

**IN THE CONSTITUTIONAL COURT OF ZIMBABWE**

**CASE NO CCZ42/18**

**HELD AT HARARE**

*In the matter between:*

**NELSON CHAMISA**

**APPLICANT**

**AND**

**EMERSON DAMBUDZO MNANGAGWA**

**1<sup>ST</sup> RESPONDENT**

**AND**

**JOSEPH BUSHA**

**2<sup>ND</sup> RESPONDENT**

**AND**

**MELBAH DZAPASI**

**3<sup>RD</sup> RESPONDENT**

**AND**

**NKOSANA MOYO**

**4<sup>TH</sup> RESPONDENT**

**AND**

**NOAH MANYIKA**

**5<sup>TH</sup> RESPONDENT**

**AND**

**PETER WILSON**

**6<sup>TH</sup> RESPONDENT**

**AND**

**TAURAI MTEKI**

**7<sup>TH</sup> RESPONDENT**

**AND**

**THOKOZANI KHUPE**

**8<sup>TH</sup> RESPONDENT**

**AND**

**DIVINE MHAMBI**

**9<sup>TH</sup> RESPONDENT**

**AND**

**LOVEMORE MADHUKU**

**10<sup>TH</sup> RESPONDENT**

**AND**

**PETER MUNYANDURI**

**11<sup>TH</sup> RESPONDENT**

**AND**

**AMBROSE MUTINHIRI**

**12<sup>TH</sup> RESPONDENT**

**AND**

**TIMOTHY JOHANNES CHIGUVARE**

**13<sup>TH</sup> RESPONDENT**

**AND**

**JOICE MUJURU**

**14<sup>TH</sup> RESPONDENT**

**AND**

<b>KWANELE HLABANGANA</b>	<b>15<sup>TH</sup> RESPONDENT</b>
<b>AND</b>	
<b>EVARISTO CHIKANGA</b>	<b>16<sup>TH</sup> RESPONDENT</b>
<b>AND</b>	
<b>DANIEL SHUMBA</b>	<b>17<sup>TH</sup> RESPONDENT</b>
<b>AND</b>	
<b>VIOLET MARIYACHA</b>	<b>18<sup>TH</sup> RESPONDENT</b>
<b>AND</b>	
<b>BLESSING KASIYAMHURU</b>	<b>19<sup>TH</sup> RESPONDENT</b>
<b>AND</b>	
<b>ELTON MANGOMA</b>	<b>20<sup>TH</sup> RESPONDENT</b>
<b>AND</b>	
<b>PETER GAVA</b>	<b>21<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	
<b>WILLIAM MUGADZA</b>	<b>22<sup>ND</sup> RESPONDENT</b>
<b>AND</b>	
<b>ZIMBABWE ELECTORAL COMMISSION</b>	<b>23<sup>RD</sup> RESPONDENT</b>
<b>AND</b>	
<b>THE CHAIRPERSON OF THE ELECTORAL COMMISSION</b>	<b>24<sup>TH</sup> RESPONDENT</b>
<b>AND</b>	
<b>THE CHIEF ELECTIONS OFFICER OF THE ELECTORAL COMMISSION</b>	<b>25<sup>TH</sup> RESPONDENT</b>

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**23<sup>RD</sup>, 24<sup>TH</sup> & 25<sup>TH</sup> RESPONDENTS' OPPOSING AFFIDAVIT**

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I, **PRISCILLA MAKANYARA CHIGUMBA**, in my capacity as the Chairperson of the Zimbabwe Electoral Commission and by due authority of the Zimbabwe Electoral Commission and that of the 25<sup>th</sup> respondent, hereby take oath and state that the facts I depose to hereunder are within my personal knowledge and belief and are true and correct. Where I relate to issues of a legal nature, I do so on advice from counsel which advice I accept.

I have read and understood the applicant's founding papers and wish to respond thereto as follows:

**IN LIMINE**

- i. No valid application has been filed by the applicant challenging the election of the 1<sup>st</sup> respondent to the office of the President of the Republic of Zimbabwe, in terms of s93 of the Constitution of Zimbabwe as read with the Constitutional Court Rules, 2016.
- ii. In terms of s93(1) of the Constitution, a challenge to the validity of an election to the office of President is instituted by way of a petition or application lodged with the Constitutional Court within seven days after the date of the declaration of the results of the election. Being a period prescribed by statute, the seven days provided by s93(1) of the Constitution are reckoned with the inclusion of Saturdays, Sundays and public holidays. The time for lodging a petition in terms of s93(1) thus expired on the 10<sup>th</sup> of August 2018.
- iii. In terms of r23(2) of the Constitutional Court Rules, the application provided for in terms of s93(1) of the Constitution of Zimbabwe shall be filed with the Registrar of the Constitutional Court and shall be served on the respondent(s) within seven days of the date of the declaration of the result of the election. Both, such filing and service within the seven-day period are constitutive of the proper lodging of a challenge to the election of a President.
- iv. Being peremptorily limited to the period of seven days after the declaration of the result of the election, any filing and/or service that is done outside that timeframe

is, accordingly, invalid with the correlative effect of rendering the entire application fatally and incurably defective.

- v. In terms of r9(7) of the Constitutional Court Rules, all process initiating litigation, (such as an application initiating a challenge to the election of a president), shall be served by the Sheriff.
- vi. On the 10<sup>th</sup> of August 2018 the applicant herein purported to file, with the Registrar of the Constitutional Court, an application in terms of s93(1) of the Constitution of Zimbabwe as read with r23 of the Constitutional Court Rules. In that application, the applicant cited me, in my capacity as the Chairperson of the Zimbabwe Electoral Commission, as the 24<sup>th</sup> respondent; the Zimbabwe Electoral Commission as the 23<sup>rd</sup> respondent and the Chief Elections Officer of the Zimbabwe Electoral Commission as the 25<sup>th</sup> respondent.
- vii. Thereafter the applicant, through his legal practitioners, without the aid of the Sheriff and thus in violation of the rules of this Honourable Court, purported to serve a copy of that application upon the Zimbabwe Electoral Commission in the evening of the 10<sup>th</sup> of August 2018. A single copy was received at the Electoral Commission's offices at Mahachi Quantum Building. No copy of the application was served on me or on the 25<sup>th</sup> respondent on the 10<sup>th</sup> of August 2018 or subsequently. Suffice to state that the purported service on the 10<sup>th</sup> of August 2018 was defective.
- viii. As both filing, and service are constitutive of an application made in terms of s93(1) of the Constitution as read with r23 of the Constitutional Court Rules, the

defective service effected on the 10<sup>th</sup> of August 2018 rendered the applicant's application fatally and incurably defective.

- ix. The defects with the papers received at the 23<sup>rd</sup> respondent's offices on the 10<sup>th</sup> of August 2018 did not, however, end there. Upon perusal of the papers purportedly served by the applicant on the 10<sup>th</sup> of August 2018, it was noted that whilst the single bundle of bound papers was titled "**Court Application**", there was in fact no court application as prescribed under r16 of the Constitutional Court Rules, (form CCZ1), in that bundle. Let me be clear on this, I do not mean that there was a defective form CCZ1 in the bundle of papers but that there was no form CCZ1, defective or otherwise, in the bundle of papers. What was in the bound bundle of papers was a cover, a consolidated index, notices of addresses of service and a founding affidavit deposed to by the applicant with various annexures thereto.
- x. What was purportedly served by the applicant on the 10<sup>th</sup> of August 2018 was, therefore, not a court application but an indexed bundle of evidence and notices of addresses of service. I do not know whether on the 10<sup>th</sup> of August 2018 the applicant had in fact issued with the Registrar of the Constitutional Court a court application in form CCZ1.
- xi. On the following day, the 11<sup>th</sup> of August 2018, the Sheriff of Zimbabwe served three copies of the applicant's application at Mahachi Quantum Building, which copies now had as part of the bundle of documents, a court application. This was on the eighth day after the declaration of the result in the election sought to be

challenged by the applicant, contrary to the peremptory dictates of the rules of court viz. the filing of such an application and consequently, in violation of the seven-day period for lodging a petition against the election of a person to the office of the President of the Republic as prescribed in s93(1) of the Constitution of Zimbabwe.

- xii. Further, upon perusing the applicant's founding affidavit, it was noted that extensive reference is made to a separate bundle of documents purportedly filed together with his application, called the "**123 Series**". That bundle does not form part of any papers received at the Zimbabwe Electoral Commission's offices either on the 10<sup>th</sup> or 11<sup>th</sup> of August 2018. At the time of deposing to this affidavit, that bundle has still not been served on myself; the 23<sup>rd</sup> respondent or the 25<sup>th</sup> respondent.
- xiii. Further still, the applicants founding affidavit refers, in several instances, to compact discs that are said to be attached to the application. No such compact discs were served at the 23<sup>rd</sup> respondent's offices either on the 10<sup>th</sup> or on the 11<sup>th</sup> of August.
- xiv. It is these absent compact discs and separate bundle of evidence that the applicant avers contain the source material used in, *inter alia*, the statistical analysis that he refers to as the "main challenge" to the 1<sup>st</sup> respondent's election to the office of the President of the Republic.

- xv. It is not clear whether the separate bundle and the compact discs were filed with the Registrar of the Constitutional Court on the 10<sup>th</sup> of August 2018 and if so it is unclear why the applicant has elected not to serve them on the 23<sup>rd</sup> and 24<sup>th</sup> respondents and I in terms of the rules of court. As this separate bundle and compact discs are clearly intended to form an integral part of the applicant's founding papers in his challenge to the presidential election return, if they were not filed, the view can be taken, persuasively so, that what was filed by the applicant on the 10<sup>th</sup> of August 2018 was only half of his application. Indeed, what was served on the respondents was not the complete application in the absence of the bundles and compact discs referred to by the applicant. A party cannot file and serve a court application in instalments.
- xvi. Because of the Constitutional time limit prescribed in s93(1) of the Constitution, the applicant can no longer present any further founding papers to the Registrar of the Constitutional Court in respect of CCZ42/18. The separate bundle and the compact discs are thus no longer capable of being filed by the applicant in founding his cause in this matter. They most certainly are no longer capable of being served in conformity with the peremptory timeframes set out in the rules of court which timeframes determine whether a petition in terms of s93(1) of the Constitution has been duly lodged. It has not.
- xvii. Lest the points I make herein above be viewed as sterile and formalistic, I aver that they have a very practical and substantive significance in this matter. Matters initiated by notice of motion require, by peremptory dictate of our law, that the applicant make out his entire case in the founding papers. In turn, a respondent

served with an application ought to be confident that the case made out in the papers so served is the full case he/she is called to plead to. If the applicant by inadvertence, error or lack of diligence fails to incorporate all relevant evidence in his founding papers, it does not avail to him to seek to file further 'founding papers' to augment those originally issued and served. He stands or falls by his originally issued founding papers. If such a litigant could file and serve his founding papers in batches or waves, the respondent would be called upon, within a limited *dies induciae*, to continually re-evaluate the case he/she is called to meet.

