

## SAIPAR Case Review

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Volume 2  
Issue 1 May 2019

Article 4

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5-2019

### Nelson Chamisa v Emmerson Dambudzo Mnangagwa and Others CCZ 42/18 (August 2018)

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#### Recommended Citation

Kaaba, O'Brien (2019) "Nelson Chamisa v Emmerson Dambudzo Mnangagwa and Others CCZ 42/18 (August 2018)," *SAIPAR Case Review*: Vol. 2 : Iss. 1 , Article 4.

Available at: <https://scholarship.law.cornell.edu/scr/vol2/iss1/4>

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**Nelson Chamisa v Emmerson Dambudzo Mnangagwa and Others CCZ 42/18 (August 2018)**

*O'Brien Kaaba*

**Facts**

Zimbabwe held its first post-Mugabe general elections on 30<sup>th</sup> July 2018. On 3<sup>rd</sup> August 2018, the Zimbabwe Electoral Commission (ZEC) declared Emmerson Dambudzo Mnangagwa as the candidate who received the requisite 'more than half the number of votes cast' and declared duly elected President of Zimbabwe. Aggrieved by this development, Nelson Chamisa, the main opposition contender, challenged the validity of the election of Mnangagwa in the Constitutional Court.

**Holding**

After hearing the case, the Constitutional Court unanimously:

- 1) Dismissed the application with costs; and
- 2) Declared Emmerson Dambudzo Mnangagwa as duly elected President of Zimbabwe.

**Significance**

This case note is based on the abridged judgment of the Constitutional Court. Ideally the note should have been based on the full reasoned judgment of the Court. However, at the time of writing, more than a year since the handing down of the abridged judgment, the full reasoned judgment had not yet been given.

The case is important as it is the first post-Mugabe presidential election petition. In a sense, the case was a test of the Zimbabwean judiciary's commitment to the possibility of contributing to the democratic rebuilding and affirmation of constitutionalism in the immediate aftermath of the dictatorial Mugabe era that destroyed key governance institutions, leaving them beholden to the ruling elite. From the African continental perspective, it could also be said that the case was an opportunity for the African judiciary to build on the precedent set by the Kenyan Supreme Court in 2017 that nullified the presidential election and elaborated a jurisprudence that is contextually relevant in redressing electoral fraud.

The decision by the Zimbabwean Constitutional Court, however, suggests that the Court failed to grab the opportunity to contribute to more democratic jurisprudence that reflects constitutional norms and values. In fact, the Court seemed to frown on the petitioner having exercised his constitutional right to challenge the election. This can be gleaned from the first order the court made. The Court tersely stated: 'The application is dismissed with costs.' Though short, this expression is weighty as it means the applicant had to bear the costs of all the parties in the case (featuring 25 respondents). It is unheard of in Anglophone Africa for a court to order costs in a constitutional matter of grave national interest. A perusal of presidential election judgments from similar jurisdictions such as Zambia (1996,<sup>1</sup> 2001,<sup>2</sup> 2016<sup>3</sup>), Uganda

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<sup>1</sup> Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba (1998) ZR 49

<sup>2</sup> Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) ZR 138

<sup>3</sup> Hakainde Hichilema and Another V Edgar Lungu and others 2016/CC/0031 Ruling No.33 of 2016

(2001,<sup>4</sup> 2006,<sup>5</sup> 2016<sup>6</sup>), Kenya (2013<sup>7</sup> and 2017<sup>8</sup>), Ghana (2013<sup>9</sup>) and Nigeria (2003<sup>10</sup> and 2007<sup>11</sup>) demonstrates that costs are not usually ordered in such matters.

Challenging a presidential election is an exercise of a fundamental constitutional entitlement that should not carry any risk of costs. The importance of this was forcefully stated by the Supreme Court in Zambia:

As we have always said on costs in matters of this nature, it is in the interest of the proper function of our democracy that challenges to the election of the president, which are permitted by the Constitution and which are not frivolous should not be inhibited by unwarranted condemnation in costs.<sup>12</sup>

In this Zambian case, the Supreme Court dismissed the presidential election petition, but considered that that alone did not mean there were no grievances upon which the applicant could seek redress, despite the complaints not rising to the requisite level that would warrant nullifying an election.

