Electoral Law, the Constitution and Democracy in Zimbabwe: A critique of *Jealousy Mbizvo Mawarire v Robert Mugabe N.O and 4 Others* CCZ 1/13.

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1.1 Introduction

The Zimbabwean elections held on the 31st of July 2013 were a direct consequence of the ruling that was handed down by the Constitutional Court in the case of *Jealousy Mawarire v Robert Gabriel Mugabe N.O and 4 Others*.[1] These elections were of great importance in that they marked the end of the Government of National Unity which was constituted under the Global Political Agreement.[2] Moreover, the 2013 elections marked the beginning of a new constitutional dispensation in Zimbabwe as the elections would see the coming into operation of most of the provisions of the new 2013 Constitution.[3]

The resolution of electoral disputes using the courts is a prominent feature in modern constitutional democracies, particularly those in Africa. The twenty first century has thus witnessed the increased 'judicialization of politics' with questions of pure politics including the fairness of electoral processes being referred to the courts for resolution.[4] It is hardly surprising therefore that the decision by the newly created Constitutional Court on a matter of great significance for the democratic processes in Zimbabwe would not escape intense scrutiny. Having undergone more than a decade of political turmoil, hopes were high that the 2013 elections would bring stability in governance structures through credible and transparent elections. Clearly, the Constitutional Court was seized with an important matter which, it could be argued, had the potential of deciding the future of democratic processes and institutions in

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[1] CCZ 1/13.
[2] This was a political agreement between the major political parties in Zimbabwe; the Zimbabwe African National Union Patriotic Front (ZANU PF) and the two major factions of the Movement for Democratic Change (MDC) to come together to form a transitional government of unity to tackle the challenges which Zimbabwe faced in 2008.
[3] Amendment Number 20, Act of 2013.
[4] R. Hirschl, 'The judicialization of Politics' in K Whittington et al (e.d), *The Oxford Handbook of Law and Politics*, Oxford, (2008) p. 119.

the country. In itself however, the exercise of constitutional interpretation is very delicate as more often than not, the final determination has a bearing on political disputes and matters of government. It is imperative that the Court be seen to be following laid down principles of interpretation as its judgments are susceptible to scrutiny and possible critique. This case note interrogates the difficulties which the Constitutional Court encountered in its quest to derogate from the laid down canons of constitutional interpretation.

1.2 Factual background of the case

The Applicant was Jealousy Mbizvo Mawarire.[5] The first Respondent was Robert Gabriel Mugabe,[6] the second Respondent was Morgan Richard Tsvangirai,[7] the third Respondent was Arthur Guseni Oliver Mutambara,[8] the fourth Respondent was Welshman Ncube,[9] and the fifth Respondent was the Attorney-General.[10] The Applicant brought this application before the court under section 24(1) of the Lancaster House Constitution[11] on the basis that his rights enshrined in section 18(1) and 18 (1) (a) of the former Constitution had been contravened. Section 18(1) provided that every person was entitled to protection of the law. Section 18(1) (a) of the Constitution further provided that every public officer had a duty towards every person in Zimbabwe to exercise his or her functions as a public officer in accordance with the law and to observe and uphold the rule of law.

The Applicant contended that the failure by the first Respondent to set a date for elections when the life of Parliament was coming to an end violated his right as a registered voter and his legitimate expectation to protection of the law. It was common cause that the Parliament of

[5] A citizen of Zimbabwe, a registered voter and the founding trustee for the Center for Elections and Democracy in Southern Africa.
[6] He was cited in his official capacity as the President of Zimbabwe and as a signatory to the Global Political Agreement (GPA), representing his party, the Zimbabwe African National Union Patriotic Front (ZANU-PF).
[7] He was cited in his capacity as the Prime Minister of Zimbabwe, and also as a signatory to the GPA, representing his party, the Movement for Democratic Change (MDC).
[8] He was cited in his capacity as the Deputy Prime Minister of Zimbabwe and also due to the fact that he was a signatory to the GPA.
[9] He was Minister in Government and was cited in his capacity as the representative of the other formation of the MDC which was a party to the GPA.
[10] He was cited in his capacity as the principal legal advisor to the Government.
[11] Lancaster House constitution 1979, which was replaced by the coming into law of a new Constitution, Amendment 20, Act of 2013, on the 22 May 2013. However, it was not replaced in its entirety; the sixth schedule of the new Constitution provided for the repealing of the former Constitution and for the implementation of the new Constitution.