- xviii. The applicant, therefore, has done two things in violation of the peremptory rules of court: he has failed to file a complete and therefore valid application with the Registrar of the Constitutional Court and he has failed to effect valid service of his application within the prescribed seven-day period. His application is thus fatally and incurably defective. It ought to be struck off the roll.

## **MERITS**

### **1. Ad Para 1.1.- 3.7**

No issues arise save to state that my address for service and that of the 23<sup>rd</sup> and 25<sup>th</sup> respondents is c/o Messrs Nyika, Kanengoni & Partners of 3<sup>rd</sup> Floor, ZIMDEF House, off Mother Patrick Road, Rotten Row, Harare.

### **2. Ad Para 3.8**

Save to state that the substance of the applicant's challenges is denied as appears more fully hereunder, no issues arise.

**3. Ad Para 3.9**

No issues save to point out that much of the evidence that the applicant wishes to place reliance upon is not part of the papers received by the 23<sup>rd</sup> respondent either on the 10<sup>th</sup> or the 11<sup>th</sup> of August 2018. For instance, the separate bundle is absent, the photographs are absent and the videos he refers to are absent. It is not clear whether the applicant filed the separate bundle, videos and photographs with the Registrar of the Constitutional Court on the 10<sup>th</sup> of August 2018.

**4. Ad Para 4.1**

Save to deny the veracity of the applicant's statistical/ mathematical grounds for challenging the presidential election return, no issues arise. A statistical report, referenced hereunder, is attached to my affidavit refuting the applicant's contentions.

**5. Ad Para 4.2-4.4**

This is denied. I deal in detail with the substance of the applicant's allegations against the Electoral Commission below. Suffice to state that there is no basis for the conclusions made by the applicant that there were constitutional and electoral law violations perpetrated by the 23<sup>rd</sup> respondent in its administration of the 2018 general elections. Further, the separately bound volume that the applicant refers to as the "123 series" was not served on me or the 23<sup>rd</sup> and 25<sup>th</sup> respondents. The evidence

alleged to be contained therein is, therefore, evidence that is no longer capable of finding its way into the record.

6. Ad Para 4.5

This is denied. Both the 23<sup>rd</sup> respondent and I as its chairperson are and have always been independent, transparent and accurate in the conduct of our functions. This is clearly confirmed by various election observer missions, (reports attached and related to in detail below), that have found the 2018 Zimbabwe general elections to have been conducted in a manner that was substantively and procedurally free, fair and credible.

7. Ad Para 4.5.1-4.5.3

This is denied.

7.1. Firstly, the footage and newspapers that the applicant refers to were never served upon me or the 23<sup>rd</sup> and 25<sup>th</sup> respondents. It is difficult to effectively engage with the issue raised by the applicant in this respect in the absence of the evidence upon which he bases his allegations against the 23<sup>rd</sup> respondent and the conduct of the state-owned media.

7.2. Secondly, because the evidence sought to be relied upon is absent from the applicant's papers which were served on us, it cannot readily be ascertainable as to whether what the applicant complains of against the state-owned media is editorial in nature or not. I say so considering the provisions of s 61(4)(a) of the Constitution of Zimbabwe which guarantees that all state-owned media of

communication must be free to determine independently the editorial content of their broadcasts or other communications.

7.3. Thirdly, in terms of the Zimbabwe Electoral Commission (Media Coverage of Elections) Regulations, 2008, s10 thereof, remedies are provided to participants in an election who allege malpractice or breach of the law by state media of communication. It was open to the applicant, in terms of those regulations, to lodge an appeal with the Electoral Commission against any decision of any state-owned media institution that he considered to be outside the parameters of the law. This includes any questions of bias as alleged by the applicant. A further right to appeal to the Electoral Court from any decision of the Electoral Commission on the issue is afforded, all in a context of very speedy and effective process of resolution of any grievances that may arise during an election period viz. media coverage. It is common cause that the 23<sup>rd</sup> respondent never received any appeal from the applicant with respect to media coverage during the electoral period in terms of the Zimbabwe Electoral Commission (Media Coverage of Elections) Regulations, 2008.

**8. Ad Para 4.5.4- 4.5.5**

This is denied.

8.1. The applicant makes a bare allegation for which he proffers no evidence. The Electoral Commission is not involved in the selection and appointment of polling agents by candidates.

8.2. The mention of 'Alexandra Mujayi' and 'Oliver Mafungo', by the applicant, is not linked to any other relevant information such as the villages they are said to head, polling stations that they are said to have acted as agents, the political party or candidate for whom they are alleged to have so acted.

8.3. Further, the applicant lodged no complaint with the Electoral Commission in terms of s239(k) of the Constitution of Zimbabwe viz. the incidents of use of traditional leaders in electoral processes that he alleges. The matters thus did not come to the Electoral Commission's attention for resolution.

8.4. Regarding the 'rogue elements' the applicant refers to as identifying themselves as being from the security sector, the averment is lacking in particularity that there is no cogent way to plead to it. No specific incidents are referenced. No affidavits by affected voters are furnished. All that is presented are bald and general averments, which, in motion proceedings, serve to establish nothing.

8.5. The lack of specificity, with respect, cannot then demonstrate as the applicant seeks to do, that the 23<sup>rd</sup> respondent has breached its constitutional and statutory duties, more so where the weight of reports by regional and international election observer missions have endorsed the 2018 general election as having been conducted in a peaceful, free and fair manner.

**9. Ad Para 4.5.6- 4.5.7**

No issues.

**10. Ad Para 4.5.8- 4.5.10**

This is denied.

10.1. The applicant once again makes bald and general averments without producing any proof before the court of his averments. Whilst averring that ZANU PF has refuted any allegations that it obtained voters' cell phone numbers from the 23<sup>rd</sup> respondent the applicant dismisses the refutation with no evidence apart from his own belief that the only possible source of the cell phone numbers was the 23<sup>rd</sup> respondent. Contrast this with how he readily accepts the refutation by cell phone service providers with no greater evidence than the same type of refutation that was done by ZANU PF.

10.2. For the avoidance of doubt, the Zimbabwe Electoral Commission does not, and has never shared confidential voter information such as voter cell phone numbers with any political party. The Electoral Commission issued a press statement making this clear, which I attach hereto marked **Annexure 'A'**. As the applicant makes a contrary assertion, it was incumbent upon him to present the proof for such assertion in his founding papers. He has failed to do so.

10.3. Further, every voters' roll provided to political parties or to any member of the public in terms of the law, contains the addresses of the voters registered thereon.

10.4. By affidavit in opposition to an urgent chamber application filed by one Sikhumbuzo Mpfu, **HC6545/18**, which matter relates to the allegation that the Electoral Commission has supplied voters' cell phone numbers to ZANU PF, the 2<sup>nd</sup> respondent therein, cited as CDE Haritatos, refutes the allegation that he was

supplied any voter cell phone numbers by the Electoral Commission. He avers therein that any voter cell phone numbers that he has have been derived from his own door to door campaigns. I attach a copy of that affidavit hereto marked **Annexure 'B'**.

10.5. The court records referred to by the applicant which he avers will be placed before the court in furtherance of his allegation viz. provision of cell phone numbers, have not been identified as to allow me or the other respondents to consider them and address their contents if need be. Again, the applicant relies on evidence that he has kept to himself.

10.6. The applicant's request for a full BVR voters' roll, and similar requests by other political parties and individuals, was denied on grounds that were clearly stated by the Electoral Commission. A press statement by the Electoral Commission to that effect, attached hereto marked **Annexure 'C'**, clearly advised the public, thus including the applicant and his political party, that the voters' roll with voters' pictures would not be availed to the public or to political parties and candidates in the election to safeguard voter information and privacy. The Electoral Commission's fears with respect to the security of voter information were very well grounded.

10.7. The voters' rolls provided to stakeholders and interested persons or institutions in terms of the provisions of the Electoral Act, in their electronic iteration, are encrypted with stakeholders being provided unique passwords to allow them to access the information on the voters' roll.

10.8. The electronic voters' roll is searchable and analysable as required by the law, but it generally cannot be edited as the Electoral Commission maintains a level of encryption on the said voters' roll which prevents the editing of the voters' roll.

10.9. However, like all encrypted electronic documents, there is a possibility that their security features can be by-passed through computer hacking. The Electoral Commission's belief, however, upon issuing the electronic voters' roll, had always been that it is adequately secured.

10.10. Events during the election period, however, caused the Electoral Commission to reconsider this belief. It came to the Electoral Commission's attention that a website called [www.zimelection.com](http://www.zimelection.com) has been established, on which site appear downloadable copies of the electronic voters' roll. These downloadable copies no longer had the Electoral Commission's encryption and were thus capable of being edited. I attach hereto, marked **Annexure 'D'**, screen grabs from the website that illustrate the averments I make herein.

10.11. In terms of our law, the keeping, maintenance and dissemination of voters' rolls lies in the exclusive purview of the Electoral Commission. This is what underpins the criminal sanction provided in s21(9) of the Electoral Act, [Cap 2:13], against anyone who tampers with or attempts to profit from the voters' roll.

10.12. The reasonable fear that the Electoral Commission thus held, is that once an electronic copy of the voters' roll containing voters' pictures is issued to the public,

the potential for decryption of that voters' roll as to render it editable, (as has occurred with the voters' roll that is currently being provided), is high. Once that voters' roll is editable, it is possible for the information thereon to be used for purposes other than what the voters' roll has been issued for. This may include identity theft and the removal or addition of names onto the voters' roll among other forms of manipulation of the voters' roll.

