of writing the official results for the presidential election remain unknown to the electorate.

The last of various explanations for this delay was advanced by ZEC's lawyer during the course of an urgent court application, made by the Movement for Democratic Change (MDC) on the 6th April 2008 to compel the release of the result. It had not, at that time, seven days after the poll, been advanced by ZEC itself. This explanation, which now appears to have been implicitly adopted by ZEC, is that ZEC is acting in terms of section 67A(4) (see annexure A) of the Electoral Act ("the Act"). The subsection provides that ZEC may "on its own initiative" order a recount of votes in any election. ZEC's contention thus appears to be that it cannot release the presidential result while the recount is in progress. However, nothing in the Act stipulates that ZEC may withhold the result of the presidential poll while a recount is underway. On the contrary, the Act specifically requires the result to be announced "forthwith" after the verification and collation process. ZEC has sought to evade this obvious requirement by obfuscating the verification process and implying that the recount is part of the verification procedure. It is not. The meaning of "verification" is set out in the Act (section 65[2]) and refers simply to presidential candidates checking integrity of the constituency returns sent to the Chief Election Officer, that is, that the numbers have not been altered en route and that the 210 returns to be added up are the same documents signed by their representatives at constituency level. It does not refer to a forensic audit of the count, as ZEC officials have sought to imply. These concerns were addressed in Part I of *An Inconvenient Truth*. This article focuses on the recount itself, though some of the issues in Part I will need to be repeated. Some of the conclusions reached earlier are also strengthened during the course of the analysis.

Subsection 67A(4), the implied basis for the recount, needs to be examined closely in order to ascertain the legitimacy of ZEC's actions. Before ZEC may order a recount on its own initiative in terms of this subsection, seven conditions must be met:

1. ZEC must consider that there are reasonable grounds for believing that a miscount has occurred at **polling station** level [section 67A(4) and 67A(5)].
2. ZEC must state the specific polling stations where a miscount of this nature is believed to have occurred and **in which election** the miscount has occurred - Local Government, Parliamentary or Presidential [section 67A(5)(a)]
3. ZEC must have **reasonable grounds** for believing that the miscount is significant enough to have affected **the result** of the election [section 67A(4)].
4. ZEC must obtain an order from the Electoral Court in order to open the ballot boxes to conduct the recount [section 70(4)].
5. ZEC's purpose in conducting the recount must be with a view to instituting a prosecution in relation to an election or election return [section 70(4)].
6. ZEC must also specify the time, date and place for the recount and the procedure to be adopted [section 67A(5)(b)].
7. ZEC must undertake and complete the recount within 14 days of the declaration of the result in all constituencies where election petitions have not been filed [section 70(3)(a)].

Each and every one of these seven grounds must exist before any recount ordered by ZEC may be considered lawful.

¹ Available at <http://www.kubatana.net/html/archive/elec/080421idasa.asp?sector=ELEC>

In what follows, an analysis is made as to whether ZEC has complied with these requirements in relation to the on-going recount. On Saturday 12th April, 2008 Justice George Chiweshe, head of ZEC issued GN 58A/2008 in the following terms:

*"It is hereby notified, in terms of section 67A of the Electoral Act that the Commission [ZEC] being of the opinion that reasonable grounds exist for believing a miscount of votes occurred that would have affected the result of the elections concerned, has ordered that a recount in respect to Presidential, Senate, House of Assembly and Local Authority Elections be undertaken at the Constituency Centres at dates and time indicated in the Schedule in respect of votes polled at **all polling stations** that were counted at the Scheduled constituency centres".*

This was a convoluted way of saying that there would be a recount of every vote for every election at every polling station in the listed constituencies. A schedule of 23 constituencies followed. There are 1092 polling stations where a recount is to take place². With one ballot box for each of the four elections this makes for at least 4 368 ballot boxes to be opened and recounted.

Requirements 1 & 2

With these facts in mind, we can now consider the first two of the requirements for a recount, that is, ZEC must have reasonable grounds for believing that a miscount occurred at a particular polling station in relation to a particular election. Accordingly, Chiweshe's notice suggests that ZEC has "reasonable grounds" (in other words objectively credible information) that a miscount occurred in all 1092 polling stations and in each and every one of the four elections at each of these polling stations. This in turn suggests it has evidence pertaining to each and every one of 4 368 ballot boxes that the ballots in each have been miscounted. The Act does not permit a recount on the basis of a belief or information that the constituency total is somehow incorrect. The suspicion must relate to a specific election at a specific polling station. In order to comply with the Act and to initiate a recount of this extent, ZEC must have reasonable information relating to a miscount in respect of 4 368 ballot boxes. This is inherently implausible.

