

**EX PARTE: EMMERSON DAMBUDZO
MNANGAGWA**

RE:

(1)

WHEN DOES THE TIME WITHIN WHICH
A CHALLENGE TO CONSULTANT'S
ELECTION AS PRESIDENT OF
ZIMBABWE LAPSE?

(2)

WHEN IS INAUGURATION DAY
ASSUMING THAT NO PETITION AS
FILED WITHIN THE TIME ALLOWED BY
LAW?

(3)

DOES THE FILING OF A PETITION
DELAY INAUGURATION DAY?

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**FOR: MUTUMBWA, MUGABE &
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FEE: DEBIT NOTE ENCLOSED

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Advocates' Rooms at the Inner Temple

TEMPLE BAR
ZIMBABWE INNS OF COURT

EX PARTE: EMMERSON DAMBUDZO MNANGAGWA

IN RE:

(4) WHEN DOES THE TIME WITHIN WHICH A CHALLENGE TO CONSULTANT'S ELECTION AS PRESIDENT OF ZIMBABWE LAPSE?

(5) WHEN IS INAUGURATION DAY ASSUMING THAT NO PETITION AS FILED WITHIN THE TIME ALLOWED BY LAW?

(6) DOES THE FILING OF A PETITION DELAY INAUGURATION DAY?

COUNSEL'S OPINION AND ADVICE

1. I am instructed on an urgent basis to immediately render the present opinion and advice. I am instructed on behalf of Emmerson Dambudzo Mnangagwa ("my consultant"). My consultant is the President Elect of the Republic of Zimbabwe. He was declared duly elected as President of the Republic of Zimbabwe by the Zimbabwe Electoral Commission on the 3rd August 2018 following elections held in Zimbabwe on the 30th July 2018.

2. I am instructed to render an urgent opinion on the following questions:

2.1 Whether my instructing attorneys are correct in their interpretation that, in view of rule 3 of the Constitutional Court Rules, 2016 (“the Constitutional Court Rules”), the last day for filing of a petition challenging my consultant’s election as president of the Republic of Zimbabwe is the 16th August 2018?

2.2 Whether my instructing attorneys are correct in their view that in the event that no election petition is filed, inauguration day would be Monday the 20th August 2018?

2.3 Whether inauguration can still take place notwithstanding the filing of an election petition challenging my consultant’s election as the President of the Republic of Zimbabwe?

SYNOPSIS OF MY OPINION AND ADVICE

3. The time for any challenge to my consultant’s election as the President of Zimbabwe lapses at midnight on the 10th August 2018.

4. Inauguration day, in the event that no petition is filed, is Sunday the 12th of August 2018.

5. Inauguration will be stayed by operation of law in the event of a petition having been filed on or before midnight on the 10th August 2018. Inauguration will, in that event, take place within 48 hours of the Constitutional Court declaring a winner. In my

calculation, inauguration will be within 48 hours of the 24th of August 2018, that is either on the 25th or at the very latest on the 26th August 2018.

WHEN DOES THE *DIES INDUCIAE* FOR THE FILING OF A PETITION CHALLENGING MY CONSULTANT'S ELECTION AS PRESIDENT OF ZIMBABWE LAPSE?

6. Section 93 of the Constitution of Zimbabwe reads in relevant part as follows:

"93 Challenge to presidential election

- (1) Subject to this section, any aggrieved candidate may challenge the validity of an election of a President or Vice-President by lodging a petition or application with the Constitutional Court ***within 7 days after the date of the declaration of the results of the election.***"

(The emphasis is mine).

7. The petition must be filed pursuant to rule 23 of the Constitutional Court Rules which reads in pertinent part as follows:

"Dispute relating to the election to the office of President or Vice President"

23. (1) An application where the election of a President or Vice President is in dispute shall be by way of court application.

- (2) The application shall be filed with the Registrar and shall be served on the respondent **within 7 days** of the date of the declaration of the result of the election."

8. The question is whether the seven days provided for in rule 23 of the Constitutional Court Rules includes weekends and public holidays?

9. My instructing attorneys take the view that weekends and public holidays are excluded by reason of rule 3 of the Constitutional Court Rules. Rule 3 of the Constitutional Court Rules reads as follows:

"Reckoning of time

"3. (1) Whenever the time for doing anything in terms of the Constitution ends or falls on a Saturday, Sunday or public holiday, the time extends to, and the thing may be done on, the next day that is not a Saturday, Sunday or public holiday.

