



**AN EXAMINATION OF THE  
PERFORMANCE OF THE ZIMBABWE  
ELECTORAL COMMISSION (ZEC) IN  
MANAGING THE 2013 ELECTIONS IN  
ZIMBABWE.**

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## EXECUTIVE SUMMARY

The manner in which the Zimbabwe Electoral Commission (ZEC) conducted the 31st July, 2013 general election has been the subject of much discussion. The timeliness of this report, coming as it does sixteen months after the poll, may also seem redundant. However, several events make it necessary to highlight and bring to the fore once more ZEC's conduct of the 2013 ballot. These events are;

- *The recent release of the “Khampepe Report” which shows that Zimbabwe’s Presidential Election of 2002 was not free and fair nor was it conducted in accordance with Zimbabwe’s electoral laws affirming assertions to this effect over the years including in the 2013 elections by civic actors in Zimbabwe;*
- *A recently released report dated October 2014 by ZEC itself to assess ZEC’s “needs” which claimed that one of ZEC’s “strengths” is its “credible and respected leadership;”*
- *The election in August 2014 election of Justice Rita Makarau, the ZEC Chairperson as the President of the SADC Electoral Commission Forum; and*
- *The appointment, less than two months after the Zimbabwean poll, of ZEC chairperson Justice Rita Makarau as head of the African Union Observer Mission to the Rwandan general elections.*

These events imply that the manner in which ZEC conducted the election of Zimbabwe’s 2013 poll and the manner in which the ZEC Chair guided the running of elections were in some way exemplary. The message that the emulation of ZEC was desirable conveyed by these events also needs to be interrogated. The reality is that there were many flaws with the manner in which the Zimbabwe 2013 elections were run.

First; the staff composition of ZEC ahead of the 2013 elections did not inspire confidence that the *modus operandi* of the body would be much different from that which governed the discredited June 2008 Poll. Two of the Commissioners under whose auspices that latter poll was conducted had been reappointed and other Commissioners, who might have sought to change the way ZEC went about its duties and to assert the independence of the body, were clearly to be a minority voice. This precognition was vindicated.

Second; that it was to be business as usual at ZEC, was apparent in the early stages of the electoral cycle. There was no attempt, for example, to take advantage of internet technology well ahead of the poll for the purposes of voter education or to deal with various aspects of voter registration and verification by making the voters’ roll accessible online.

Third; when a precipitate election date was announced by the President, ZEC voiced no objection as to the practical and logistical difficulties caused by the date or to the fact that the legislation still in the process of being drafted to govern the election was inchoate or to the fact that it had not been consulted over the contents of this legislation as constitutionally required.

Fourth; as had been the case previously, ZEC left the registration process almost entirely in the hands of the Registrar-General, widely distrusted and accused of bias by opposition parties in every election from 1985 onwards and confirmed by the Khampepe Report.

Fifth; when cogent evidence of a skewed and partial registration process emerged, ZEC did nothing to intervene to correct the bias. It did not perform its statutory and constitutional duty to maintain

copies of the voters roll and when the public was denied electronic copies of the voters roll by the Registrar-General (who should have been receiving instructions from, rather than issuing instructions to, ZEC in this regard), ZEC fully supported the Registrar-General in his implausible claims as to why the electronic roll was not made available as required by the Electoral Act and Constitution.

The opaque, distorted, skewed and inaccurate voters roll laid the foundation for a poll which could not be viewed as fair and is one of the main reasons why, even usually tolerant observers such as SADC and the AU, eluded this adjective from their assessment of the poll. A number of problems emerged as the electoral cycle unfolded

- *ZEC's deference to the security sector became apparent when it unlawfully accepted special votes for the entire complement or the police force. This was not only in violation of the Electoral Act but resulted in foreseeable administrative chaos which led to about 30 000 members of the force being unable to vote. ZEC was compelled to approach the Constitutional Court to ask that it be permitted to conduct the election other than in accordance with Electoral Law (itself ironically a constitutional requirement) in order to allow these members of the security sector to vote.*
- *Lapses occurred on voting day itself. The measures in place to avoid multiple voting were inadequate. The method by which indelible ink is used as a security mechanism in this regard was not properly implemented, and inexplicably and uniquely, no UV machines to check for ink residue were made available for the 2013 poll.*
- *Evidence of a large number of fraudulent voter registration slips being distributed was brushed aside and not pursued by the Commission.*
- *After the poll, polling irregularities might have been revealed through an examination of election residue. Rather than pursuing the constitutional requirement that the poll be transparent and verifiable with enthusiasm ZEC sided with those seeking to prevent examination of the voting paper work and materials, suggesting that ZEC itself had little confidence in the integrity of the ballot.*
- *ZEC's processes were also characterised by general clerical incompetence, including the fact that the tallies for the Presidential Results contained numerous errors and that the final officially announced total for the Presidential Election was thus incorrect.*

The evidence on the ground is that the 2013 election was characterised by an unsatisfactory legal framework; registration bias; constituency stuffing; a flawed voters roll with duplicates and the deceased on it; a botched special voting procedure; fraudulent and multiple voting using registration slips; weak indelible link; denial of aggrieved parties to examine electoral residue; failure to address media bias; results mismanagement evident in arithmetic errors in ZEC's own published results; use of invalid forms, unaccounted ballot papers; and basic administrative incompetence.

Concerns raised by various civil society actors and aggrieved candidates from opposition political parties, to this effect to ZEC were either treated lightly or dismissed. From this, it is apparent that, contrary to the eager assertions of the Constitutional Court in this regard, ZEC did not carry out its duty to ensure that the polls were free, fair and credible and conducted in accordance with Electoral Law and the Constitution. It is concerning, therefore, that the way in which ZEC administered the 2013 election could be seen as exemplary for the region, bringing to question the integrity of the election observation system in the region as a whole.

## INTRODUCTION

This report, on the manner in which the Zimbabwe Electoral Commission (ZEC) conducted the 31<sup>st</sup> July, 2013 general election, is admittedly somewhat anachronistic, coming as it does sixteen months after the poll. However, several events make it necessary to highlight and bring to the fore once more ZEC's conduct of the 2013 ballot.<sup>1</sup>

Less than two months after the poll, ZEC chairperson Justice Rita Makarau was appointed head of the African Union Observer Mission to the Rwandan general elections, implying that the manner in which she had guided ZEC's conduct of Zimbabwe's 2013 poll was in some way exemplary. The message that emulation of ZEC was desirable was also conveyed by the August, 2014 election of Zimbabwe to head the SADC Electoral Commission Forum, again in the person of Justice Rita Makarau, who was unanimously elected as president of this body, the mandate of which is to observe polls in SADC countries.<sup>2</sup> The position assumed increased importance due to the fact that Botswana, Mozambique and Namibia all held elections within the year.

The recent release of the "Khampepe Report" suggests that these appointments may be less than flattering. The Khampepe Report was compiled by two, Judges, Dikgang Moseneke and Sisi Khampepe, who were dispatched by then South African President, Thabo Mbeki, to report on whether Zimbabwe's Presidential Election of 2002 was free and fair and had been conducted in accordance with Zimbabwe's electoral laws. It took a six year legal battle to compel the release of the Report, as successive South African presidencies sought to keep it out of the public domain. The Report contradicted regional observer mission statements which had claimed the 2002 poll to be a credible reflection of the will of the Zimbabwean people. On the contrary it unequivocally held that the election "could not be considered free and fair." These facts support what has long been believed by Zimbabweans, that reports by regional bodies invited by the Zimbabwean government to observe elections in the country are informed more by comity between SADC leaders than the conduct of the elections themselves. The appointment of Justice Makarau thus may have been made on an understanding, arrived at on the basis of the manner in which she shepherded the conduct of the 2013 Zimbabwe poll, that she would not change the manner of reporting on elections adopted by the region. The analysis below supports this assumption.

Furthermore, a report commissioned by ZEC itself to assess ZEC's "needs" dated October 2014 claimed that one of ZEC's "strengths" is its "credible and respected leadership" maintaining that:

*The Chairperson, appointed shortly before the 2013 harmonised Elections, has quickly developed a positive reputation, leading a team of diverse Commissioners with a variety of different skills and experiences.*<sup>3</sup>

The claimed positive reputation of the chairperson requires examination.

It should also be noted that ZEC is required to present its own report on the conduct of elections to Parliament as soon as possible after the announcement of the results, and in any event not later than six months thereafter.<sup>4</sup> Without explanation or apology ZEC's Report on the 2013 poll was finally presented to Parliament in September 2014, eight months later than the maximum permissible statutory deadline.<sup>5</sup> With Parliament recently resuming sittings<sup>6</sup> for the first time after such

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<sup>1</sup> See for example *Massive AU Nod For Zim Poll System* The Herald 21.09.13.

<sup>2</sup> At the 16th SADC Electoral Commission Forum Annual General Conference in Mauritius on August 12 and 13, 2013.

<sup>3</sup> *Identification of the Zimbabwe Electoral Commission Needs Gaps - The Road to 2018* ZEC October 2014 p27 Report funded by the Danish Embassy and compiled by Rushdi Nackerdien.

<sup>4</sup> Section 13(1) of the Electoral Act [Chapter 2:13].

<sup>5</sup> As was the report of the previous Commissioners, a fact accepted without comment by Parliament.

presentation, this paper will hopefully provide useful material to parliamentarians to enable them to debate the report.

### **The Composition of ZEC**

At the end of 2005, by way of a constitutional amendment, significant changes were made to the manner in which Zimbabwe's Electoral Management Body was to be composed.<sup>7</sup> Instead of the Electoral Supervisory Commission, whose five members were appointed by the President, the Zimbabwe Electoral Commission was established. Only the Chairperson was to be appointed by the President. The remaining members were chosen by the President from a list submitted to him by the Parliamentary Committee on Standing Rules and Orders (CSRO). The composition of ZEC has only changed slightly with recent Constitutional Amendments. ZEC now comprises a chairperson, appointed by the President after consultation with the Judicial Service Commission and the CSRO, and eight other members appointed by the President from a list of not fewer than 12 nominees submitted by the CSRO.

These salutary changes, which reduce a President's influence over a body which manages elections in which the President and/or his or her party is a contestant, were not immediately much remarked upon for several reasons. Firstly, the next general elections, and elections for the newly (re)established Senate took place before the changes came into effect.<sup>8</sup> Secondly, ZANU PF won a two thirds majority in the 2005 general election, resulting in a CSRO heavily dominated by that political party. The perception of political bias in the appointment of Commissioners thus remained. It was the Commissioners so appointed who were in place for the general and presidential elections of 2008. ZEC's statutory report presented (also belatedly) to Parliament after the 2008 poll did nothing to improve its image. The report seemed to indicate that the Commissioners were alone in the country in not being aware of the brutal and endemic violence which preceded the June 2008 presidential run-off election.<sup>9</sup> ZEC also accepted the palpably false returns from the largely unmonitored poll without comment.<sup>10</sup>

However, after the March 2008 poll, the combined MDC formations commanded a majority in Parliament which was reflected in the composition of the CSRO of the Seventh Parliament. An opportunity thus presented itself for new Commissioners to be appointed (after the expiry of the terms of office of their predecessors) who would robustly defend the tenets of democratic, free and fair elections come the polls of 2013. It was not an opportunity which was taken.

Two previous Commissioners who had given the deeply flawed June 2008 election a clean bill of health, were reappointed to the new ZEC.<sup>11</sup> Justice Mtambanengwe was appointed as chairperson. This appointment was curious for two reasons. Firstly, Prof. Reginald Austin, who had been proposed by the MDCs for this position, was quite obviously the most qualified candidate, as a lawyer with extensive international experience in electoral observation and electoral management.<sup>12</sup> Secondly, Justice Mtambanengwe, who initially sought to carry out his duties while

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<sup>6</sup> On 25.11.14.

<sup>7</sup> Constitutional Amendment No 17 (Act No. 5 of 2005).

<sup>8</sup> On 01.12.05.

<sup>9</sup> Notwithstanding the murder of one of its own staffers, Ignatious Mushangwe.

<sup>10</sup> For a critique of this report see – See *Hear No Evil, See No Evil, Speak No Evil* RAU 2008 available at [www.researchandadvocacyunit.org](http://www.researchandadvocacyunit.org).

<sup>11</sup> Joyce Kazembe and Theophilus Gambe.

<sup>12</sup> He has served as the Head of Legal and Constitutional Affairs for the Commonwealth Secretariat; as Chief Electoral Officer of the United Nations Transitional Authority in Cambodia; as a Director of the Electoral Unit at International IDEA in Stockholm; as Chief Electoral Adviser for Afghanistan's 2004 presidential election; and as Director of the Electoral Component, United Nations Observer Mission in South Africa.

still a judge in Namibia, appeared to be in a fragile state of health.<sup>13</sup> Deputy Chairperson, Joyce Kazembe, of the previous and discredited ZEC, thus wielded undue influence within the body and interfaced more frequently with the press and public than Justice Mtambanengwe, until the latter's resignation and replacement by Justice Rita Makarau.<sup>14</sup> Justice Makarau is a judge of the Supreme Court and former non-constituency ZANU PF MP. Although Justice Makarau was to lend ZEC a more urbane and sophisticated face, it was apparent that none of the new Commissioners would be prepared or able to aggressively change the modus operandi of the body. Despite having the authority to do so,<sup>15</sup> there was thus no attempt to replace the senior members of ZEC's secretariat,<sup>16</sup> most of whom were considered by the MDCs to be partisan appointees acceptable to ZANU PF and many of whom had backgrounds in the security and intelligence sectors.<sup>17</sup>

## **The Legislative Framework**

The 2013 general elections in Zimbabwe were governed by provisions in the new Constitution (partly in force from 22<sup>nd</sup> May, 2013<sup>18</sup>) and by the Electoral Act (the "Act") and accompanying Regulations. The Constitution provided that elections must be held regularly and be "peaceful, free and fair."<sup>19</sup> The Constitution also obliged the State to "take all appropriate measures" to ensure that:

- i) *all eligible citizens are registered as voters;*
- ii) *every citizen who is eligible to vote in an election has an opportunity to cast a vote;*
- iii) *all political parties and candidates contesting an election have reasonable access to all material and information necessary for them to participate effectively;*
- iv) *all political parties and candidates contesting an election have fair and equal access to electronic and print media, both public and private.*<sup>20</sup>

ZEC was obliged to ensure that whatever voting method was used, it was "*simple, accurate, verifiable, secure and transparent*" and to ensure the safekeeping of "electoral materials,"<sup>21</sup> which presumably includes the voters' roll.

Various transitional provisions of the new Constitution were specifically intended to apply to the first elections held after the charter became law. Among these provisions was a requirement that the Registrar-General of Voters, under the supervision of the Zimbabwe Electoral Commission, conduct a special and intensive voter registration and a voters' roll inspection exercise for at least thirty days after the election had been called.<sup>22</sup>

The new Constitution also provided that no amendments could be made to the Electoral Act unless the Zimbabwe Electoral Commission had been consulted and any recommendations made by the Commission had been duly considered.<sup>23</sup> Furthermore, once the election date had been proclaimed

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<sup>13</sup> *Elections Chief to Operate From Namibia* Zimonline, 12.02.10 <http://www.zimonline.co.za/Article.aspx?ArticleId=5704>.

<sup>14</sup> The other members were Daniel Chigaru, Geoff Feltoe, Petty (sic) Makoni, Sibongile Ndhlovu, Bessie Nhandara and Mukuni Nyathi.

<sup>15</sup> Section 9 of the Electoral Act.

<sup>16</sup> ZEC, however, had no general power to replace the Chief Elections Officer without the authority of Minister of Justice.

<sup>17</sup> *We Have ex-Military, CIO Officials in Our Secretariat: ZEC Daily News* 20.02.13.

<sup>18</sup> Other provisions became effective when the President was sworn into office after the ensuing poll.

<sup>19</sup> Section 155(1) of the Constitution.

<sup>20</sup> Section 155(2).

<sup>21</sup> Section 156(ii)(c).

<sup>22</sup> Paragraph 6(3) of Part Three of the Sixth Schedule.

<sup>23</sup> Section 157(4).

no (further) changes could be made to electoral law ahead of the election.<sup>24</sup> Since the first elections had to be held under electoral laws in conformity with the new Constitution,<sup>25</sup> numerous amendments needed to be made to the extant Act – including the changes required to cater for the re-introduced system of (partial) proportional representation.<sup>26</sup> These changes thus had to be made in consultation with ZEC and before the election was called.