ZEC's argument might be that, as reported, ZANU PF filed complaints in respect of 21 constituencies, and the MDC in respect of two³. Although all but five or six of these were filed outside the 48 hour time limit for a recount at the instance of a candidate [in terms of section 67A(1)], ZEC might say the complaints nonetheless revealed evidence sufficiently credible for it to order a recount on its own initiative under section 67A(4). Such an argument does not close the credibility gap however. A candidate applying for a recount under 67A(1) must state the polling station where the miscount was believed to have occurred, the number of votes believed to have been miscounted in relation to the particular election in which he or she was a candidate and the believed manner in which the miscount occurred, if known. Thus such an argument by ZEC would require one to accept that at least one candidate in each of the four elections provided credible evidence of a miscount pertaining to every single polling station, and pertaining to all four elections in 23 constituencies. Put another way the argument requires there was evidence provided by candidates of about 4 368 instances of miscounting - a singularly unlikely proposition.

On 23rd April, 2008 the state controlled *Herald* newspaper released some of the results for the only constituency where the recount has been completed at that stage. ZANU PF's tally went up by one vote from 6 193 to 6 194 against the MDC's 5 931 in the House of Assembly poll. The Senate poll remained unchanged. *The Herald*, rather comically, fails to disclose the result of the presidential recount (presumably in deference to the government's desire to cast a Harry Potter cloak over these results) and simply states that the Senate poll remained unchanged, reluctant to disclose the front runner in that Senate constituency. Accordingly, despite ZEC claiming to have evidence which gave reasonable grounds to believe a miscount had occurred, the *Herald* report reveals approximately 24 000 ballots were recounted in relation to two elections from 82 ballot boxes and the difference is but one vote from the previous count. This margin of error is 0.000041% for the two elections and 0.00002% for all four if the count in the other two polls showed no error. Of about 82 ballots boxes (or 164 for all four elections) of which ZEC said it had credible evidence of a miscount only one showed an error - of a single vote. This suggests that the "reasonable grounds" ZEC was required to have to initiate a recount for the polling stations in this constituency either were not reasonable or did not exist at all.

² Source www.kubatana.net

³ See Zanu PF retains Goromonzi West, April 23, 2008 - <http://www.kubatana.net/html/archive/elec/080423herald.asp?sector=ELEC> or <http://www.herald.co.zw/inside.aspx?sectid=33522&cat=1>

It should be noted that although section 67A(7) provides that ZEC's claim that it may under take a recount because it "has reasonable grounds to believe that a miscount occurred of such significance that it would have affected the result of the election" is not subject to appeal, this does not mean that it may not be taken on judicial review in the usual way.

The above analysis shows that two of the seven criteria were not satisfied for a recount. Whether any of the remaining criteria were satisfied will now be considered to show the extent of the illegality of the recount.

Requirement 3

The third requirement is that ZEC must believe, again on reasonable grounds, that the miscount **is significant enough** to have affected **the result**. Those results in the 23 constituencies relating to the House of Assembly are as follows:

	MDC AM	MDC MT	ZANU PF	OTHERS	DIFFERENCE	No. of polling stations
Bikita West	7048	7029	19	57		
Bikita South	6916	5284	299	1632	49	
Chimanimani West	8558	7107	1451	49		
Mutare West	7597	7577	536	20	52	
Gokwe-Kabuyuni						7234

	7156
	78
	46
Mberengwa North	
	2352
	9722
	7370
	44
Mberengwa South	
	885
	1309
	8291
	6982
	43
Mberengwa West	
	315
	2912
	5508
	2596
	38
Mberengwa East	
	616
	1251
	7292
	6041
	34
Chiredzi North	
	2679
	18413
	336
	15734
	67
Gutu North	
	5045
	4343
	702
	35
Gutu South	
	1570
	5757
	3559
	2198
	43
Gutu Central	
	6398
	4767

	1631 48
Masvingo West	4513 4122 1053 391 42
Masvingo Central	4905 4793 870 112 40
Zaka West	4734 4030 663 704 33
Bulilima East	3180 2181 3104 76 59
Goromonzi West	5931 6193 -262 41
Zvimba North	944 1701 6784 5083 56
Lupane East	5424 1352 3368 4072 53
Silobela	Cand1 679 4624 4137 1462

Cand2 642

Buhera South

8833
7613

1220
49

Zhombe

2289
5445
5122

323
58

Zhombe

2289
5445
5122

323
58

Source: www.kubatana.net

Even though in some areas there is only a small margin of votes between two main parties (being as low as 19 in one constituency) suggesting that if a miscount occurred, it could be of sufficient significance to affect the result, in many instances the margin is so wide as to render this implausible. Most egregiously the margin in Chiredzi North is huge and a miscount of some 15 735 votes is required to effect the result in the House of Assembly Election. ZEC must reasonably believe that such a miscount of this extent occurred before it may order a recount of polling stations in this constituency. It is worth emphasizing that the miscount must affect **the result** i.e. who emerges as the winner, not simply the percentages polled for each candidate as any error would do that. If ZEC was using evidence supplied in ZANU PF's complaints as its basis for its decision to order a recount in relation to polling for the House of Assembly seat in Chiredzi North, as suggested, then it appears that ZEC believed that ZANU PF had supplied them with credible evidence that a miscount had occurred in relation to this parliamentary seat of over 15 735 votes **and** that the result should have been a victory for the MDC candidate. It seems unlikely that ZANU PF supplied such evidence.

