

The Role of Judiciaries in Presidential Electoral Disputes Resolution in Africa: The Cases of Zambia and Zimbabwe

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Abstract: The African continent, arguably more than any other continent, is riddled with electoral disputes. While disputes are an inherent feature of elections; in Africa electoral disputes culminate in violence and havoc. Instead of ameliorating this trend, judiciaries seem to exacerbate it. The electoral laws in the majority of African countries provide for dispute resolution mechanisms. At the apex of these mechanisms are the judiciaries. The judiciaries ordinarily play the role of adjudication of disputes in societies; and this role is widely accepted. With regards to electoral disputes the role of the judiciary is not without any controversy. The role of the judiciary in election related conflicts is complicated not only by the fact that they oftentimes decide in favour of the establishment but also, and much more importantly, by the principle of democracy. The cases of Zambia and Zimbabwe provide perfect microcosms of a pervasive problem in Africa. The principle of democracy reposes the ultimate power to decide rulers in the electorate. Allowing the judiciaries to second-guess the electorate is controversial. The main question is whether judiciaries in Africa should continue to be final arbiters on electoral disputes; particularly the disputes that concern the electoral results. Another question is whether judiciaries in Africa have been adjudicating on electoral disputes in a manner that enhances the higher objective of democratisation. The questions will be investigated by studying the leading decided cases from the two countries under study. Methodically, the paper will use the politico-legal approach as the subject straddles both the political and legal studies.

Keywords: Conflicts, Disputes resolution, Electoral disputes, Electoral laws, Judiciaries

1. Introduction

The last decade of the twentieth century saw the upsurge in democratic elections in Africa (Cheeseman, 2010). This was the era of reprieve for African peoples who were gradually emerging from the bondages of either colonialism or military dictatorships. Elections became the chief struts of these transitions. The electoral euphoria of this period was soon to be eclipsed by the incessant electoral conflicts (Sachikonye, 2004; Matlosa, 2001; Matlosa, 2004). Some of these conflicts brought unprecedented devastations on the continent (Abuya, 2010). While conflict is an inherent feature of electoral completion everywhere, in Africa the scale of devastation has been monumental (Ohlson and Stedman, 1994).

Incidentally, judiciaries became nerve-centres of the infrastructure for electoral dispute resolution in many, if not all, African countries. Their roles became so central to the electoral process so much that they really determined, even more than voters in some cases, who become the rulers. Agitated by this newly acquired role of the judiciaries in the electoral process, scholarship surged on the role of African judiciaries in electoral process (Kaaba,

2015; Azu, 2015, Nkansah, 2016). The research burgeoning on this subject points to interesting, and sometimes contradictory, patterns of the role of African judiciaries in elections. Nevertheless, the widely accepted view is that African judiciaries have not ameliorated the situations of electoral disputes in Africa. Instead, in the majority of cases after the intervention of courts in electoral disputes situations escalate; and invariably end up in violence. As Omotola (2010:67) pointedly contends that, 'The contradictions of electoral justice in Africa represent another factor responsible for electoral violence in Africa'. This has led to the emerging criticism of judiciary as the arbiter on electoral processes (Ellett, 2008).

The question hovering on the role of African judiciaries in elections is rendered uniquely important because it is an adjunct of the broader question about the independence of judiciaries on the continent. In other parts of the globe, particularly in the Western hemisphere, the role of the judiciary in dispute resolution, in general, and electoral disputes, in particular, is less controversial. The reason is that judicial independence is generally presumed. In Africa, the opposite is only true; there is widespread

scepticism about the independence of the judiciary (Vondoepp, 2005). This scepticism is rendered even more credible by the proven trend that in almost all the presidential electoral petitions the judiciary dismissed them (Azu, 2015). An interesting undercurrent to this trend is that the sitting presidents have a very strong hand in the appointments and removal of judiciaries. Thus, when the sitting president is challenged through the electoral process, the judiciaries become the shield for the *status quo* (Madhuku, 2006; Fombad, 2014). The Kenyan Supreme Court in *Odinga v Independent Electoral and Boundaries Commission* (2017) in the aftermath of the 2017 presidential election is an outlier in the broader scheme of things. Despite this consistent pattern, the newly adopted constitutions and electoral legislations continue to place the judiciaries at the epicentre of electoral dispute resolutions architecture of many, if not all, African countries.