However, on the 31st May, 2014, in a jurisprudentially curious judgment,<sup>27</sup> the Constitutional Court issued a ruling that elections had to be held before the 31<sup>st</sup> July, 2014. The decision coincided with President Mugabe’s stated wish that elections be held sooner rather than later, and anticipated what many lawyers believed to be the latest date for elections by three months.<sup>28</sup>

The date set by the Constitutional Court might have accorded with Mugabe’s wishes. It did not, however, accord with various timelines fixed by both the Constitution and electoral law. The mandatory intensive 30 day voter registration period had yet to commence. The Electoral Act provided that registration had to end the day before the Nomination Court sat, and the Constitution that elections could be no sooner than 30 days after such sitting. So there needed to be a sixty day period between the start of the intensive registration period and the election. When the start of the intensive voter registration period was delayed until the 9<sup>th</sup> June, 2013, the Nomination Court could not sit before the 9<sup>th</sup> July if registration was to be done over 30 days in terms of the Act and the Constitution, and the election thus could not be before the 9<sup>th</sup> August, at the earliest.

Mugabe sought to deal with these potential illegalities by perpetrating another. Under the cover of legislative powers granted to him under the Presidential Powers (Temporary) Measures Act,<sup>29</sup> Mugabe purported to effect extensive changes to the Electoral Act by presidential regulation<sup>30</sup> to provide, not only for the system of proportional representation required by the new Constitution, amongst other provisions, but also to allow voter registration to continue beyond the sitting of the Nomination Court.<sup>31</sup> On the same day as the Presidential Regulations were gazetted, 13<sup>th</sup> June, 2013, the election dates were proclaimed,<sup>32</sup> setting the 28<sup>th</sup> June, 2013 for the sitting of the Nomination Court, and thus leaving the 30 day period required until the elections, with a few days to spare.

While this dealt with the possible illegality of a failure to hold the 30 day intensive voter registration period, the manner in which it was done was of questionable legality. The Presidential Powers (Temporary) Measures Act (PPTMA) cannot be used to make or amend electoral legislation. The Constitution is clear that elections must be conducted under an “Act of Parliament”, not presidential regulations, and the Presidential Powers (Temporary) Measures Act, itself says 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.<sup>33</sup> And as a matter of basic equity, a contestant in the election should not be

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<sup>24</sup> Section 157(5).

<sup>25</sup> Paragraph 8 of Part 3 of the Sixth Schedule.

<sup>26</sup> 60 of the 80 Senatorial seats and 60 seats reserved for women are allocated on the basis of the proportion of votes received by province during the first-past-the post poll for seats in the National Assembly – see section 120 and 124 of the Constitution.

<sup>27</sup> *Jealousy Mbizvo Mawarire v Robert Gabriel Mugabe N.O. and Ors* CCZ1/13.

<sup>28</sup> For a discussion of this ruling and its effect see D. Matyszak *Old Wine, New Bottles* available from [www.researchandadvocacyunit.org](http://www.researchandadvocacyunit.org).

<sup>29</sup> Chapter 10:20.

<sup>30</sup> S.I. 85 of 2013.

<sup>31</sup> Section 26A of the amended Act.

<sup>32</sup> S.I. 86 of 2013.

<sup>33</sup> See D. Matyszak *The 2013 Elections: Zimbabwe’s Ground Hog Day* RAU July 2013.

allowed to set the rules. Furthermore, a precondition for the validity of any changes to electoral law was consultation with ZEC and consideration of any recommendations it might advance.

Several applications to the Constitutional Court after these Regulations were made, which challenged their validity, were dismissed. Sixteen months after the poll, we are yet to be told why, as the reasons for the judgments were “to be given later.” The legal foundations for the validity of the Electoral Act, as purportedly amended, and thus the election itself, remain unknown.

The purpose of the constitutional requirement for consultation with ZEC, before electoral legislation is introduced or amended, is presumably to ensure that impractical or undesirable provisions are not introduced, and that the Act is properly crafted. Having failed to consult ZEC as required, this ill was not then avoided. The proposed amendments to the Electoral Act, which had been part of a process of negotiation between the MDCs and ZANU PF, had not been finalised and subjected to the kind of scrutiny required before legislation becomes law. The inchoate legislation contained contradictory provisions, cross references in vital areas to sections which did not exist, and loose and ambiguous wording.<sup>34</sup> The Presidential Regulations largely reproduced this work-in-progress and thus its defects.

One such defect was the shortened period between the sitting of the nomination courts and Election Day. ZEC had previously successfully lobbied the legislature to extend the period to at least 42 days. Any shorter period, ZEC had argued, would result in logistical difficulties. Mugabe reduced this period to 30 days by the Presidential Regulations. The stated logistical difficulties thus arose as anticipated, as will be seen.

A second defect of importance was the extension of the cut off point for voter registration to 12 days beyond nomination day. This amendment was incompatible with Section 28 of the Act. The latter section provides that any objection to the inclusion of a person on the voters’ roll for a constituency could only be acted upon if made at least 30 days before the poll. Together the provisions meant that voters could be registered for the election up to 18 days prior to the election, but no objection could be made to voters wrongfully included on the roll between the 30<sup>th</sup> and 18<sup>th</sup> day before the election. The amendments made by the President of ZANU PF, *qua* president of the country, thus introduced a structural unfairness into the electoral law which redounded to the advantage of his party. Unless prevented from so doing by the Registrar-General or ZEC, it was now possible for a party to stuff a constituency with supporters, without any recourse for the opposing candidate. As discussed later, far from preventing the stuffing of constituencies, the Registrar-General colluded in this process, without any intervention from ZEC – even when the issue was brought to its attention.

A third major problem lay in the fact that in the crucial area of results management and the procedure for the announcement of results, the law was ambiguous, contradictory and contained cross references to non-existent sections.

Despite having cogent grounds for so doing, or arguably even being legally so obliged, ZEC raised no objection to the fact that it had not been consulted as constitutionally required before the Presidential Regulations purporting to amend electoral law were introduced. It made no attempt to draw attention to the flaws in the legislation; and, rather than protesting the logistical difficulties which would arise due to the precipitate election date and shortening of timelines, on the contrary stated that it was fully able to conduct the elections within the new timeframe.<sup>35</sup> ZEC’s silence in

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<sup>34</sup> For further detail on this see: *A Fudge Recipe: Determining and Declaring the Result of Zimbabwe’s 2013 Presidential Election* Derek Matyszak RAU 26.07.13.

<sup>35</sup> ‘ZEC Ready for Polls’ *Makarau Newsday* 13.06.13.

this regard suggested deference to the President, a candidate in the impending poll, and did not foster confidence that the poll would be handled impartially.

### **Voter Registration and the Voters' Roll**

Despite the unsatisfactory legal framework, the Commission still had power over the conduct of the elections, and was required to ensure that they were free and fair. Furthermore, ZEC was also responsible for the maintenance and custody of the electoral roll,<sup>36</sup> a responsibility that the previous ZEC (unlawfully) left in the hands of the widely distrusted Registrar-General of Voters. The inflated voters' rolls, containing the names of deceased persons and duplicate entries, have long been believed to facilitate electoral fraud.<sup>37</sup> The new ZEC had the power to ensure that accurate voters' rolls were in place before the next election.<sup>38</sup>

The registration of voters and the compilation and maintenance of an accurate national voters' roll is generally recognised as an essential and key part of the electoral cycle. Since the voters' roll records who may or may not vote, it may ultimately have a determining effect on who wins the poll. Equally importantly, it is imperative that the voters' roll, being the cornerstone of the administration of a democratic election, be accurate and up to date. While an incomplete voters' roll may disenfranchise those who might otherwise be entitled to vote, an inflated roll containing duplicate entries, names of persons who have emigrated or of dead voters, lends itself to electoral fraud. If the roll is inflated, a false and increased ballot count can be affected (through ballot box stuffing, multiple voting or manipulation of the figures on returns) without appearing blatantly implausible against the number of registered voters. In the same way, an inflated roll acts as the justification for printing an excessive number of ballot papers, further opening possibilities for electoral fraud. An ideal voters' roll is one where all names which ought to appear on the Voters' Roll do, and all names which ought not to appear on the Voters' Roll, do not.

#### *Responsibility*

Voter registration is carried out by constituency registrars who must compile both ward and constituency rolls.<sup>39</sup> The process is conducted under the “*general supervision and direction*” of the Registrar-General of Voters.<sup>40</sup> In the exercise of this function, the Registrar-General is himself subject to the “*supervision*”<sup>41</sup> and “*direction and control*”<sup>42</sup> of ZEC. The ultimate responsibility for this process thus lies with ZEC. It is apparent, however, that ahead of the July 2013 poll, and transgressing the requirements of the Electoral Act (“the Act”), ZEC, repeating the failure of its predecessors, abdicated its authority in this regard, leaving the Registrar-General in sole control of the process, initially with little,<sup>43</sup> and subsequently with ineffective, direction. During the pre-election period it also emerged that an Israel firm with questionable credentials, Nikuv, was involved in some opaque manner in the registration process. It did not help matters that ZEC,

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<sup>36</sup> Section 100C(1)(c) and (d) of the Constitution.

<sup>37</sup> See, generally, D. Matyszak, 2013 *Vision – Seeing Double and the Dead: A Preliminary Audit of Zimbabwe's Voters' Roll* (RAU 2009), available at [http://www.Kubatana.net/docs/demgg/rau\\_audit\\_voters\\_roll\\_091012.pdf](http://www.Kubatana.net/docs/demgg/rau_audit_voters_roll_091012.pdf).

<sup>38</sup> Section 20(1) of the Electoral Act.

<sup>39</sup> Sections 19 and 24 of the Electoral Act Chapter 2:13.

<sup>40</sup> Section 19(3) of the Electoral Act.

<sup>41</sup> Paragraph 6(2) of Part 3 of the Sixth Schedule to the Constitution is to the following effect: “*For the purposes of the first elections, the Registrar-General of Voters is responsible, under the supervision of the Zimbabwe Electoral Commission, for registering voters and compiling voters' rolls.*”

<sup>42</sup> Section 18(2) of the Electoral Act.

<sup>43</sup> See *Opening Remarks by Mrs Justice Rita Makarau Chairperson of Zimbabwe Electoral Commission on the Consultative Meeting Held with the Political Parties on the 5th of June 2013 at Harare International Conference Centre (HICC)* available at [www.zec.gov.zw/speeches?download=507](http://www.zec.gov.zw/speeches?download=507).

supposedly in control of the process, appeared to have no knowledge of Nikuv's operations.<sup>44</sup> When Nikuv's involvement was queried with the Registrar-General, the Registrar-General's response was that he (and not Nikuv or, by implication, ZEC) was fully in control of voter registration.<sup>45</sup>

### *Registration bias*

The lack of direction and control by ZEC, and the partisanship of the Registrar-General, was all too manifest in the two concentrated registration periods ahead of the election, the last of which was the 30 day intensive registration period required by the Constitution. While many of the problems which arose during both registration periods could, with some justification, be attributed to inadequate funding, other difficulties were on account of the partisan nature of the process. The determination of the number of mobile registration centres and the length of time spent in each ward was left to the Registrar-General, although the process should have been under the control of ZEC. The manner in which the exercise was then conducted manifested bias in the concentration of registration centres in favour of ZANU PF strongholds,<sup>46</sup> and the actual process of registration at some centres was expedited for select groups and obstructed at others.

Since parliamentary elections in Zimbabwe are constituency based, rolls are constructed according to the place of residence of each voter. The Electoral Act gives constituency registrars considerable discretion in the registration of voters, requiring that such officials must be "satisfied" that a claimant for registration resides in the constituency for which he or she seeks registration as a voter.

The "definition" section of the Act<sup>47</sup> sets out what constitutes "proof of residence." Such proof can conveniently be divided into two categories: that for urban dwellers and that for the rural populace.

The former includes the following:

- utility bills of the claimant or utility bills in the name of the owner of the property, accompanied by a letter from the owner stating that the claimant occupies the premises;
- a written sworn statement by the claimant's landlord as to the claimant's address;
- a sworn statement (written or oral) by the claimant's employer confirming the claimant's address;
- bank statements and hospital bills showing the claimant's address;
- a stamped addressed envelope sent to the claimant's address or any other satisfactory documentary evidence reasonably establishing the place of residence of the voter.

In the case of rural claimants, a sworn oral or written statement by the councillor, chief, headman or village head of the area or village where the claimant resides, confirming that the claimant resides in the area or village concerned is acceptable. In addition to these provisions, a 2012 amendment to the Act provided that ZEC could prescribe documents which would constitute proof of residence.<sup>48</sup>

In practice, these provisions and the discretion given to constituency registrars resulted in a process heavily biased in favour of ZANU PF supporters. It will have been immediately noted that a rural

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<sup>44</sup> See *Tsvangirai Question's Voters' Roll Credibility* Bulawayo24 01.07.13.

<sup>45</sup> See the transcript of an interview with Mudede 'Voters' Roll did not Cost Anyone Election' The Herald 03.08.13.

<sup>46</sup> While the heavy concentration of registration centres in rural areas could be defended on the basis that the population in these areas is more widely dispersed than in the generally MDC aligned urban areas, there appeared to be a bias even among the rural provinces with the greatest allocation of registration centres in the Mashonaland Provinces, where ZANU PF support is centred.

<sup>47</sup> Section 4.

<sup>48</sup> Section 23(5) of the Electoral Act.

dweller is almost entirely dependent on the goodwill of local leadership in order to register as a voter. ZANU PF aligned (meaning most<sup>49</sup>) local leaders, by withholding the necessary confirmation of residence of perceived MDC supporters in the area under their jurisdiction, could make registration for such rural claimants extremely difficult.

In urban areas, rather than the simplest means of proving registration, i.e. a stamped addressed envelope, being used or promoted as a means of proving residence, registration officials demanded the most onerous method which applied to most claimants – that which required the co-operation of the would-be voters' landlord to supply the necessary paperwork before accepting the claim for registration.

While the ZEC chairperson claimed to be disheartened over the difficulties facing those seeking to register in urban areas,<sup>50</sup> ZEC's "solution" exacerbated rather than attenuated the problem. ZEC determined that an affidavit as to residence by the claimant should now be accepted by constituency registrars. The ratio behind claimants attesting to affidavits before Commissioners of Oaths was presumably the deterrent effect arising from that fact a criminal offence would be committed if the claimant provided false information as to his or her address under oath. As such, the introduction of affidavits was entirely unnecessary and simply added a further delaying bureaucratic step to the process. The Electoral Act already provides for criminal penalties to be applied if false information is given during the registration process.<sup>51</sup> The signature of the claimant declaring that information, which included an address, on an application form for registration as a voter should thus have sufficed. The process introduced by ZEC required pro forma affidavits to be made available and to have Commissioners of Oaths on hand while they were attested. This all meant more paperwork, more queues and more opportunity for obstructionism.

During the intensive registration periods, some urban registration centres reported a mere 20-30 claimants being registered per day.<sup>52</sup> Long and slow moving queues developed whose progress was further impeded by the fact that lists of security force members were sent to these registration centres for en masse registration. In other urban centres, members of the security sectors were bussed to registration centres, moved to the front of queues, and registered with a speed and alacrity not afforded to others.<sup>53</sup> ZEC remained supine as the Registrar-General's office blatantly abused a system supposedly under ZEC's supervision and control.

Reports appeared in the non-ZANU PF aligned press bemoaning the tortuous and tardy nature of the process in MDC strongholds such as Harare,<sup>54</sup> while the ZANU PF-controlled Herald reported registration in the rural areas as being "*as easy as ABC*."<sup>55</sup>

Bias was also evident in dealing with the registration of those affected by the change in citizenship laws brought about by the new Constitution. In 2001, new laws prohibiting dual citizenship had been introduced,<sup>56</sup> motivated, it seemed, by the desire of ZANU PF to disenfranchise those of foreign origin perceived to have voted against its position on the constitutional referendum of the previous year. Under the guise of applying this legislation, many people, often unlawfully, were deprived of their Zimbabwean citizenship and struck off the voters' roll by the Registrar-General.

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<sup>49</sup> ZANU PF aligned government officials wield considerable influence over local leaders – see D. Matyszak *Formal Structures of Power in Rural Zimbabwe* available from [www.researchandadvocacyunit.org](http://www.researchandadvocacyunit.org).

<sup>50</sup> *New Voter Registration Exercise in the Pipeline* The Herald 15.05.13.

<sup>51</sup> Section 37(2) of the Electoral Act.

<sup>52</sup> See *Fresh Chaos Rock 30 Day Registration* The Zimbabwe Independent 14.06.13.

<sup>53</sup> *Cabinet Descends on Chaotic RGs Office* The Zimbabwe Independent 19.04.13.

<sup>54</sup> *Registration 'delaying tactics' Rile Voters* Daily News 05.07.13.

<sup>55</sup> *Registration: As Easy as ABC for Aliens* The Herald 22.06.13.

<sup>56</sup> Act 12 of 2001.