In Goromonzi West, discussed under criteria one and two, ZEC's alleged reasonable grounds that the recount was significant enough to affect the result turned out to be a single vote in a margin of difference between the two candidates of 262 votes. Once again it must be deduced that the "reasonable grounds to believe a miscount had occurred significant enough to affect the result" (in this case 263 votes) that ZEC was required to have before initiating a recount either were not "reasonable" or did not exist.

At the time of writing results are still awaited from five constituencies. The result in 18 constituencies remain unchanged. The ZEC chairman has admitted that "no major changes" are expected suggesting that the results in the remaining five will remain unchanged. This means, excluding the presidential election, the "reasonable grounds to believe that a miscount had occurred sufficient to affect the result" that ZEC's Commissioners

claimed in 3 276 instances proved to be unfounded 3 276 times, i.e. a 100% failure rate. ZEC's bona fides in initiating a recount in this manner cannot but be called into question as a result.

No comment can be made as to whether the recount has affected the presidential tally as, once again, ZEC has cast a cloak of secrecy around these results. However, nearly 24 000 votes are required to affect the presidential vote by 1%. ZEC must be aware that the margin in the first presidential count is extremely small for there to be any effect on **the result**. The result must either be that a candidate has an absolute majority or a simple majority, meaning that **the result** is either that requiring a run off or an outright declaration of a winner. For the miscount to have affected one or other of these possible results there must be one candidate with almost exactly 50%, failing which the recount does not meet the legal requirement of being significant enough to affect the result (The two main contenders are believed to have garnered over 90% of the vote, so the question of a tie for second place does not arise).

Requirement 4

This requirement arises from section 70(4) of the Act. This subsection provides that “**No person**” shall open any sealed ballot box or sealed packet of electoral material “or permit any such packet to be opened”, **except in terms of an order of the Electoral Court**, which is a court established in terms of the Act especially to deal with electoral matters. It makes no exception for ZEC officials acting in terms of section 67A(4). “No person” must be taken to mean precisely that. “No person” includes ZEC – and even CIO spooks. Had the section been intended not to include ZEC officials acting under section 67A(4), it would have used words such “as other than in the case of” ZEC officials so acting, or would have said “subject to section 67A”. It does not.

ZEC obviously cannot conduct a recount of the ballots without opening the sealed ballot boxes. Accordingly, it was required to have obtained an order from the Electoral Court to authorize it to do so. It did not do so and is in clear breach of section 70(4).

In terms of section 67A(7) ZEC's decision to order a recount is not subject to any appeal. This does not mean that the decision is not subject to judicial oversight. The requirement that ZEC follows the Act and applies for a court order to open the ballot boxes (after having determined at its sole discretion that a recount is necessary) is not “an appeal” against ZEC's decision. It is a reasonable procedural provision providing an independent judicial check upon whether the grounds ZEC considers exist and permit a recount (requirements 1, 2 & 3 above) are in fact reasonable. Had ZEC followed this provision the current situation of ZEC recounting ballots in over 4 368 boxes would not have been allowed. Any reasonable judge would have held that ZEC could not possibly have reasonable grounds to believe that a miscount had occurred “significant enough to have affected the result of the election” in such a multiplicity of instances. At the very least an Electoral Court would have required ZEC to support its claim.

Requirement 5

This requirement touches upon the reason for the recount. Section 67A(4) is silent about the purpose behind the recount. In the case of a recount requested by a parliamentary candidate under 67A(1), the request must be made within 48 hours of the declaration of the result. Section 66(4) provides that a declaration of a parliamentary candidate is final and cannot be reversed other than by way of electoral petition. Accordingly, a recount by ZEC under 67A(1) cannot be to reverse the result. It could only then be in order to provide supporting evidence for an electoral petition which must be brought within 14 days of the declaration of the result and determined by the Electoral Court within six months, or to institute or support criminal proceedings against those responsible for the miscount.

For what reason then can ZEC initiate a recount under 67A(4)? The section is silent on this point. The Second Schedule to the Act requires that the Chief Elections Officer announce the presidential result “forthwith” upon the verification and collation of the constituency returns. Nothing in section 67A(4) suggests that this process may be arrested because ZEC has initiated a recount – contrary to the judgment of Uchena J in the urgent application referred to above. The recounts in relation to parliamentary results, in the same section, specifically provide that where a candidate requests a recount by ZEC the result must have been released. There is nothing suggesting that the position under 67A(4) is any different. The reason ZEC may initiate a recount may be deduced from section 70.