10.13. Already the hacking of the electronic voters' roll that the Electoral Commission affords to the public, (as averred above), has resulted in a denting of the credibility of the voters' roll, (I reaffirm that the country's voters' roll is indeed credible, but facts seldom trump opinion in these matters). For instance, the July 12, 2018 edition of the NewsDay newspaper carried an article titled ***'Zec beefs up voters' roll'***. One of the issues reported in that article were the allegations, (already addressed herein above), that the Electoral Commission had afforded confidential information on the voters' roll, (cell phone numbers), to a political party contesting the election. The allegation is false but the damage to credibility is real and arises not from any failure by the Electoral Commission but by acts that are extrinsic to the Electoral Commission. The article also quotes the Minister for Information Technology and Cyber Security weighing in on the issue of hacking of the electronic copy of the voters' roll afforded to members of the public in the context of a website established whereon a decrypted electronic voters' roll appears. For clarity, the Electoral Commission's own database has not been hacked but individuals have clearly hacked the copies of the electronic roll they were given as to remove the security features/ encryption thereon.

10.14. The Electoral Commission's apprehension necessarily extends to the printed voters' roll as well. Once an editable version of the electronic voters' roll with voters' pictures is in the public domain, it is possible to print out an edited copy of that voters' roll. Where valid printed rolls with voters' pictures are in the public domain, many would be incapable of distinguishing the genuine rolls from the manipulated ones. Again, this unduly erodes the credibility of the electoral process.

10.15. These events spoke to the prudence of shoring up the credibility of the voters' roll to safeguard voter information and prevent the possibility of identity theft and motivated the Electoral Commission's decision not to avail the BVR roll to any political party or individual. The decision was not made with respect to the applicant alone but to all candidates and political parties contesting the 2018 general elections.

10.16. Further, the reasonableness of the privacy considerations relating to release of the BVR roll were considered in the matter of **Ethel Mpezeni v The Electoral Commission of Zimbabwe & 10 Others HC6332/18**, wherein the applicant approached the High Court seeking an order barring the Electoral Commission from making public a voters' roll with her picture on it. Her reason for seeking such relief was that she feared that such a voters' roll was in violation of her right to privacy as enshrined in s57 of the Constitution of Zimbabwe. Her application was duly granted on the terms and basis that she had presented it to the court.

10.17. The reasons for the denial of the BVR roll are thus, not abstract or absent as the applicant avers but are cogent and have received favourable judicial notice.

**11. Ad Para 4.5.11**

No issues.

**12. Ad Para 4.5.12- 4.5.13**

This is denied.

12.1. Firstly, the reports that the applicant refers to as having shown 'serious discrepancies' in the voters' roll have neither been shared with the respondents nor identified/named by the applicant. The separate bundle in which they are said to be contained was, as I have already averred, never served on me or the 23<sup>rd</sup> and 25<sup>th</sup> respondents.

12.2. Secondly, the Electoral Commission, through a press statement of the 10<sup>th</sup> of June 2018, called upon stakeholders that wished to conduct independent audits of the voters' roll to do so and share their findings with the Electoral Commission. I attach that statement hereto marked **Annexure 'E'**. The only organisation that shared its findings with the Electoral Commission was the Zimbabwe Election Support Network, (ZESN), which report gave a positive assessment of the voters' roll prepared by the Electoral Commission. I attach a copy of that report hereto marked **Annexure 'F'**. If there are other reports as referenced by the applicant,

which were not shared with the Electoral Commission, the Commission cannot be judged based on findings in those reports which it is not privy to.

12.3. Thirdly, there is extensive provision in the Electoral Act, (s28 and s29 of the Electoral Act), for voters to raise objections to the maintenance of certain registrations on the voters' roll which they believe ought not to appear thereon. The applicant does not state whether, upon considering the reports he refers to, he or the compilers of those reports, availed themselves to the processes and procedures outlined in the Electoral Act to remedy the anomalies they allege or caused properly placed voters to take up such processes.

**13. Ad Para 4.5.14- 4.5.15**

This is denied.

13.1. The nomination court for the 2018 general election sat on the 14<sup>th</sup> of June 2018. Prior to that date there were no candidates to speak of in respect of the 2018 general election.

13.2. As at the 5<sup>th</sup> of February 2018, there were no election campaigns being conducted or promotional material in respect of the 2018 general election being flighted in the media. It is thus common cause that we were still in the pre-election period on or about that date.

13.3. The applicant avers that I wore an article of clothing associated with a candidate and used in his campaign and promotional material in breach of the law

on the 5<sup>th</sup> of February 2018, some four months before the sitting of the sitting of the nomination court.

13.4. As at the 5<sup>th</sup> of February 2018, the scarf referred to by the applicant, which bears the colours of the Zimbabwean flag, had no link, connection or association with any presidential election campaign. It may be useful to narrate the history of the scarf and its rise to prominence to illustrate my point.

13.5. The scarf made its first appearance at the Davos World Economic Forum held from the 23<sup>rd</sup> to the 26<sup>th</sup> of January 2018 where the Zimbabwean delegation, led by the President of the Republic, who is also the 1<sup>st</sup> respondent in this matter, all wore the same scarf. I attach hereto, an article marked **Annexure 'F'** which was written at the time of the Davos Word Economic Forum which highlights that the scarf was not a partisan but a national symbol.

13.6. By the 5<sup>th</sup> of February 2018, the Davos World Economic Forum had ended only ten days prior. How the scarf is said to have morphed, in that ten-day period, when it was still in the very early stages of its rise to prominence, from a symbol of national pride to a symbol of a presidential election campaign is unexplained by the applicant.

13.7. His averments are thus, once more, bald and unsubstantiated.

13.8. While it is true that I tried on a scarf designed by Miss Celia Rukato, a young Zimbabwean designer whose vision is to build national consciousness and that a photograph was taken with my consent to promote the designer it is baseless and

malicious to assert that the wearing of the scarf is therefore a sign of bias. I could not have known or anticipated at that date that 1<sup>st</sup> respondent would go on to make that scarf his trademark.

13.9. This allegation is at one with the misogynistic attacks on my person and professional integrity by the applicant and his supporters. Applicant is a registered legal practitioner and an officer of the court who went on record on numerous public occasions to cast aspersions on the whole judiciary in Zimbabwe and on me in particular. His conduct was unbecoming for an officer of the court.

**14. Ad Para 4.5.16**

I reiterate the averments I have already made in respect of the provision of the BVR voters' roll. Further, from the inception of the biometric voter registration exercise in 2017, the Electoral Commission has always been clear that the voting method to used for the 2018 general election would not be biometric. I attach a press statement to that effect hereto marked **Annexure 'G'**.

**15. Ad Para 4.5.17- 4.5.19**

This is denied.

15.1. Firstly, in terms of s40C(1)(c) of the Electoral Act, political parties can conduct voter education.

15.2. Secondly, the request that was made by ZANU PF to the Electoral Commission was that they be provided with sample ballots for each electoral race contested in the 2018 general election i.e. a sample ballot relating to each constituency or ward under contestation in the poll. The response by Dr. Qhubani Moyo was that the Electoral Commission would only give each political party three sample ballots, one for presidential elections, another for House of assembly elections and one for local authority elections. This is what was made available to all political parties including the applicant's own party. I attach hereto an affidavit by Dr. Qhubani Moyo relating to this issue marked **Annexure 'H'**.

15.3. Thirdly, there is no basis for the allegation that the provision of sample ballot papers, which was done for every political party contesting the election, created fertile ground for rigging through ballot swapping and stuffing. I attach hereto, marked **Annexure 'I'**, a sample ballot for the presidential, house of assembly and local authority elections. These sample ballots are clearly endorsed "**SAMPLE**". How such a ballot could be swapped and pass for the actual ballots used in the election is again not explained by the applicant.

15.4. Further, and in any event, if the applicant holds a well-grounded fear that there was ballot swapping and stuffing using sample ballots in the election, he had the opportunity to seek the unsealing of election residue and inspect same for any sample ballots.

15.5. Further still, the counting process at the close of the poll is witnessed by polling agents and election observers, if any instances of sample ballots having found their

way into ballot boxes, as the applicant alleges, existed, surely the thousands of polling agents and scores of election observers across the country would have picked that up during the count.

**16. Ad Para 4.5.20- 4.5.23**

This is denied.

16.1. This issue has already been decided by a court of competent jurisdiction having come before the Electoral Court in EC09/18, a matter between **People's Democratic Party v Chairperson of ZEC & Anor**, wherein the applicant challenged the design of the presidential election ballot paper on grounds identical to those raised herein by the applicant. The Electoral Court found in that matter that the presidential election ballot, as designed by the Electoral Commission, was in compliance with the law.

16.2. The ballot paper design, having followed the law, cannot give rise to an allegation of bias on the part of the Electoral Commission. In any event, whilst the applicant alleges that the ballot paper design was meant to afford the 1<sup>st</sup> respondent a material advantage, he does not state in what way such advantage is alleged to have arisen or manifested. He attaches no affidavits from any voters who aver that the design of the ballot paper caused them to vote for the 1<sup>st</sup> respondent against the will or unduly influenced them to vote for the 1<sup>st</sup> respondent or caused them confusion in identifying their preferred presidential candidate on the ballot paper.

**17. Ad Para 4.5.24**

No issues.

**18. Ad Para 4.5.25**

This is denied.

18.1. The separate bundle of evidence that the applicant refers to has not been availed to the respondents.

18.2. Polling station returns were affixed to all polling stations established by the Electoral Commission for the conduct of the 2018 general election. No proof has been placed before the court by the applicant indicating that there are polling stations where the returns were not affixed as required by the law.

18.3. It is not indicated at which polling stations the applicant alleges the returns were not affixed and whether he had polling agents stationed at such polling stations and if so why no affidavits have been deposed to by such agents in support of the applicant's averment that 21% of polling stations did not have returns affixed in terms of the law.

18.4. Having made the allegation, the applicant was enjoined to prove it in his founding papers. He has failed to do so.

**19. Ad Para 4.5.26**

This is denied.

19.1. Firstly, the applicants founding papers have not proven an irregularity as alleged. The applicant makes no more than a bare allegation.

19.2. Secondly, the conclusion made by the applicant, from this bare allegation, is that the Electoral Commission rigged the presidential election with no evidence furnished and no explanation given as to how the alleged rigging is said to have taken place.