The Registrar-General, without any intervention from ZEC, ensured that those entitled to recover their citizenship under the new Constitution, and thus the right to vote, faced a process arduous enough to be incomplete before the voter registration process ended.<sup>57</sup>

A further anomaly arose from ZEC's interpretation of the constitutional requirement that the Commission must "conduct a special and intensive voter registration and a voters' roll inspection exercise for at least thirty days" after the elections had been proclaimed by the President.<sup>58</sup> Logic demands that the intensive registration takes place for 30 days first, followed then by a second 30 day period when the results of the intensive registration could be examined. In order to accommodate the controversial and precipitate date set by the President, ZEC conflated the registration and inspection periods so that both took place simultaneously over a single 30 day period rather than sequentially. The problems caused by this illogical interpretation of the constitutional requirements were aggravated by the fact that those wishing to inspect the roll and those wishing to register were required to form a single queue, thus slowing down the process for both. No separate register was kept for the recently registered to facilitate the verification exercise and to render the process more transparent, as is the case in many other jurisdictions. The transparency in the electoral process required by the constitution and the process of checking the roll by individual voters could easily have been facilitated and expedited (thus relieving pressure on the registration process) by making the voters' roll available on the internet, as is the case in many other jurisdictions and which is easily accomplished. For reasons unstated, this obvious and constructive option was not taken or pursued.

Many predominantly MDC-supporting registration claimants thus were disenfranchised as a result of the manner in which the registration exercised was conducted.<sup>59</sup> MDC-T Secretary-General Tendai Biti claimed that 300 000 people had been unable to register in Harare alone.<sup>60</sup> While Biti did not indicate how he had arrived at this figure, it was nonetheless apparent that large numbers of urban dwellers who wished to register as voters had been unable to do so. The Constitution, as noted above, requires that the State take all reasonable measures to "ensure" that those eligible are able to register as voters. The use of the word "ensure" suggests a high duty of care placed upon ZEC to make registration (and voting) easy for citizens. ZEC make no attempt to use this provision to extend the voter registration period (though it was to use the same section in the Constitution to allow members of the security sector to vote outside the provisions of the Electoral Act to protect their right to vote).

#### *Analysis of the results of the registration process*

##### *i) the effect of the bias*

The qualitative assessment of bias is supported by a quantitative analysis of the Voters' Roll.<sup>61</sup> On figures released by ZEC, the first intensive registration period showed that the distribution ratio of the 204 041 new voters in this initial special registration period was about 4:1 in favour of ZANU PF strongholds compared with those of the MDCs (i.e. the Mashonaland Provinces v Harare and Bulawayo). The two rural Matabeleland provinces showed a low registration of new voters, similar to that of the metropolitan provinces of an average of 5.6% (compared with an average of 4% for

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<sup>57</sup> *Voter Registration Nightmare Continues For 'Aliens'* SW Radio 03.07.13.

<sup>58</sup> Paragraph 6(3) of Part III of the Sixth Schedule to the Constitution.

<sup>59</sup> The anger of some of these voters is graphically captured in film footage in the documentary "An Incredible Election" <http://www.youtube.com/watch?v=Ro9MRcHN0R0>.

<sup>60</sup> Biti gave no indication as to how he had arrived at this figure. However, the statement accorded with the general impression that numerous people wishing to register had been unable to do so.

<sup>61</sup> For the detailed analysis see *Syncopated Numbers: Arithmetic Discord and Zimbabwe's 2013 "Harmonised" Election* RAU March 2014 available at [www.researchandadvocacyunit.org](http://www.researchandadvocacyunit.org).

Harare and Bulawayo). Similar data was not released following the second intensive 30 day registration period. This data cannot be determined since the electronic copy of the Voters' Roll has still not been made available more than one year after the election in July 2013.

However, if the pattern of bias claimed by ZANU PF during the first registration drive (4:1) continued during the second, and one extends these ratios to the total of 779 279 new voters, then 623 423 of the new voters would have been ZANU PF supporters. The difference between even voter registration between the MDCs and ZANU PF, and the 4:1 bias in favour of ZANU PF, is some 233 784<sup>62</sup> plus votes, or would have been responsible for 7.14% of Mugabe's tally in the presidential poll.

ii) *Constituency Stuffing*

The analysis of the roll also revealed more overt manipulation and bias in voter registration in the form of constituency stuffing. After the poll the arduous process of converting the hard copies of the roll for a handful of constituencies into electronic copies was undertaken by an NGO. The electronic copy of the roll for one such constituency, Mount Pleasant, was closely examined after the poll and compared with the election results.<sup>63</sup> Cogent evidence emerged that this constituency, previously considered a safe MDC-T seat, had been won by stuffing the constituency with security sector personnel by falsely listing them as resident in the army and police quarters in the constituency.

The constituency, forming part of Harare Province, comprises two wards of Harare Municipality – ward 7 and ward 17. The number of registered voters in the constituency increased<sup>64</sup> by 9 322 voters from 22 245 in March 2008, or nearly 42%, making some 31 594 voters on the roll<sup>65</sup> for the July 2013 poll. Approximately 9 419 people with security sector addresses were added to the constituency just ahead of the 2013 election. 8 232 of these members were registered in ward 7. Some 5 475 voters migrated<sup>66</sup> out of the constituency, making a total of 14 797 voters new to the constituency since 2008. Of the 6 221 voters who migrated into the constituency from another constituency, some 4 008, or 64%, claimed to reside at security sector addresses. A search of the database entries shows that 11 147 of total number of voters in the constituency now have security sector addresses, some 35%.<sup>67</sup> The same search criteria used on the database containing the 2008 Voters' Roll shows only 3 227 voters at these addresses.

The resultant number of people claiming to reside in the constituency conflicted with data from the 2012 Census, reflecting an impossible registration rate of 112.6%<sup>68</sup> of the eligible population registered in ward 7 and an improbable 96% in ward 17.<sup>69</sup>

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<sup>62</sup> An even split of the 779279 votes being 389 640 each. The 4:1 bias gives 623 423:155 856 with the MDCs thus registering 233 784 less voters. (7.14% is arrived at using a hypothetical 3 276 509 valid votes cast as the denominator).

<sup>63</sup> Details of the findings are given in *Syncopated Numbers* see fn 59 above.

<sup>64</sup> This is a net increase, taking into account those removed from the constituency roll.

<sup>65</sup> The hard copy of the roll has been scanned, converted into text and entered into a database, allowing the analysis presented here.

<sup>66</sup> The numbers relating to migrations into the constituency from elsewhere are not 100% accurate, due to duplicates on the digital version of the roll supplied by the Registrar-General in 2008. However, the variation is too small to affect the conclusions given here in any significant manner.

<sup>67</sup> The search criteria included "barracks, army, force, ZRP, ZNA, police and prison".

<sup>68</sup> This over registration, as mentioned above, opens up the opportunity for multiple voting, as the number of votes cast is less likely to exceed the number of registered voters if such multiple voting occurs and the roll contains numerous entries which should not be there. However, this situation must be considered in the light of the large number of people registered as voters in the constituency after the 2012 Census.

Ahead of the 2013 election, senior members of the ZRP, including the Commissioner-General, had given plain instructions to members of the force to vote for ZANU PF.<sup>70</sup> Members of the force were repeatedly threatened with expulsion from the force if they showed any preference for MDC as a party. Those members, bussed to select polling stations to vote, may also have felt that secrecy of their ballot was compromised by so many voting at the same polling station at the same time.<sup>71</sup> For example, at Alexandra Park A Polling Station in ward 7, which is close to KG VI Defence Forces Head Quarters and Barracks, some 1 717 people voted for the ZANU PF parliamentary candidate as opposed to 339 for that of the MDC-T. In ward 7, the MDC-T secured the most votes at only two of the 11 polling stations.<sup>72</sup>

The ZANU PF parliamentary candidate thereby secured a majority with 8 595 more votes than the 1 738 votes garnered by his 2008 predecessor.<sup>73</sup> 7 797 of these votes came from ward 7, and the ZANU PF<sup>74</sup> candidate for the local authority was consequently declared elected as a councillor for that ward.<sup>75</sup> Mugabe captured 10 301 of the votes against 7 540 cast for Tsvangirai.<sup>76</sup>

ZANU PF's victory in this constituency was thus apparently secured by registering a large number of security force members, who could largely be relied upon to vote for ZANU PF, in a constituency where they were not resident. During the course of court hearings of the election petition challenging the result brought by the losing candidate, the Registrar-General was asked to explain how so many members of the security sectors came to be registered at addresses that could not possibly accommodate that number of people. The Registrar-General response was that they had been registered on the basis of a letter confirming their *employment* in the relevant security sector and not their addresses. At this juncture, it is worth recalling and comparing the earlier comments about the stringent proof of residence requirements that were applied to ordinary citizens.

The failure to supply an electronic copy of the Voters' Roll prevented the MDC candidate from being aware of the extent of the manipulation ahead of the vote. However, a study of the hard copy revealed some of the registration irregularities, which the MDC-T candidate, Jameson Timba, brought to the attention of ZEC. The response of ZEC was to advise Mr. Timba to proceed in terms of Section 28 of the Act, which was advice given when ZEC knew, or ought to have known, that the time limit for lodging complaints in terms of that section had already expired.<sup>77</sup>

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<sup>69</sup> It should also be borne in mind that in Mt Pleasant, as in all other constituencies, those below 30 years old are grossly *under* registered, bringing the average registration rate down. The over registration of those in the 40 - 44 year age group would be a figure of well over 150% - see The RAU Report.

<sup>70</sup> See, for example, *Chihuri Orders Police Force to Ensure ZANU PF Wins Elections* <http://www.swradioafrica.com> 08.03.13 and *Police Ordered to Eliminate MDC Sympathizers in the Force* <http://www.zimeye.org/?p=15552> 30.03.10.

<sup>71</sup> Security sector voters were given special treatment and moved to the head of queues thus making them virtually the only voters at particular polling stations for an extended period.

<sup>72</sup> Strathaven Shopping Centre, and Avondale A.

<sup>73</sup> There is some confusion around this result. The ZANU PF candidate was initially announced on state media as having secured 7 945 votes, considerably less than the 10 301 secured by Mugabe as ZANU PF Presidential candidate. However, the constituency return reflected 10 333 votes, matching the official figure now posted on ZEC's website.

<sup>74</sup> Musatye Gwasira.

<sup>75</sup> The votes of ZANU PF national assembly candidate, Jaison Passade could thus be held to comprise 1 738 loyalists and 8 595 new security sector voters. Jameson Timba's tally could be held to comprise 3 875 loyalists, 630 from the Ncube camp, and 2 390 new voters.

<sup>76</sup> The Presidential tallies for 2008 were not released at anything lower than provincial level, so a comparison cannot be made.

<sup>77</sup> See Paragraph 42 of the Electoral Petition of the losing candidate for Mt Pleasant, Jameson Timba.

Furthermore Section 28 was inapt for the circumstances facing the MDC-T candidate. The manner in which this section is drawn suggests that it is more appropriate where a single individual is aware of another person wrongly included on the roll. In the situation under examination, where a candidate, rather than an individual member of the public, claimed that thousands of voters were being “stuffed” into his constituency, it does not seem practical, or in accord with the intention of the legislature, that the candidate, presumably heavily engaged with election preparations, should be required to prepare an application for each one of the thousands of wrongly included voters, and follow the laborious and time consuming procedure for the removal of each. It appears more fitting that the candidate should approach the electoral management body ZEC, which has an inherent and statutory duty to ensure the fairness of the poll, to take the necessary measures to prevent abuse of a registration process which should have been under its direction and control. The response of ZEC may be considered even more remiss when one considers that the amendments to the Act pertaining to registration referred to in the introduction, had created a structural unfairness by allowing the registration of voters after the time when objections to such registration could be lodged. ZEC should have been alive to ensuring that the structural unfairness did not result in actual unfairness. ZEC was also later to state that it had no power to order changes to the Voters’ Roll.<sup>78</sup>

An investigation by ZEC may have made it clear that the Registrar-General and his officials were collaborating with the security sector to manipulate the roll, thus displaying a partiality which discredited not only the registration of voters in Mount Pleasant, but the national registration process. ZEC’s inaction in the face of a cogent claim of manipulation of the Voters’ Roll suggests connivance with the process. The integrity of ZEC, and thus the election itself was severely compromised.

*iii) Duplicates*

ZEC released an early version of the national voters’ roll in electronic form, complete as at the end of May 2013. Computer analysis revealed numerous duplicates on the roll. Below is a small extract from a spreadsheet showing a sample of such duplicates.

AKIMU	NORA H	08/08/197 3	75-286063- B-48	VIL PAROWA HDM MARANGE CH MAR MUTARE
AKIMU	NORA H	08/08/197 3	75- 2886063- Q-48	VIL PAROWA HDM MARANGE CH MARANGE,MUTARE
AKSON	CHIPO	18/07/197 1	68-801250- R-63	1241/B MHASHU STREET DZIVARASEKWA 3 HARARE
AKSON	CHIPO I	18/07/197 1	63-801250- J-63	NO 4 PLOT 13 TYNWALD HARARE
AKUMBATIR A	KOND E	18/11/196 9	38-063215- J-38	GLENELLEN FARM KAROI
AKUMBATIR A	KOND E	18/11/196 9	38-109935- R-38	SHAWNGAN FARM COMPOUND KAROI
AKUWETA	ENIA	25/12/193 8	04- 2009134- B-04	VIL NYAHUNDA HDM NYAHUNDA CH MAZUNGUNYE BIKITA
AKUWETA	ENIA	25/12/193 8	42-009134- B-04	VIL NYAHUNDA HDM NYAHUNDA CH MAZUNGUNYE

<sup>78</sup> See *Court Watch* 9/2014 Veritas 11.06.14.

The spreadsheet has 634 596 similar entries on the roll. It will be noted that there are names which appear twice on the roll (in some cases there are triplicate entries) with slight variations in the names and addresses. In the sample provided, for example, it is highly improbable that Chipo Akson is a different person from Chipoi Akson, with the same date of birth and an identical ID number but for one digit.

Of most significance are the identification number entries. In some instances, although the two entries are unlikely to refer to different individuals, they have completely different ID numbers – e.g. Akumbatira K. in the sample provided. More frequently, however, the entries have almost identical ID numbers, with a minor variation, such as an additional repeated digit (e.g. Akimu) or a 0 has been added to the suffix and the remaining digits pushed to the right (e.g. Akuweta).

While at first it may be thought that the duplicate entries arise from typographical errors in attempting to enter the same data twice, it appears that this cannot be so for the following reason. Zimbabwe's ID number system uses a "mod 23 check letter" security mechanism precisely to prevent the entry of incorrect ID numbers. This check letter system works as follows: The digits to the left of the letter on the ID number are treated as a single number and divided by 23.<sup>79</sup> The remainder then determines the check letter, which letter corresponds with the numerical placement of the letter in the alphabet. As an example, consider Chipo Akson's ID number of 68-801250R 63. The number 68801250 is divided by 23 which yields 2991358, remainder 16. The 16<sup>th</sup> letter of the alphabet (less I, O &U) is R which is thus the check letter, and establishes the fact that this is a valid ID.

This system then guards against false entries. If a data entry clerk were to enter a wrong digit so that the number 63801250R63 is entered for Chipo Akson, that is, mistakenly writes the second 8 as a 3, this will generate an invalid ID sequence. The check letter for the erroneously entered number is J and not R.

Accordingly, the ID entry number for Chipoi Akson, which differs from that of Chipo Akson only in that there is a 3 where there is an 8 in the latter, cannot simply be a typographical error because the data check letter has also been changed from R, which would be incorrect and signal an error, to J, which is correct. For a typographical error one would have to assume not only that the 8 was entered wrongly, but also that the check letter R was entered "wrongly" as J which just happened to match and be the correct check letter for the typographic error of the entry of 8. The odds of this happening are remote. Yet for all of the 634 596 entries of similar IDs differing often by just one digit, the check letters have been computed and have been found to be correct. The ID numbers have thus been correctly generated and are not simple typographic mistakes.

It is thus difficult to conceive how these duplicate entries could have been made innocently. ZEC was provided with this information by RAU amongst others, but, to date, has been given no response. Without a copy of the final electronic roll, it is not possible to determine whether these "errors" were corrected. It is also worth pointing out that the "duplicates" were disproportionately distributed in the three southern Provinces of Bulawayo, Matabeleland North, and Matabeleland South. The possible effect of 232 738, or 73% of the duplicates on the vote, were these persons able to vote twice, or more than twice is obvious. ZEC, being responsible for the Voters' Roll, should explain this abnormality.

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<sup>79</sup> This is the number of letters in the alphabet minus I, O and U. I and O are excluded to avoid confusion with one and zero. U is excluded so that the resultant number is a prime number, 23, more suitable for the system.

iv) *The deceased on the roll.*

The electronic version of the roll, up-to-date to the end of May 2103, released by ZEC was audited by RAU and compared with the data contained from the preliminary census of the previous year.

~~Table 1~~ shows the number of adults in each age band according to the census, compared with the number of people in those age bands registered as voters. The final column shows the percentage of the adult population registered as voters.