(2) In any other case, ***unless the contrary intention appears***, where anything is required by these rules or in any order of the Court to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of such period."

(The emphasis is mine).

10. I disagree that the seven days include weekends and public holidays. The key phrase is "unless the contrary intention appears". The Rules of the Constitutional Court derive from the Constitution itself. The Constitution is the Supreme Law of Zimbabwe as provided for in section 2 thereof. The Constitutional Court Rules must be construed in conformity with the Constitution and not the other way round.

11. It follows, therefore, that the meaning of “seven (7) days after the date of the declaration of the results” in rule 23 must be derived from the provisions in section 93 of the Constitution, which have overriding effect. The seven (7) days in rule 23 of the Constitutional Court Rules have their genesis from section 93 of the Constitution. What calls for interpretation is the phrase “within seven days after the declaration of the results” in section 93 of the Constitution. It is that interpretation that informs the meaning of “seven (7) days” in rule 23 of the Constitutional Court Rules.

12. Section 93 of the Constitution provides the “contrary intention” contemplated by rule 3 of the Constitutional Court Rules.

13. Section 332 of the Constitution of Zimbabwe embodies definitions of terms used in the Constitution. It does not define the word “day”. We must, therefore, resort to the ordinary principles of constitutional construction by reason of section 331 as read with section 46 of the Constitution. We must extract the meaning of the phrase “within seven days after the date” of the declaration of the results from the Interpretation Act [Chapter 1:01] (“the Interpretation Act”). This is because section 3 of the Interpretation Act reads as follows:

“2 Application of this Act

(1) The provisions of this Act shall extend and apply to every enactment as defined in this Act, including this Act, which was in force in Zimbabwe immediately before the 1st November, 1962, or thereafter comes into force in Zimbabwe, except in so far as any such provisions—

(a) are inconsistent with the intention or object of such enactment; or

(b) would give to any word, expression or provision of any such enactment an interpretation inconsistent with the context; or

(c) are in such enactment declared not applicable thereto.

(2) Nothing in this Act shall exclude the application to any enactment of any rule of construction applicable thereto and not inconsistent with this Act.”

14. Section 3 of the Interpretation Act defines the word “Act” as follows:

“**Act**” means—

(a) any law included in the Revised Edition of the Statute Law of Southern Rhodesia prepared under the authority of the Revised Edition of the Laws Act, 1937; and

(b) any law of the Legislature of Zimbabwe made on or after the 1st January, 1939; and

(c) any law of the Legislature of the former Federation in force in Zimbabwe by virtue of the provisions of an Order in Council made under the Federation of Rhodesia and Nyasaland Act 1963 of the United Kingdom;”

15. The Constitution of Zimbabwe is a law of the Legislature of Zimbabwe enacted after the given date. The Interpretation Act applies in the construction of the Constitution.

16. Section 33 of the Interpretation Act reads as follows:

“33 **Time**

(1) Words in an enactment relating to time, and references therein to a point of time, shall be construed as relating to standard time as used in Zimbabwe, that is to say, **2 hours in advance of Greenwich Mean Time.**

- (2) Where in an enactment a period of time is expressed to begin on, or to be reckoned from, a particular day, that day shall not be included in the period.
- (3) Where in an enactment a period of time is expressed to end on, or to be reckoned to, a particular day, that day shall be included in the period.
- (4) Where the time limited by an enactment for the doing of anything expires or falls upon a Saturday, a Sunday or a public holiday, the time so limited shall extend to, and the thing may be done on, the first following day that is not a Saturday, a Sunday or a public holiday.
- (5) Subsections (2), (3) and (4) shall apply whether or not the number of days concerned is expressed to be clear days.
- (6) In an enactment—
 - (a) a reference to midnight in relation to any particular day shall be construed as a reference to the point of time at which that day ends;
 - (b) **a reference to a weekday shall be construed as a reference to any day which is not a Saturday or Sunday;**
 - (c) a reference to a month shall be construed as a reference to a calendar month;
 - (d) a reference without qualification to a year shall be construed as a reference to a period of 12 months.

(The emphasis is mine).