19.3. An applicant in motion proceedings ought to make out his full case in the founding papers and if, as he has done herein, he makes bald and unsubstantiated allegations, his application cannot possibly succeed. Surely if the applicant had polling agents at the unidentified polling stations he alleges did not have returns affixed, those agents would have been given V11 forms before the return for the polling station is affixed in terms of the law. The applicant does not in this context present his V11 forms and contend that the V11 forms that the Electoral Commission has are different from what he has. If he did not have polling agents at the unidentified polling stations how does he conclude that the alleged failure to affix a return in terms of the law occurred or resulted in the alleged rigging at those unidentified polling stations?

19.4. In the context of a challenge to an election return, it is not enough for the applicant to give broad, sweeping statements as a basis for the relief he seeks. He must illustrate in his papers how the tally of votes was affected by an issue that he raises as a ground for his challenge. He fails to do so.

**20. Ad Para 4.5.27- 4.5.31**

This is denied.

20.1. The bundle of evidence that the applicant refers to as containing proof of the malpractice he alleges occurred during postal voting was not served on the respondents. It is unclear whether it was issued together with the applicant's application.

20.2. The applicant's premise that 7500 police officers voted through the postal voting system in the 2018 general election is not correct. The total number of people that were permitted to cast a postal vote in the 2018 general election was 7464, as appears in the schedule attached hereto marked **Annexure 'I'**. A consideration of annexure 'I' shows that of the total number, police officers constituted 4482. It is, therefore, misleading for the applicant to aver that some 7500 postal ballots for police officers were processed in the 2018 general election and ought to be invalidated.

20.3. The chief question that must be considered on this issue is whether the secrecy of the ballot was compromised. The Electoral Commission has received no complaints from any of the police officers that participated in the postal vote to the effect that they were not allowed to mark their ballots in secret and in the manner that they wished. Similarly, there are no affidavits placed before the court by the applicant from affected voters showing that there was a coercive process

by which the voter was made to vote other than by secret ballot and for a candidate(s) other than a candidate of his/her choice.

20.4. Further, a challenge to the postal voting process for the 2018 general election has previously been taken before the Electoral Court by the applicant's party the MDC-Alliance in the matter of **Movement for Democratic-Change v Zimbabwe Electoral Commission & The Commissioner-General Zimbabwe Republic Police EC01/18**. That application was dismissed as the applicant failed to put any evidence before the court in the form of affidavits by affected voters showing that the postal voting process had been compromised and, therefore, ought to be invalidated. The grounds for the dismissed challenge are the same as those taken up by the applicant in the present matter and the absence of evidence is the same.

**21. Ad Para 4.5.32- 4.5.33**

This is denied.

21.1. The process of collation and verification of the presidential election results was done transparently, and the applicant's agents, Mr. Morgan Komichi and Mr. Jameson Timba had full access to the results collation room at the Electoral Commission's national command centre.

21.2. An email was sent by the Electoral Commission to all presidential chief election agents, including the applicant's agents, inviting them to come and verify the presidential election results. I attach a copy of that email hereto marked **Annexure 'J'**.

21.3. Further, I personally called upon all chief election agents for the presidential election to come for collation and verification of the presidential election results on a live ZBC broadcast from the Electoral Commission's national command centre. I attach a compact disc with the relevant footage hereto marked **Annexure 'K'**.

21.4. Further, one of the applicant's presidential election agents, Mr. Jameson Timba, is quoted in the NewsDay newspaper confirming that they were in the process of verifying the presidential election results. I attach a copy of that article hereto marked **Annexure 'L'**.

21.5. Further, I attach hereto a photograph of Mr. Jameson Timba in the results collation room, marked **Annexure 'M'**. Also appearing in the photograph are the presidential election agents for the NCA and ZIPP political parties. The photograph was taken during the collation and verification process for the presidential election results.

21.6. Further still, I attach hereto, marked **Annexure 'N'** and **'O'** respectively, affidavits by Mrs. Mavis Mudiwakure, the Electoral Commission's Director Election Logistics and Mrs. Pamela Mapondera the Electoral Commission's Director for Information and Communications Technology both of whom were stationed in the results collation room. They both confirm that the applicant's chief election agents were present for the collation and verification of presidential election results. Mrs. Mavis Mudiwakure narrates how candidates' election agents, including Mr. Jameson Timba for the applicant, requested and were furnished with V11 and V23

forms for them to check and verify any issues that they wished to so verify during the collation and verification process. Mrs. Pamela Mapondera relates, in addition to the various election agents, to the election observer groups that visited the results collation room during the entire collation and verification process.

21.7. It is, therefore, not correct that the process of collating and verifying presidential election results was done under a cloud of secrecy.

**22. Ad Para 4.5.34- 4.5.35**

This is denied.

22.1. The bundle of evidence referred to by the applicant was not served on the respondents herein.

22.2. The Electoral Commission reported all instances of political violence that were brought to its attention to the Zimbabwe Republic Police. I attach hereto marked **Annexure 'P'** some of the referral letters by the Electoral Commission to the ZRP of instances of political violence and referrals to the Human Rights Commission.

22.3. Further, I attach hereto marked **Annexure 'Q'** extracts from reports by various election observer missions, namely ECF SADC observer mission; COMESA observer mission; SADC PF observer mission, African Union observer mission; SADC observer mission and the NORDIC observer mission, which have the general conclusion that the electoral environment leading up to and during voting in the 2018 general elections, was peaceful. The full reports are contained in a compact

disc attached hereto as **Annexure 'Q1'**. I also attach the statement I made at the 2018 peace pledge hereto marked **Annexure 'R'**.

22.4. The allegation that the Electoral Commission took no action to address instances of politically motivated violence is, therefore, not correct.

**23. Ad Para 4.5.36**

No issues.

**24. Ad Para 4.5.37**

This is denied. The Electoral Commission does not have evidence of the systematic distribution of inputs geared at inducement to vote for a particular political party or candidate and none appears to have been proffered by the applicant in his papers.

**25. Ad Para 4.5.38- 4.5.39**

This is denied.

25.1. The applicant has not established, through evidence, the averments in his paragraph 4.5.37 and having failed to do so the follow up in paragraphs 4.5.38 and 4.5.39 do not arise.

25.2. As already averred, any complaints received by the Electoral Commission were referred to the ZRP and the Human Rights Commission for appropriate action.

25.3. The applicant has not placed before the court any complaint lodged with the Electoral Commission alleging a malpractice in terms of s136(1)(c) of the Electoral Act let alone the subsequent evidence, had such complaint been placed before the court, that the Electoral Commission did not act upon it.

**26. Ad Para 4.4.40- 4.4.43**

This is denied. I refer to the various observer reports that I have attached hereto which give the electoral process administered by the Electoral Commission a passing grade in terms of freeness, fairness and credibility.

**27. Ad Para 4.6**

This is denied.

27.1. The A series, attached to the founding papers, consists of five V11 forms. There was a total of 10 985 polling stations in operation during the 2018 general election. There are also ten provinces in Zimbabwe thus at least five provinces are not represented on the V11s forming the applicant's A series. Five V11s out of 10 985 polling stations and out of ten provinces is by no means representative of the pattern that the applicant alleges in his paragraph 4.6. No trend can be established by the applicant's sample.

27.2. In any event, where the actual data for the 2018 general election is available, no meaningful purpose can be served by the hypothetical that is postulated by the applicant's sample. But even if one considers sampling that was being done during

the conduct of the 2018 general election by the largest election observer group on the ground, ZESN, their report shows consistency with the results declared for the presidential election by the Electoral Commission. I attach a copy of that report hereto marked **Annexure 'S'**.

27.3. Applicant also alludes to having sourced the said V11s from social media, suffice to remind him that a V11 form is obtained through the provisions of s64(1)(d1) of the Electoral Act. The authenticity of his source of data is thus in doubt.

**28. Ad Para 4.7**

This is denied.

28.1. Once again, the applicant makes a bald averment based on no evidence. Nothing is placed before the court to prove or demonstrate the alleged stopping of counting which he seeks to present to the court as a fact. No affidavits by election agents stating that counting was stopped and at what polling stations it was stopped as alleged. No observer reports recording the phenomenon alleged by the applicant that there was an abrupt stoppage of counting are either attached or referenced by the applicant. Indeed, no observer group noted the phenomenon alleged by the applicant.

28.2. For the avoidance of doubt, counting at all polling stations was conducted in the normal manner as prescribed by the Electoral Act without any stoppages as alleged by the applicant.

**29. Ad Para 4.8**

This is denied.

29.1. The results of the 2018 general elections were announced as they became available.

29.2. The proximity of Harare province polling stations to the national command centre has no bearing on the speed with which the counting process in those polling stations is conducted and hence the time at which results from those polling stations, wards and constituencies become available. In fact, Harare province was the last to avail full results. It must be borne in mind that Harare province has a high voter population and that it had the highest number of candidates contesting in the national assembly and local authority elections.

29.3. The applicant places no evidence before the court, be it in the form of affidavits by his election agents in Harare stating that counting was concluded early but results announced last or reports by election observers to the same effect. In any event, the applicant does not relate his averments in this respect to the nub of his challenge. The announcement of results, in whatever sequence, does not affect the outcome of an election. If a candidate garnered 10 votes in a particular constituency, that tally is not changed whether that result is announced first or

last. In my reading of the applicant's papers he does not challenge the correctness of the results declared for Harare province.

29.4. Further, and in any event, in terms of s66(1) of the Electoral Act the declaration of results for National Assembly elections is done at the constituency level by the constituency elections officer. The announcement of that result at the national command centre satisfies no legal requirement and as such grounds no legal challenge to the elections.

**30. Ad Para 4.9**

This is denied.

30.1. Whilst it is correct that the presidential ballots are counted first the transmission of results from a polling station by a presiding officer to the ward centre is done at the same time for all three electoral races under consideration i.e. the presidential ballots are counted first then we move on to the House of Assembly ballots and lastly, we count the local authority ballots. Only after all have been counted and their returns duly completed, does the presiding officer leave the polling station to take the results and the election residue to the ward centre.