**Table 1**

<b>Age Bands</b>	<b>Adult Population</b>	<b>Voter Population</b>	<b>Numerical Difference</b>	<b>% Registered</b>
18 – 19	524,142	46,506	477,636	8.87%
20 – 24	1,154,669	225,787	928,882	19.55%
25 – 29	1,063,852	549,946	513,906	51.69%
30 – 34	830,324	881,149	-50,825	106.12%
35 – 39	674,638	899,362	-224,724	133.31%
40 – 44	467,057	759,189	-292,132	162.55%
45 – 49	363,267	480,961	-117,694	132.40%
50 – 54	389,214	463,578	-74,364	119.11%
55 – 59	337,319	390,734	-53,415	115.84%
60 – 64	259,476	296,487	-37,011	114.26%
65 – 69	181,633	217,402	-35,769	119.69%
70 – 74	129,738	193,434	-63,696	149.10%
75 – 79	116,764	128,577	-11,813	110.12%
80 +	155,686	341,003	-185,317	219.03%
<b>TOTALS</b>	<b>6,647,779</b>	<b>5,874,115</b>	<b>773,664</b>	<b>88.36%</b>

It will be noted from the table that while there is under registration of those aged 29 and below (which brings the total percentage of adults registered within a mathematically possible range) there are impossible registration rates for every age band above this rising to above 219% for those over 80. With another 500 000 voters added to the roll after this audit, the impossible percentages would have increased enormously, even taking into account the just under 280 000 removed from the roll in the pre-election period.<sup>80</sup> After RAU released this audit the ZANU PF influenced Herald tried to

<sup>80</sup> It is not known how many of this number had been removed by the time the May roll had been compiled.

distort the findings, claiming a registration rate of 93 percent, without analysis of the age bands, as if this figure were a virtue and claiming that a million people had been removed from the roll by the Registrar-General as deceased.<sup>81</sup> RAU presented its report to ZEC, but as was the case when the issue of duplicates was brought to ZEC's attention, no substantive response was received. However, immediately after the election Justice Makarau stated:

*During the two voter registration exercises, we called on all stakeholders to raise any irregularities on the Voters' Roll. To our surprise, not even a single stakeholder came to us to raise any anomaly.*<sup>82</sup>

The statement was not only false, but somewhat cynical given that the electronic copy of the roll which would have allowed the roll to be audited and firm evidence of the anomalies unearthed, had been withheld.

v) *Other Registration Irregularities*

On Election Day, a large number of people (304 890) were turned away from the polling stations as unregistered in the ward. Similarly an inordinate number of people (206 901) cast a ballot as "assisted voters." ZEC bears responsibility for both these blemishes on the poll.

There were three possible reasons for voters being turned away:

- These were people who had arrived to vote without having attempted to register and whose names were not on the rolls;<sup>83</sup>
- or were people who had wrongfully been removed from the roll or moved onto a roll for another ward or constituency;
- or were people who did not know the ward in which they were registered.

Quite obviously, many of these problems would have been averted if the aspirant voter had been able to check the roll more readily before polling day, something which could have been facilitated, but was not, by making the roll electronically available and posting it on the internet. Furthermore, ahead of the election 278 432 people were removed from the voters' roll as deceased without following the procedures required by the Act, and without objection from ZEC. It thus cannot be stated with certainty that all the deletions ought to have been made.

It is clear that the number of those assisted to vote (3.7% of the poll) greatly exceeded the number who may actually have required such assistance on the ground of illiteracy, suggesting fear and intimidation as a motivating factor.<sup>84</sup> This problem could have been greatly attenuated if those who genuinely require help to cast their ballot, register as assisted voters before the poll. The roll would then record<sup>85</sup> the voter as one who will be assisted and the reason for requiring assistance. This would prevent people from being intimidated into requesting assistance on polling day, allow those inspecting the roll to voice objections if the claim was not genuine and assist election officials by providing information as to which wards required special polling materials, such as Braille ballots. This simple and obvious step was not adopted by ZEC and the procedure clearly was abused affecting the integrity of the poll.

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<sup>81</sup> See *93pc Register to Vote The Herald* 21.07.13.

<sup>82</sup> *Political Parties Failed to Cite Anomalies- ZEC The Herald* 01.08.13.

<sup>83</sup> This may have been on account of the fact the numerous person do appear on the roll as registered voters despite never having undertaken registration formalities.

<sup>84</sup> Zimstat puts Zimbabwe's literacy rate at 97%. *The End of the Road* Solidarity Peace Trust October 2013 using UNESCO figures, puts literacy more plausibly at 86%.

<sup>85</sup> Usually through an agreed symbol or numerical or alphabetical substitute - i.e. a = visually impaired, b = illiterate etc.

## The Roll Itself

Many of the defects in registration referred to above and the magnitude of these shortcomings would have been exposed ahead of the poll, had the electronic version of the roll been made available for analysis and scrutiny as required by the Act and Constitution. The failure of ZEC to supply the electronic digital version of the roll to be used for the election was perhaps the most patent and signal of the flaws in the 2013 election and the one most commonly cited as the reason why Zimbabwe's election did not meet the standard of fairness required for a democratic poll. The refusal to release the electronic copy of the national roll also suggested an apprehension that an examination of the data on the roll would provide firm evidence of the manipulation of the roll and registration bias outlined above.

In terms of the Act, ZEC is required to keep and maintain a voters' roll for each ward and constituency, and the national roll.<sup>86</sup> At least one copy of the national roll and every voters' roll must be kept at the ZEC head office, and at least one copy of each ward and constituency voters' roll must be kept at all the Commission's offices within the constituency concerned. These rolls must be in both printed and electronic forms. It is the duty of ZEC, and not that of the Registrar-General of Voters, to supply copies of these rolls when so requested.<sup>87</sup>

Seven months before the poll ZEC's Deputy Chairperson Joyce Kazembe reportedly stated that the Commission had installed "*an independent computer with a national voters' roll which is taken to the Registrar-General of Voters for updating every week.*"<sup>88</sup>

Notwithstanding this claim, the failure of ZEC to meet requests during the latter part of the electoral period for the electronic roll makes it clear that ZEC either did not then have electronic copies of the rolls (national, constituency and ward) at its head office, nor copies of the ward and constituency rolls at its constituency offices, as required by the Electoral Act or was refusing to release them. The first possibility is suggested by the fact that ZEC improperly re-directed requests for the voters' rolls to the Registrar-General.<sup>89</sup> However, subsequent events provided evidence that neither the Registrar-General nor ZEC officials wished the electronic roll to be made available.

The Registrar-General, Tobaiwa Mudede, *de facto* in charge of voter registration for every election from 1985 onwards, has long treated the roll as a document to be kept occluded from the public eye. He has vigorously opposed court applications to make the roll available, summonsed intelligence officers to question those wishing to examine the roll at his offices, lobbied for legislation to be changed so that only hand written extracts could be taken from the rolls, strenuously opposed the present provisions requiring an electronic version to be made available and sought to dilute their effect.<sup>90</sup> When issuing what he purported to be the "electronic version" of the roll for elections in 2008, Mr. Mudede handed to the MDC-T (for US\$30 000) 210 discs of the roll

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<sup>86</sup> Section 20 of the Electoral Act.

<sup>87</sup> Section 21 of the Electoral Act.

<sup>88</sup> See *ZEC's Kazembe Shields RGs Office* The Zimbabwean 28.11.12. The word "installed" implies that the computer was a desk top. That this computer should have been taken to the Registrar-General for updating, rather than the information being brought to the computer via flash stick etc suggests a rather unwieldy process or unfamiliarity with contemporary technology by the Deputy Chairperson.

<sup>89</sup> See the interview with Tobaiwa Mudede available at <http://www.africaspeaks.com/reasoning/index.php?topic=8689.0;wap2>.

<sup>90</sup> For this history see *Preventing Electoral Fraud in Zimbabwe* SAIRR May 2011. Two weeks before the election Mudede (and, significantly, not ZEC) sought an interdict against RAU to prevent it from presenting a *report* on the voters' roll after mistakenly believing that RAU would publish the roll itself at the meeting. Despite the fact that the voters' roll ought to be a public document in any event, the temporary interdict was granted. The matter was not pursued after being overtaken by events.

in TIFF format - essentially digital photographs of each page of the roll, rather than a proper electronic, and searchable copy, which fits onto a 20c computer disk.

The difficulties in obtaining the electronic version of the roll continued for the 2013 election. After repeated requests for the electronic version of the roll, as it then stood, had failed by the end of May 2103, ZAPU, a contesting political party, was compelled to prepare a court application to obtain a copy. As a result of the threat of the court hearing, an electronic version was eventually supplied, not by ZEC, but the Registrar-General, who, in a letter accompanying the disk, claimed the power to impose conditions on its use, and threatening (non-existent) criminal sanctions if the conditions he had manufactured and imposed (i.e. that it could not be “reproduced or misrepresented”) were breached.<sup>91</sup> ZEC officials have aided and abetted this kind of obstructionism. The following cameo is illustrative.

Once voter registration was completed (by 10<sup>th</sup> July 2013) repeated requests made by MDC-T staffers to obtain the final electronic roll from ZEC were unsuccessful. Eventually, on the 26<sup>th</sup> July, 2013 a more senior MDC-T official, proceeding on the basis of assurances made by the ZEC Chairperson, attended ZEC’s offices to collect the roll for his constituency and the whole country, which he had been told would be made available. On arrival at ZEC’s offices he was told by a ZEC official that the roll would have to be collected from the Registrar-General’s Office. A letter to the Registrar was generated, ostensibly for this purpose. Then, under the guise of facilitating the visit, the official called the Registrar-General’s Office to warn officials there of the impending visit by the letter-bearing MDC candidate. Speaking in the vernacular Shona, spoken by the majority of black Zimbabweans, in front of the white MDC official, the ZEC officer advised that the letter should not be acted upon and various subterfuges were considered and discussed over the phone that would prevent the MDC candidate from obtaining the roll. The subterfuge agreed was for the responsible official at the Registrar-General’s Office to be absent – as was indeed the case when the MDC candidate went to collect the roll at the agreed time. Conversation amongst clerks at the Registrar-General’s Office, again in Shona, confirmed that the official from the Registrar-General’s office had no intention of arriving for the appointment and even less of releasing the roll. Unhappily for the ZEC officials and those at the registry, the white MDC official speaks Shona.<sup>92</sup>

A few days after stating the roll would be available to the MDC official, on the 30<sup>th</sup> July, 2013 the ZEC Chairperson declared at a press conference that ZEC was ready for the poll the following day. Advising candidates to collect copies of the roll at this late stage, not from ZEC as the law requires, but from the Registrar-General’s Office, Justice Makarau advised that “*due to logistical challenges*” the Registrar-General Office might “*not be in a position to issue the electronic copies...But hard copies are available and all political party candidates are called upon to visit his offices to pick up their copies.*”<sup>93</sup> The failure to supply the electronic roll, a fundamental flaw in the electoral process which many observers regarded as fatally affecting its integrity, was thus dealt with in an off-hand manner by the Chairperson as if a small and irrelevant detail mentioned merely as an afterthought.

The statement also made it clear that the compilation and custody of the Voters’ Roll unlawfully had been left entirely in the hands of the Registrar-General, Tobaiwa Mudede. Justice Makarau did not know whether electronic copies would or would not be available, and if not, why not, other than that there were might be “logistical challenges” allegedly preventing its distribution, not by ZEC, but the Registrar-General. Justice Makarau was at a loss to explain how hard copies could be made available but not the usually more easily produced electronic versions and referred the matter to Mr.

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<sup>91</sup> See *Court Watch 5/2013* Veritas 30.05.13.

<sup>92</sup> Information obtained from an undated written account given by the MDC-T official.

<sup>93</sup> See *ZEC Ready: Ballot Papers, Voters’ Roll Dispatched* The Herald 31.07.13.

Mudede. Mr. Mudede refused to answer questions on the issue saying that Justice Makarau had already addressed the point and that it was a press conference convened by ZEC and not his office.

Although the damage had been done, as the electronic version of the roll is required for analysis well ahead of the poll, an urgent court application was made on the same day to compel ZEC to issue the electronic version of the national Voters' Roll. Both ZEC and the Registrar-General were cited as respondents. In opposing the application Justice Makarau stated that ZEC was unable to supply the electronic copy due to a "technical fault" in ZEC's information and technology system, causing it to be offline.

This excuse was anomalous for several reasons. Firstly, ZEC was legally obliged to retain custody of electronic copies of the national, constituency, and ward rolls in the manner described above. It should not have required IT technology to access the rolls from elsewhere – presumably the Registrar-General's office. That this was so, is supported by a subsequent statement by the Chief Elections Officer that although candidates were not supplied with the digital copy, they could have viewed the roll electronically by calling at ZEC's offices. Secondly, the day previously Justice Makarau had indicated that there were "logistical challenges" being faced by the Registrar-General which might prevent the supply of the roll in an electronic form. She was unable to state the nature of these "logistical challenges." A day later she was apparently aware that the "logistical challenges" were supposedly a technical fault in IT equipment at her own offices. The nature of this technical fault, when it had occurred, how it had manifested and what had been done to remedy it, was not stated. The judge accepted this bland and improbable statement from the ZEC chairperson without requiring any supporting evidence. Why there was no backup copy of the roll, or how hard copies of the roll could be produced by sending data to a printer, but the same data could not be sent to a storage device, was also not explained, and no explanation was sought by the court. The order given by the judge was that:

*ZEC should provide hard copies of constituency voters' rolls free of charge to MDC-T election candidates by midday on Wednesday, 31 July, 2013 and then provide some electronic copies of the voters' roll once the elections management body's information and technology system is back online.<sup>94</sup>*

It is important to note here that the order referred to ZEC's IT system and not that of the Registrar-General. It is likely that ZEC had stated that it was its equipment that was at fault, and not that of the Registrar-General, and the court order was issued in this form, due to the cognisance that it was ZEC who ought to have had custody of the electronic copy.

Three days after the ZEC press conference, and two days after the election, at a press conference which was convened by his office, Mr. Mudede still refused to entertain questions from journalists about the absent electronic copy of the roll, replying with something of a non-sequitur:

*"I am entitled not to answer certain questions. You can't have a perfect system. There is always a 10% margin of error."*

He further stated that the matter was "contentious", and asked a junior official to deal with the question, who did so in the following terms:

*The time we had was short. We had to prioritise the hard copy so that we could send them to the polling stations.*

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<sup>94</sup> See *Courts Order Zim Electoral Body to Release Voters' Roll* zimbabweelection.com 31.07.13. The case citation is not known.

ZAPU continued its efforts to try to obtain the electronic copy of the roll after the election. Its request for the roll was responded to by Justice Makarau, in November 2013, by way of a letter which contained the following revealing assertions:

*We regret to advise that the commission is unable to give you an electric copy of the National Voter' Roll that was used for the elections held on 31 July. You are aware that the Voters' Roll used for the election was **compiled and maintained by the office of the Registrar General of Voters** who has indicated that **his machines are still down even as I write to you**. We simply cannot give you copies of the roll as the Registrar is unable to produce the same. We have never deviated from this position that whilst we have obligation to provide you with the roll, it is physically impossible to do so.* (emphasis added).

Although, as apparently stated on oath in papers responding to the court application for the electronic roll on the 30<sup>th</sup> July, 2013, that there was a technical fault with ZEC's "information technology", the letter suggested that there was nothing wrong with ZEC's equipment. The alleged fault lay at the Registrar-General's Office who had custody of the roll. The court order, which stated that the roll was to be supplied when ZEC's equipment was "online" was thus misdirected. There was nothing wrong with ZEC's equipment.

A few days after this letter was sent, the Court dismissed a second application for the electronic roll. The judgement was reported by the Herald thus:

*"That the Applicant's application to be provided with the voters' roll in electronic form be and is hereby dismissed," said Justice Bhunu. In dismissing the application, Justice Bhunu said it had not been shown **that ZEC's equipment** was now functional.... "Thus, before the Applicant's application in this respect can succeed, he needs to show that the suspensive condition relating to the non-functionality of the electronic equipment has been fulfilled. In the absence of such fulfilment, the application cannot succeed."* (emphasis added)

Apart from the anomaly that the correspondence from the Chairperson of ZEC had already shown that ZEC's machines *were* functional – it was those of the Registrar-General which allegedly were not, it was entirely inappropriate that the onus of proving that digital copy of the roll was accessible was placed on the Applicant. This information not only was not within the Applicant's knowledge, but since there is a statutory duty upon ZEC to supply the electronic copy, it was for ZEC to provide the evidence (which should not have consisted merely of a hearsay repetition of the Registrar's *ipse dixit*) of continued dysfunctionality.