Zimbabwe would stand dissolved by the effluxion of time on the 29th of June 2013. However, when the Applicant brought his application to court, the President had not set a date for elections. The Applicant contended that a reading of the relevant constitutional provisions[12] showed that the President had to call for elections within the life of Parliament.

The issue before the court was a relatively simple one, and the court phrased is as follows, "when after the accepted dissolution of Parliament by the effluxion of time in terms of the Constitution should harmonised elections be held?"[13] However, this simple question generated different arguments from the parties to the application. The second and the fourth Respondent were of the view that the former Constitution granted discretion to the President to call for elections on any date up to four months **after** the dissolution of Parliament. On the contrary, the Applicant and the first Respondent were of the view that elections should be held **within** four months **before** the life of Parliament comes to an end.[14]

1.3 Assessment of the majority judgment

The task before the Constitutional Court boiled down to that of constitutional interpretation. The court had to interpret section 58 (1) as read with section 63(4) and (7) of the former Constitution to determine when elections were due to be held. Section 58 (1) of the former Constitution dealt with the timing of elections and the fixing of dates for elections by proclamation. It provided that;

> "(1) *A general election and elections for members of governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or, as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the Gazette, fix*."

Chidyausiku CJ writing for the majority, came to the conclusion that a reading of section 58(1) produced two possible interpretations, that is, reading A and reading B.

In terms of Reading A

[12] Section 58(1) as read with section 63(4) and (7) of the former Constitution.
[13] Jealousy Mawarire case *op cit* note 1 at p. 8.
[14] *Ibid* p. 11.

"(1) A general election and elections for members of the governing bodies of local authorities shall be held on:

i. such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or

ii. as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the *Gazette,* fix." [15]

In terms of Reading B

"(1) A general election and elections for members of the governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after:

i. the issue of a proclamation dissolving Parliament under section 63(7) or,

ii. as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the *Gazette,* fix."[16]

In construing section 58(1) in line with reading A, elections had to be held within the life of Parliament. In contrast, construing section 58(1) in line with reading B meant that, elections could be held up to four months after the dissolution of Parliament. The court held that a reading of section 58(1) in line with reading B produced results which were absurd in that the framers of the constitution could not have intended general elections to be held outside the life of Parliament as this violated the separation of powers principle. In the face of two competing interpretations, the court favoured the interpretation which in its view did not produce absurd results.

One can argue that the words of section 58(1) were clear and unambiguous in their wording and only pointed to one meaning. The breakdown of section 58 (1) which was done in an effort to decipher its meaning had consequently produced an ambiguous and vague meaning. Malaba DCJ observed that the wording of section 58 (1) points to nothing more other than the plain and

[15] *Ibid* p. 10.
[16] *Ibid* p. 11.

unambiguous meaning. [17] Patel AJA was also of the view that section 58 (1) of the Constitution pointed to noting more than the plain and ordinary meaning of the words.[18] The plain and ordinary meaning of the words in section 58(1) pointed to fact that the President can call for elections on any date he may choose within four months after the dissolution of Parliament by the effluxion of time.

It has been argued that the interpretation exercise that was carried out by the learned Chief Justice violated the basic rules of grammar.[19] Matyszak argues that 'He(Chidyausiku CJ) inserted colons into the section (where none existed in the original) ostensibly to highlight what he claimed was the ambiguous nature of the provision, but in fact creating an ambiguity that did not exist before.'[20]

The principles of constitutional interpretation have been clearly expounded by the courts. For instance, in the case of *Hewlett v. Minister of Finance*[21] Fieldsend CJ held that;

> *'…In general the principles governing the interpretation of a Constitution are basically no different from those governing the interpretation of any other legislation. It is necessary to look at the words used and to deduce from them what any particular phrase or words means having regard to the overall context in which it appears.'*

This entails that when interpreting constitutional provisions, due regard has to be made to the words used and the meaning of the words in the overall context of the provisions. The grammatical rules of language must also be respected.[22]

In the case of *Minister of Home Affairs (Bermuda) and Another v. Fisher and Another,*[23] the court observed that a constitution ought to be treated 'as *sui generis*, calling for principles of its

