



ELECTION  
RESOURCE  
CENTRE

Resourcing for Electoral Excellence

# 2019 BY-ELECTIONS: A COCKTAIL OF REFORMS AND NON-COMPLIANCE WITH THE LAW

The Election Resource Centre, (ERC), a think tank and advocacy organization working on elections extends its congratulations to the Zimbabwe Electoral Commission (ZEC) on conducting the recent wave of three by-elections for Glen View South Constituency, Mangwe Constituency and Masvingo Rural District Council Ward 1 in line of Section 39 of the Electoral Act on vacancies and by-elections.

## **NOTED REFORMS**

The ERC welcomes the following as key improvements in the conduct of by-elections following the 2018 harmonized elections;

1. Invitation of civic society organization to conduct voter education ahead of by-elections
2. Deploying voter educators in by-election sites
3. Posting of voters rolls outside polling stations
4. Early announcement of election results
5. Early sharing of some election statistics after the by-elections

The noted administrative measures taken by ZEC, some of which have not required any laws to be changed to be effected, show the capacity of the election management body to institute reforms for purposes of giving full effect to constitutional principles in Section 156 on a voting method that is simple, accurate, verifiable, secure and transparent. It is clear, from the actions of ZEC that not all reforms require laws to be changed to implement electoral reforms given that since May 2018, there have not been any changes in laws regulating the conduct of elections.

## **RED FLAGS**

In noticing and acknowledging progress towards improving the conduct of elections in Zimbabwe through by-elections, the ERC has also noted the following issues requiring attention by ZEC;

- 1. Assigning of voters to different polling stations from the one they were originally registered to without their consent**

The ERC noted instances of voters indicating that their names were not found on the voters' roll of polling stations that they voted at during the 2018 harmonized election. The allegations were further raised by the Movement for Democratic Change Alliance in their communication directly to ZEC pertaining to the pattern which could have resulted in a significant number of voters being turned away from voting in the by-election.

Section 68 (2) of the constitution provides for administrative justice stating that any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing, the reasons for the conduct. Being transferred from the polling station that one registered on to another adversely

affects one's right to vote, the expectation to vote at a particular station and the interest to participate in elections.

Furthermore, Section 26A of the Electoral Act provides for the closure of the voters roll two days after proclamation noting that no person can be registered as a voter unless a claim to register is lodged before the cut of period. By changing polling stations at which voters registered to vote, ZEC is potentially registering voters at new polling stations after the voters roll would have been closed which is not legal.

There is no evidence that ZEC communicated with affected voters in altering the voters roll ahead of the by election. It is also not clear which provision of the law ZEC used in moving voters from one polling station to the other without communicating with the individual voters whose contacts ZEC has.

## **2. Limited instances of a publicly displayed voters' roll for inspection by voters.**

While the law does not explicitly provide for public inspection of the voters roll, it is common practice by ZEC to publicly display the voters roll for citizens to scrutinize the document in public places across the country as provided for in Section 21 of the Electoral Act. This crucial process has been limited to only a few days before polling day during by elections in selected instances.

## **3. Invitation of citizens to raise objections against any name on the voters roll.**

The Electoral Act, Section 28, provides for objections to the retention of any name on the voters roll in writing giving the grounds for such an objection. The value of facilitating an exhibition or a public inspection of the voters roll is that it allows citizens to know who is on the voters roll and possibly to object if anyone on the roll is not qualified to be registered at that polling station. ZEC has not complied with Section 28 of the Electoral Act by invited citizens to object to any name on voters roll, a process that could easily increase the credibility of the document. The election management body has an obligation to conduct elections in full compliance of the provisions of the law.