Having unlawfully surrendered control of the entire registration process to the Registrar-General, it appears that when the process was complete and the Registrar-General refused to provide the electronic copy to ZEC as statutorily required, ZEC was unwilling or unable to do anything about the situation. The Registrar-General apparently had no intention of running the risk that the skewed, manipulated, inflated and inaccurate roll would be released by ZEC for analysis, as the law demanded. Rather than taking the Registrar-General to task about the embarrassment caused or pointing out that the Registrar-General's Office had shortly before the election paid \$10 million to Nikuv precisely, it seems, to ensure the functionality of the IT equipment at the Registrar-General's Office, ZEC officials sought to down play the gravity of the absence of the electronic roll. Thus during the hearing of the election petition for Mt Pleasant constituency, the Chief Elections Officer claimed that the failure had not caused any prejudice as candidates could have searched the electronic roll at ZEC's offices. Justice Makarau stated that both candidates had been equally prejudiced as neither had received copies of the electronic roll and thus, by implication, there was

no unfairness.<sup>95</sup> The statement was akin to a bank manager stating that neither a depositor whose account had been wrongly debited, nor the depositor whose account had been wrongly credited, had been prejudiced as bank statements had been denied to both.

ZEC's constitutional duty to ensure the safekeeping of electoral materials,<sup>96</sup> which presumably includes the electronic roll, had either been forgotten or was deemed unimportant. Even the hard copies of the roll were not made readily available before the poll.<sup>97</sup> The national roll was only received by the MDC-T at 6.00 pm on the day of polling.

### **Special Votes.**

Special Votes were introduced into the Act following the 2008 election after it became clear that provisions, whereby members of the ZRP and other security sectors cast their vote at police stations or barracks under a postal voting system, had been abused, and security personnel had been compelled to cast votes in accordance with the wishes of their commanders.<sup>98</sup> Electoral law for the 2013 poll provided that the Special Votes had to be cast over two days, and at least 16 days before the election on the 31<sup>st</sup> July.<sup>99</sup> This left ZEC only 14 days to deal with the highly complex issue of special votes.

A Special Vote was only to be granted to a member of the police force who would:

*be unable to vote at a polling station in his or her constituency because he or she.....[would] be performing security duties during the election.*<sup>100</sup>

ZEC received approximately 66 000 applications<sup>101</sup> for special votes from the Zimbabwe Republic Police and accepted 63 268,<sup>102</sup> a number which appeared massively inflated against what the Minister of Finance claimed was an establishment on the payroll of some 44 133 police force members. Allegations were made that the number had been increased by the inclusion of spouses of members and general hands employed at police stations.<sup>103</sup> The police spokesperson claimed that the large figure was due to the inclusion of the Special Constabulary that would be on duty during elections.<sup>104</sup> Given that for the March, 2008 election ZEC issued only 4 350 postal votes<sup>105</sup> for the entire security sector, the number certainly seemed unlikely.<sup>106</sup>

In response to queries about this improbable number, the Chair of ZEC, Justice Makarau stated:

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<sup>95</sup> See *Court Watch 9/2014* Veritas June 2014.

<sup>96</sup> Section 156(ii)(c) of the Constitution,

<sup>97</sup> See *Letter From David Coltart to the Head of the SADC Observer Mission* 31.07.13 indicating that as at 2.00 pm on the date of the poll he still had not received the hard copy of the roll for the constituency he was contesting.

<sup>98</sup> Evidence of this was recorded by hidden cameras - see *Exclusive: Secret Film Reveals How Mugabe Stole an Election* <http://www.guardian.co.uk/world/2008/jul/04/zimbabwe1>.

<sup>99</sup> Section 81A(1)(a) of the Electoral Act.

<sup>100</sup> Section 8 of the Electoral Act.

<sup>101</sup> Originally reported as being 69 222 - *Special Vote Court Case Postponed as ZEC u-turns on Voters' Roll* SWRadio 17.087.13.

<sup>102</sup> The revised numbers were reportedly supplied by Joyce Kazembe, the Deputy Chair of ZEC – see *Zec Starts Ballot Paper Distribution* The Herald 24.07.13.

<sup>103</sup> *Flawed Special Voting System* The Zimbabwean 10.07.13.

<sup>104</sup> *Police Clarify Special Voting Numbers* The Herald 13.07.13.

<sup>105</sup> *Report on the 2008 Elections* ZEC February 2008 p28.

<sup>106</sup> This increased more than tenfold to an improbable 48 410 applications for the discredited presidential run-off poll a number still far short of 63 268 applications made for 2013 see pages 7 and 10 respectively of ZEC's report.

*We are relying on the information that we have from the police that all the applicants are members of the uniformed police....They have given us their names, force numbers and EC numbers and that information will say they are all members of the police force.*<sup>107</sup>

However, whether or not the 66 000 was the full and genuine establishment of the ZRP and constabulary was not in fact the issue. In order to allow Special Votes for all 63 268 members ZEC had to credulously believe that all would be unable to vote in their constituencies on polling day, as they would all be away from their constituencies performing election related duties.<sup>108</sup> This required ZEC to believe that the entire police force would be relocated from their normal places of residence ahead of the poll. This is inherently implausible.<sup>109</sup>

ZEC, however, did not query the applications as it ought to have,<sup>110</sup> thus creating an intractable problem for itself. In addition to the usual requirements for a poll, such as establishing polling station infrastructure and providing election materials, ZEC had, in respect of each of the 63 268 special votes:

- to process the applications;
- notify the applicants whether the request had been granted and supply them with written authorisation to cast a special vote;
- inform the applicants of the days on which they were to cast their special vote and the place and times at which they could do so;
- once this was done, ZEC then had to prepare a unique and customised envelope for each and every one of the 63 268 special voters clearly inscribed with the words “Special Ballot Papers” and the name of the constituency and ward in which he or she is registered, together with instructions on how to cast the vote.<sup>111</sup>

The Act requires that police officers granted a special vote, must cast their vote at the special polling station for the district in which are they performing duties away from the constituency.<sup>112</sup> Thus ZEC had to determine, in 63 268 instances, exactly where to dispatch the customised envelope.

This was a mammoth logistical undertaking which was never going to happen in the time available. It did not. ZEC’s Deputy Chair, Joyce Kazembe, weakly tried to claim that the resultant chaos was on account of the printers being unable to supply the ballots timeously. That failure itself was blamed on the fact that the final list of candidates at ward and constituency level was not known until the appeals in this regard had been determined by the courts only a few days before and that some candidates had not submitted their photographs.<sup>113</sup> However, this could only have affected a score of ballots, and should not have extended, as did the chaos due to the absence of ballot envelopes, to all 210 constituencies. ZEC carefully avoided stating that the real source of its

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<sup>107</sup> *New Row as 69 000 Cops Seek Special Vote* New Zimbabwe 11.07.13.

<sup>108</sup> The fact that every member of the police force is apparently registered as voter, despite registration being, in theory, voluntary, seems to have passed without comment.

<sup>109</sup> It may legitimately be asked as to why the police hierarchy wished to have the entire force utilise the special voting system. The implication is that the hierarchy may have believed that it would still be able to influence voting in some manner, raising suspicion about the entire process.

<sup>110</sup> Section 81D. ZEC must be satisfied that each applicant is entitled to a special vote.

<sup>111</sup> Section 81(6)(b).

<sup>112</sup> Section 81B(1) of the Electoral Act. The provision is peculiar as it would be unlikely that the officer would have been deployed to the area of his duties 16 days ahead of the election, suggesting that the police officer would need to travel there to cast his vote, return home, and then return to the area of his or her duties during the poll.

<sup>113</sup> *ZEC Blames Delays on MDCs Appeals* The Herald 15.07.13.

difficulty was the foreshortened electoral period and the vast number of special votes granted. ZEC was also later to comment that the procedures for the Special Vote were impractical.<sup>114</sup> Since the provisions relating to special votes had been amended by the Presidential Regulations<sup>115</sup> shortly before the election, ZEC should have been consulted about the procedures and have been given the opportunity to voice its objections then. As noted, this requirement was violated without a murmur from ZEC. ZEC thus harvested the results of its silence. The fact that ZEC tried to conceal the real cause of the chaos, and thus obscure the fact the applications by the entire complement of the ZRP were unlawful, is of no little import, as it suggests connivance between ZEC and the security sector, or at the least, supine obeisance by ZEC to its demands.

Anecdotal accounts portrayed the dedication of Commissioners to ensuring that the security sector members could exercise the special vote to be such that they personally worked deep into the night filling the special voting envelopes to try to avert the impending fiasco. During the attempted poll, hastily trained polling officers reportedly neglected to ask voters for their special voting authorisation as the Act requires and worked from a polling officer handbook which failed to advise polling officers to demand to see that voters' hands were not marked with the indelible ink designed to prevent multiple voting. Riot police (curiously not lining up to cast votes themselves) arrived to quell rowdy police officers whose patience in waiting for their ballot envelopes had since long expired.<sup>116</sup> Voting apparently extended into the third day, thus breaching the requirement that balloting end 16 days before Election Day.

Despite this illegality, in the event, 26 160 members of the ZRP were still unable to vote, with only 37 108 casting their ballots.<sup>117</sup>

Once a person has been granted a special vote, the die is cast. On the grant of the special vote a line is drawn through the voter's name on the ward voters' roll and marked special vote.<sup>118</sup> Section 81H(1) of the Act provides, that any person granted a special vote who:

*casts or attempts to cast a vote at an ordinary polling station, shall (whether or not he or she has cast a special vote at the same election) be guilty of an offence.*<sup>119</sup>

The Act does not provide for the withdrawal of special votes.

It was thus apparent that ZEC could not meet the constitutional requirement that the elections are “conducted efficiently, freely, fairly, transparently and in accordance with the law.”<sup>120</sup>

With the reduction of the timelines for the election by President Mugabe and with the Zimbabwe Republic Police unlawfully having made applications for the entire complement of the police force to be granted special votes, ZANU PF aligned officials had created a chaotic situation whereby many people who could be expected to vote for the party would not be able to do so. ZEC thus determined on a course which would rescue the situation for ZANU PF. Seemingly immune to embarrassment, ZEC filed an application with the Constitutional Court, requesting that those granted a Special Vote be allowed to vote on the 31<sup>st</sup> July, notwithstanding the provisions of the Electoral Act, and notwithstanding the fact that the special vote had been granted to these officers

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<sup>114</sup> ZEC Files Application for Special Vote Reprieve The Herald 24.07.13.

<sup>115</sup> The provision had been introduced by an Electoral Amendment, Act 3 of 2013.

<sup>116</sup> Riot Police Deployed Amid Special Vote Chaos New Zimbabwe 15.07.13.

<sup>117</sup> See fn 14 above.

<sup>118</sup> Section 81D(3) of the Electoral Act.

<sup>119</sup> Section 81H(1) of the Electoral Act.

<sup>120</sup> Section 239(a) of the new Constitution.

precisely on the basis that they would not be able to vote on that day. This latter fact passed without comment by the Constitution Court which speedily granted ZEC's application.

There was no transparency as to whether correct procedures had been followed amidst the chaos surrounding the Special Vote, and, in particular, whether the names of security sector members who had voted, had been crossed off the rolls to be used at polling stations on election day. There was thus a real risk of these members voting a second time on election day, as the provisions of the Electoral Act, which were designed to prevent this, were either not applied or the Constitutional Court had ruled need not be implemented. This opened the door to the possibility of 37 108 duplicate votes being cast.<sup>121</sup> Only an examination of all voting residue could determine what transpired in this regard. As will be seen below, ZEC later took steps to ensure that the residue would never be examined.

ZEC's undoubted dedication in ensuring application of the constitutional provision that that every citizen who "*is eligible to vote in an election or referendum has an opportunity to cast a vote*" was nowhere evident in applying the equivalent provision in the same section of the Constitution in relation to voter registration which requires that it ensures that *all eligible citizens ... are registered as voters*.

When the intensive voter registration period came to an end with many people still wishing to register, there was thus no recourse to the Constitution, despite vociferous protests about the predicament.<sup>122</sup> To the contrary, instead the Chair of ZEC stated:

*"The law stipulates that voter registration and inspection would end on 9 July and we do not operate outside the law."*<sup>123</sup>

In the case of voter registration, the Electoral Act was strictly applied. In the case of the Special Vote, ZEC went to the extent of approaching the Constitutional Court asking for permission to operate outside the provisions of the Electoral Act in order to secure the vote of police force members. ZEC made an admirable effort to overcome the logistical challenges presented by the Special Vote for the ZRP and the application of the right to vote for every Zimbabwean policeman. When it came to Zimbabweans held in prison, however, an insouciant ZEC nonchalantly stated that it could not be bothered with the logistical difficulties of affording inmates their constitutional rights for the 2013 election. Maybe next time.<sup>124</sup> There was no attempt to allow those in the diaspora to vote.<sup>125</sup>

## Polling

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<sup>121</sup> There were also accounts of the contrary occurring, of police officers being refused a ballot on the 31<sup>st</sup> July, 2013 on account of the fact that their names had been crossed off the roll as having cast a special vote.

<sup>122</sup> Some through protests outside ZEC's offices on 22.07.13 - *Diplomats Cast their Ballots Ahead of July 31<sup>st</sup>* <http://www.swradioafrica.com/> 23.07.13.

<sup>123</sup> *No Extension to Voter Registration* The Chronicle 11.07.13.

<sup>124</sup> *Prison Inmates Won't Vote: Makarau* The Zimbabwe Independent 12.07.13. While acknowledging prisoners' constitutional right to vote Makarau cited logistical difficulties as a reason for not putting this into effect. The same reasoning probably was behind the Constitutional Court's ruling dismissing an application to compel ZEC to allow those in the diaspora to vote see fn immediately below.

<sup>125</sup> Shortly before the poll, however, the Constitutional Court's ruling dismissed an application to compel ZEC to allow those in the diaspora to vote, though reason are yet to be given - *Tavengwa Bukaibenyu v Chairperson, Zimbabwe Electoral Commission and 3 Others* SC126/13 (original citation).

With some notable exceptions,<sup>126</sup> ZEC generally carried out its duties with regard to election logistics and infrastructure in an admirable and efficient manner. Polling booths were set up as required, equipped with voters' rolls, ballot papers, ballot boxes and seals, and opened on time. Polling Officers were well-trained and fully understood what was required of them.<sup>127</sup> This may be favourably contrasted with the elections in Malawi, which took place ten months after those in Zimbabwe, disrupted and discredited by administrative chaos.<sup>128</sup>

Unfortunately, despite this logistical competency, in 2013 other fundamental flaws in the process, in addition to those already outlined, seriously compromised the integrity of the election.

**Fraudulent and multiple voting?**

i) *Voter registration slips.*

Using the concertinaed (compressed) electoral timetable as an excuse, the Registrar-General claimed that many of those who had registered as voters had not been entered into the Voters' Roll. Those in possession of voter registration certificates<sup>129</sup> ("slips") were to be allowed to vote simply by displaying voter registration slips issued at the time of registration.<sup>130</sup> The voter registration certificates are short, simple documents which contain no security features and are as seen below:

<p align="center"><b>CERTIFICATE OF REGISTRATION AS A VOTER</b></p> <p>Serial No.</p> <p>This is to certify that .....has been registered as a Voter on the Voters' Roll for the Constituency of .....</p> <p>Block number: .....</p> <p>National registration number: .....</p> <p>Place of registration: .....</p> <p>Name of Registrar in print form: .....</p> <p>Date: ..... Signature: .....</p>	
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For unknown reasons, even though polling is ward-based, the slip certifies an entitlement to vote in a particular constituency, rather than ward. Although the ward may be identified by block number, such block numbers do not appear on the rolls held by the polling officers. Polling officers thus

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<sup>126</sup> For example, in the 2002 Presidential Elections there was an inadequate number of polling stations in urban areas and polling stations unlawfully closed while many were still queuing to cast their ballot.  
<sup>127</sup> Even if this knowledge has not always been properly applied.  
<sup>128</sup> See *Organised Chaos – the Case of Malawi 2014 Elections* Nyasa Times 31.05.14.  
<sup>129</sup> Issued in terms of section 26 of the Act.  
<sup>130</sup> In terms of section 56 of the Act.

have no means of ascertaining whether the holder of a registration slip is voting in the correct ward, opening up the possibility of the voter casting a ballot in more than one ward. There is no requirement that the slip be marked once the vote has been cast.

The absence of security features on the slip, other than the easily reproduced<sup>131</sup> stamp of the registry, meant that the slips could be forged without difficulty, once again opening up the possibility of multiple voting<sup>132</sup> and voting by those not entitled to do so – for example on the basis of age.