17. Section 93 of the Constitution does not relate to “seven weekdays”. It relates to “seven days”. If the intention was to exclude Saturdays, Sundays and public holidays, the legislature would have said so by using appropriate language. The simple reference to “seven days” is a reference to calendar days and includes weekends and public holidays.

18. Rule 3 of the Constitutional Court Rules cannot inform the interpretation of “seven days” in the Constitution. The Constitution as the Supreme Law informs the meaning of “seven (7) days” in rule 23 of the Constitutional Court Rules.

19. I am fortified in this view by the construction rendered by the High Court in the electoral law context in ***Nyamapfeni v Constituency Registrar, Mberengwa East & Ors 2008 (1) ZLR 164***. In that case, Uchena J as he then was, held that the meaning of “days” in the High Court Rules which at that time applied to election petitions, did not apply to the meaning of “days” in the Electoral Act [Chapter 2:13] [“the Electoral Act”]. His lordship relied on the Interpretation Act and concluded that “within four days” as used in section 46 (19) (b) of the Electoral Act included Saturdays, Sundays and public holidays. His Lordship summed up the arguments presented before him as follows at page 167^H 165^H – 166^C:

“In respect of the second point *in limine* Mr Chikumbirike submitted that an appeal in terms of s 46 (19)(b) of the Electoral Act must be lodged with the Electoral Court within four days of the rejection of the appellant’s nomination. He said in this case the appeal should have been lodged by the 19th February 2008. He based his interpretation of s 46(19)(c) of the Electoral Act on s 33(2), (3) and (4) of the Interpretation Act (*Chapter 1:01*) hereinafter referred to as the Interpretation Act.

In his response Mr *Mugabe* for the appellant submitted that the appeal was lodged in time as Saturdays and Sundays should not be included in the reckoning of time. He referred the Court to Order 1 Rule 4A of the High Court Rules. He in the alternative submitted that the ordinary

meaning of a day excludes Saturdays Sundays and public holidays.

Mr *Chikumbirike* in response submitted that the ordinary meaning of a day includes Saturdays, Sundays and public holidays, as a day means a day and cannot exclude other days."

20. The learned judge, as he then was, resolved the matter by reasoning as follows from page 166 - 169:

"I agree with Mr Chikumbirike's construction as it accords with the literal meaning of the word 'day'. That is why the name of each day of the week ends with the suffix "day". That construction is supported by case law. In the case of *Ellis & Another v Maceys Stores Ltd* 1983 (2) ZLR 17 (SC) @18G GUBBAY JA said,

"Rule 30 (a) lays down that where leave to appeal is not necessary, as in this case, an appeal is properly entered by serving notice of appeal 'within twenty-one days of the day of the judgment appealed against'. Does the period include 'none-business' days? There is no doubt that it does. First, the ordinary meaning of the word 'days' embraces both business and none-business days. If it were intended to exclude none-business days it would have been a simple matter to have used the expression 'twenty-one business days'.

In the case of *Kombayi v Berkhout* 1988 (1) ZLR 53 (SC) @ 56B KORSAH JA, referring with approval to the Ellis case said:

"This court has repeated *ad nauseum* that the calculation of time for lodging of appeals was based on ordinary days and not court days".

Words in a statute should be interpreted in accordance with the definition usually found in the definition or interpretation section of that statute. In the absence of a definition for the words to be interpreted one has to look to the Interpretation Act for assistance in interpreting words in a statute. In relying on the aforementioned one can also invoke the general rules of interpretation provided it would not be inconsistent with the definition provided in the Act or the Interpretation Act." (My emphasis).

21. His Lordship related to section 2 of the Interpretation Act quoted elsewhere above as well as the definition of "Act" that I have referred to. He continued thus:

"There is no doubt that the Electoral Act falls under this definition and should therefore be construed according to the provisions of the Interpretation Act as the words "day or days" are not defined under the Electoral Act.

Mr *Mugabe's* submission that the time should be reckoned in terms of the High Court rules could have been premised on the provisions of s 165 (4) of the Electoral Act which provides as follows-

"Until rules of court for the Electoral Court are made in terms of this section, the rules of the High Court shall apply, with such modifications as appear to the Electoral Court to be necessary, with respect to election petitions and other matters over which the Electoral Court has jurisdiction"

It is true that this court can rely on High court rules, but the issue to be determined is whether or not the provisions of r 4A extend to time limits prescribed in an Act of Parliament. Rule 4A provides as follows-

"Unless a contrary intention appears, where anything is required by these rules or in any order of the court to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of such period."