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[17] *Ibid* p. 28. Malaba CJ commented "The Applicant has turned the clear and unambiguous language of the provisions into a subject-matter of a question of interpretation which has unfortunately plunged the court into irreconcilable differences of opinion."
[18] *Ibid* p. 47.
[19] D. Matyszak, ' "New Bottles- Old Wine"- An Analysis of the Constitutional Court Judgment on Election Dates' (2013) *Research and Advocacy Unit* p. 2.
[20] *Ibid* p. 2. See also Jealousy Mawarire case *op cit* note 1 at p. 48, where Patel AJA argues that, 'In my respectful view, dividing s 58(1) in this fashion detracts from its grammatical structure and leads to an inchoate rendition of the provision.'
[21] 1981 ZLR 571.
[22] G.M. Cockram '*Interpretation of Statutes*' 3rd ed, Capetown, Juta & Co Ltd (1991) p. 36. See also the case of *Volschenk v Volschenk* 1946 TPD 487.

own, suitable to its character' The moot point is to determine the principles of constitutional interpretation which are in tandem with the *sui generis* nature of a constitution. It has been argued that the art of constitutional interpretation is no different from the art of construing a statute.[24] The modern trend in construing constitutional provisions supports a purposive approach over a strict adherence to a literalist approach.[25] However, in adopting a purposive approach, can the court disregard the plain and ordinary meaning of words?

In the case of *State v Zuma* [26] Kentridge JA stated as follows;

> ``*While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single `objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean . . . If the language used by the lawgiver is ignored in favour of a general resort to values, the result is not interpretation but divination*.'

A purposive approach to constitutional interpretation is progressive but such construction must be supported by the language of the provision. A purposive approach cannot be implemented in disregard of the plain and unequivocal language of a provision. Invariably, a purposive approach 'does not mean that judges are entitled to ignore the text of the constitution and invent an interpretation of the relevant provision that facilitates preferable moral consequences, but rather that judges may interpret the text in the light of the fundamental values that it is designed to protect.'[27] This recognises the duty of fidelity which is upon judges which imposes a constraint

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[23] [1979] 3 ALL ER 21 (PC).

[24] L. Madhuku, 'Constitutional Interpretation and the Supreme Court as a Political Actor: Some Comments on United Parties v Minister of Justice, Legal and Parliamentary affairs,' (1998) Vol. 10:1, Legal *Forum*, p. 51.
"the purposive approach which is urged in constitutional interpretation is no different from the well known 'golden' and rules 'mischief' rules…the court must take us through the language of the relevant provision and show the manner in which that language supports the purposive meaning being decided upon."

[25] *Ibid* p. 50. See also G. Carpenter, 'Constitutional interpretation by the existing judiciary in South Africa-Can new wine be successfully decanted into old bottles?' (1995) XXVIII *CILSA* 1995 p323-337; H. Botha, 'Ablie and the politics of interpretation' (2010) 25 *SAPL* p. 39-58; C. M. Fombad, 'Constitutional Reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' August (2011) *Buffalo Law Review* p.1007-1108.

[26] 1995 4 BCLR 401 (CC) 17-18.

[27] P. Lenta, 'Constitutional Interpretation and the rule of law' (2005) 2 *Stellenbosch law Review* p. 274.

upon interpretation.[28] The duty of fidelity entails that judges, in interpreting the constitution, should have due regard to the language of the constitutional provisions and place a construction upon the words which can be sustained by the language of the text. They cannot disregard the plain language of the text and place a meaning which gives an outcome favoured by the interpreter.

The same view was adopted in the Zimbabwean case of *Mike Campbell (Pvt) Limited and Another v The Minister of National Security Responsible for Land, Land Reform and Resettlement and Another*.[29] The Applicants in this case argued that Constitution of Zimbabwe Amendment (No. 17) Act, 2005[30] was unconstitutional on the grounds that it violated the Applicants' right to protection of the law and the right to a fair hearing within a reasonable time. Amendment number 17 to the Constitution introduced an ouster clause which precluded the courts form determining any challenge to the acquisition of land by the government carried out in terms of Section 16B of the Constitution. Applicant contended that the legislature had no power to take away the right of access to the court as this would undermine the balance of powers of the state between the legislature and judiciary. The court held that it was a valid exercise of legislative power. Further, it was held that the clear words of a constitution must be construed to override any doctrine of constitutionalism predicated on essential features or core values.[31]

The canons of statutory interpretation dictate that the Court should first start by interpreting the constitution as written by the framers (the plain meaning approach) and only resort to the other interpretive paradigms where the plain meaning approach fails due to ambiguity or absurdity.[32] In light of the above, one can argue that in the *Mawarire case* a reading of section 58 (1) was plain and unambiguous in its meaning, hence the Court should have given effect to the words as there was no need to resort to a teleological approach.