On election day, the Daily News, a newspaper sympathetic to the MDC-T, reported that the MDC-T parliamentary candidate for Hatfield, Tapiwa Mashakada had discovered 20 youths in possession of “thousands” of voter registration slips, which they were distributing “to unemployed youths, vagrants and many other youths bussed into the constituency from other high density suburbs around Harare”. The Daily News quoted one of the youths involved as saying:

*“They recruited us from across Harare while some were shipped from nearby farms and rural areas. Buses spent 24 hours since Tuesday bringing in youths... They spent the whole night issuing the slips, but we do not know whether they are fake or genuine but the bottom line is they had thousands of them”.*

A “live up-date” blog at 16:49hrs on polling day had the following entry:

*I wanted to vote at Houghton Park primary only to be told that my name is in Chimanimani. But was told to go to Hatfield Girls High. Upon arrival at Hatfield Girls, I was given a voter’s registration slip and asked politely to vote for Alicia Lumumba but a president of my choice. Is this free and fair? Only people with slips from Lumumba are being given the right to vote even if they do not appear in the Voters’ Roll.<sup>133</sup>*

There were numerous other anecdotal reports of the use of fraudulent registration slips.<sup>134</sup> However, according to a report in Newsday newspaper, Senior Assistant Commissioner Charity Charamba reduced the incident to just one person arrested for possessing six voter registration slips. ZEC was dismissive of the report that had been sent to it on the issue. Deputy Chairperson Joyce Kazembe chose to interpret the report as meaning that 20 people had been found with one forged slip each and claimed that the integrity of the election had not been affected:

*But the issue of credibility, 20 (voters) out of the millions who have voted? I think you have to figure (that) out for yourself.<sup>135</sup>*

Aware that this was the equivalent of stating that 20 people found with a leaked paper had not compromised the integrity of a national examination, Joyce Kazembe hastily added that the question of whether there were any other instances of fake slips was being investigated. Nothing further was heard about the matter.<sup>136</sup>

## ii) *The Indelible ink*

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<sup>131</sup> Or unlawfully supplied by officials in the registry.

<sup>132</sup> A registered voter could vote in the ward where he or she is registered, and, proceed to another ward where his or her name would not appear on the roll, and vote there using the registration slip.

<sup>133</sup> See <http://www.thezimbabwean.co/news/zimbabwe/67333/live-updates-zimbabwe-elections-2013.html>. It is obviously possible that the blog was planted precisely because information about the forged registration slips had become known.

<sup>134</sup> See for example *How ‘Robbery’ Mugabe Stole Election* SWRadio 09.09.13.

<sup>135</sup> *Massive Vote Fraud Unearthed* Daily News 01.08.13.

<sup>136</sup> It will be of interest whether the matter is dealt with in ZEC’s statutory report to Parliament.

Although a line is drawn through the relevant entry on the Voters' Roll once a ballot paper has been issued to a voter, this can only be done on the roll at the polling station where the ballot is cast. The only means of preventing the voter casting a ballot at another of the approximately 10 polling stations in each ward is through the use of indelible ink. Accordingly, each person who votes is required to dip a finger in the purple ink which marks the person as having voted and which ought to remain on the voter's skin for the election period (and longer). The ink should contain specified quantities of silver nitrate to achieve this effect. This silver nitrate chemically combines with skin cells and cannot be washed off.

For the ink to be effective, it must thus contain adequate quantities of silver nitrate, which must not be allowed to settle at the bottom of the holding container. ZEC allowed the test for the chemical quality of the ink to be conducted by the forensic department of the Zimbabwe Republic Police. The decision to allow the test to be conducted by the ZRP was in line with its general approach to the elections, already highlighted in the botched Special Vote. ZEC must have been aware of complaints about interference by the security sector, including the ZRP, in electoral processes, raised by political parties and civil society organisations in previous elections. Furthermore, several senior ZRP officers had specifically declared allegiance to ZANU PF (in violation of the Police Act<sup>137</sup>) and senior members of the ZRP, including the Commissioner-General, had given plain instructions to members of the force to vote for ZANU PF.<sup>138</sup>

ZEC's feigned naivety that tests on the indelible ink conducted by the ZRP's forensic laboratories were adequate to meet the need that the election be viewed as fair and that it was conducting the election impartially did not convince many. Several anecdotal reports suggested that the ink was easily removed, indicating an inadequate nitrate content, either from the outset or, possibly due to inadequate supplies, that it had been diluted.

*iii) Ways in which fraud was made possible.*

The inflated Voters' Roll containing many more names than actual voters, had already ensured that if multiple voting were to take place it would not be detected on account of there being more votes cast in ward than there were registered voters in the area. The possibility of multiple voting was further advanced by two other decisions taken by ZEC.

The first was ZEC's decision to print 35% more ballots than there were voters on the basis of the numbers on the inflated roll. The international best practice suggests only 5%-10% above the maximum possible required should be printed. The excessive number of ballot papers at polling stations meant that if a larger number of voters "than expected" arrived at a polling station, they would not miss the opportunity of voting on account of inadequate supplies of ballot papers.

The second was ZEC's inexplicable decision not to equip each polling station with UV devices which reveal silver nitrate residue on voters' fingers under ultra violet light as had been done in the 2008 poll. In giving evidence during the election petition for Mount Pleasant, and in response to a question on the point, the Chief Elections Officer astoundingly claimed that he was unaware whether the machines had been issued or not.<sup>139</sup> The devices are usually utilised when a suspicion

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<sup>137</sup> Paragraph 48(1) of the Schedule to the Police Act [Chapter 11:10]. For details on this aspect see *Zimbabwe's Security Sector – Who Calls the Shots?* – D. Matyszak RAU 07.11.

<sup>138</sup> See, for example, *Chihuri Orders Police Force to Ensure ZANU PF Wins Elections* <http://www.swradioafricacom> 08.03.13 and *Police Ordered to Eliminate MDC Sympathizers in the Force* <http://www.zimeye.org/?p=15552> 30.03.10.

<sup>139</sup> See *Court Watch 9/2014* Veritas 11.06.2014.

or allegation of a prior vote has been raised, as was the case in Mount Pleasant where several apparent police recruits voting had pinkish stains on their fingers which they claimed was boot polish. The excuse could not be tested without the UV devices, and the “recruits” were allowed to vote.<sup>140</sup>

A study of the election results by RAU<sup>141</sup> showed that, even if generous allocation of votes is made to each of the possible sources (such as newly registered voters) of the 1.03 million additional votes President Mugabe attained in 2013 relative to the 2008 poll, the origin of some 168 212 votes still requires explanation. The only possible source of these votes is either that this number of people was registered as voters in 2008 but did not choose to cast a ballot that year or multiple voting.<sup>142</sup> As has been indicated above, many of the conditions in place for the 2013 poll, and for which ZEC bore responsibility, did not preclude the latter possibility.

Whether multiple voting had taken place could have been conclusively proved or refuted through an examination of election residue after the poll. ZEC, however, was determined that no such examination should take place, as will be seen in what follows.

### **The Examination of Election Residue**

As noted at the outset, the new Constitution for Zimbabwe specifically provided that whatever voting method was adopted for elections in Zimbabwe it was to be “*simple, accurate, verifiable, secure and transparent*”.<sup>143</sup>

Rather than upholding this principle, the courts and ZEC showed a predilection for opacity. This propensity was clearly displayed in an application<sup>144</sup> to obtain access to polling material for the Mount Pleasant constituency as an adjunct to the election petition for the seat discussed above.

Several provisions of the Electoral Act relate to the handling of, and access to, some of the electoral material after the ballots are counted. Firstly, section 64(1) provides:

- 64(1) After the counting is completed the presiding officer shall without delay, in the presence of such candidates and their election agents as are present -*
- (a) close and seal the aperture in the ballot box; and*
  - (b) make up into separate packets sealed with his or her own seal and with the seals of those candidates and election agents, if any, who desire to affix their seals -*
    - (i) the unused and spoilt ballot papers and counterfoils of the unused ballot papers placed together;*
    - (ii) the counterfoils of the used ballot papers, including the counterfoils of the spoilt ballot papers;*
    - (iii) the register of assisted voters;*

Accordingly, the only election material referred to in section 64(1) (a) and (b) is the ballot box and the following documents: the register of assisted voters; the unused and spoilt ballot papers and the counterfoils of each; and the counterfoils of the used ballot papers. All of these documents are

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<sup>140</sup> See Paragraph 108 of the Petition for Mount Pleasant available at [http://archive.kubatana.net/docs/legal/timba\\_v\\_passade\\_elec\\_petition\\_130816.pdf](http://archive.kubatana.net/docs/legal/timba_v_passade_elec_petition_130816.pdf).

<sup>141</sup> See the *Syncopated Numbers* Report fn 59 above.

<sup>142</sup> Or a combination of the two.

<sup>143</sup> Section 156(a) of the Constitution.

<sup>144</sup> *Jameson Zvidzai Timba v The Chief Elections Officer and Four Ors* EC 122/13.

placed into sealed packets. The practice is that the sealed packets are placed in the ballot boxes, but there is no legal requirement that this should be done.

Section 64(2) requires that these documents in sealed packets and the ballot boxes are delivered to the ward election officers and not, as may be inferred from section 70(1) – see immediately below – to the constituency election officers.<sup>145</sup>

The custody of, and access to this material is governed, in part, by section 70 of the Electoral Act, which provides as follows.

*70(1) A constituency elections officer shall not open any -*  
*(a) closed and sealed ballot box or sealed packet that has been delivered to him or her in terms of section 64(1)(a) and (b); or*  
*(b) sealed packet containing documents referred to in section 79;<sup>146</sup> or*  
*(c) closed and sealed postal ballot box or sealed packet referred to in section 64(1)(a) and (b);*  
*while such ballot boxes and packets remain in his or her custody.*

Section 70(2) then requires that the ballot boxes and sealed packets referred to above are delivered (by the constituency, not ward, elections officers) into the custody of the Chief Elections Officer, who is then obliged in terms of section 70(3) to destroy all “documents”, meaning the sealed packets referred to in section 70(1) – and not the ballot boxes, ballot papers, voter rolls etc – no earlier than 14 days after the poll, unless an election petition “in relation to the constituency concerned” has been lodged.<sup>147</sup> Of key importance is then the injunction in section 70(4), that is:

*No person shall open any packet referred to in subsection (1) or permit any such packet to be opened, except in terms of an order of the Electoral Court, which may be granted by the Electoral Court on its being satisfied that the inspection or production of the contents of such packet is required for the purpose of instituting or maintaining a prosecution for an offence in relation to an election or return or for the purpose of a petition questioning an election or return.*

These provisions are unsatisfactory in numerous respects,<sup>148</sup> not least because they are adulterated by more than a few of the many errors with which the Electoral Act is littered, as earlier noted, and to which ZEC should have drawn attention before the poll. One such error is the fact that the provision (as per section 70(1)(a)) includes sealed packets or ballot boxes “*delivered to the constituency election officers in terms of section 64(1)(a) and (b)*”. There are no such packets or ballot boxes delivered to constituency election officers or any other electoral officer in terms of that section.

The application in the Mount Pleasant petition to the High Court was made for all closed and sealed ballot boxes and packets referred to in section 70(1)(a),(b) and (c) to be opened and inspected by the Applicant. As noted, only election material referred to in section 70(1)(b) and (c) exists. This is the material listed above prepared by presiding officers at polling stations in terms of section

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<sup>145</sup> Section 12 of the Electoral Regulations 2005 (S.I. 21/2005) requires delivery of ballot boxes and election material “referred to in section 69 of the Act” to be delivered to the constituency election officers. However, section 69 of the Act was repealed (and not replaced) in 2007.

<sup>146</sup> This is similar documentation relating to postal ballots.

<sup>147</sup> Even in the event of an election petition, the material must be destroyed within six months – the time within which all such petitions must be determined (section 182 of the Electoral Act).

<sup>148</sup> It should be apparent from the preceding that the sections are marked by a lack of clarity and confusing and contradictory provisions.

64(1)(a) and (b) and subsequently delivered to ward election officers, and the material pertaining to postal ballots (section 79 materials). This material is not part of the documentation referred to in section 70(1), and thus not part of the injunction in section 70(4).

The application for access to the electoral material was dismissed. In so doing the judge fully accepted the argument in opposition filed by ZEC. The Commission contended that, due to the fact that the 2013 general election was harmonised, the inspection of the constituency election residue to which the Applicant sought access necessarily entailed inspection of residue relating to the presidential election.<sup>149</sup> This material, ZEC maintained, could only be accessed if there was a petition relating to the presidential election before the court - and the only court that could entertain such a petition and who thus had jurisdiction to allow the inspection of the residue was the Constitutional Court.<sup>150</sup>

As should now be apparent from a reading of the sections cited above, the basis upon which ZEC argued that access to all elections residue should be refused, borders on the absurd.

Firstly, in terms of section 70(1) the restriction on opening sealed ballot boxes and the specified sealed packets only applies to a constituency elections officer, and only when such items are in the custody of such elections officer. Once such items are not in the custody of the constituency election officer, as may be so pursuant to an order of court, or once they have been received by the Chief Elections Officer, the restriction under section 70(1) falls away and only the restriction under section 70(4) remains.

Secondly, and more importantly, section 70(4) only proscribes the opening of certain *sealed packets* without an order of court. It does *not* proscribe the opening of ballot boxes as ZEC claimed. Furthermore, only such sealed packets referred to in section 64(1)(b) and section 79 fall within the proscription. These consist, as noted above, of the following:

- the register of assisted voters;
- the unused and spoilt ballot papers and the counterfoils of each;
- the counterfoils of the used ballot papers and materials relating to postal votes.

The ward Voters' Rolls used at each polling station, the register of voters turned away<sup>151</sup> and indeed the used ballot papers themselves do not fall within the proscription, do not therefore need to be destroyed in terms of section 70(3)<sup>152</sup> and are not part of the election residue to which access is proscribed. ZEC should thus have agreed to allow the inspection of this material.

Thirdly, the restriction relating to the opening of these specified sealed packets, and these sealed packets alone, is that they may not be opened other than in terms of an order of the Electoral Court. Only one condition needs to be satisfied for the Electoral Court to order the opening of sealed packets, that is, the court must be satisfied:

*that the inspection or production of the contents of such packet is required for ..... the purpose of a petition questioning an election or return (Section70(4)).*

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<sup>149</sup> It is worth noting that section 70(3) requires the destruction of election material from a constituency unless there is a petition relating to the election in that constituency. It would not be possible to destroy documentation relating to the presidential poll (such as assisted voters) without also destroying material relating to a constituency for which a petition might have been lodged, thus rendering this section unimplementable also.

<sup>150</sup> See p4 et seq of the judgment.

<sup>151</sup> Although elections officers maintained such registers, this does not appear to have been a legal requirement, as was the case for assisted voters.

<sup>152</sup> There is thus also no requirement that this material is destroyed as required by section 70(3)(b) of the Act.

There is no requirement, as ZEC by implication contended, that the sealed packet must be one containing residue from the election which is the subject of the petition. The stipulation is only that the inspection of the contents of the packet is “required” for the purpose of that petition.<sup>153</sup>

Thus, for example, if it were believed that ballots for a parliamentary election were erroneously tallied amongst those for a presidential election, and sealed in a packet for that presidential election, that sealed packet pertaining to the presidential election would need to be opened and examined, not for the purposes of challenging the presidential election, but for the purpose of the petition challenging the parliamentary election.

Contrary to the assertions of ZEC, this is precisely allowed by section 70(4) of the Electoral Act. If the Electoral Court is satisfied that the opening of a sealed packet pertaining to the presidential election is required “for the purpose of questioning an election or return” in a constituency poll, there is no impediment to the grant of an order in this regard. It is a complete non-sequitur to hold that necessary sight of the material relating to the presidential election precludes inspection of election material relating to a parliamentary seat. So long as sight of that material was required for purposes of the petition relating to the constituency poll, an order to open the sealed packets was competent.

Had the impediment which ZEC held to exist, really existed, then such impediment would have violated the Constitution. It is trite that a law must be interpreted in such a manner as to render it valid wherever possible. The interpretation placed upon section 70(4) by ZEC has the result that the section can never be implemented by a candidate wishing to challenge a parliamentary result, unless and until the Constitutional Court (and not the Electoral Court as stated in section 70(4)) has ordered the opening of sealed packets pursuant to a petition brought by a candidate in a presidential election. This is clearly not how the legislature intended the provision to be interpreted. The rights of a parliamentary candidate cannot depend on a contingency which may or may not come to pass, depending on the whims of a third party. It also suggests that malfeasance in a parliamentary election can only be exposed through the examination of election residue if there was also alleged malfeasance in a presidential election – and an application to unseal packets pertaining to a presidential election may be refused on grounds which have no cogency in relation to the parliamentary election.

Occluding the contents of sealed packets, and refusing to allow ballot boxes to be opened and the contents inspected, prevents voting from being verifiable and transparent – a specific requirement of the Constitution which ZEC seemed reluctant to apply.

There was, and is, no law which proscribes the opening of the ballot boxes (other than by the constituency elections officer). There was, and is, no law which proscribes the opening of the sealed packets containing the ward rolls. There was, and is, no law proscribing the examination of the ballot papers and register of those turned away from the polls. There was, and is, no basis upon which the sealed packets referred to in section 70(4) ought not to have been opened in the interests of verifiability and transparency. There was little point in compiling documentation, which would allow an audit of the accuracy and integrity of the poll, such as ballot paper counterfoils and registers of those turned away and assisted to vote when, on the argument and approach adopted by ZEC, which no one would ever be able to read or inspect. Yet, at the instigation of the Zimbabwe

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<sup>153</sup> Section 70(3) of the Act requires the destruction of the sealed packets unless a petition has been lodged “in relation to that constituency”. It is held here that where an election petition challenges the results in one constituency and seeks access to election material in an adjacent or other constituency or poll, then such adjacent or other constituency is a constituency “in relation to the petition”.