The key words in rule 4A are "where anything is required by these rules or in any order of the court to be done within a particular number of days". This means the rule applies to anything required to be done by any rule in the High Court rules or an order of the court. It does not extend to situations not provided for by the rules or court orders. It therefore does not assist in the construction of s 46 (19)(c) of the Electoral Act, which is not a provision of the High Court rules, but a provision of the Electoral Act.

In this case the words "day" or "days" are not defined in the Electoral Act. They are however provided for in s 33 of the Interpretation Act, which provides as follows:-

....

The clear meaning of s 33(1) to (4) is as follows. Subsection one spells out that section 33 defines any reference to time in any enactment in Zimbabwe. Subsection two excludes the day on which the event triggering the reckoning of time occurred, meaning the reckoning of time starts from the next day. Subsection three includes the last day of the stated period in the reckoning of time. Subsection four extends the period if the last day falls on a Saturday, a Sunday or a public holiday, to the next day which is not a Saturday, a Sunday or a public holiday. The inclusion of subsection four and its providing for extension if the period expires on a Saturday, a Sunday or a public holiday means Saturdays, Sundays and public holidays are included in the reckoning of time. This interpretation is confirmed in the case of *Makuwaza v National Railways of Zimbabwe* 1997 (2) ZLR 453 (S) at 456 E-F where McNALLY JA said:

“It was conceded on the understanding that the period from 10 May to 26 May was less than fourteen days if one excludes Saturdays, Sundays and public holidays.

That may be so, but on what basis does one exclude those days? The Interpretation Act [*Chapter 1:01*] does not allow it. The Labour Relations (Settlement of Disputes) Regulations (SI 30 of 1993) do not authorize it. It is only permitted in matters before the High Court and Supreme Court because the rules of those courts specifically say so (rr 4A and 1 respectively)”.

See also the case of Ellis *supra* at pp 18-19.

When the provisions of s 46 (19)(c) of the Electoral Act are construed in terms of s 33 of the Interpretation Act it becomes clear that the day on which the appellant is advised of the rejection of his nomination papers is not included. The reckoning of the four day period starts on the following day and ends on the fourth day if the fourth day falls on a day other than a Saturday, a Sunday or a public holiday. If the fourth day falls on a Saturday, a Sunday or a public holiday the period then expires on the following day which is not a Saturday, a Sunday or a public holiday. The ordinary meaning of a “day” includes all days. If the legislature had intended the period to only include business days they would have said so. The provisions of s 33 of the Interpretation Act are consistent with the provisions of s 46 (19)(c) of the Electoral Act. The interpretation in terms of s 33 is also consistent with the contextual meaning of s 46 (19)(c) of the Electoral Act which provides as follows-

“If no appeal in terms of paragraph (b) is lodged within four days after the receipt of notice of the decision of the nomination officer, the right of appeal of the candidate

shall lapse and the decision of the nomination officer shall be final”.

...”

22. This reasoning is not only sound but is well founded in Supreme Court authority. It applies to the Constitution by parity of reasoning. Section 93 of the Constitution talks of “within seven days after” in the same manner as section 46 (19) (c) of the Electoral Act dealt with by Uchena J, as he then was.

23. I conclude and advise as regards this question, that the seven days in section 93 of the Constitution include weekends and public holidays. It is this meaning which informs the “seven (7) days” in rule 23 of the Constitutional Court Rules. Rule 3 (2) of the Constitutional Court Rules is thus inapplicable to Rule 23 thereof because there is a clear “contrary intention”.

24. The result is that the phrase “within seven days after” in rule 23 of the Constitutional Court Rules carries the same meaning as the same phrase in section 93 of the Constitution.

25. The results were declared in the early hours of the 3rd August 2018. We exclude the 3rd August 2018 but include the seventh day inclusive of weekends and public holidays. The seven days therefore lapse at midnight on the 10th August 2018.

WHEN IS INAUGURATION DAY ASSUMING THAT NO PETITION IS FILED?

26. Section 94 of the Constitution provides as follows in pertinent part:

“94 Assumption of office by President and Vice-Presidents

(1) Persons elected as President and Vice-Presidents assume office when they take, before the Chief Justice or the next most senior judge available, the oaths of President and Vice-President respectively in the forms set out in the *Third Schedule*, which oaths they must take—

(a) on the 9th day after they are declared to be elected;
or

....