30.2. In terms of s110(3)(f) of the Electoral Act there is no requirement to announce presidential election results for each constituency. Notification of the results for each constituency is in any event done at the constituency collation centres by posting of V23 forms. The statutory obligation created by s110(3)(f) of the Electoral Act relates to the declaration by myself, in my capacity as the

Chairperson of the Electoral Commission, of the winner in the presidential election, which I did in terms of the law, or declaration that a runoff presidential election shall be held if the results call for one, the results in the 2018 presidential election do not call for a runoff presidential election.

**31. Ad Para 5.1**

Despite the applicant's averments under paragraph 4.5.32 and 4.5.33 of his founding affidavit to the effect that his election agents were not notified of the date and place of verification and were not given an opportunity to make notes of the contents of constituency returns, the applicant under paragraph 5.1 of his founding affidavit makes the opposite averment. He admits that his election agents were called for a verification process, he admits that they heeded this call and came to the 23<sup>rd</sup> respondent's national command centre where the verification was taking place, he admits that his agents were present when the verification process was underway, he admits that the verification process went on for two days with his election agents in attendance. This coupled with the affidavits by Mrs. Pamela Mapondera and Mrs. Mavis Mudiwakure attached and already referenced, shows that not only were his agents in attendance, they participated in the verification process. As part of the verification process, the applicant's election agents, election agents for other presidential candidates as well as election observers had full access to the original V11s and V23s with respect to the presidential election from which they could make notes as they required.

**32. Ad Para 5.2**

This is denied.

32.1. Transmission of results from polling stations, wards and constituencies is done manually. This is consistent with the provisions of s64(2) of the Electoral Act. The Electoral Commission had no server set up at the national command centre or anywhere else, on which results were sent and stored in real time as the applicant suggests.

32.2. His suggestion is also curious as it comes immediately after he avers that for close to two days the Electoral Commission's staff were busy manually entering data from original V11 forms onto an excel spreadsheet.

32.3. As he has alleged the existence of a server, it is incumbent upon the applicant to prove his allegation. Again, he places no evidence before the court in respect of this issue.

**33. Ad Para 5.3- 5.4**

This is denied.

33.1. Advocate Thabani Mpofu, Mr. Morgan komichi and Mr. Jameson Timba met with the Electoral Commission's acting Chief Elections officer Mr. Utloile Silaigwana and the Secretary to the Commission Mr. Dominico Chidakuza, at the 23<sup>rd</sup> respondent's national command centre. They were advised that there is no server being kept by the Electoral Commission for the transmission of election

results. I attach hereto, marked **Annexure 'T'** a supporting affidavit by Mr. Utloile Silaigwana, the 25<sup>th</sup> respondent, relating to this issue among others.

33.2. The letter referred to by the applicant has the same enquiry that was addressed fully in the meeting with the CEO and the Secretary to the Commission. The applicant was thus given a full response to the substance of his enquiry. The insinuation that there has not been a response to his enquiry is thus not true.

**34. Ad Para 5.5**

This is denied.

34.1. Verification of presidential election results was done over the two-day period that the applicant acknowledges his election agents were present and participating at the national command centre.

34.2. The verification process itself consisted of election agents verifying the V11s and V23s that the Electoral Commission had and was using to compile the full result of the presidential election.

34.3. As I have already averred, over the two day period, the applicant's election agents had unlimited access to all the original V11 and V23 forms relating to the presidential election and had the opportunity, at their discretion, to make notes from those V11 and V23 forms or to raise any queries with the Electoral Commission officials where they had problems with the information that was on

the V11s and V23s being used by the Electoral Commission versus what they had through their own election agents from various polling stations.

34.4. As already averred, Mr. Jameson Timba during this process, had occasion to request V11 and V23 forms for several constituencies, he examined those forms and made whatever notes he wished to make, he did not raise any queries with respect to those V11s or V23s.

34.5. Further, as I have already averred, there was no server kept by the Electoral Commission on which election results were transmitted from polling stations and stored.

34.6. In terms of s110(3)(d) of the Electoral Act, the subject of a verification process are the actual returns from the various constituencies across the country. These returns consist of the V11 and V23 forms. The addition of the figures specified on the V11 and V23 forms on an excel spreadsheet is not the verification described in s110(3)(d).

34.7. The process prescribed by law is what was happening over the two day period confirmed by the applicant where full and unlimited access was granted to all presidential candidates and their agents to the various original returns from the constituencies allowing them, if they believed any data recorded thereon was incorrect, to question such data and have the query so raised related to and dealt with by the Electoral Commission.

**35. Ad Para 5.6- 5.8**

This is denied.

35.1. The applicant, with respect, contradicts himself in this paragraph. Having previously averred in paragraph 5.1 of his affidavit that on August 1<sup>st</sup> his election agents, Mr. Komichi and Mr. Timba, were called for verification of the presidential election results and that that process took two days, his deposition under paragraph 5.6 that no verification took place is at variance with his previous evidence.

35.2. Verification of presidential election results in terms of s110(3)(d) of the Electoral Act took place.

35.3. Because the provisions of Part XIII of the Electoral Act are imported, with necessary changes, into s110 of the Electoral Act, (except for sections 66, 67 and 68), it may also be helpful to refer to the provisions that describe and give colour and context to the verification process in Part XIII of the Act, these are s65(2)(b), s65A(2)(b) and s65B(2)(b).

35.4. In all three subsections, the process of verification enjoins ensuring that each return purports to be duly certified by the presiding officer of the polling station concerned or the ward elections officer for the ward concerned or constituency elections officer for the constituency concerned respectively. This is why the original returns are used in the verification process and candidates and their election agents, including the applicant's election agents, were given full access to those returns during the verification process as I have averred above.

35.5. The provisions of s110 of the Electoral Act are such that the absence of any candidate or his/her election agent does not stop the process prescribed in that section from proceeding to its conclusion. An illustration can be found in the provisions of s110(3)(d) and s110(3)(e) which both require the Electoral Commission's CEO to act in the presence of those election agents **as are present**. Section 110 does not, therefore, mandate that a declaration in terms of s110(3)(f) shall only be done where the candidates' election agents have signed off on the results of the presidential election. In any event, the Electoral Commission's CEO denies the statements and assurances that are attributed to him in the applicant's founding papers in this respect and says as much in his affidavit attached hereto and already referenced above.

**36. Ad Para 5.9- 6.1**

This is denied. The process as provided in the electoral law relating to collation, verification and announcement of presidential election results was followed by the Electoral Commission as I have illustrated herein above. Any mathematical error that may have occurred in the process is neither gross nor sufficient to overturn the outcome of the presidential election and thus cannot ground the vacation of the declaration I made in terms of s110(3)(f)(ii) of the Electoral Act. I also refer to the statistical report attached hereto in support of my averment herein. The report is marked annexure 'Z' and is referenced below.

**37. Ad Para 6.2**

This is denied. I reiterate my averments made above.

**38. Ad Para 6.2.1**

This is denied.

38.1. All V11s and V23s for the presidential election were physically delivered by all relevant elections officers to the Electoral Commission's national command centre and formed the basis of collation and verification of the results for the presidential election.

38.2. I have, in my depositions thus far, shown that not only were the original V11 and V23 forms used in the collation and verification of presidential election results at the national command centre but also that the applicant's election agents were involved in that process and were given, upon request, access to any of the V11 and V23 forms for purposes of verification.

38.3. The provisions of s110 of the Electoral Act do not oblige the Electoral Commission, in the declaration of a winner in a presidential election, to announce constituency totals. That no constituency totals were announced, therefore, cannot be a basis for a legal challenge to the results of the presidential election. In any event, the averment by the applicant regarding announcement of constituency totals must always be linked to a material change in the election's outcome as to justify the relief that he seeks. He does not make this link in his founding depositions.

**39. Ad Para 6.2.2**

This is denied. verification was done. Election agents had access to all the source documents used to collate the presidential election results. Election agents were at liberty to raise any queries with the Electoral Commission's officials with respect to any return. In fact, I am advised that the 8<sup>th</sup> respondent's chief election agent was one of the election agents that did in fact raise a query with the Electoral Commission during the collation and verification process with respect to the return for Makokoba constituency as there was an unsigned V11 that had been sent to the national command centre. The query was addressed, and the relevant presiding officer sent the duly signed V11 to the national command centre.

**40. Ad Para 6.2.3- 6.2.4**

This is denied.

40.1. There was no server used by the Electoral Commission for transmission of election results.

40.2. Verification was done in terms of the law. The V11 and V23 forms were available and were used in that process.

40.3. The excel spreadsheet was a tool for addition of totals. It is not part of the verification in terms of the law. Even when one considers the statutory framework set out in s110 of the Electoral Act, verification is provided for under s110(3)(d) and thereafter addition of the verified totals is provided for under s110(3)(e). The later does not factor into the former. The verification provided for in s110(3)(d) was done.

40.4. The applicant had election agents at polling stations across the country. Whilst he was granted unlimited access to V11s and V23s at the national command centre during the verification process, he himself also had the same source documents available to him through his own election agents. On what grounds the Electoral Commission would then seek to deny his chief election agents access to source documents that it had already given to his election agents across the country is not explained and demonstrates that the version of events narrated by the applicant is not true. His chief election agents had access to all the source documents for the verification exercise. They did access those documents. They made notes from those documents. They raised no queries on those documents.

**41. Ad Para 6.2.5**

This is denied.

41.1. As I have already averred the provisions of s110 of the Electoral Act, do not enjoin that election agents or candidates must sign off on results prior to their announcement and the declaration in terms of s110(3)(f).

41.2. The mischief behind excluding such a requirement is that the process outlined in s110 of the Electoral Act ought not to be susceptible to being taken hostage by any of the candidates contesting the election.

41.3. I also refer to the affidavit by the Electoral Commission's acting CEO Mr. Utloile Silaigwana already referenced above which sheds further light on the relevant events of the 2<sup>nd</sup> and 3<sup>rd</sup> of August 2018.

**42. Ad Para 6.2.6**

This is denied.

42.1. In terms of s110 of the Electoral Act, there is no requirement that presidential election results be announced by constituency. What is provided for, as I have already averred, is that once the total votes have been tallied, I make a declaration consistent with those results, in terms of s110(3)(f). The applicant does not refer the court to the statutory provision grounding the contention that the procedure for the announcement of presidential election results and the declaration made were contrary to the law.

42.2. There being no basis for the applicant's objection to the announcement of presidential election results, the correlative conclusion by the applicant; that the 23<sup>rd</sup> respondent sought to misrepresent the results of the election, has no foundation. It is false and is denied.

