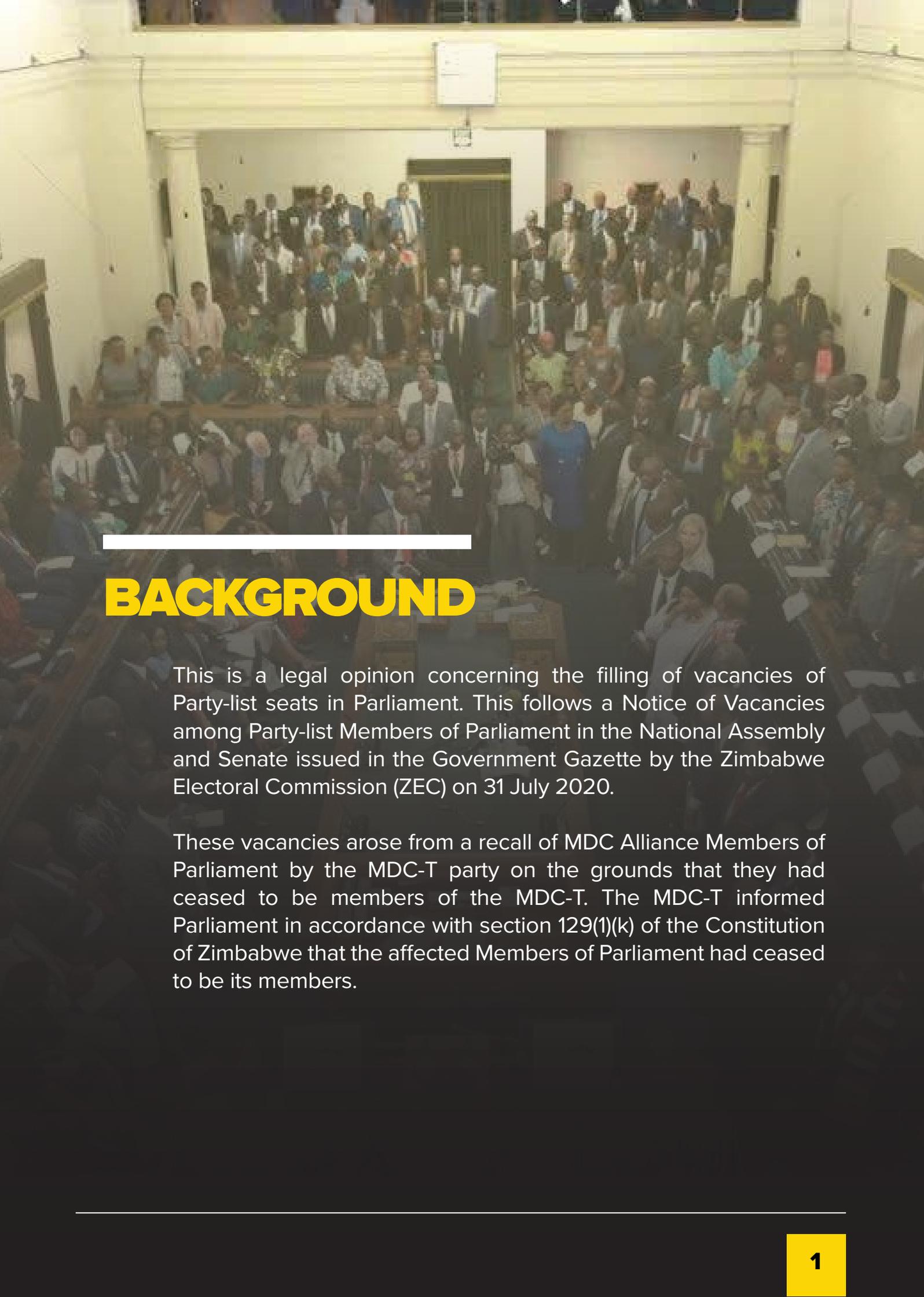




LEGAL OPINION

ON VACANCIES AMONG
Party-List members of Parliament

July, 2020

A large group of people, likely members of parliament, are seated in a chamber. They are dressed in formal attire, including suits and dresses. The room has high ceilings and large windows. The overall atmosphere is formal and professional.