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[28] See L. Lessig, 'Fidelity and Constraint' (1997) Vol 65:4 Fordham *Law Review* 1365-1433 and R. Dworkin 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve' (1997) Vol 65:4 *Fordham Law Review* 1249-1268.
[29] SC 49/07.
[30] Act N0. 5 of 2005.
[31] Mike Campbell case *op cit* note 29 at p. 33-35.
[32] S.K. Asare, 'Plain meaning v Purposive interpretation: Ghana's constitutional jurisprudence at a crossroad.' June (2006) University *of Botswana law Journa*l p. 93.

An analysis of the constitutional jurisprudence of the Supreme Court[33] shows that the approach that the court has taken in constitutional interpretation has been inconsistent.[34] Some cases have been decided on a purely literalist approach whereas other cases have been decided on very broad principles of interpretation. Such an approach to constitutional interpretation is undesirable as it creates the perception that the Supreme Court favours the interpretative approach which gives effect to the results it wishes to achieve.[35] The selective application of different methods of interpretation has been attributed to the courts trying to adopt the interpretative approach that does not conflict with the executive arm of the government.[36] Prior to this application being brought before the court, the first Respondent wanted to have elections set on an earlier date, whereas the second Respondent was calling for elections to be set at a later date in order implement electoral reforms that were necessitated by the new constitutional dispensation.[37]

In holding that section 58 (1) intended elections to be held within the life of Parliament, the majority's reasoning was that this interpretation favoured constitutionalism as there would be no violation of the doctrine of separation of powers. One is persuaded to agree with the dissenting judgments for a number of reasons. Firstly, holding elections outside the life of Parliament is not absurd or 'mind boggling' as many other constitutional democracies in the world also allow for Parliamentary or general elections to be held outside the life of Parliament. Malaba DCJ in his dissenting judgment highlights many examples of countries that have such a practice.[38] This

[33] Supreme Court dealt with matters of a constitutional nature in the old constitutional dispensation. In the new constitutional dispensation, it is the Constitutional Court that has the final decision on matters of a constitutional nature.

[34] Cases decided on a purely literalist approach: - *Davies and Another v Minister of lands, Agriculture and Water Development* 1996(1) ZLR 681; *Nyambirai v National Social Security Authority and Another* 1995 (2) ZLR 1 (S); *Public Service Commission, Austin and Another v Chairman, Detainees Review Tribunal and Another* 1988 (2) ZLR 21; *Hewlett v Minister of Finance* 1981 ZLR 571; *Mike Campbell (Pvt) Limited and another v. The Minister of National Security Responsible for Land, Land Reform and Resettlement and Another* SC 49/07.
On the other hand, cases decided on a purposive approach *Rattigan and Others v Chief Immigration Officer and others* 1994 (2) ZLR 54; *Woods and Others v Minister of Justice and Others* 1994 (2) ZLR 196; *In Re Mlambo* 1991(2)ZLR 339; *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs* 1991(1) ZLR 105; *S v Ncube and others 1987* (2) ZLR 246.

[35] L. Madhuku *op cit* note 24 at p. 52. He argues that a court which is inconsistent in the manner in which it approaches the task of constitutional interpretation risks being portrayed as playing pure politics.

[36] *Ibid* p. 51.

[37] D. Matyszak *op cit* note 19 at p. 2.

[38] Jealousy Mawarire case *op cit* note 1 at p. 39- 40. The Malaysian Constitution Section 55(4) provides that general elections shall be held within sixty days from the date of dissolution of Parliament; the case

clearly illustrates that no absurdity would have resulted from giving effect to the ordinary, grammatical meaning of section 58 (1), which allowed for elections to be held within four months outside the life of Parliament.

Secondly, there have been instances where the executive and judicial arms have operated without legislative oversight. In 2008, the executive arm continued to function without legislative oversight for five months between the dissolution of Parliament for the March 2008 election and the start of the seventh Parliament in 2008.[39] Hence, such a situation would not have been against Zimbabwean constitutional practice.

Thirdly, the majority did not take into account various other factors which would lead to a violation of separation of powers and a situation of rule by decree. The elections which were in dispute here were the 'first elections' as defined in the sixth schedule of the new Constitution.[40] The new Constitution provided that these first elections had to be conducted in terms of an electoral law which was in conformity with the provisions and standards laid down in the new Constitution.[41] This entailed that major reforms needed to be carried out to the electoral law to bring it in conformity with the standards laid down in the new Constitution. However, the time limit that was imposed by the Supreme Court did not leave enough time to allow these reforms to be passed through Parliament and passed into law. This resulted in the President using his powers in terms of the Presidential Measures (Temporary Powers) Act[42] to pass the necessary