In order to open a ballot box ZEC must be in possession of a court order authorising the opening of that particular ballot box (or in the instant case) 4 368 specific ballot boxes. To obtain such a court order ZEC needs

to apply to the Electoral Court. But the Electoral Court will issue an order permitting the ballot boxes and sealed electoral material to be opened in **only** two prescribed circumstances. The first is for the purposes of determining an election petition brought before it. ZEC cannot bring an election petition. Only a candidate in an election may do that. Accordingly, ZEC cannot obtain an order to open ballot boxes by bringing an electoral petition. The second basis for the Electoral Court to issue an order permitting a sealed ballot box or packet containing electoral material to be opened is when this must be done to “for the purpose of instituting or maintaining a prosecution for an offence in relation to an election or return”. Thus ZEC may only open the ballot boxes and recount the ballots for the purposes of criminal proceedings. And, reading this requirement with section 67A(4), ZEC can only do so if it believes that a (fraudulent) miscount has occurred significant enough to affect the result. In terms of section 70(4) ZEC cannot obtain an order to open the ballot boxes on the basis that it wants to do a recount, with a view to altering a result if the recount justifies this. Not only does section 70(4) prevent such an action, but nowhere in section 67A is ZEC authorized to change a declared result. This interpretation of the purpose for which ZEC can initiate a recount is entirely consistent with section 66(4) of the Act which provides that a result declared by a constituency electoral officer “shall be final” and may only be changed by way of petition to the electoral court. It is also consistent with the Second Schedule to the Act, which requires that the result based on constituency returns is declared “forthwith” by the Chief Elections Officer. Section 67A(4) does not stipulate that ZEC may initiate a recount for the purposes of auditing the constituency returns for the presidential election and the Chief Elections Officer is thus excused from complying with the provisions of the Second Schedule. Yet Justice Uchena, ruling on the MDC’s urgent application for the release of the results, correctly found that ZEC may initiate a recount, and then proceeded to rule that the recount may be for the purpose of checking the veracity of the constituency returns and delaying the presidential result. That the recount may be deployed for this purpose is simply assumed by the judge on the basis of ZEC’s say so and without any support in Section 67A(4) or elsewhere in the legislation.⁴

Furthermore, if none of the contestants gain an absolute majority there must be a run off within 21 days of the “previous election”. If the Chief Elections Officer does not announce the result on the basis that ZEC has initiated a recount, the intention of giving a 21 day preparation period for the run off is lost. There could not therefore have been an intention by the legislature that the effect or purpose of a ZEC initiated recount is to indefinitely delay the announcement of the result while an audit of the returns is conducted.

It has been suggested that an election is a process and not an event. Thus when the legislation refers to the “previous election” it is referring to a process which ended with the declaration of the result. The 21 days, in this argument, then refers to the declaration of the result after the recount and audit. This argument cannot be sustained. When the Act intends something to happen within a certain time from the declaration of the result (for example in section 67A itself or the bringing of an election petition challenging the presidential election) it uses precisely that phrase i.e. “within 30 days of the declaration of the result”. When it intends to refer to the election as a process rather than an event it uses the term “election **period**”. Section 4 defines an election period as

“in the case of a Presidential election, the period between the calling of the election and the declaration of the result of the poll in terms of paragraph 3(1) of the Second Schedule”

Accordingly if the 21 days was to run from the declaration of the result, the legislation would have said so. Or it would have said within 21 days of the end of the election period. In fact it says 21 days from the previous election, thus referring to polling day, the 29th March, 2008.

Requirement 6

ZEC must specify the time, date and place for the recount and the procedure to be adopted. This is the only requirement that ZEC has come anywhere close to meeting. ZEC’s published notices specified the time and date (19th April, 2008) for the recount and a single location in each constituency for all the polling station ballots in each constituency to be recounted. However, the procedure ZEC announced that it will adopt for the recount is illegal. A notice published in the *Herald* on the 14th April, 2008 outlining part of the procedure makes ZEC’s intentions clear. This states that after the recount the constituency election officer shall declare the person who has the most votes after the recount the winner. As stated above, once the winners have been declared by the constituency election officers, as they have been, the declarations are final in terms of section 66(4). If the legislature had intended ZEC to be able to override the express provisions of section 66(4) by virtue of its

⁴ MDC & Morgan Tsvangirai v Chairperson of ZEC and Chief Elections Officer E/P24/08 p14

powers under 67(A) it would have said so. It did not and in fact, as indicated, section 70(4) suggests that ZEC may not even initiate a recount for this purpose.