BACKGROUND

This is a legal opinion concerning the filling of vacancies of Party-list seats in Parliament. This follows a Notice of Vacancies among Party-list Members of Parliament in the National Assembly and Senate issued in the Government Gazette by the Zimbabwe Electoral Commission (ZEC) on 31 July 2020.

These vacancies arose from a recall of MDC Alliance Members of Parliament by the MDC-T party on the grounds that they had ceased to be members of the MDC-T. The MDC-T informed Parliament in accordance with section 129(1)(k) of the Constitution of Zimbabwe that the affected Members of Parliament had ceased to be its members.

WHY THE LEGAL OPINION?



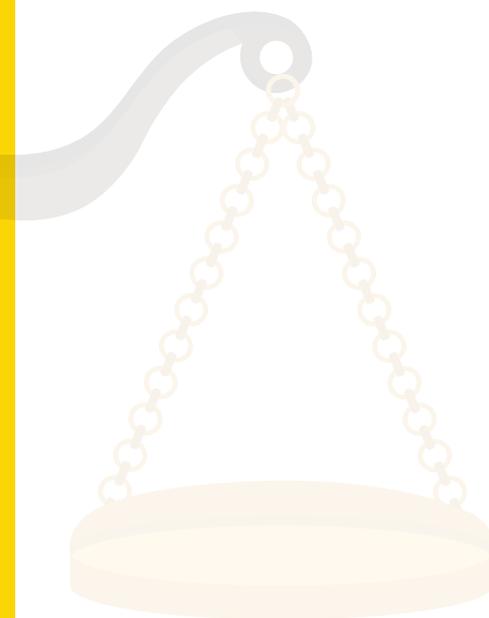
The ERC proffers this legal opinion which identifies legal risks and issues that electoral stakeholders should address as part of the ongoing recalls of members of the National Assembly and the Senate.

From the perspective of an electoral stakeholder, this legal opinion, or more specifically the engagement around the content of the legal opinion, is a valuable tool towards a credible electoral process. Engagement through the legal opinion may identify positions that ZEC and other electoral stakeholders may leverage to mitigate risks in the ongoing recall and subsequent replacement of Party-list Members of Parliament.

LEGALITY

However, there is an existing legal dispute concerning the legality of the recalls. This is because the affected Members of Parliament were elected under the ticket of the MDC Alliance party and not the MDC-T party which has subsequently recalled them. The affected members argue that the MDC-T had no power or right to recall them from Parliament. As the ERC understands, this legal dispute is awaiting final resolution in the courts of law.

ZEC has proceeded to issue the notice of vacancies, citing section 39(4)(a) of the Electoral Act (Chapter 2:13), which provides that it is required to notify the public of such a vacancy by notice in the Government Gazette. The notice followed notification of the vacancies to ZEC by the Speaker of the National Assembly and the President of the Senate in terms of section 38 of the Electoral Act.



UNCONSTITUTIONALITY OF SECTION 39 OF THE ELECTORAL ACT

Firstly, as has already been stated, there are multiple legal disputes surrounding the recall of the affected Members of Parliament. These disputes revolve around the legality of the MDC-T's notice of recall which resulted in the vacancies. These legal challenges are currently before the courts of law and have not been resolved. The purported vacancies are therefore not yet a settled issue pending the final decisions of the courts.