Electoral Commission, access to all of this material, which would have provided crucial information relating to the veracity of the poll in Mt Pleasant, was denied. It is stating the obvious that the reason why the legislature determined that this documentation should be generated was precisely so that the veracity of the poll could be tested and that the process would be transparent. Although ZEC's grounds for refusing access to the election material were inane, they were adopted as the judgment of the Court.

ZEC claimed that the fault lay with the Act which required legislative intervention to rectify the anomaly that, on its interpretation of the Act, due to the "harmonised" nature of the elections, meant that residue could never be inspected. However, even if the error were with the Act, which it is not, the defect should have been pointed out by ZEC before, and not after the poll.

Of some 101 electoral petitions<sup>154</sup> challenging constituency results initially filed, only one was heard, with 59 withdrawn<sup>155</sup> and a remarkable 41 dismissed on technical procedural grounds or withdrawn in anticipation of dismissal on this account. Underlying these dismissals was the approach of the courts that a petition would be held fatally defective on account of the slightest deviation from the rules of court, regardless of how inconsequential such departure or lacking in prejudice to a Respondent.<sup>156</sup> It seems improbable that in all instances the fault lay with the competence of the lawyers. The fault was more likely to be found in the rules themselves and the approach taken by the Electoral Court – a problem exacerbated by the contradictory indications as to which rules were in fact to be applied.<sup>157</sup>

It is worth noting that the plain language of section 70(4) also does not require that a petition must precede the order to open the sealed packets. In the case of criminal proceedings relating to electoral violations, it is specifically stated that the sealed packet may be opened for the purpose of "instituting" the proceedings, i.e. before such proceedings have been commenced and indeed in order to gather the evidence to initiate the same. In the same way, it ought to be competent to open the sealed packets for the purpose of determining whether a petition ought to be brought, so long as the application in this regard is made before these documents are destroyed in terms of section 70(3) and is "for the purpose of" a petition.

The requirement that there be an election petition before there may be an inspection of election residue, together with the dismissal or withdrawal of all bar one petition, meant that there was no possibility for inspection of the election residue in any of the constituencies where electoral malpractice had been alleged. ZEC's "homework" for 2013 was never to be marked.

### **Failure to Address Media Bias**

A perennial complaint concerning the electoral terrain in elections has been the use of Zimbabwe's state media, funded by tax payers of all political persuasions, to promote a single political party – ZANU PF. The position was little changed in 2013. An NGO, the Media Monitoring Project of

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<sup>154</sup> 95 were filed by the MDC-T, 6 by ZANU PF. For a detailed discussion of these petitions see *Court Watch 6/7 & 8 2014* Veritas 04-05/2014.

<sup>155</sup> Many of the initial withdrawals were due to the inability to raise the \$10 000 security deposit which had to be lodged to pursue each petition.

<sup>156</sup> Per Bhunu J in *Tracy Mutinhiri and Wilson Makanyaire* [citation unknown] 25.11.13.

<sup>157</sup> As Veritas put it: "*Confusingly the Electoral Act pointed to two different sets of rules: section 193 appeared to require compliance with the Electoral (Applications, Appeals and Petitions) Rules [SI 74A/1995 made under the former Electoral Act], while section 165 seemed to lay down that until new rules of court were made under the current Electoral Act, the rules to be followed would be the High Court Rules, subject to changes deemed necessary by the Electoral Court*".

Zimbabwe, MMPZ, carefully monitored the coverage afforded to political parties by state media in the month preceding the 2013 election and whether there was compliance with the requirement that “news and current affairs programmes or features relating to the election in question were presented in a balanced, fair, complete and accurate manner.”<sup>158</sup>

MMPZ reported<sup>159</sup> that, of the 436 stories state media carried on party activities and campaigns, 278 (64%) related to the activities of President Mugabe and his ZANU PF party, compared with only 126(29%) relating to MDC-T and its leader, Morgan Tsvangirai. <sup>160</sup>Furthermore 253 (91%) of the 278 stories carried on ZANU PF portrayed the party in a positive light, with the remaining 25 (9%) neutral. Yet 112 (89%) of the 126 stories on the MDC-T were negative, with only 14 (11%) neutral. Even, the African Union Election Observer Mission noted that “the national broadcaster tended to provide live and in-depth coverage largely to a single political party.”<sup>161</sup> The sentiment was echoed by the SADC Election Observer Mission.<sup>162</sup>

This situation pertained, notwithstanding the requirements of the Zimbabwe Electoral Commission (Media Coverage of Elections) Regulations,<sup>163</sup> aimed at ensuring equal coverage for political parties and equity in the media. The provisions were supplemented and strengthened by amendments to the Act in 2012 (Part XXIB). Furthermore, section 160K of the Act required ZEC, with the assistance of the Zimbabwe Media Commission and the Broadcasting Authority of Zimbabwe, to monitor the media during the election to ensure compliance with the laws relating to electoral coverage.

No indication was given, by word or deed, that ZEC was aware of this provision of the Electoral Act. Since ZEC is specifically enjoined<sup>164</sup> to include an assessment of the coverage of the election by the news media in its statutory post-election report to Parliament, it presented its findings in annexure E of its report to Parliament. The lengths to which ZEC is prepared to go to cover up the unfairness of the electoral process and to protect ZANU PF is amply demonstrated by this annexure. ZEC deals with the blatant bias towards ZANU PF in the state media, noted by all observers, by the patently disingenuous subterfuge of claiming that both ZANU PF *and* MDC-T received the lion’s share of coverage – without alluding to the fact by far that the greater proportion of this percentage was accorded to ZANU PF and that when coverage was afforded to the MDC-T, it was almost invariably negative. It is precisely this approach by ZEC which leads to a questioning of the motivations behind the appointment of Justice Rita Makarau to head regional electoral bodies.

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<sup>158</sup> Section 8(1) of the Regulations.

<sup>159</sup> *Election Watch 2013-20 MMPZ*.

<sup>160</sup> 15 (3%) concerned the other MDC formation led by Industry Minister Welshman Ncube. The remaining 17 (4%) concerned small parties. These included Dumiso Dabengwa’s ZAPU; the Zimbabwe Development Party, led by Kisinoti Mukwazhe; Simba Makoni’s Mavambo/Kusile; Ndonga; and the newly formed United Movement for Democracy.

<sup>161</sup> *Report of African Union Election Observation Mission to the 31 July 2013 Harmonised Elections in the Republic of Zimbabwe* paragraph 48. The coyness in naming the party is noteworthy.

<sup>162</sup> *Summary Statement of the SADC Observer Mission to the Harmonised Elections in the Republic of Zimbabwe Held on 31<sup>st</sup> July, 2013*. The SADC statement, however, egregiously approached the matter as if the bias in the state media was somehow balanced by and equivalent to that of “pirate” radio stations (using the controversial term deployed by ZANU PF), ignoring the very limited broadcasting times of these stations, the fact that the reception is poor and often jammed, that shortwave radios required to receive this signal had unlawfully been confiscated en masse by the police ahead of the election, that the state media is funded by the taxpayers money and the use of the state media to promote the interests of a single political party is an abuse of state resources.

<sup>163</sup> S.I.33 of 2008.

<sup>164</sup> Section 160(K)(2).

## Results (mis)Management

### *i) Legislative ineptitude and ZEC's inaction*

After the controversy around the delay in announcing the results of the March 2008 general elections,<sup>165</sup> there were attempts to streamline and tidy the law relating to the tabulation of returns and declaration of the outcome. However, the precipitous proclamation of the election dates left the attempts half baked. For reasons already noted, the amendments to the Electoral Act and Electoral Regulations were drawn in haste without proper consideration and care. As a consequence, the very area of the legislation it had been sought to improve, in fact became further confused due to the incomplete drafting process. The legislation thus was ill-conceived in part<sup>166</sup> and, in particular, contained several omissions and contradictions pertaining to processes of tabulation and the declaration of the result of the all important presidential election.

Provisions in the Act (in section 37(C)) relating to the transmission of results implied that the Presidential result would be determined at the National Command Centre by aggregating the totals on the ten provincial returns, one from each province, for each of the five candidates. The returns would have arrived at provincial level after being totalled and aggregated at each successive level, beginning with the polling station. This conclusion was, however, gainsaid by both section 110(3) and section 37C(4)(f)(ii), each of which set out entirely different procedures.

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

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

This process of tabulation was thus founded upon “section 65(3)(i). There was **no** such section in the Act. More importantly, this tabulation process contradicted the process set out in section 37C(4)(c)(i) that the constituency elections officer aggregated the ward returns, and not the polling station results.

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

A second difficulty was section 110(3)(f)(i) which provided that after the Chief Elections Officer had aggregated the 210 presidential constituency returns, the Chair of the Zimbabwe Electoral Commission must “forthwith” declare the result.<sup>167</sup> This requirement does not sit well with section 37C(4)(f)(ii) which provided that:

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<sup>165</sup> D. Matyszak. *D. Law, Politics and Zimbabwe “Unity” Government* KAS and RAU 2010.

<sup>166</sup> One of the ill-conceived aspects was a new requirement that ZEC release the Presidential Results within five days rather than “as soon as possible” or “forthwith” as previously required. Of course, if ZEC had not released the results within the required period, an approach to the courts would simply have resulted in an order that the results be released “as soon as possible”. The change thus had no practical effect other than to provide a false sense of security which could have been more substantively provided by tightening the provisions stipulating expedition.

<sup>167</sup> Section 110(3)(f)(i).

*provincial returns for the presidential election gathered from every provincial command centre shall be transmitted to the National Command Centre, where the provincial returns shall be collated to obtain the **initial results** of the presidential election and the **final result**<sup>168</sup> of the presidential election shall, after reconciling the provincial returns with the polling station returns and presidential constituency returns ...be reflected in a return that distinctly reflects number of votes cast for each presidential candidate at every polling station, ward centre,<sup>169</sup> presidential constituency centre and provincial command centre.*

This provision thus required that the National Command Centre had to audit the provincial returns to ensure that the numbers thereon reconciled with the numbers on the polling station returns and returns at all other levels sent directly to the National Command Centre, as indicated above, and that it prepared a spreadsheet reflecting the reconciled results at all levels. While this “return” could have been very useful in ensuring that no manipulation or change of results had occurred in the transmission process between the various centres, or to expose it if it had, it unfortunately blurred the question of when the result was to be declared.

This provision could have been interpreted<sup>170</sup> to imply that the presidential result could not be declared until the reconciliation had been done. Such an interpretation directly contradicted the requirement of section 110(3)(f)(i) that the result was to be declared “forthwith” after the constituency returns had been aggregated. So when was the result of the presidential election to be declared?

- After the presidential constituency returns had been aggregated by the Chief Elections Officer?<sup>171</sup>;
- or after the aggregation of the presidential provincial returns revealed the “initial” results?;
- or after the “final result” had been audited and reflected in the required spreadsheet return?

In the event it appears that the second option was selected.

When these electoral laws were brought into being without consultation with ZEC, as constitutionally required, ZEC was duty bound to have voiced an objection, and pointed to these (and other) conflicting provisions and deficiencies as the consequence of ignoring this constitutional obligation. Instead, ZEC remained silent in the face of a problem which could have been acute had the results of the presidential poll been close.<sup>172</sup>

The Presidential Regulations containing these errors, contradictory provisions and ambiguities lapsed after six months, as required by the enabling Act.<sup>173</sup> Amending legislation was thus again required to bring electoral law into line with the Constitution. A Bill purportedly to this effect was brought before Parliament in February 2014. Shortly before the second reading of the Bill, the ZEC Chairperson was approached and asked if ZEC had been consulted on the proposed legislation and

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<sup>168</sup> It is unclear why at first results (plural) is referred to and then “result” singular immediately thereafter. “Results” might be held to refer to the final tallies of the five candidates and result may mean whether and who a person is declared elected as president, or whether a run-off must take place on account of no person having received an absolute majority.

<sup>169</sup> There does not appear to a requirement, unlike the polling station and other returns, that the presidential ward returns are copied to the National Command Centre.

<sup>170</sup> On asking several lawyers for their interpretation of this section, this is the one I have been given by each.

<sup>171</sup> Recall that it is not even clear if this aggregation should be done, as the process is contradicted by the process set out in section 37C(4) of the Act.

<sup>172</sup> See D. Matyszak *A Fudge Recipe* RAU May, 2013.

<sup>173</sup> On 10<sup>th</sup> December 2013. Section \*\*\* of the

whether it had made any recommendations relating to the Bill. Initially the ZEC Chairperson replied with a non-sequitur stating that the Presidential Regulations had lapsed thus this constitutional provision was not an issue. When pressed on the matter in a follow-up telephone call, Justice Makarau then stated that the Chief Elections Officer had considered the Bill and had made recommendations to Parliament. However, simultaneously the Chairperson of the Parliamentary Legal Committee<sup>174</sup> (PLC), part of whose mandate is to ensure the constitutionality of Bills, was telephoned and asked if the Committee had checked whether there had been compliance with the constitutional requirement of consultation with ZEC and consideration of its recommendations. The Chairperson of the Committee replied that it was not the PLC's duty to confirm this, but rather the duty of ZEC to complain if they had not been consulted. He stated that they had not received any communication from ZEC. The responses by the Chairperson of ZEC and that of the Chairperson of the PLC cannot both be true.<sup>175</sup>

The resultant Act passed by Parliament on the 28<sup>th</sup> May 2014, reproduces many of the provisions of the lapsed Presidential Regulations, and repeats the errors and contradictions relating to tabulation – including the reference to the *non-existent* section 65(3)(ii).<sup>176</sup>

*ii) Accounting Incompetence – the Presidential Result*

Zimbabwe's presidential elections require that for there to be an immediate outright winner, the successful candidate must attain an absolute majority of 50% + 1 vote of the valid votes cast.<sup>177</sup> With, in theory, a single vote able to determine the outcome, precision in tabulation of the presidential result is essential. It was uncertainty in such tabulation in the closely fought Kenyan election which had such bloody consequences for Kenya in 2007.

Thus, section 37(C) introduced a useful check mechanism for the presidential results. A system of double accounting was deployed so that as each return was submitted to the next level, a copy was sent to the National Command Centre to be entered on a “master” return, as the provision cited above indicates. This master return thus should have reflected the results and totals for the presidential election from polling station upwards.

One needs to bear in mind that the election officer at each polling station and centre had to make multiple copies of the returns in each election for distribution, all of which, certainly in the rural areas, in the absence of photocopiers, had to be done by hand or using carbon paper with frequently indistinct results. There were 9 735 polling stations.<sup>178</sup> For the Presidential Election, with five candidates, there were 48 675 polling station entries on the spread sheet return, to match the data on 1 958 ward returns (9 790 entries), 210 constituency returns (1050 entries) and 10 provincial returns (50 entries). ZEC appeared to have had insufficient time to train its staff and to acquire the

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<sup>174</sup> Jonathan Samukange MP for Mudzi South.

<sup>175</sup> This information was given by telephone by journalist Peta Thornycroft (who called Makarau) and Derek Matyszak (who called Samukange) on the 9<sup>th</sup> April, 2014.

<sup>176</sup> The Act now awaits the President's signature, which must be made before 05.08.14, before becoming law.

<sup>177</sup> Section 110(3)(f)(ii). The sub-paragraph does not refer to valid votes cast, but this arises by implication from the paragraph following.

<sup>178</sup> Section 51(3) of the Act requires constituency elections officers to publish a notice of all the places where polling stations are to be established at least three weeks ahead of the election. The purpose of this is to allow political parties adequate time to make the logistical arrangements to have polling agents present at all polling stations. The notice must be re-published on polling day to inform voters where they may cast their vote. The ratio behind the legislation, and the wording of the Act, make it clear that the notice published on polling day must be the same as that published three weeks earlier. Contrary to the Act, the notices published on election day contained 65 additional polling stations, leaving the political parties scrambling to make arrangements to monitor these hitherto undisclosed stations. The list published on polling day, however, matched that of published results at polling station level, thus discounting the use of “ghost” polling stations.

necessary physical infrastructure to undertake this accounting exercise.<sup>179</sup> There was thus ample room for error, as so happened.

The official results announced for the presidential elections are inaccurate - by over 1 772 votes in Mashonaland West Province alone due to accounting errors. There are other, but lesser accounting errors in other provinces. An excerpt from the official results on the spreadsheet released by ZEC, the tally of which is that officially gazetted, appears below as an example of one such error. The extract shows the officially recorded results for two wards in Norton constituency.