Requirement 7

The last requirement is that once ZEC has its “reasonable grounds” indicated in requirements one, two and three above, and once it has its court order from the Electoral Court it must proceed with its recount within 14 days of the declared result. This arises by implication from section 70(3). That section requires the Chief Elections Officer to destroy all the ballots within 14 days of the declaration of the last constituency result, unless an election petition has been filed. Accordingly, in respect of the local authority, Senate and House of Assembly polls as at the 19th April, 2008 any recount should have involved sifting through ashes, not counting ballots, in all constituencies where an election petition has not been lodged. If the legislation had intended to place a moratorium on the destruction of ballots where a ZEC recount has been initiated, it would have included such a moratorium in the same part of the section where it placed a moratorium on the destruction of ballots while the determination of an election petition is pending. It did not. ZEC clearly has not met the 14 day requirement or, at the very least, the Chief Elections Officer has not complied with the mandatory requirement to destroy the ballots.

Some observations on these aspects

Section 67A, under which ZEC seeks to justify the recount and the delay in releasing the presidential result, is, ironically, the progeny of the SADC mandated negotiations between the MDC and ZANU PF intended to create the conditions for free and fair elections in Zimbabwe. It has been inserted into the Act between sections 67 and 68 with little regard to its compatibility with other sections in the Act, such as 66(4), 70(3), 70(4), 110(3) and the Second Schedule. Furthermore, it is most likely that 67A was not intended to apply to presidential elections at all. The first subsections of 67(A) clearly address Parliamentary seats, while the latter subsections leave their intended application unspecified. However, section 67A falls within Part XIII of the Act. Section 112 provides that Part XIII of the Act (other than sections *sixty-six*, *sixty-seven* and *sixty-eight*, for which the provisions of the Second Schedule are substituted) shall apply, with any changes that may be necessary, to an election to the office of President. In other words, the sequence of sections 66, 66 and 68 were not intended to apply to presidential elections. When section 67A was inserted between section 66 and 68 the draftsman probably forgot to amend section 112 and add it into the sequence.

ZEC might like to argue that section 70 was not intended to apply to section 67A and the last few requirements (the need for a court order and time limit) given above thus do not affect a recount under 67A(4). However, in terms of the rules for interpreting statutes, one is not permitted to speculate upon what the legislature intended to say, but did not. One also may not approach the parties involved in negotiating section 67A and ask them what they meant. The legislation must be interpreted in light of what is written in the four corners of the Act, not what a person thinks ought to have been written but was not. After all, ZEC’s opinion in this regard may differ from that of the electorate. If any two sections appear to contradict each other, they must be read to resolve the contradiction as far as possible.

ZEC may suggest it is *implied*, once the section authorizes a recount, that the ballot boxes may be opened by its officials without an order of court and it is *implied* that the Chief Elections Officer must not destroy the ballots. If this line is pursued ZEC would also have to argue that it is *implied* that it has the power to reverse a constituency result. Similarly, ZEC would have to argue that it is *implied* that it may withhold the presidential result, (despite the Second Schedule requirement that the result is declared “forthwith”) while the recount is underway. There is nothing to suggest that this should be implied. The other subsections of 67(A) specifically authorize the recount only **after** a result has been declared. Accordingly, if anything is to be implied in this respect it should be to the contrary of ZEC’s assertion. Furthermore, the most obvious inference is that section 67(A) was not intended to apply to a presidential poll. This requires only one assumption rather than the host required in ZEC’s interpretation.

The Act can be sensibly read without reading into it implied provisions which are not explicitly stated, and under general rules of statutory interpretation this is the approach which ought to be judicially adopted.

The requirements that ZEC must follow in order to conduct a recount is what is written in the legislation and is as set out herein. It is not for ZEC or anyone else to suggest that the legislature really meant something else and to ignore what has been enacted by parliament. ZEC has failed to follow or comply with all seven of the requirements for a recount.

The recount currently underway in 23 constituencies is thus clearly unlawful. The MDC sought an urgent interdict against ZEC to stop the unlawful recount from taking place from Zimbabwe's High Court. The merits of the application were not addressed, the Judge curiously declining to hear the matter on the basis that the matter "was not urgent".

The implementation of the strategy of a recount reveals considerable co-ordination between the Government of Zimbabwe, ZEC and the state controlled media. On the second Sunday after the poll, the *Sunday Mail* reported that ZANU PF had filed complaints with ZEC alleging "a serious, profound and far-reaching case of miscounting" despite the fact that the paper's own report showed only minor discrepancies of as few as four and seven votes in some instances. In Court papers filed the same day ZEC initially adopted these complaints as its reason for delaying the release of the presidential results. Two days later, the *Herald* ran a banner headline under which it reported a nation wide arrest of ZEC officials. Their crime was apparently "abuse of official duties" in submitting erroneous voter returns. The report attempted to create a picture of widespread electoral fraud. To exaggerate the importance of the charges, prosecutors seem to have been instructed to oppose bail for the hapless ZEC officials and compliant magistrates acceded to the prosecutors' requests in several instances, citing the seriousness of the offence. The public was clearly being prepared for the extensive recount subsequently "independently" initiated by ZEC. However, as the arrested ZEC officials began appearing in court to face charges, cases were either thrown out of court on account of a total lack of evidence⁵ or the charges preferred revealed the triviality of the complaints. The following report in the *Herald* is not atypical:

It is the State's case that Mukoko negligently and wrongfully completed a V23 form, which was then forwarded to ZEC with errors. The form indicated that President Mugabe polled 6 030 votes instead of 6 035, Morgan Tsvangirai of MDC-T had 5 407 instead of 5 467 while Makoni had 860 votes instead of 865. The State is alleging that as a direct result of the abuse of duty by the accused the presidential candidates did not get the correct and true reflection of their votes.⁶

It is obvious, if this report is correct, that the most likely explanation in relation to this charge is that the ZEC official inadvertently read badly handwritten "5s" and "6s" as "0s" resulting in a marginal error which would scarcely have affected the result. This hardly seems to warrant a front page headline and a remand in custody for a "serious" offence.

Why the Recount is Taking Place

Since the recount is not authorized in terms of the law, the reasons it is taking place must be sought elsewhere. It should be noted that this is the first time that ZANU PF has lost an election and the first time that ZEC has not accepted the signed constituency returns at face value and, from finding zero errors in the past three most recent elections, for this election claimed 4 368 miscounts. This cannot be explained as a different approach by different people. The personnel comprising ZEC remains largely unchanged from previous elections.

It was shown in Part I that the recount has been used (wrongly) to justify the delay in releasing the result of the presidential election. ZEC claimed it needs to verify the ballots in that election. This does not explain why ZEC has initiated a recount in all elections, and not just the presidential ballots, and initiated it as extensively as it has done, the recount being undertaken throughout 23 constituencies. One possibility is that the recount has been implemented in this manner so that the process is extended for as long as possible. ZEC officials, having initially announced that the recount would take three days, have extended this to a week owing to the sheer number of ballot boxes to be opened and recounted. Ten days later the results of the recount have not been fully announced. All indications are that ZEC is complicit in ZANU PF's desire that the presidential result is delayed until it is ready for the result to be known. Two statements quoted in the press reveal that ZEC is not acting independently as required:

I hope we will be through over the weekend, but it's difficult to be very definite because these politicians may raise something at the very last minute. (Utloile Silaigwana ZEC spokesman, reported by AFP 25/04/08)

⁵ *The Zimbabwe Independent* 16/04/08.

⁶ *The Herald* 22/0/08

ZEC ought to be acting on the “reasonable ground” requirements given above, not on issues raised by politicians.

Demanding a recount of the recount in Bulilima East ZANU PF candidate Sandi-Moyo walked out of the counting centre after a dispute with the MDC claiming:

After all, it was us who called for these recounts and we have the right to seek clarifications when necessary. (reported by *The Zimbabwe Independent* 16/04/08)

A second theory, which arises inevitably from the delay in announcing the result and the sum of circumstances surrounding the recount, is that the purpose of the recount is to manipulate the results, both to alter the result of the House of Assembly poll to restore ZANU PF’s majority or narrow the loss, and alter the crucial percentages received by the presidential candidates. The two theories comfortably co-exist, and it is to the latter that the second part of this paper now turns - the manipulation of the results.

Perpetrating Electoral Theft

It is much easier to rob a bank when it is open for business, rather than after hours when its vaults are locked and all security systems are in place. Similar considerations apply to stealing an election after polls have closed. Zimbabwe’s Electoral Act and Electoral Regulations have numerous provisions intended to protect the integrity of the ballots and ballot boxes. It would require extensive and time consuming planning to steal the election and if the security provisions in the legislation are implemented, signs of breaking and entering will be apparent to any diligent investigator or observer. These security provisions are as follows.

Prior to the commencement of the poll, the presiding officer receives, in addition to a sealed translucent ballot box which all parties may inspect as empty, a copy of the voters’ roll for the appropriate ward, books of ballots and a distinctive stamp in a sealed packet for the marking of the ballot papers. It is an offence for details of the stamp to be disclosed to any person prior to the poll and the sealed packet may not be opened prior to polling. The number of ballots received is recorded in the presence of the parties’ election agents.

Polling takes place by each qualified voter being given a ballot paper and the voter’s name is crossed off on the voters’ roll. The ballot paper bears a number which is duplicated on the counterfoil in the book of ballots, in the same manner as a cheque book. The ballot paper is stamped with the distinctive stamp before being handed to the voter. Any ballot without the distinctive stamp may not be included when the count takes place at the polling station.