The newly adopted Constitutions in Zambia and Zimbabwe are leading the pack in this new trajectory. The new constitutions have introduced the notion of 'constitutional courts' which are the courts specifically empowered with competence to deal with electoral disputes. Thus, the courts are stronger today in electoral processes than they were few decades ago despite their record being not so controversial. This pre-eminence of the courts in political process generally, and elections in particular, has received immense criticism. The criticism has been that the involvement of judiciaries in electoral processes amounts to what has been called judicialisation of politics; 'the ever-accelerating of reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies' (Hirschl 2006:721). This notion questions the increasing role of the courts from their traditional passive domain to the modern active domain (Sarkin, 1997; Tate & Vallinder, 1995).

Mindful of the special role played by the courts in electoral processes, legal scholarship and judicial precedent have developed the special jurisprudence for adjudication of electoral disputes. The mainstay of this jurisprudence is the emphasis on substantive justice as opposed to formal (procedural) justice. This emerging jurisprudence has found its way into the electoral laws and, in countries such as Zambia and Zimbabwe, the constitutions. This emergent jurisprudence notwithstanding, courts in Africa are still holed up in proceduralism as an excuse for indiscriminate dismissal of electoral petitions

('Nyane, 2018; Musiga, 2016). The most common procedural ground for dismissal of electoral petitions is the evidential burden of proof (Omotola, 2010: 52) puts the matter much more succinctly in that,

'... resort to the election petition tribunals and courts...has raised more questions than answers. So many obstacles, including the huge cost of seeking electoral justice, the near impossible conditions of the 'burden of proof' imposed on the litigant, the undue protraction of litigation, and the seeming lack of independence of the judiciary, have served to limit the reach of electoral justice.'

This paper analyses the role judiciaries in Zambia and Zimbabwe as the microcosms of the broader continental pattern. The data for this analysis is gotten from the electoral laws and decided cases. In the end, paper contends that while the judiciaries still have a role to play in electoral justice. Nevertheless, measures should be taken to guard against the widely spread phenomenon in Africa where elections that are otherwise invalid are legitimised by judiciaries. The paper starts off by revisiting and problematizing the principles of the emerging jurisprudence on adjudication of electoral disputes in Africa. The second section analyses the application of these principles to the two countries under study herein – Zambia and Zimbabwe.

2. Problematising the Principles and Concepts on Adjudication of Electoral Disputes in Africa

The participation of courts in electoral processes is a fair recent phenomenon, having only been reluctantly accepted in Britain in the 19th century (O'Leary 1962). Just as there is a raging controversy today about the role of judiciary in electoral process, it was initially thought that the sanctity of the judiciary would be dented if courts were to be permitted to descend into the arena of electoral politics. It was thought that electoral disputes are better resolved by parliament as petitions on elections returns (*R (Woolas) v The Parliamentary Election Court*, 2010). It was deemed that the House of commons was the better judge of the disputes about the return of its own members. However, as electoral fraud became widespread, the impartiality of parliament to resolve electoral disputes was increasingly called into question in Britain (Porbitt, 1906; Rix, 2008). Hence, in 1868 the British parliament enacted the

Parliamentary Elections Act. The Act introduced the shift from parliamentary-based dispute resolution to the judicial-based dispute resolution mechanism. The Act empowered the Court of Common Pleas to try electoral disputes. This newfound role of the judiciary in electoral disputes has been accepted in England and throughout Africa hitherto. In England the most recent statute on electoral dispute resolution is *The Representation of People Act* of 1983. The Act (Section 120(1)) posits that 'no parliamentary election and no return to parliament shall be questioned except by a petition complaining of an undue election or undue return'. Thus, the concept of a petition is now firmly established in electoral parlance as a means by which the validity of an election is questioned in a specially designated court of law. In Africa, only superior courts – High Courts, Supreme Courts of Appeal or Constitutional Courts – are empowered to preside over electoral petitions. For instance, the section 93(1) of the Constitution of Zimbabwe (2013) provides that 'any aggrieved candidate may challenge the validity of any election of a President or Vice-President by lodging a petition or application with the Constitutional Court within seven days after the date of the declaration of the results of the election.'