The South African Constitutional Court has elaborated a three-fold rationale for ordinarily not ordering costs in constitutional matters.<sup>13</sup> First, it diminishes the chilling effect that an adverse costs order can have on parties asserting constitutional rights and might have the effect of citizens foregoing meritorious claims. Second, constitutional litigation, regardless of the outcome, might bear not only on the interests of litigants directly involved in a matter, but may have consequences on the rights of others similarly situated. Third, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the constitution.<sup>14</sup>

The fact that the Court did not find in favour of a litigant is not sufficient warrant to order costs. The Court must take a broad look at matters raised and consider how a costs order may hinder or promote the advancement of justice.<sup>15</sup> Writing for the unanimous Lesotho Court of Appeal, Justice Musonda held that in constitutional matters, even if a litigant laboured under the misconception that they had a good case, that alone is not sufficient ground for the court to order costs when the case is lost.<sup>16</sup>

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<sup>4</sup> Kizza Besigye vs. Yoweri Museveni Electoral Petition No. 1 of 2001

<sup>5</sup> Kizza Besigye vs. Yoweri Kaguta Museveni Presidential Election Petition No.1 of 2006

<sup>6</sup> Amama Mbabazi v Yoweri Kaguta Museveni and Others Presidential Election Petition No. 01 of 2016

<sup>7</sup> Raila Odinga vs. The Independent Electoral and Boundaries Commission and others Supreme Court Petition No. 5,3 and 4 of 2013

<sup>8</sup> Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others Presidential Election Petition No. 1 of 2017

<sup>9</sup> Nana Addo vs. John Dramani No J2/6/2013 Judgment of 29 August 2015

<sup>10</sup> Muhammadu Buhari and others vs. Olusegun Obasanjo and others SC.133/2003 17 NWLR (2003)

<sup>11</sup> Atiku Abubakar and others vs. Musa Umaru Yar'adua and others SC.72/2008 Supreme Court of Nigeria Judgement of 12 December 2008

<sup>12</sup> Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) ZR 138

<sup>13</sup> Trustees for the Time Being of the Biowatch Trust v Registrar Genetic Resources and Others [2009] ZACC 14, para 23

<sup>14</sup> Ibid

<sup>15</sup> Ibid, para 16

<sup>16</sup> Kananelo Mosito and Others v Qhalehang Letsika and Others Court of Appeal (Civil) 9/2018, para 50. See also The President of the Court of Appeal v The Prime Minister and Others Court of Appeal (Civil) 62/2013, para 27

Allowing aggrieved parties to seek relief in the courts without risking being condemned to costs potentially opens the courts widely to the people, or as Prempeh put it, it allows judges to 'take the courts to the people.'<sup>17</sup> This would ensure that courts become the commonly used avenues for resolution of contested democratic claims as opposed to resort to street violence or other self-help means.

In the case of Zimbabwe, the award of costs in constitutional matters is governed by the Constitutional Court Rules 2016.<sup>18</sup> Rule 55(1) provides: 'Generally no costs are awarded in a constitutional matter: Provided that, in an appropriate case, the Court or judge, as the case may be, may make such order of costs as it or he or she deems fit.' The Court in this case never even referred to this authority, nor did it give any explanation justifying the award of costs. In the absence of a cogent justification for an award of costs, the Court could be said to have acted arbitrarily and out of spite in order to 'punish' the petitioner for exercising his constitutional right. Such a decision does not clothe the Zimbabwean Constitutional Court in good light and suggests it failed to extricate itself from the feelings of the ruling party and its candidate whose election was being challenged.

Another notable issue in the judgment relates to the nature of evidence the court suggested was needed for the applicant to prove his claim. According to the Court, the petitioner should have produced source evidence demonstrating the irregularities in the electoral results. This evidence could, *inter alia*, have come from the candidate's party poll agents and election observers, by furnishing the Court with signed copies of election results forms (Form VII) from polling stations. In the words of the Court:

The applicant was at large to have his polling station agents at each and every polling station around the country. Observers were also free to participate in the process. The applicant's agents would have observed the voters arriving, being given the ballot papers as applicants for these papers before the presiding officers, going to vote in secret in the booths, and having the vote counted in their presence if they were there. At the end of the counting all agents would have signed the VII form if they so wished and given copies.