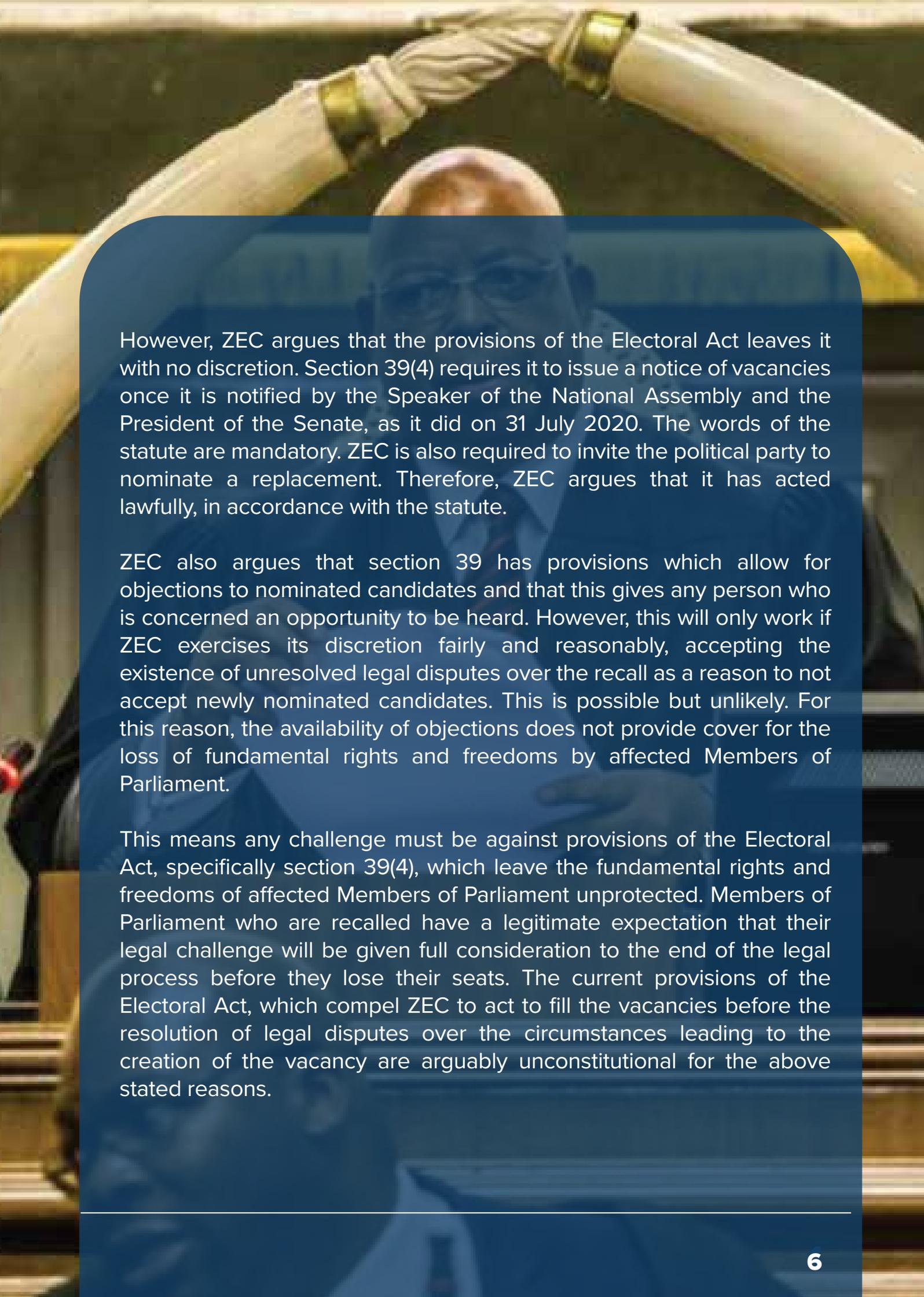
The ERC believes that it is premature for ZEC to proceed, as it has done, to issue a notice of vacancies when there are pending legal cases aimed at determining the legality of vacancies. There are fundamental rights and freedoms which are adversely affected by the hasty approach taken by ZEC in these matters.



The right to a fair hearing provided for in section 69 of the Constitution means that a party to a dispute is entitled to a determination of his matter before a decision that is adverse to his or her rights is implemented. Section 69(3) provides that “Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.” Clearly the “right of access” is inclusive of the entire process up to the resolution of the dispute. The right to a fair hearing would be meaningless if a process that is being challenged was allowed to proceed to implementation regardless of pending legal action before the courts of law.