**43. Ad Para 6.2.7- 6.3**

This is denied.

43.1. As I have already averred, what lies in the sole purview of the Chairperson of the Electoral Commission, (where available), is the declaration made in terms of s110(3)(f) of the Electoral Act. I made that declaration in terms of the law.

43.2. What the various Commissioners of the Electoral Commission announced were provincial totals. Nothing in the Electoral Act bars this. None of the Commissioners made any declaration in terms of s110(3)(f).

43.3. The applicant does not explain in his affidavit how he concludes that the way the election results were announced affected the eventual outcome. He simply makes a bare allegation which is, in any event, not supported by the relevant provisions of the Electoral Law.

**44. Ad Para 6.4- 6.4.3**

This is denied.

44.1. Annexure C to the applicant's papers is not a document originated by the Electoral Commission. The Electoral Commission cannot vouch for its authenticity.

44.2. Whilst the applicant avers that annexure C to his papers shows discrepancies between votes announced by the Electoral Commission and the actual tallies from V11 and V23 data, that is not discernible from annexure C. Annexure C has seven columns labelled "Constituency"; "Registered Voters"; "V/Turnout"; "N. Chamisa"; "E. Mnangagwa"; "Others" and "Spoiled/Rejected". Data has been inputted with respect to four of these columns i.e. the *Constituency*, *Registered voters*, *N.*

*Chamisa* and *E. Mnangagwa* columns. The other columns are blank save for a single entry made under *Others*. It is not apparent, and the explanation is absent from the founding affidavit, how annexure C constitutes a demonstration of a discrepancy as alleged by the applicant. The legibility of the copy of annexure C attached to the papers received by the 23<sup>rd</sup> respondent is also difficult for the *N. Chamisa* and *E. Mnangagwa* columns. That notwithstanding, I have not been able to discern the point made by annexure C. Annexure C does not appear to be evidence for what the applicant avers it is.

**45. Ad Para 6.4.5**

This is denied.

45.1. The applicant's calculations are wrong. This is why:

45.2. The total voter population for purposes of the 2018 general election was 5 695 936 and not 5 659 583 indicated by the applicant. The previously announced number before polling day had been 5 695 706, which figure was adjusted by the addition of 230 voters who had been registered on a BVR registration kit in Chegutu, Mashonaland West province, prior to the cut-off date for the 2018 general election but had not been uploaded into the database.

45.3. The Electoral Commission made no announcement with respect to the final voter turnout when results for the House of Assembly elections were announced. The statement made relating to voter turnout was a statement I made on

television after the close of the polls on the 30<sup>th</sup> of July 2018 in which I advised that as at 18:00hrs we had received voter turnout figures from four out of the ten provinces in Zimbabwe namely Masvingo, Bulawayo, Midlands and Harare. Note that for those four provinces that had reported, polls were still open as at 18:00hrs.

45.4. I advised in that statement that the average turnout, from the statistics made available as at 18:00 from the four provinces that had reported, was 75%. I further advised in that statement that we were still to receive statistics from Mashonaland West, Mashonaland Central, Mashonaland East, Matebeleland North, Manicaland and Matebeland South provinces. I attach a copy of the statement hereto marked **Annexure 'U'**.

45.5. The final voter turnout in the presidential election was 85.1% which, when applied to the total voter population, equates to 4 847 233. The results announced by the Electoral Commission for the presidential election totalled 4 847 996, a variance of 763 votes with the actual 85.1%, which variance is accounted for by some errors in data capture, (which I will address further down in my affidavit and are also addressed in the statistical report attached) but does not change the outcome of the election.

45.6. The computation by the applicant, based on a turnout of 72%, does not, therefore, yield a correct result reflective of what happened on election day.

45.7. The 700 000 votes that the applicant alleges are unaccounted for are directly resultant upon the use of 72% as the final voter turnout in the presidential election and not the correct 85.1%.

45.8. Further, the figure that the applicant comes up with, 4 032 000, as 72% of the total voter population includes, by necessary implication, every vote that would be cast in a presidential poll including votes that would, on the count, be deemed to be invalid for one reason or another. The figures he indicates as the total votes cast from the announced results, 4 775 640, and from the data on the Electoral Commission's CD, 4 774 878, both reflect the total **valid** votes cast in terms of the announcements and the data on the CD.

45.9. The 4 032 000 on the one hand and the 4 775 640 and 4 774 878 on the other are thus totals representing two different kinds of things the former including every valid and invalid vote and the latter only the valid votes. The applicant then proceeds to subtract, in turn, the two elements of the latter category of votes from the former category of votes thus yielding in each instance the 700 000 alleged unaccounted votes without taking account, in that computation, of the difference between the two things he has subtracted from each other.

45.10. The applicant's computation does not, therefore, establish the 700 000 unaccounted votes he alleges to be part of the tally for presidential election votes.

#### **46. Ad Para 6.4.6**

46.1. In terms of the applicant's D series, the applicant identifies a variation in the results of the presidential election of 0.1% giving him a total of 44.4% and the 1<sup>st</sup>

respondent a total of 50.7%. This does not affect the outcome of the election as the 1<sup>st</sup> respondent still passes the statutory threshold of 50% plus 1.

**47. Ad Para 6.4.7- 6.4.8**

This is denied.

47.1. In terms of s56(3a) of the Electoral Act, a voter is not obliged to receive multiple ballots where more than one election is being conducted simultaneously. A voter is at liberty to specify which of the multiple elections he/she wishes to cast a ballot in and he/she is accordingly given ballots corresponding to those electoral races.

47.2. The applicant's averment that by peremptory dictate of the law, every voter must be given three ballots, (for the presidential, House of Assembly and local authority elections), and thereafter cast same said ballots again by peremptory dictate of the law, is, therefore, not correct.

47.3. A voter can, and voters did opt in some instances not to vote in all the electoral races that were underway on the 30<sup>th</sup> of July 2018. For instance, in ward 6 Chegutu Municipality at Pfupajena High School polling station, the incorrect ballot for the local authority election was delivered and voters, when given the option to wait for the correct ballot to be delivered, indicated that they wanted to vote in the absence of the local authority ballot and were allowed to cast their ballots for the electoral race(s) that had correct ballots at the polling station.

47.4. Further, in any general election there are electoral races that are uncontested.

For instance, in the 2018 general election there were 47 local authority wards that were uncontested. No ballots are issued in respect of those electoral races on polling day.

47.5. Further, the lack of a preferred candidate may influence which electoral races

voters will participate in. In the 2018 general election, the applicant's political party did not field any candidates for two House of Assembly seats namely Insiza North and Chiredzi North House of Assembly constituencies. It is possible that in those constituencies voters that cast votes in favour of the applicant for the presidential election may have opted not to vote in the House of Assembly election because of absence of an MDC-Alliance candidate. This issue is more widespread when one considers that most political parties, except for ZANU PF and the MDC-Alliance, did not field candidates in most of the electoral races that were underway on the 30<sup>th</sup> of July 2018. Despite there being no candidates fielded by these political parties in most of the elections for the House of Assembly and local authority, several managed to field presidential candidates that received votes across the country in the election. It cannot be ruled out that voters who voted for such candidates may have opted out of voting in the House of Assembly and local authority elections.

47.6. Most importantly, however, the issue that the applicant raises in this respect

ought, if true, to be demonstrable using V11 forms and the presidential election residue.

- 47.7. Every V11 form has a ballot paper account i.e. immediately before the unsealing of ballot boxes and commencement of counting the presiding officer at every polling station accounts for the ballot papers received at the start of the poll.
- 47.8. The number of ballot papers received is recorded on the V11 form as well as the number of ballot papers used. The latter number is determined by counting the counterfoils of issued ballots. Once that number is ascertained, the ballot boxes are then opened and the actual ballots in the boxes are counted. If there has been stuffing of ballots, as the applicant suggests, the number of ballots in the box will be more than the number of issued ballots according to the counterfoils.
- 47.9. The applicant, however, did not seek to unseal the presidential election residue in preparing his challenge.
- 47.10. The applicant does not put before the court, if such exist, V11 forms that show higher numbers of counted ballots to those issued at the polling station.
- 47.11. The applicant does not place any affidavits before the court from his election agents stating whether at certain polling stations the count yielded a higher number of cast ballots than those issued.
- 47.12. The applicant does not allege whether, from the V11 forms that he obtained through his agents, the trend of higher numbers of presidential ballots being cast to those in the House of Assembly election does not appear and only appears in the results announced by the Electoral Commission.

47.13. He does not do any of this because none of it is true. The results announced by the Electoral Commission, minus a few data capture errors that are immaterial to the result of the election, are a true representation of the votes cast in the 2018 local authority, House of Assembly and presidential elections.

47.14. Further, even when one considers the applicant's averments under paragraph 6.4.9 wherein he alleges inflation and deflation of results, his final tally for the inflation, which he alleges arises from altered returns by the Electoral Commission, an allegation that is denied by the Electoral Commission, is 10 343, which figure is far below the 40 000 that he states under paragraph 6.4.8 as having been the "excess votes" in the presidential election.

**48. Ad Para 6.4.9- 6.4.10**

This is denied.

48.1. The Electoral Commission did not alter data on election returns as alleged by the applicant. He has placed before the court no proof of his allegation and annexure F1 and F2 that he refers to are not election returns. They are a tabulation of figures the source of which is unknown.

48.2. If the applicant alleges alteration of an election return, he must present what he refers to as the authentic election return and juxtapose it with the return that he claims was altered. He does not do so. The disc he refers to as F3 was not served on the respondents. We have not had occasion to consider it. His reasons for not

serving that disc, which forms part of his challenge together with his court application, is unknown.

48.3. Further, the applicant had a right to seek the unsealing of election residue if he believed that there was alteration of election returns to prove that what was in the ballot box differs from what is recorded on any election return he seeks to challenge.

48.4. As it stands, his averments are bald and not supported by any evidence.

**49. Ad Para 6.5.3**

This is denied.

49.1. The information represented on the applicant's G series is false.

49.2. There are no polling stations where more than a thousand people voted. There are no polling stations where more people voted than appear on the voters' roll for that polling station.