After the count is completed the ballots are returned to the ballot box and the aperture is immediately sealed. There appear to be several of seals for the aperture to the ballot boxes. Plastic blue non-reversible sliding seals, each of which is numbered, secure the edges of the lid. These can only be removed by cutting them off. A padlock is also placed on the ballot box and the keys placed in a wax-sealed envelope. The mouth at the top of the box is covered with a piece of paper signed by the election agents and affixed by red wax seals in each of the four corners. Also sealed in separate packets with red wax are all used and unused books of ballots, with their counter foils, and the marked copy of the voters’ roll. The mark on the wax seals may be that of the presiding officer and elections agents’ own marks. This election material is often sealed in the ballot box with the ballot papers. The polling station return is completed, the results entered thereon displayed to the candidates who are invited to sign the return, and the return is posted outside the polling station. The polling station return form V11 must in addition account for all ballot papers received by the presiding officer and the serial numbers of the ballots used entered on the return. After the posting of the results the sealed items and returns are immediately delivered to the constituency elections officer. On receipt, the constituency elections officer and election agents may check the seals for any tampering. The sealed items, as indicated earlier, may not be opened other than in terms of a court order.

With these security features in mind one can now consider what would be necessary to tamper with the ballot count. If the modus operandi is to introduce additional marked ballot papers into the ballot boxes various difficulties must be overcome to conceal the fact that this has taken place. This would require one or more of the following actions:

1. picking the padlock on the box; or
2. breaking the seal on the envelope containing the padlock keys and attempting to reseal, forging any distinctive marks on the seal; and

3. cutting the blue plastic sealing tags, and replacing them with others with the same serial numbers; and
4. inserting ballots with duplicate serial numbers identical to those already in the box; and, before so doing
5. marking those ballots with the presiding officer's stamp, by breaking open and resealing the sealed envelope in which the stamp should have been placed after the poll, or forging or using a duplicate of such stamp; and
6. sifting through the box to remove ballots with the same serial numbers as those inserted; and
7. making sure the duplicate ballots replace those which are marked with a contrary vote.

It should be noted that merely tampering with the paper seal covering the ballot box mouth would be insufficient to achieve this. Merely stuffing ballots in through this broken seal would result in ballots bearing serial numbers which differ from those recorded as used by the polling officer. There will also be more ballots than those marked as having voted on the voters' roll, unless the roll is removed from the sealed packet in which it should have been placed after the poll and tampered with. If duplicate ballot papers are stuffed into the box, then two ballots with identical numbers would be in the box. The only solution to this would be to forge the polling station return indicating new ballot serial numbers and number of ballots used. However, several copies of the original return would have been distributed, posted at the polling station and would not be available to be altered. The voters' roll would still need to be changed to reflect the increase in the number of voters. A similar problem exists if there is an attempt to introduce fraudulently an entire ballot box.

If there is an attempt to introduce a fictitious polling station with an entire set of ballot boxes, ZEC would have to explain why this station did not appear on the official list, and why this polling station was ignored initially at ward and constituency levels. There would also need to be a forged voters' roll with lines drawn through the names of persons falsely purported to have voted.

A further difficulty arises for any would be ballot manipulator. In constituencies where the margin between the candidates is large, a choice must be made whether to stuff one ballot box with a large number of votes, thus showing signs of tampering in only one place, but leaving a suspiciously large number of votes at one polling station for a particular candidate, or spreading these votes through a number of polling stations and thus increasing the number of boxes where tampering has taken place. In the case of the presidential poll, some 24 000 votes would need to be introduced in 23 constituencies to make a 1% difference in the tally. This would be no easy task. If, as some reports (such as ZESN⁷ and the MDC's own account) suggest, Morgan Tsvangirai may have obtained 50.3% and Mugabe around 43%, 7 200 votes would need to be removed from Tsvangirai to bring him below the crucial 50% margin, and/or no less than 168 000 new votes would need to be allocated to Mugabe to bring him to parity with Tsvangirai. It is unlikely that manipulation to this extent could occur undetected.

A report filed by a Guardian newspaper reporter stated:

A monitor with the Southern African Development Community, Dianne Kohler-Barnard, says she witnessed tampering in two constituencies that "points to a concerted effort to rig the result in order to bring about a Mugabe 'victory'". "In Mberengwa West they brought the first four boxes down for counting. Each box has two of the blue ties with numbers on it that are used to seal it along with padlocks. They had a whole set of duplicates of the blue ties, with the same numbers, on the other side of the hall. The keys to the padlocks are inside envelopes sealed with wax. All the seals were broken. I can only surmise that the keys were removed and the padlocks unlocked," she said. "Then they discovered that the protocol register, which lists how many voting books were used and the numbers, was missing."

