

- 54.37.1** what is the matter at issue for which expert evidence has been procured?
- 54.37.2** do Applicant's experts possess the education, experience, skill, knowledge and training to assist the Court on the matter at issue?
- 54.37.3** have Applicant's experts employed a methodology that is testable, whose error rate is stated, is peer reviewed and which has general acceptance within the relevant discipline?
- 54.37.4** have the applicant's experts shown in their reports that they are aware of their special duty of impartiality or have they abandoned objectivity and become advocates for the applicant, and in so doing do the experts' opinions conflict with those of other experts in the field in a way that defies reasoned assessment?

**55.** These will now be considered in turn.

**What is the matter in issue?**

- 55.1** The petition alleges that the 23<sup>rd</sup>, 24<sup>th</sup> and 25<sup>th</sup> Respondents have systematically rigged the election in favour of 1<sup>st</sup> Respondent through running an election that was not credible, biased, 24<sup>th</sup> Respondent's choice of clothing, voter intimidation, systematic violations of electoral law, prejudicial decisions around ballot paper design and citing of polling stations, ballot stuffing, manipulation of the tallying of results and unlawful announcements of results that did not tally with televised estimates and announcing results in the wrong order such that Harare results were announced last.

**Are the experts qualified?**

- 55.2** None of the experts are qualified to testify on the facts in issue. The facts in issue need no expert evidence. They need direct and real evidence.

**55.3** The matter at issue is the actual numbers in the election. While Dr Otumba is clearly an expert in mathematics and statistics, there is nothing in his knowledge, skill and experience to suggest that he has any scientific, technical or other specialised knowledge on elections. According to his CV, the only election he appears to have advised on was in 2005, and related to the election of directors of a Sugar Board. In his 'Supporting Affidavit' filed with the applicant's answering affidavit Dr Otumba adds that his opinion and conclusions:-

*"were used by the Kenyan Supreme Court in the presidential petition of **Raila Amolo Odinga v Independent Electoral and Boundaries Commission & Ors Presidential Petition 1/17**, in which I consulted for the petitioner therein Or Odinga against Uhuru Kenyatta. The court's judgement was positively influenced by my findings. I have a 100 percent success rate as regards statistics in a presidential election."*

**55.4** That last sentence regarding his 100% success rate shows that Dr Otumba is aware that the experience required is that of analysing elections, and not just looking at numbers. It is submitted that advising on the election of directors for a sugar board some 13 years ago does not rise to the level of knowledge or information gained from study, observation, practice or experience that a qualified expert is required to have. And, as we have already seen (**Richardson v Fuchs, supra**), involvement in litigation of a similar nature does not constitute the requisite 'training and experience' needed for someone to qualify as an expert on a matter at issue. In any event, in 432 pages of the **Odinga** judgement Dr Otumba's opinion is not referenced at all. His name is mentioned once at page 264 in connection with an application for a number of affidavits to be included in evidence, and they include his name.

**55.5** It follows that while Dr Otumba is undoubtable an expert in mathematics based on his curriculum vitae, he is not an expert on analysing elections.

**55.6** The above goes for the remainder of the experts.

**55.7** It is unnecessary to traverse the rest of the requirements. Nothing turns on the so-called expert evidence.

**55.8** The only available original, primary and admissible evidence is that provided by the 23<sup>rd</sup> respondent. This evidence is predicated on the presumption of regularity. In ***Emmanuel v Umana & Ors (2016) LPELR-40037 (SC)*** the Nigerian Supreme Court said that:

*“Surely, the presumption of regularity enjoyed by INEC’s results are not rebuttable by presumptuous postulations or rhetorical questions but only by cogent, credible and acceptable evidence... This must be so for a court of law can only pronounce judgement based on credible evidence presented and properly established before it. It is, thus, not at liberty to go outside the evidence and search for extraneous evidence in favour of the parties ...”*

**55.9** In this case, the presumption of regularity has not and cannot be controverted.

**55.10** Even considering the corrections made by the 23<sup>rd</sup> respondent at the time it availed the results on cd, which results are no different from those in its opposing affidavit, the 1<sup>st</sup> respondent achieved the 50% plus one vote threshold.

**55.11** His election cannot be vacated on the fanciful and yet unfounded “numbers do not lie” sloganeering. This ground too, must fail.

## **CONCLUSION**

53 We submit in conclusion the application is both adjectivally and substantively still born. It is an abuse of court process intended to delay the first respondent’s inevitable ascendancy to the presidency. It is meant to hold the 1<sup>st</sup> respondent and the nation at ransom to achieve purposes and objects unconnected to the litigation.

54 This court is enjoined to relate to s93 (3) of the Constitution. It must find that the application is not properly before the court. It must find, in any event, that the necessary jurisdictional facts have not been alleged and substantiated. The onus on the

applicant has not been discharged. It must dismiss the application with costs at the legal practitioner and client scale.

55 In dismissing the application, this court must declare that the elections were held in accordance with the laws of Zimbabwe; that the elections were free, fair and credible and reflect the free electoral and political expression of the majority of the people that voted, and that the 1<sup>st</sup> respondent, Emmerson Dambudzo Mnangagwa, be declared to have been duly elected as the President of Zimbabwe.

56 We pray accordingly.

**RESPECTFULLY SUBMITTED,  
HARARE 20<sup>TH</sup> AUGUST 2018.**

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**LEWIS URIRI**  
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