In the view of the Court, if the evidence from the agents and observers from polling stations was produced, it would have answered all questions to do with allegations of manipulating the results. The Court further thought that an election should not be easily nullified as the declaration of results gave rise to a presumption of validity.

Although this approach looks innocuous on the surface, on close examination it gives the impression of a Court that is scared to confront the electoral disputes presented before it head-on, without excuses. As John Hatchard has argued, such an approach 'can be seen as a way of ensuring that the most sensitive of political questions is avoided.'<sup>19</sup> Two short-comings of this approach can be noted. First, in this computer technology era, results of an election can be manipulated regardless of, or even more aptly, in spite of having party agents and observers at the polling stations. This possibility is well illustrated by the 2017 Kenyan Supreme Court decision.<sup>20</sup> In nullifying the election, the Supreme Court was convinced that the results were

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<sup>17</sup> H Kwasi Prempeh, 'Marbury in Africa's Judicial Review and the Challenge of Constitutionalism in Contemporary Africa' (2006) 80 *Tulane Law Review* 65

<sup>18</sup> Statutory Instrument 61 of 2016

<sup>19</sup> John Hatchard, 'Election Petitions and the Standard of Proof' (2015) 27 *Denning Law Journal* 300

<sup>20</sup> *Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others* Presidential Petition No. 1 of 2017

tampered with in the Independent Electoral and Boundaries Commission's (IEBC) servers. The IEBC itself was complicit in the fraud. In this case, reports from observers were of no use at all, as the Supreme Court pointed out: 'The interim reports [of observers] cannot therefore be used to authenticate the transmission and eventual declaration of results.'<sup>21</sup> Considering that Chamisa made similar allegations of election results tampering as was the case with the 2017 Kenyan elections, the Court should have been more open to the possibility of elections being manipulated not just at the polling station but in the national tabulation process, and to the possibility that the ZEC may have been complicit.

Second, the presumption of validity of an election lacks any demonstrable basis in the Zimbabwean Constitution, or any modern liberal constitutional law theory. The Court's role as a guardian of constitutionalism is to enforce constitutional values, in this case, the values of allowing people to choose their own leaders in an environment that allows the collective and genuine will of the people to prevail. As such, state institutions cannot be presumed, without critically clearing every reasonable allegation, to administer a credible election. The constitutional norms that entitle citizens to political participation and genuine elections also bind public institutions and, therefore, state institutions should not enjoy any privileges and presumptions in their favour. As the Kenyan Court in 2017 showed, such state institutions may not always utilize their power for the common good but use it to manipulate systems for narrow interests. It is, therefore, the duty of the electoral court to ensure that every little allegation is properly assessed and to this effect, state institutions responsible for conducting elections should not have any benefit of the assumption that they conducted their affairs prudently. This approach was recently used by the Austrian Constitutional Court when it nullified that country's 2016 presidential election. It stated:

Therefore, not only individual possible incidents of manipulation, which are potentially more likely, such as the invalidation of votes, but rather all theoretically possible forms of manipulation and abuse have to be taken into account; because as explained above the legal provisions intended to safeguard the electoral principles are also to serve as protection against manipulation and abuse by the state itself as the organizer of the elections.<sup>22</sup> (emphasis the author's)

The role of the electoral court in a constitutional democracy should be to enforce constitutional norms and not take pre-determined positions. It should be open to assess all possible allegations and consider state agencies administering elections as equally bound to constitutional standards as everyone else. The Zimbabwean Constitutional Court had an opportunity to do this. It had a further opportunity to devise contextually relevant mechanisms of responding to local democratic needs of the country and help rebuild the democratic aspirations of the Zimbabwean people, taking the example of the Kenyan Supreme Court in 2017. This however, is not to argue that the Court should have invalidated the election, but that it should have presided over the dispute as a neutral enforcer of constitutional values. The abridged judgment, however, suggests the opportunity may have been missed.

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<sup>21</sup> Ibid

<sup>22</sup> Heinz-Christian Strache and Others v Federal Electoral Commission and Others Constitutional Court W 6/2016-125 (1 July 2016), page 159.