(2) The incumbent President continues in office until the assumption of office by the President-elect in terms of [subsection \(1\)](#).”

27. These provisions are clear. If there is no challenge to my consultant's election, he must take the prescribed oath on the ninth day after the declaration of the results. The ninth day is the 12th August 2018.

28. I advise, therefore, that if no petition challenging my consultant's election as President of the Republic of Zimbabwe is filed by midnight on the 10th of August 2018, arrangements be made to swear him in as the President of the Republic of Zimbabwe on Sunday the 12th August 2018.

**DOES THE FILING OF A PETITION BY THE 10TH AUGUST 2018
HAVE THE EFFECT OF DELAYING INAUGURATION?**

29. Yes. As Malaba DCJ, as he then was, opined in *Tsvangirai v Mugabe, CCZ 20/2017*:-

“A petition or application challenging the validity of an election of a President may be a predatory action aimed at preventing ascendancy into power by the winner.”

30. Section 94 of the Constitution in pertinent part reads as follows:

94 Assumption of office by President and Vice-Presidents

(1) Persons elected as President and Vice-Presidents assume office when they take, before the Chief Justice or the next most senior judge available, the oaths of President and Vice-President respectively in the forms set out in the *Third Schedule*, which oaths they must take—

(a) ...

(b) in the event of a challenge to the validity of their election, **within 48 hours** after the Constitutional Court has declared them to be the winners.

(2) The incumbent President continues in office until the assumption of office by the President-elect in terms of [subsection \(1\)](#).”

31. In the event of a petition inauguration day will be delayed to within 48 hours of the declaration of the winner by the Constitutional Court. I will show below that this would have to be either the 25th or 26th August 2018. I must mention in passing that I have previously advised on, and we have discussed, the prospects of success of any potential petition on every possible conceivable ground and concluded that on the facts and the law any such petition suffers from imminent and predictable failure. Our draft responses are hand and will be finalised as soon as the petition is served and filed within the time lines provided for in the rules of court.

32. Assuming that a petition is filed on the 10th August 2018, the Constitutional Court must hear and determine the petition

within fourteen days after the petition was lodged. This excludes the 10th August 2018 but includes the fourteenth day. The Constitutional Court must decide no later than midnight on the 24th August 2018. Assuming further that the Constitutional Court declares my consultant duly elected President of the Republic of Zimbabwe, he will have to be inaugurated within 48 hours of the 24th August 2018, that is, by no later than midnight on the 26th August 2018.

MY OPINION AND ADVICE

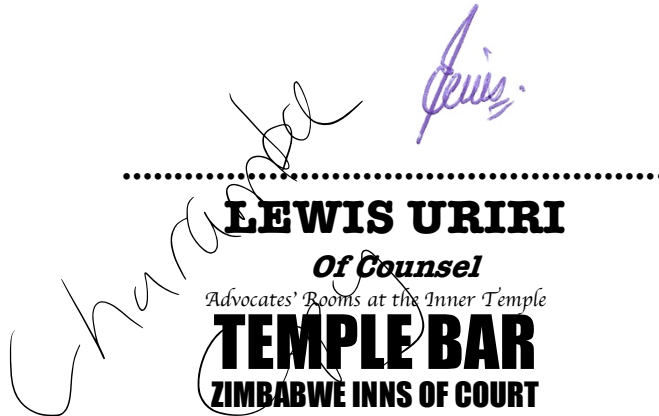
33. It is for the above reasons that I conclude and advise that:

33.1 The dies induciae for the filing of any challenge to my consultant's election as the President of the Republic of Zimbabwe lapses at mid-night on the 10th August 2018.

33.2 Inauguration day where no petition is filed by midnight on the 10th of August 2018 is the 12th August 2018.

33.3 A petition challenging my consultant's election as President of the Republic of Zimbabwe has the effect of delaying his inauguration up until the 25th August 2018. He must in any event be sworn in no later than the 26th August 2018.

**RESPECTFULLY SO ADVISED.
HARARE THIS 8TH AUGUST 2018.**



**TO: MESSRS MUTUMBWA, MUGABE & PARTNERS
HARARE (Your Ref: S.I Mutumbwa).**