49.3. I have grouped the polling stations listed in the applicant's G series by province and prepared a schedule for each province in respect of which is represented the information presented by the applicant and three additional highlighted columns at the far right of the schedule which show the Electoral Commission's own verification with the relevant V11 forms for the identified polling stations showing that no polling station recorded more votes than registered voters. Attached to those schedules are the V11 forms in respect of the polling stations indicated on

each schedule which confirm the information on the Electoral Commission's schedule and dispel any allegation that the polling stations identified by the applicant in his G series experienced over voting. The schedules and V11 forms are marked **Annexure 'V'**.

49.4. By way of illustration of the false nature of the information on applicant's G series:

- i. The applicant's G series alleges that at Mandara Primary School polling station in Bikita West 809 people voted in the presidential election out of a total registered voter population of 447. The V11 form in respect of Mandara Polling Station, however, records, contrary to the applicant's assertions, that 371 people voted in the presidential election.
- ii. Applicant's G series alleges that at Bikita Minerals Primary School polling station in Bikita West constituency 831 people voted in the presidential election out of a voter population of 348. The V11 form for Bikita Minerals Primary School polling station records, contrary to the applicant's assertions, that 309 people voted in the presidential election.
- iii. Applicant's G series alleges that at Nharira Primary School polling station in Gutu North Constituency, 536 people voted in the presidential election out of a voter population of 271. The V11 form for Nharira Primary School polling station records that 236 people voted in the presidential election.

49.5. The trend is repeated for all the polling stations identified by the applicant in his G series. The applicant's G series thus holds no evidentiary value in this matter and demonstrates that what the applicant proffers as evidence in support of his application ought to be taken with a healthy pinch of salt.

**50. Ad Para 6.5.3.1**

It is not clear how the applicant requires the respondents to answer the averments in this paragraph. The Electoral Commission does not control voter behaviour including voter turnout.

**51. Ad Para 6.5.4- 6.5.6**

This is denied.

51.1. The applicant does not state where he derives the figure of 200 000 as the people who voted in Mashonaland Central province. The province has a total voter population of 531 984. With a voter turnout of 85.1% in the presidential election the number of votes cast in the province would exceed 400 000. The applicant's averments in this respect are thus based on no evidence.

51.2. Reliance by the applicant on an online news story instead of seeking the actual election residue cannot assist in his case. The question that he poses i.e. did 400 000 plus voters cast their ballots in Mashonaland Central in the presidential election, is not answered by production of an online news story, it is answered in

the ballot box, in the election residue, in the voters' rolls that were used on polling day that are sealed in with the ballot papers. The applicant did not seek to access that election residue.

51.3. The question is also not answered by the affidavit of Gilbert Kabodora referred to by the applicant, which affidavit relates to events prior to the close of the polls and prior to counting of ballots. That affidavit presents no tally of votes. The deponent thereto does not aver that he conducted a tally of votes in Mashonaland Central that yielded total votes cast in the presidential election below 200 000. All he says is that at the few polling stations he visited, out of 973 polling stations in Mashonaland Central, he believes turnout was low. Compare this with the applicant's readiness to state, albeit erroneously, 72% as the voter turnout in the presidential election in paragraph 6.4.5 of his founding affidavit. 72% of the total voter population for Mashonaland Central province is 383 028 already above the 200 000-figure presented by the applicant.

51.4. The applicant's averments are bald and unsubstantiated. They cannot ground any challenge to the outcome of the presidential election.

**52. Ad Para 6.5.7**

This is denied.

52.1. The Electoral Commission put in place measures to allow civil servants seconded to the Electoral Commission during the elections to cast their votes. I

attach hereto, marked **Annexure 'W'** a letter addressed to the Amalgamated Rural Teachers Union of Zimbabwe in which the Chief Elections Officer advises the leadership of that organisation of the measures put in place by the Electoral Commission to ensure that civil servants voted on polling day. These included posting them as close to their polling stations as reasonably possible; providing them with transport on polling day to go and cast their votes and return to their duties; ensuring that all polling stations had enough manpower to allow the polling officers to take turns going to their respective polling stations to cast their votes and ensuring that at every polling station any election official that wanted to cast his/her vote would not have to stand in the voting queue in order for them to speedily vote and return to his/her duties.

52.2. I also attach hereto affidavits by members of the civil service confirming that the exercise of their right to vote was in fact facilitated by the Electoral Commission. I mark them **Annexure 'X'**.

52.3. Other civil servants seconded to the Electoral Commission were able to successfully apply for postal voting and thus cast their votes by that method and were not affected by being on duty with the Electoral Commission on polling day.

52.4. Other civil servants opted to forfeit their vote in preference for being posted as polling officers. I attach hereto marked **Annexure 'Y'**, declarations by members of the civil service seconded to the Electoral Commission signifying that they are forfeiting their vote in preference for being posted as polling officers.

52.5. The Electoral Commission thus did not do anything to disenfranchise any eligible voter on polling day who was seconded to the Electoral Commission from the civil service.

**53. Ad Para 6.5.8**

This is denied. It is not clear how the applicant concludes that unidentified members of the civil service were going to vote for “the opposition” as he avers.

53.1. Firstly, he has failed to establish the disenfranchisement he alleges as he has placed no evidence before the court on that score. The affidavits of Jokoniah Mawopa and Obert Masaraure do not take the applicant’s case any further as they make very general averments and do not themselves allege disenfranchisement by the Electoral Commission.

53.2. Secondly, his assumption that members of the civil service are opposition supporters/voters is made without foundation. Voting is by secret ballot in our electoral system, how the applicant presumes to know the voting choices of the unidentified civil servants he refers to is unclear. It cannot form the basis for the relief he seeks.

**54. Ad Para 6.5.9**

This is denied.

54.1. The affidavits of Mr. Jokoniah Mawopa and Mr. Obert Masaraure are presented by the applicant as showing the “actual numbers” of state employees allegedly disenfranchised by the Electoral Commission’s actions, those affidavits, give no actual figures as claimed by the applicant. What the deponents thereof do is to talk of an assessment process, the details or specific methodology of which they either do not share or describe in extremely sparse detail as be of no assistance in assessing the veracity of their claims.

54.2. The basis of their conclusions being unknown, such conclusions cannot be relied upon as evidence before this Honourable Court. Of the alleged 40 000 disenfranchised teachers for instance, not one has deposed to an affidavit confirming the applicant’s averments. The deponents themselves do not aver that they were victims of the alleged disenfranchisement.

54.3. Further, the court case related to by Mr. Masaraure in his affidavit is mischaracterised as an order granted after an adversarial hearing was conducted. That matter was in fact determined through an order by consent which order codified the measures to be taken by the Electoral Commission to allow civil servants to vote on polling day as already enumerated above. The Electoral Commission was committed to facilitating voting by its polling officers. It put measures in place for this to be done. Those measures were followed on polling day.

**55. Ad Para 6.6.1**

This is denied. I reiterate my averments made herein above with respect to the question of postal voting.

**56. Ad Para 6.6.2**

This is denied.

56.1. The Electoral Commission has no part to play in a voter's decision to be assisted to vote. In terms of s59 of the Electoral Act, a voter is entitled, if they so wish, to have a person of their choice assist them to cast their votes on polling day.

56.2. The applicant's assumption that the assistance of voters in the 2018 general election constituted an irregularity/ serious electoral malpractice finds no basis in any evidence before the court. In fact, apart from the bald allegation, the applicant presents no evidence to substantiate his claim.

56.3. The applicant's further allegation that the assistance of voters ought to be linked to "voter intimidation and the SMS being sent to prospective voters" and thus had a "huge effect on the election" is also not substantiated by evidence.

**57. Ad Para 6.6.2.1**

The collation of results of some polling stations twice was a data capture error whose extent has no material effect on the result of the presidential election. After correction of the double entries the 1<sup>st</sup> respondent still meets the statutory threshold of 50% plus 1. This issue is addressed further in the expert statistical analysis that is attached to my affidavit which deals with the expert reports presented by the applicant and the

other minor data capture errors identified in the applicant's founding papers. I attach that report hereto marked **Annexure 'Z'**.

**58. Ad Para 6.6.21**

This is denied.

58.1. No polling stations disappeared on polling day. The applicant does not state the names of the polling stations that he alleges to have disappeared on polling day.

58.2. No polling stations were created on polling day. 1HRDC and 2HRDC that the applicant cites as examples of created polling stations are in fact not polling stations. 1HRDC stands for ward 1 Hurungwe Rural District Council and 2HRDC stands for ward 2 Hurungwe Rural District Council.

58.3. The document attached to the applicant's papers marked annexure M is a V23B form which records ward returns and not polling station returns. 1HRDC and 2HRDC are listed under a column titled "Ward Number".

58.4. The totals that appear under each candidate's name on that form are totals for the corresponding wards not for any single polling station.

58.5. Applicant's annexure M is clearly titled "*Collation of ward returns in respect of National Assembly constituency election*". Why the applicant seeks to present it as a return showing polling stations is unclear. What is clear is that the applicant's

contention that certain polling stations disappeared, and others were created on polling day is not substantiated by any evidence. It is in fact not true.

**59. Ad Para 6.6.2.2**

This is denied. I reiterate my averments in respect of the allegation that V11s were not posted at 21% of polling stations. Applicant has not placed any evidence for his averment before the court. He has not named the polling stations he alleges did not have returns posted. His averments are bald and cannot, with respect, ground the relief he seeks.

**60. Ad Para 6.2.2.3**

This is denied.

60.1. The applicant seeks to call arguments based on probability in aid of his contentions of “manmade results” when the actual returns from the election are available and thus need only be produced to show that, contrary to the applicant’s averments, there are polling stations that returned identical results. The returns are signed by different polling agents, including the applicant’s polling agents. I attach a sample of the relevant returns to illustrate my averments hereto marked **Annexure ‘1’**.

60.2. The applicant’s contention that there are “manmade” results is thus not true. It cannot ground the relief that he seeks herein.

**61. Ad Para 6.2.2.4**

This is denied. The information on the CD provided by the Electoral Commission adds up to 100%. The applicant does not indicate whether in his calculation he considered rejected votes along with valid votes to come up with the total votes cast or he relied on the total valid votes only. The later formulation would yield a percentage less than 100% but the former formulation yields 100%.

**62. Ad Para 6.6.3**

This is denied.

62.1. All candidates were provided with an electronic copy of the voters' roll. The only change that was made to the voters' roll is the addition of the 230 voters registered on the Mashonaland West BVR kit as I have already averred herein above.