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of Kenya where section 9 the Sixth Schedule of their New Constitution provided that "the elections for the President, the national Assembly and Senate shall be held within sixty days after dissolution of the National Assembly at the end of its term"; Article 16.3 of the Constitution of Ireland provides that after dissolution of the Parliament a general election for members of Parliament shall take place not later than thirty days after the dissolution; Article 15(2) of the Constitution of Andorra provides that the President has the power to choose a date of an election to fall between the thirtieth and fortieth day following the end of the term of Parliament; Article 64.3 of the Constitution of Bulgaria provides that the date for an election shall fall within two months from the expiry of the life of Parliament; Article 73(1) of the Constitution of Croatia provides that elections for members of the Croatian Parliament shall be held not later than sixty days after the expiry of the mandate or dissolution of the Croatian Parliament.

[39] D. Matyszak *op cit* note 19 at p. 3.

[40] Section 1 of the sixth schedule of the new Constitution.

[41] Section 8, sixth schedule of the Constitution, Amendment No. 20, Act of 2013.

[42] Chapter 10:20.

changes into law.[43] This was an outright usurpation of legislative functions and thus a violation of the separation of powers principle.

Constitutionalism is a multi-faceted concept. Needless to say, free, fair and democratic elections are also important in upholding constitutionalism, good governance and accountability.[44] The electoral process and the electoral laws must facilitate electoral democracy so as to minimize electoral fraud among other electoral irregularities.[45] The *Mawarire* judgment resulted in a rushed electoral process which exposed these elections to irregularities. Although the July 2013 elections were approved by the Southern African Development Community (SADC) and the African Union (AU), there have been various allegations of electoral irregularities.[46] Invariably, a literal reading of section 58 (1) of the former Constitution would have allowed enough time to make changes to the electoral law and enough time to adequately prepare for elections.

Fourthly, the court overlooked the fact that the President had discretionary powers which were granted to him by section 58(1) of the former Constitution.[47] The vesting of discretion to the President gave him power to set dates for elections anytime within the time limits provided by section 58(1). Clearly, the canons of constitutional interpretation do not support the majority decision to order the President to set a date for elections.[48]

1.4 Conclusion

The language of the section 58(1) as read with section 63(4) and (7) of the former Constitution was clear and unambiguous in its meaning. A literal reading of section 58 (1) of the Lancaster House Constitution shows that the President had the discretionary power to set a date for

[43] Mugabe gets away with amendments by decree *Zimbabwe Independent* (28 June, 2013) available at http://www.theindependent.co.zw/2013/06/28/mugabe-gets-away-with-amendments-by-decree/ accessed 5/11/2013 at 15.15hrs.
[44] C.M. Fombad *op cit* note 25 at p. 1106.
[45] *Ibid* p. 1021. Fombad maintains that a common strategy has been for the ruling parties to tailor electoral codes and procedures to favor them and exclude their competitors from the race, hence the importance to ensure that electoral laws and processes and fair and facilitate a democratic electoral process.
[46] See 'Zimbabwe's election results marred by fraud' available at http://www.sokwanele.com/zimbabwe-elections/evidence-of-fraud. (Accessed 2/12/13 at 1428hrs).
[47] Words such as '…such days or days…as the president may, by proclamation in the Gazette fix' point to the discretionary power that was given to the President in setting the dates for elections.
[48] See *Mukwereza v Minister of Home Affairs* SC-7-04.

elections up to four months after the dissolution of Parliament. Moreover, an analysis of the constitutional practice in other constitutional democracies points to the same conclusion. Credible elections are important in a democratic country as they lend legitimacy to the government that is in power at the end of the day. The calling of elections is essentially the prerogative of the executive and the executive must to take into account many considerations such as the prevailing socio, economic and political factors in setting a date for elections.

In order to enhance the prospects for free and credible elections in Africa, it is imperative that the courts abide by the long established canons of constitutional interpretation. Where the language of a statute is clear and unambiguous, the court must give effect to the commands of such language. Departure from the plain and ordinary meaning of the words of a provision is permissible only where sticking to the plain and ordinary meaning would result in an absurdity. The judiciary must be the vanguard of democracy and must be seen to be upholding the rule of law and constitutionalism. It is constitutionally unacceptable for the judiciary to go beyond the limits of judicial activism. The *Mawarire case* has once again highlighted the importance of the judiciary in shaping the democratic systems in emerging democracies in Africa. It is critical for the judiciary to appreciate the importance of fair and justified decision making, particularly in highly contested cases that define important political and democratic processes in the country.