Similarly, the right to fair administrative justice provided for in section 68 of the Constitution is that every person is entitled to administrative conduct that is “lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.” This right, which includes legitimate expectations would be meaningless if administrative bodies proceeded to implement decisions that are still under legal challenge. For the same reason as the right to a fair hearing, the realisation of the right to fair administrative justice requires the legal process to be concluded before a challenged decision is implemented.





However, ZEC argues that the provisions of the Electoral Act leaves it with no discretion. Section 39(4) requires it to issue a notice of vacancies once it is notified by the Speaker of the National Assembly and the President of the Senate, as it did on 31 July 2020. The words of the statute are mandatory. ZEC is also required to invite the political party to nominate a replacement. Therefore, ZEC argues that it has acted lawfully, in accordance with the statute.

ZEC also argues that section 39 has provisions which allow for objections to nominated candidates and that this gives any person who is concerned an opportunity to be heard. However, this will only work if ZEC exercises its discretion fairly and reasonably, accepting the existence of unresolved legal disputes over the recall as a reason to not accept newly nominated candidates. This is possible but unlikely. For this reason, the availability of objections does not provide cover for the loss of fundamental rights and freedoms by affected Members of Parliament.

This means any challenge must be against provisions of the Electoral Act, specifically section 39(4), which leave the fundamental rights and freedoms of affected Members of Parliament unprotected. Members of Parliament who are recalled have a legitimate expectation that their legal challenge will be given full consideration to the end of the legal process before they lose their seats. The current provisions of the Electoral Act, which compel ZEC to act to fill the vacancies before the resolution of legal disputes over the circumstances leading to the creation of the vacancy are arguably unconstitutional for the above stated reasons.

WHICH POLITICAL PARTY HAS THE RIGHT TO FILL VACANCIES?

The second and perhaps most urgent issue concerns the identity of the political party to which ZEC is required to send an invitation to submit names of candidates to fill the vacancies. The ERC submits that the party which has the right to nominate replacement candidates is the political party which provided the party-list at the general elections. A reading of the provisions regarding party-list seats and how they are filled makes it clear that the party in question was the MDC Alliance and not the MDC-T.

A “party-list seat” is defined in section 45B of the Electoral Act as “one of the seats in the Senate referred to in section 120(1)(a) of the Constitution or one of the seats in the National Assembly reserved for women referred to in section 124(1)(b) of the Constitution, or one of the seats in a provincial council referred to in section 268(1) of the Constitution.” The party-list is therefore a list of candidates chosen by a political party to fill vacancies in terms of a formula provided for in the Eighth Schedule of the Electoral Act. The party which submitted the party-list in terms of which affected Members of Parliament were elected was the MDC Alliance. This will become clearer in the provisions of the Electoral Act which deal with party-list seats.

In terms of section 45E of the Electoral Act, it is only the office-bearer of a political party that is permitted to submit nomination papers containing party-list candidates of that political party. The party-list system is based on the recognition of political parties as accepted by the nomination court before the election. In the 2018 elections, the office-bearers who presented the party-list candidates to the nomination court did so on behalf of the MDC Alliance. It is therefore the party-list of the MDC Alliance.



In addition, according to section 45E(2) a nomination paper is required to state the name of the political party and the address of its main office in Zimbabwe; the abbreviation of the political party's name which will appear on the ballot paper; and any distinctive symbol which may accompany the name. The name, abbreviation and symbol that were put on the nomination papers of the affected Members of Parliament belonged to the MDC Alliance.

Fourth, section 45D(1)(b) provides for the disqualification of a candidate where he or she has been nominated as a party-list candidate by more than one political party in the same election. Consequently, a candidate can only be on the party-list of one political party. In this case, that political party was the MDC Alliance. They could not have been nominated by the MDC-T in the same election. If that were so, they would have been disqualified in accordance with the Electoral Act.