62.2. The applicant's averment that his alleged lack of a voters' roll gave the Electoral Commission the opportunity to illegitimately assist the 1<sup>st</sup> respondent is not substantiated by any evidence. No causal link is made between the alleged lack of a voters' roll and the alleged illegitimate assistance. The alleged illegitimate assistance itself is not particularised. Its alleged effect on the presidential election in terms of altering the results is again not explained. The applicant's allegation in this respect is bald and cannot ground the relief he seeks.

**63. Ad Para 6.6.4**

This is denied.

63.1. I refer to the affidavit by Mr. Munyaradzi Musodza in response attached hereto marked **Annexure 3**. I also point out that V11 forms had already been distributed to all polling agents present at polling stations after the counting of ballots. Forcing polling agents to change V11 forms as alleged, would yield no plausible benefit in the context of the election.

**64. Ad Para 6.7- 6.7.1**

This is denied.

64.1. It is not clear what annexure O is meant to illustrate. That notwithstanding, “unusual” voting patterns as the applicant alleges, do not constitute a breach of the law. They do not constitute an electoral malpractice and since the applicant does nothing to explain the link between his allegation of “unusual” voting patterns to the vacation of the presidential election results in any cogent manner, his averments in this respect do not ground the relief that he seeks.

64.2. Many instances can be cited where election results buck the trend but none of them can, by that fact, be deemed irregularities in the election, for instance:

- i. In Norton constituency Themba Mliswa, an independent candidate won the House of Assembly election and the ZANU PF candidate lost but the ZANU PF presidential candidate received the most votes in that constituency;

- ii. In Harare South ZANU PF won its only House of Assembly seat in Harare whilst the rest of the province was won by the MDC-Alliance;
- iii. In Bulawayo South ZANU PF won its only House of assembly seat in Bulawayo province the rest having been won by the MDC-Alliance;
- iv. The MDC-Alliance won the House of Assembly seat for Gwanda Central whilst the rest of the House of Assembly seats for the province were won by ZANU PF candidates; and
- v. In Matebeland South province ZANU PF won 7 House of Assembly seats as opposed to the MDC-Alliance's 5 but the applicant garnered more votes in the presidential election in that province than the 1<sup>st</sup> respondent.

64.3. Voter behaviour is not predictable with any certainty and when voters vote against the assumed trend that does not create an electoral malpractice or breach of the electoral law or any ground to challenge an election return.

**65. Ad Para 6.7.2**

This is denied.

65.1. A consideration of the applicant's P series shows that it does not establish what the applicant avers.

65.2. Consider the V11 for Makosa Primary School appearing at page 185 of the applicant's papers as part of his P series. Notice that every V11 form, under section B, provides a ballot paper account that allows recording of ballot paper books from 1 up to 12. Where the ballot paper books supplied to a polling station go beyond 12, a presiding officer takes another V11 form and continues the recording of the ballot paper books on that V11 from 13 going forward until all ballot paper books are recorded.

65.3. In the example under consideration the numbers 1-12 in section B are crossed out and replaced, in long hand, with the numbers 13-21 being the last ballot paper book recorded. The 'second' V11 is thus attached to the first to have a full account of the ballot papers and the results for the poll are recorded on the first V11 i.e. the one that records ballot book 1 to ballot book 12.

65.4. What the applicant has done is to take the 'second' V11 that recorded ballot book 13 to ballot book 21 and seek to present it as a standalone V11 that was not duly completed. This is deliberate and misleading.

65.5. I attach hereto the full V11 for Makosa Primary which clearly shows that the results for that polling station are duly recorded on the V11, marked **Annexure '2'**.

65.6. Further, it must be noted that a presiding officer at a polling station completes several V11 forms with identical information to furnish all parties entitled to the V11 with their copy. In doing this it can occur that the presiding officer may inadvertently neglect to complete one of the copies as occurred in the Makokoba

constituency referred to previously in my affidavit. The election agents will however, have been given their returns and the return for the polling station will have been posted outside the polling station. This does not ground any allegation of a malpractice of any kind.

**66. Ad Para 6.7.2.3**

This is denied.

66.1. The applicant challenges the number of votes entered for the 1<sup>st</sup> respondent on his annexure Q and the total ballots issued. He does not challenge the sum recorded under *Total Valid Votes Received*, recorded on his annexure Q, which figure is reached by adding the total votes received by each candidate. He further does not challenge the signatures by two MDC-Alliance agents that appear on his annexure Q. If one were to accept the applicant's contention that the 1<sup>st</sup> respondent's total votes were in fact 9 and not 549, the figure recorded under total valid votes received, which the applicant does not challenge, would no longer be attainable. It is only attainable where the 1<sup>st</sup> respondent has a total vote count of 549. Applicant's annexure Q, therefore, proves no forgery of V11 forms and as it is signed by two MDC-Alliance agents, neither of whom has deposed to an affidavit disowning the information on applicant's annexure Q and producing the "correct" V11, that document is beyond challenge and is valid.

**67. Ad Para 6.7.4**

This is denied. Applicant's annexure R is not explained. The applicant merely refers the court and the respondents to his annexure R and states that it shows "further discrepancies in vote tallies". What those discrepancies are is not put across in his deposition. Further, the copy of annexure R attached to the papers received by the 23<sup>rd</sup> respondent has two highlighted columns that are illegible. The respondents thus do not know what it is they are asked to plead to with respect to annexure R. Its import in proving the applicant's case is thus, also unknown.

**68. Ad Para 6.7.5**

Again, the affidavits referred to are not specified. The specific violations they relate to and how those alleged violations materially affect the result of the presidential election are also not spelt out. It is thus, difficult to plead to this paragraph. Out of an abundance of caution whatever allegations are made therein are denied.

**69. Ad Para 6.8**

This is denied. The applicant has failed to prove his case. He places no cogent evidence before the court establishing any material effect on the outcome of the 2018 presidential election. His application cannot succeed.

**70. AD AFFIDAVIT BY DR. OTUMBA EDCAR OUKA**

The contents of Dr. Otuba's Affidavit are denied.

70.1. I have attached an expert statistical report hereto, marked **annexure Z**, referenced herein above, which report relates and responds to the averments and

analysis made by Dr. Otuba. I thus respond to his affidavit and report through the agency of annexure Z hereto and the various relevant depositions I have made in this affidavit.

**71. AD AFFIDAVIT BY GEORGE NYANDORO**

The contents of Mr. Nyandoro's affidavit are deined.

71.1. I have attached an expert statistical report hereto, marked **annexure Z**, referenced herein above, which report relates and responds to the averments and analysis made by Mr. Nyandoro. I thus respond to his affidavit and report through the agency of annexure Z hereto and the various relevant depositions I have made in this affidavit.

**72. AD AFFIDAVIT BY PATIENCE MUTONGWIZO**

72.1. I have no independent knowledge of the issues deposed to by Mrs. Patience Mutongwizo in her affidavit. The Electoral Commission is also not in receipt of any complaint by a voter alleging any electoral malpractice by a headman in any of the polling areas mentioned by Mrs. Patience Mutongwizo.

72.2. The Electoral Commission has also not received any complaints with respect to the alleged incident involving a lorry carrying ballot papers.

**73. AD AFFIDAVIT BY GILBERT KABODORA**

I have already related to this affidavit in my depositions in response to applicant's paragraph 6.5.6. For the avoidance of doubt, the contents of his affidavit are denied.

**74. AD AFFIDAVIT BY ISLAM MADHOSI**

This is denied. I refer to the affidavit by the Electoral Commission's acting CEO Mr. Utloile Silaigwana in response.

**75. AD AFFIDAVITS IN TERMS OF SECTION 278 OF THE CP AND E ACT**

These affidavits are noted. However, the persons mentioned therein as having been the victims of political violence have not presented their own depositions confirming the depositions made by Dr Admire Virimayi Jira. I would urge them to lodge complaints with the Electoral Commission as soon as possible to ensure the investigation of their issues.

**76. AD AFFIDAVIT BY JAMESON TIMBA**

This is denied. I reiterate the averments made in response to the applicant's founding affidavit in as far as they relate to the affidavit by Mr. Jameson Timba. I maintain that verification was done in terms of the law and the relevant V11 and V23 forms were available to Mr. Timba upon request.

**77. AD AFFIDAVIT BY MORGEN KOMICHI**

This is denied. I reiterate my averments made in response to the applicant's founding affidavit as they relate to Mr. Morgen Komichi and to the affidavit by the Electoral

Commission's acting CEO which responds to some of the issues arising in Mr. Komichi's affidavit.

**78. AD AFFIDAVIT BY JOKONIAH MAWOPA**

This is denied. I reiterate my averments with respect to the measures put in place to ensure that civil servants managed to vote on polling day and make reference to the affidavits by civil servants attached hereto and already referenced above.

**79. AD AFFIDAVIT BY SWITHERN CHIRWOODZA**

I reiterate my averments made in my responses to the applicant's founding affidavit with respect to the question of postal voting. No affidavits have been placed before the court by voters alleging electoral malpractices or the erosion of the secrecy of their vote. Further the issue has come up for determination before the High Court and the prayer to nullify the postal vote was dismissed on the grounds that there was no evidence placed before the court in the form of an affidavit by a police officer or voter that had been the victim of electoral malpractices during postal voting. The same situation arises in the present application. The same outcome should be realised.

**80. AD AFFIDAVIT BY OBERT MASARAURE**

This is denied. I reiterate my averments made in response to the question of disenfranchisement of civil servants as it arose in the applicant's founding affidavit.

**81. AD AFFIDAVIT BY JOSEPH MADZUDZO**

This is denied. I refer to the affidavit by Mr. Munyaradzi Musonza in response.

**82. AD AFFIDAVIT BY MACHOKA GIFT KONJANA**

In respect of Chegutu West Constituency a data capture error occurred. The error is admitted.

**WHEREFORE** the 23<sup>rd</sup>, 24<sup>th</sup> and 25<sup>th</sup> respondents pray for the dismissal of the application with costs.

**THUS, DONE AND SWORN TO AT HARARE THIS 15<sup>TH</sup> DAY OF AUGUST 2018.**

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**PRISCILLA MAKANYARA CHIGUMBA**

**BEFORE ME:**

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**COMMISSIONER OF OATHS**