## **4. Stakeholder access to the voters roll.**

The Electoral Act, Section 21 (1) provides that the voters roll is a public document open to inspection by the public. Since 2017, ZEC has been working on developing a biometric voters' roll, one which contains pictures of the voter in addition to details contained in the old voters roll. On Election-Day on the 30th of July 2018, ZEC used a voters roll with pictures to facilitate voting while stakeholders who requested for a copy of the roll only received an excel version of the document. Section 155 of the Constitution, provides that all political parties and candidates should have reasonable access to all material and information necessary for them to participate effectively in elections. The voters roll is an important piece of information necessary for effective participation in elections. Part 1, Section 3 (e) of the Electoral Act under General

Principles of Democratic Election, the voting method must be simple, accurate, verifiable and transparent. Unless ZEC publicly shares a full copy of the biometric voters roll used in polling station on Election Day, it is not possible to verify that the excel version given to stakeholders is the same as the one ZEC uses. Furthermore, The Electoral Act in Section 21 talks about a voters roll as a public document and not a version of the voters roll as a public document. Arguments suggesting privacy as enough justification to withhold public access to the voters roll are not supported by the law and any refusal to share the full voters roll as provided for by the law means that ZEC is in violation of the law.

#### **5. Use of an exclusion list (voters roll).**

The Electoral Act makes no provisions for an exclusion list. There are indications that such a list has been prepared for elections starting with the 2018 harmonized elections to by-elections. There has been no indication of the legal basis for producing and using such a list in the voting process. <sup>1</sup> Limited clarity on the exclusion list, which is not made public, the absence of a public exhibition (inspection of the voters roll) ahead of the by-elections and restricted access to the voters roll (not a version of the roll) to stakeholders is in potential contravention of Section 156 of the Constitution which clearly spells out that voting methods used must be simple, accurate, verifiable and transparent.

Furthermore, the reasons for placing a registered voter on the so-called exclusion list penalizes the voter for an inconsistency that the voter has no control over. Identity delays are determined by the Registrar and not individual citizens. By accepting to register a voter based on the details supplied should be enough to keep the voter on the voters roll

#### **6. Postal Voting.**

Section 72 of the Electoral Act provides for voting by post by members of the uniformed forces, election officials, persons out of the country on government business or spouse of persons outside the country on government business. While the ERC considers the provision discriminatory on the basis of employment in potential violation of Section 56 of the Constitution, ZEC has again proceeded to conduct by-elections with disregard of legal provisions for postal voting. The election management body has an obligation to comply with Sections 73, 74, 75 and 76 of the Electoral Act in handling postal votes. The Electoral Act, additionally, provide clear

---

<sup>1</sup> The exclusion list contains names of voters whose entries would have been picked during a de-duplication process and said to contain either errors, have duplicate features such as identity numbers or finger prints. Such a list is where names are parked and individuals can have an opportunity to respond to exclusion from the main voters roll. Some of the causes for a voter being placed on the exclusion list are not within the control of the voter who bears no responsibility for the issuance of an identity number that may be allocated to another as an example.

provisions for transparency and accountability by the Chief Elections Officer through outlining the need to keep records, some of which should be publicly accessible until the election results are declared. In all the by-elections conducted since the 2018 harmonized elections, ZEC has not acted in compliance with legal provisions on postal voting potentially disenfranchising Zimbabweans of their right to vote and to be represented through elections.

### **Reasons to Set Aside an Election**

Sections 177 (a) and (b) of the Electoral Act also provide reasons why an election could be set aside which include non-compliance with the Electoral Act. While the provisions have their own limitations, ZEC is currently at risk of conducting by-elections outside the law.

### **Key Consideration for ZEC**

ZEC has to provide evidence supporting its compliance with the constitutional and legislative provisions in the conduct of by-elections or to explain the departure from legal provisions in their conduct in full adherence to Section 3 of the Constitution (Founding Values and Principles) which binds the state and all its institutions and agencies of government at every level to observe principles of good governance including transparency, justice, accountability and responsiveness.

In addition, ZEC has to consider urgently issues relating to closure of the voters roll for purposes of providing enough time for legally cleaning the roll, allowing voters to object the retention of voters on the roll and providing a final voters roll for use for purposes of nomination and voting. It may be necessary to advocate for immediate legislative change to ensure that future by-elections are conducted in full compliance of the constitution and all laws.