The next day, Kohler-Barnard was monitoring the recount in Goromonzi West. "There were ballot boxes with keys missing. One had the padlock open. Some had the envelopes with the keys sealed with Sellotape instead of wax," she said. "All the party agents had signed that they placed ten books of voting papers into a box after the election. When the box was opened there were only nine. They scabbled around and found the book lying on the floor somewhere. Either the fairies came down and took the book out of the box or

⁷ The Zimbabwe Electoral Support Network, using a projection made from 436 polling station returns and using recognised techniques devised by professional statisticians calculated Tsvangirai as winning between 49% and just over 50% of the presidential poll.

there was someone in there. It tells me that the box was opened, the ballots were fiddled with and it was repacked but the person did it badly." Reports of significant tampering have come in from other constituencies, including Bulilima East where the seals were broken on all of the boxes for the presidential election from 57 polling stations.
(22/04/08)

While these observations are consistent with signs of tampering, other signs of tampering, - the other steps given above - must co-exist to make a conclusive pronouncement of fraud. These details do not appear in press and other reports⁸. For example, while the number of voters could not be checked due to missing protocol register in the case of Mberengwa West polling station, it should have been possible to check the number of voters and ballot serial numbers from that polling station return. In the absence of evidence that this was done, the report is inconclusive and insufficient to show fraud. And in fact, there was no significant change to the count at Mberengwa West. Nor was there any significant change to the count in Goromonzi West, despite the clear signs of tampering outlined above. Similar comments could be made in regard to the reported observations at other constituencies.

Conclusion

Given the difficulty involved in surreptitiously manipulating the vote, the absence of any unambiguous evidence of fraud when such should exist if it has taken place and given the largely unchanged results in the Parliamentary polls, it seems that the recount has been undertaken primarily for the purposes of delay. Initially the delay seems to have taken place while ZANU PF attempted to negotiate with the MDC. Thereafter, the delay appears to have been occasioned by several advantages for ZANU PF. Firstly, it breaks the momentum gained by the MDC's parliamentary victory and ensures that the electoral euphoria does not carry into any presidential run off. Secondly, it allows ZANU PF and Mugabe to show that despite the loss, power still vests with them and to suggest that ZANU PF has no intention of relinquishing this power regardless of what the electorate may wish. This has both an intimidatory effect on the electorate and may be used to strengthen ZANU PF's hand in any negotiations. Thirdly, as was the case after ZANU PF lost a referendum on the constitution shortly before the election of 2000, it allows ZANU PF to use the created hiatus before any run off in the presidential election to re-establish control over the rural constituencies. And as with the period after the elections in 2000, the manner of re-establishing this control is through intimidation and systematic and widespread violence. The recount "initiated by ZEC" is thus a vital plank in this strategy and, as should be apparent from the above, it is clear that ZEC has willingly colluded with and assisted ZANU PF in this regard.

It remains to be seen whether this collusion will be extended. Throughout the recount process there have been several inauspicious signs that ZEC's policy of procrastination in regard to the presidential result is set to continue. Although ZEC has indicated that candidates will be allowed to start verification and observe the collation process of the presidential returns on 29th April, 2008, it seems to be preparing the public for this process to be an extended one. As stated previously, the verification process is defined in the Act, and refers simply to the candidates being shown the returns and being allowed to make notes as to their contents. ZEC however, has suggested that candidates may be allowed to contest the returns again at this stage, once again resulting in further protracted delay.

⁸ See www.Sokwanle.com for more details of tampering with electoral material.

ANNEXURE A

67A Recounting of votes

- (1) Within forty-eight hours after a constituency elections officer has declared a candidate to be duly elected in terms of section 66(1), any political party or candidate that contested the election in the ward or constituency concerned may request the Commission to conduct a recount of votes in one or more of the polling stations in the ward or constituency.
- (2) A request in terms of subsection (1) shall—
 - (a) be in writing, signed by an appropriate representative of the political party or candidate making the request; and
 - (b) state specifically the number of votes believed to have been miscounted and, if possible, how the miscount may have occurred; and
 - (c) state how the results of the election have been affected by the alleged miscount.
- (3) On receipt of a request in terms of subsection (1) the Commission shall order a recount of votes in the polling stations concerned if the Commission considers there are reasonable grounds for believing that the alleged miscount of the votes occurred and that, if it did occur, it would have affected the result of the election.
- (4) The Commission may on its own initiative order a recount of votes in any polling stations if it considers there are reasonable grounds for believing that the votes were miscounted and that, if they were, the miscount would have affected the result of the election.
- (5) Where the Commission orders a recount of votes in terms of this section, the Commission shall specify—
 - (a) the polling stations whose votes are to be recounted and, where appropriate the votes that are to be recounted; and
 - (b) the date on which, and the place and time at which the recount is to take place; and
 - (c) the procedure to be adopted for the recount;

and shall take all necessary steps to inform accredited observers and all political parties and candidates that contested the election of its decision and of the date, time and place of the recount.

- (6) Accredited observers and representatives of candidates and political parties that contested the election shall be entitled to be present at any recount ordered in terms of this section.
- (7) The Commission's decision on whether or not to order a recount and, if it orders one, the extent of the recount, shall not be subject to appeal.