WARD NO.	POLLING STATIONS	FACILITY	Dabengwa Dumiso (ZAPU)	Mugabe Robert Gabriel (ZANU PF)	Mukwazhe Munodei Kisinoti (ZDP)	Ncube Welshman (MDC)	Tsvangirayi Morgan (MDC-T)	Total Votes Cast	Total Valid Votes Cast
3	Dudley Hall Primary A	School	0	54	0	1	75	130	130
3	Dudley Hall Primary B	School	0	74	0	0	88	163	162
3	Dudley Hall Primary C	School	2	107	1	1	126	238	237
3	Engineering Council	Offices	0	112	1	4	172	292	289
	<i>4 POLLING STATIONS</i>	<b>WARD TOTAL</b>	<b>2</b>	<b>347</b>	<b>2</b>	<b>6</b>	<b>461</b>	<b>823</b>	<b>818</b>
4	Knowe Primary A	School	0	218	1	7	345	574	571
4	Knowe Primary B	School	0	140	0	6	252	403	398
4	Knowe Primary C	School	2	169	0	10	304	488	485
4	Railway Station	Tent	0	150	1	5	171	331	327
	<i>4 POLLING STATIONS</i>	<b>WARD TOTAL</b>	<b>2</b>	<b>347</b>	<b>2</b>	<b>6</b>	<b>461</b>	<b>823</b>	<b>818</b>

It will be noted that the totals for Ward 4 simply repeat the totals for Ward 3 and are not a correct summation of the columns. The difference is some 963 valid votes cast.

A comparison of Mashonaland West spreadsheet for the presidential elections, when compared with the national spreadsheet for that election, both published by ZEC shows discrepancies in every total, as the table below indicates.<sup>180</sup>

<sup>179</sup> *The Case for an Efficient and Transparent Results Management System* Election Resource Centre, 23.07.13.

<sup>180</sup> Data supplied by Mike Davies in *Preliminary Report on the Comparative Analysis of 2013 Election Results* 01.14 (unpublished)

	Extracted from ZEC's published <b>National Presidential Results</b>	ZEC's published Presidential Results <b>Mashonaland West</b>	Variation
Dabengwa Dumiso	2077	2066	-11
Mugabe Robert Gabriel	278059	277312	-747
Mukwazhe Munodei Kisinoti	895	883	-12
Ncube Welshman	5667	5603	-64
Tsvangirai Morgan	101554	100616	-938
Total Votes Rejected	7751	7683	-68
Ballot Papers Unaccounted for	18	14	-4
Total Votes Cast	396003	394163	-1840
Total Valid Votes Cast	388252	386480	-1772

With the double entry system of accounting, errors of this nature should have been noted and corrected. The errors suggest that there was no reconciliation of the returns before the final announcement of the presidential result was made.

*iii) General Accounting Incompetence*<sup>181</sup>

For the first time, commendably, the election results for the Presidential Election, disaggregated down to polling station level, were published, appearing in electronic form on ZEC's website.<sup>182</sup> The National Assembly results were also similarly disaggregated and published. It was a requirement of the Act that ZEC compile spreadsheets containing this information and thus it should have been a simple matter to post the data on its website.<sup>183</sup> Although not required to do so by the Act,<sup>184</sup> in the interests of completeness, transparency and verifiability, ZEC ought to have published the local government results in the same form. It did not, publishing only the ward totals.

An examination of these results reveals some of the disarray in the compiling of the results by ZEC. The posting of the results itself has not been done efficiently. The process by which the results are accessed is convoluted and the website confusing and frustrating.<sup>185</sup> The posted results are also littered with errors, omissions and anomalies.

For example, results are missing in their entirety for five wards in the Presidential Election and for six constituencies in the Parliamentary elections.<sup>186</sup> The first omission appears to have affected the official tally for the presidential result while the latter makes cross-checks and comparison of the results in the three polls difficult and even impossible in some areas. Redcliff constituency appears

<sup>181</sup> The data in what follows was compiled and researched by Mike Davies, see fn178 immediately above.

<sup>182</sup> Previously results had not been disaggregated below provincial level. The failure to disaggregate results is regarded by those studying electoral processes as a red flag indicating fraud.

<sup>183</sup> While ZEC is obliged to compile the data, it is not obliged to publish it – this is a lacuna in the Act which ought to have been addressed by the recent amendments to the Act. It was not.

<sup>184</sup> This arises, partly by inference, from the processes set out in section 37(C)(4) of the Act.

<sup>185</sup> The results for the National Assembly are NOT found by clicking on the link entitled "2013 Harmonised Election Results" at <http://www.zec.gov.zw/election-notice-board/election-results/2013-election-results>. After opening the menu on the "Election Notice Board" (Not "Elections") one needs to scroll down past the referendum (not election) results to National Assembly Provincial Results, where the results can be accessed by Province. There is no consolidated national spreadsheet.

<sup>186</sup> Buhera South, Bulilima West, Chiredzi North, Masvingo West, Mwenezi West, Zvimba North.

thrice. Four polling stations in the presidential election<sup>187</sup> and three in the parliamentary election<sup>188</sup> are listed, but the results have not been entered – thus apparently disenfranchising those voting there, affecting the tallies in both the presidential and parliamentary elections and possibly affecting the allocation of seats on the basis of proportional representation.

The posted National Assembly results show the MDC-T candidate for Kariba as having received some 20 116 votes at a single polling station (Nselelo Primary School); Chiredzi RDC Wards 18, 19, 27, 28 and 30 are misallocated to Chiredzi Town Council and the Total Votes Cast at Rushinga RDC Ward 6 Nyanhoto Village Tent polling are entered as 3 against a total of 85 Valid Votes Cast. Fortunately, these latter errors are not carried through to the final totals.

*iv) Invalid return forms*

The prescribed layout of a Ward Collation Return appears as Form V23A in the First Schedule of the Electoral Regulations, S.I. 21 of 2005 as amended by S.I. 87 of 2013.<sup>189</sup> This format was prescribed specifically for the 2013 elections. However, the return actually used for the ward collations was not as legislated. Two important columns were omitted, that to record postal votes and that to record special votes. A record of the special votes would have enabled this ballot to be verified (as required by section 65(4)(a)) and to check whether the chaos around the special vote had affected the integrity of the ballot. With the elision of the column for special votes, the special votes were thus not recorded separately and simply aggregated with the ordinary votes, thus rendering it impossible to determine how many special votes were cast for each ward and rendering it impossible to comply with section 65(4)(a) of the Act.

It was a constitutional requirement that the 2013 elections were conducted in accordance with electoral law. Use of the correct version of form 23A and the verification of the votes recorded on the form were part of electoral law. ZEC failed to apply electoral law in respect of the ward collations thus breaching both the Act and the Constitution. It cannot be said with any certainty whether this failure by ZEC was by accident or design, but since the correct form might have exposed any improprieties arising from the chaotic nature of special vote, one is compelled to consider the latter as more likely.

*v) Missing Ballot Papers*

When the Chairperson of ZEC was asked why 35% more ballot papers had been printed than there were voters on the roll, Justice Makarau replied as follows:

*35% is a large number, but it's our duty to account for each and every ballot, all 8.7 million ballots will be accounted for, that is what will make for a fair election.*<sup>190</sup>

The ballots were *not* all accounted for. There were massive discrepancies between the ballots issued and the voters cast. In 2013, on presenting him or herself to a polling officer and being confirmed as entitled to vote, each voter was issued with three ballot papers,<sup>191</sup> one for each of the polls taking place: local government, parliamentary and presidential. Voters were not given the option of casting a ballot in only one or two of the elections and were required to vote in all three if they chose to

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<sup>187</sup>Harare City Council (Ward 43) Budiro 1 Creche; Bikita RDC (Ward 27) Savuli Compound; Gweru City Council (Ward 10) Mkoba 9 & 10; Shurugwi Town Council (Ward 12) Shurugwi 2 Secondary School

<sup>188</sup> The three are in Chegutu Municipality Ward 12 (Chegutu West).

<sup>189</sup> By Presidential Regulations made simultaneously with the Regulations purporting to amend the Electoral Act and the proclamation of the election date.

<sup>190</sup> *ZEC Owns Up to Electoral Irregularities* The Daily News 30.07.13.

<sup>191</sup> This fact was confirmed with the Chairperson of ZEC by telephone in November 2013.

vote at all.<sup>192</sup> It is also an offence to remove a ballot paper from a polling station.<sup>193</sup> With these requirements in mind, the instance of Mount Pleasant constituency may once again be used to illustrate the issue of missing ballots.

The results for Mount Pleasant constituency appear in the table below. From this table it will be noted that nearly 10 000 less votes were recorded in the local government elections when compared with the national assembly and presidential elections. This then raises the question, to date unanswered by ZEC, as to the whereabouts of 10 000 ballots issued for the local government poll in Mount Pleasant alone.<sup>194</sup> 10 000 ballot papers which were issued to voters in Mount Pleasant for the local government seats in the two wards were not in the ballot boxes when the count took place, either as valid or spoiled votes. They could not lawfully have been removed from the polling station. So where are they? If they were unlawfully removed, the fact that 55% of voters could engage in such unlawful activity under what should have been the watchful eye of polling officers does not inspire confidence in the integrity of the poll.

	<b>MDC-T</b>	<b>ZANU-PF</b>	<b>Others &amp; Rejected</b>	<b>TOTAL</b>	<b>VALID</b>
<b>Presidential</b>					
Ward 7	3,915	7,780	263	11,956	11,819
Ward 17	3,625	2,521	168	6,314	6,249
	<b>7,540</b>	<b>10,301</b>	429	<b>18,270</b>	<b>18,068</b>
<b>National Assembly</b>					
Ward 7	3,605	7,797	547	11,949	11,784
Ward 17	3,290	2,536	485	6,311	6,240
	<b>6,895</b>	<b>10,333</b>	1032	<b>18,260</b>	<b>18,024</b>
<b>Local Authority</b>					
Ward 7	321	1,725	45	2,091	2,091
Ward 17	3,687	2,496	68	6,251	6,251
	<b>4,008</b>	<b>4,221</b>	113	<b>8,342</b>	<b>8,239</b>

Comparing the results of the three elections at ward level, the ballot totals match in only 18 wards. In all the remainder, there are a greater number of total ballots cast (both valid and invalid) in one or other of the three polls, raising the question as to the whereabouts of the remaining issued ballots. The issue was also marked in Harare City Council Ward 7, where 11 819 valid votes were cast in the Presidential election but only 2 091 in the local authority election. The ballot papers for over nine thousand voters (82% of those voting in the ward) cannot be accounted for. An examination of the residue in the Mount Pleasant petition would have helped to explain the discrepancies.

### **Administrative Incompetence**

It has already been noted that ZEC staff did not enter the results received at the National Command Centre correctly or accurately. The official tally for the presidential result is also incorrectly

<sup>192</sup> Unless, as was the case in some local authority elections, the ward was not contested.

<sup>193</sup> Section 85(1)(d).

<sup>194</sup> 10 ballots also appear to be missing when the National Assembly and Presidential totals are compared.

calculated. This inefficiency was part of a generalised and apparently slapdash approach to a process which should have been characterised by exquisite precision. An examination of some of the documents generated by ZEC shows a lack of basic competence. The staff seemed incapable of spelling Matabeleland consistently. None of the various attempts was accurate, though “Matebeleland” was settled upon. ZEC should also have determined a consistent form for the acronyms of the political parties, which would have facilitated electronic cross-checks and removed errors. Instead, for example, every conceivable permutation is found in ZEC’s documentation. The Movement for Democratic Change (Tsvangirai), thus appears as MCD (sic); M.D.C; M.D.C .T; M.D.C T; M.D.C-T; M.D.C.; M.D.C. T; M.D.C.T; M.D.C.T; MDC; MDC - T; MDC -T; MDC T; MDC- T; MDC-N; MDC-T; MDCT; MTC T (sic).

Similar clerical inefficiency was manifest around the nomination process. ZEC was unable to choose between referring to a seat as “uncontested” or “unopposed” switching between the two. Some candidates who were listed as unopposed in fact participated in contested polls.<sup>195</sup> On numerous occasions the candidates’ names were entered into the incorrect schedules for opposed and unopposed candidates.

The pervasive clerical and arithmetic errors suggest that ZEC staff may have been appointed to or retained their positions on the basis of criteria unrelated to proficiency in the performance of their duties.<sup>196</sup>

## Conclusion

Within a week of the poll two more ZEC Commissioners resigned,<sup>197</sup> with Commissioner Mkhululi Nyathi, specifically citing the *modus operandi* of the body as the reason. His letter read, in part:

*I hereby tender my resignation from the Zimbabwe Electoral Commission with immediate effect. I do not wish to enumerate the many reasons of my resignation, but they all have to do with the manner the Zimbabwe 2013 harmonised elections were proclaimed and conducted ....While throughout the whole process I retained some measure of hope that the integrity of the whole process could be salvaged along the way, this was not to be, hence my considered decision to resign.*<sup>198</sup>

If not working in active collaboration with the security sector, ZEC did nothing that obstructed its objectives. And, despite numerous violations of electoral law and the Constitution, ZEC’s *modus operandi* was supported at every turn by the Courts. Although the usual rule is that a litigant may withdraw from legal proceedings at anytime provided there is a tender of costs, when Tsvangirai sought to withdraw his election petition on account of judgments which denied him both access to documentation pertaining to the election and the opportunity to lead oral evidence, the Constitutional Court insisted that the petition proceed. The insistence seems to have been predicated upon the Court’s anxiety to pronounce upon the legitimacy of the election. Yet in a Presidential Election Petition, the nature of the order which may be given by the Court is

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<sup>195</sup> For example, local authority nomination results forms list Johannes Sachirera MDC-T as the unopposed candidate (and the declared Councillor) for Nyanga RDC 16 yet the results sheet records a contested election between Sachirera (who received 157 votes) and Machado Josephine of ZANU PF who was declared the winner with 550 votes; similarly for Hurungwe RDC Ward 21 the nomination results forms show Lillian Nxele of ZANU PF elected unopposed yet results sheet records a contested election between her (462 votes) and Sekiwa Loveness F of the MDC (35 votes).

<sup>196</sup> See fn 15 above.

<sup>197</sup> The first was Simpson Mtambanengwe. While the third Commissioner, Geoff Feltoe, did not give clear reasons for his resignation, being a individual renowned for his considerable personal integrity, few doubted that his motivation was similar to that of Nyathi.

<sup>198</sup> *Zim Electoral Commissioner Resigns Over Unfair Elections* The Mail & Guardian 03.08.13.

constitutionally restricted to only one of three options:<sup>199</sup> to declare a winner; to invalidate the election; or make any other just and appropriate order. The Constitutional Court went beyond this limit and in its order declaring Mugabe President, held:

1. *That the Zimbabwe Presidential election held on July 31 2013 was **in accordance with the laws of Zimbabwe** and in particular with the Constitution of Zimbabwe and the Electoral Act.*
2. *That the said election was **free, fair and credible**. Consequently, the result of that election is a true reflection of the free will of the people of Zimbabwe who voted.*
3. *That Robert Gabriel Mugabe was duly elected President of the Republic of Zimbabwe and is hereby declared the winner of the said election.*<sup>200</sup>

Only the third part of the judgment is authorised by the Constitution. The judgment was all the more remarkable in that the Court had itself, on application by ZEC in relation to the Special Vote, specifically allowed the election to be held other than in accordance with the Electoral Act.

If there was any harmony<sup>201</sup> in the 2013 elections, it is to be found in the relationship between ZEC the security sector and the Courts. This is not unusual in Zimbabwe's electoral process. A perusal of press reports on Zimbabwe from ten and more years ago reveals that little progress has been made in reducing the democratic deficit in Zimbabwe and ensuring free, fair and credible elections. The same complaints and issues raised in respect to the 2013 elections have been raised in every election since the year 2000. The cyclical trajectory of Zimbabwe's politics is clearly manifest in the refrains of those opposed to ZANU PF's continued rule and who wish to see an opening of democratic space in the country. Thus, from 1999, the bromide was that there could not be a democratic election in Zimbabwe without a proper Constitution. During the defective constitution-making process of the Inclusive Government (2009-2013), the bromide was that a proper Constitution for Zimbabwe could not be developed without a democratic election. The Inclusive Government, the "GNU", itself was presented as the cure for the flawed 2008 election, the election of 2013 presented as the cure for the flawed GNU. And, as it is hoped this paper makes clear, there cannot be a free and fair election without the institutional reform of bodies such as ZEC, the judiciary and security sector. There is unlikely to be such reform in the absence of a free and fair election.

The chance to break this logjam arose in 2008. On account of their success at the polls, the MDC-T<sup>202</sup> was presented with the opportunity to reform Zimbabwe's Electoral Management Body by ensuring that it comprised Commissioners with some understanding of the phrase "free, fair and credible." Never a party to miss an opportunity, the moment was lost. The best that may now be hoped for is that the political cost of conducting elections in the manner of 2013 is increased by exposing the failings of ZEC and vigorously debating its statutory report now before Parliament.

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<sup>199</sup> See section 93(4) of the Constitution.

<sup>200</sup> For the full court ruling see *Tsvangirai Loses Election Cases* The Herald 21.08.13.

<sup>201</sup> The elections would be more aptly described as synchronised.

<sup>202</sup> Working with the MDC formation.