Fifth, in terms of section 45F(3) the Chief Elections Officer is required to notify the public through the Government Gazette the names of the political parties which would have submitted party-lists and the names of the party-list candidates who would have been nominated by each political party for each province. In this case, the political party which was listed by the Chief Elections Officer in the Government Gazette was the MDC Alliance and the party-list candidates were duly named as MDC Alliance candidates. In terms of section 45C(5), the formula for the election of party-list candidates is provided for in the Eighth Schedule to the Electoral Act. The calculation is on the basis of the proportion of votes that the political party gets in relation to the total number of valid votes cast for all the constituency candidates in the electoral province concerned. This number excludes votes cast for independent candidates.

It is the provincial elections officer who determines who has been elected using the appropriate formula. He or she states in terms of section 45I which party-list candidates have been duly elected for each political party. The representatives of the political parties contesting the election are provided with the names of the elected candidates and the calculations by which the determination was reached.

A perusal of these documents will demonstrate that the party-list seats were awarded to the MDC Alliance candidates on the basis of votes obtained by the MDC Alliance as a single political party, not as separate entities. Any separation could have produced an outcome that is wholly different from the current Parliament. There can be no doubt that the political party in question was the MDC Alliance, not any other party. It is common cause that ZEC recognised the MDC Alliance as a political party for purposes of the 2018 elections.

HOW PARTY LISTS SHOULD BE FILLED

How party-list vacancies should be filled and who has the right to fill such vacancies may be observed in a parallel situation where a candidate on the party-list dies, withdraws or otherwise becomes unavailable before the determination of the election result. The Electoral Act makes it clear that the political party which submitted the party-list has the right to provide a replacement candidate. The ERC posits that the situation cannot be different if the vacancy arises after the election result is known.

The situation before the result is known is provided for in section 45H of the Electoral Act. Section 45H(3) provides that if there are no more eligible party-list candidates for a particular political party (due to death or withdrawal of a candidate), ZEC must notify the public that there is a vacancy and must “invite the political party concerned in writing to submit the name of a qualified person to fill the vacancy”.

Thereafter, the “political party must lodge with the Commission” a nomination paper with a new name. The Chief Elections Officer is then required to inform the public of the nomination and to invite any objections.

Any person has the right to object to the nominated candidate. The decision whether or not to uphold the objection lies with ZEC.

There is no difference between this situation where the political party is called upon to fill a vacancy that has arisen before or after the announcement of the results. In either case, it is the political party which submitted the party-list which has the right and power to fill the vacancy. In this case, it is indisputable that the political party is the MDC Alliance.

The relevant procedure in this case is covered in section 39 of the Electoral Act. Once it is notified of a vacancy, ZEC must notify the public by issuing a notice in the Government Gazette that a vacancy has arisen. The provision does not give ZEC discretion. As has already been argued, this is unconstitutional because it forecloses an affected Member of Parliament's right to get an effective remedy where his or her seat is filled before the resolution of his complaints.

ZEC is also required to invite the political party to submit a nomination to fill the vacancy. It has already been argued that based on the facts arising from the 2018 elections, the proper party that ZEC should invite to fill the vacancy is the MDC Alliance.

According to section 39(6)(a), once the political party has submitted a nomination and ZEC is satisfied that the papers are in order, it should notify the public through the Government Gazette. Members of the public are entitled to submit written objections together with reasons to the nomination in accordance with section 39(6)(b). This is a key stage in the current process. If there are any objections to the political party that ZEC has invited to submit nominations, this is a good point to raise objections citing reasons for the objection.

If there are no objections or if ZEC considers that there are no valid grounds of objection, it will go ahead and notify the public through the Government Gazette that the person nominated has been appointed to the role.

However, according to section 39(7), if ZEC considers that there are valid objections to the nomination, the political party is to be afforded any opportunity to make representations on the matter. If ZEC upholds the objections, the process will start again until a suitable replacement is found.

CONCLUSION

In this case, there is room to challenge the constitutionality of the provisions which compel ZEC to proceed with the process of filling vacancies even when affected Members of Parliament are still objecting to their recall. These provisions of the Electoral Act, which leave ZEC with no discretion in the matter are arguably unconstitutional as they interfere with the rights to a fair hearing and the right to fair administrative justice.





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