Although the role of the judiciaries in electoral disputes is firmly established in contemporary times, it is not without controversy. The fears of judicialisation of politics are still extant and genuine today as they were initially when it was deemed that the courts have no role in electoral disputes (Kibet & Fombad, 2017). The fears of bringing rigid and inflexible judicialism to bear on the will of the people have always loomed large in the discourse. The courts of law have the traditional obsession with proceduralism which often puts less emphasis on the substance of the dispute in question (Omotola, 2010). This obsession has been immensely criticised in contemporary academic and judicial approaches (Sypnowich, 1999). Hence, it has been deemed that proceduralism – which connotes over reliance on rules and processes of dispute resolution as opposed to the substance of the dispute – would totally be inappropriate for electoral disputes. A special jurisprudence for electoral disputes therefore emerged which is an antithesis to the traditional approach (Vickery, 2011). The new approach on electoral disputes emphasises the substance of the dispute as against the process. This approach as well has its origins from Britain. The United Kingdom Representation of People Act (1983) under section 23(3) provides that:

'no parliamentary election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the parliamentary elections rules'

The Act goes to identify mainly two grounds for invalidation of an election. The first one is that the election was not conducted 'substantially' in accordance with the law regulating elections; and secondly, such violation of the law had substantially affected the result of such election (Section 23(3)). Thus, it would seem that the mainstay of the jurisprudence on electoral disputes is the extent to which the violation of the electoral law substantially affected the result. This approach is called the substantial effect doctrine. The classical case, which has been the flagbearer of the doctrine as it is today applied in Africa, is the House of Lords decision in the case of *Morgan v Simpson* (1974). The court in this case formulated a triangular theory of the doctrine of substantial effect. The court said the three kingpins of the doctrine are, a) if an election was conducted so badly that it was not substantially in accordance with the law, the election is vitiated; b) if the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls; c) even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated.

Studies on presidential election petitions in Africa demonstrate that judiciaries in Africa are aware of the substantial effect doctrine but, quite often, they either misapply it or deliberately choose to abuse it (Musiga, 2016; Kaaba, 2015; Azu, 2015; Nkansah, 2016). In the majority cases, fundamentally flawed elections are legitimated by courts under the guise of substantial effect doctrine. Judiciaries, pretty much to the chagrin of everybody, use the substantial effect doctrine to validate elections even in cases that are palpably conducted in violation of the electoral laws. Examples are legion throughout Africa. In Lesotho, the High Court in the case of *Abel Moupono Mathaba and Others v Enoch Matlaselo Lehema and Others* (1993) declined to vitiate an election outcome in the aftermath of the controversial 1993 election despite the fact that it had already made a finding that the election was not conducted in accordance with the electoral law. The court created an artificial

analytical problem in an effort to justify its reluctance to vitiate a flawed election. It said,

'We are unable to state that the invalidity of the elections has been conclusively established. We point out, however, that some of the apparent irregularities and discrepancies are sufficiently serious concerns. We cannot however postulate that the result does not reflect the will of Lesotho electorate. We merely point out that the means for checking this has been compromised and created much room for doubt' (p28). (emphasis added)

This kind of prevarication is common throughout Africa; elections in Africa are invariably conducted not in accordance with the law. Instead of rooting out this practice, judiciaries in Africa busk under the proven misapplication of the substantial effect doctrine. In the case of *Akufo-Addo v Mahatma* (2013), a Ghanaian Supreme Court refused to vitiate the outcome of 2012 presidential election which was overtly marred by illegalities such as over-voting, unauthentic (unsigned) ballot papers, unknown (un-serialised) polling stations and voting without biometric verification. The court, through the minority judgment of Ansah JSC (p99), made a determination that, 'it is clear that the irregularities associated with the 2012 presidential election were substantial ... it is equally clear that the non-compliance in this case affected the results of the 2012 presidential'.

The pattern is almost the same throughout Africa. The Court of Appeal of Nigeria in the case of *General Muhammadu Buhari v Independent National Electoral Commission* (2008) refused to invalidate the 2007 presidential election on the basis of a brazen misapplication of substantial effect theory. The court said:

[[I]t is manifest that an election by virtue of [the applicable statute] shall not be invalidated by mere reason that it was not conducted substantially in accordance with the provisions of the [applicable statute]. It must be shown clearly by evidence that the non-compliance has affected the result of the election.

With the exception of the most recent judgement of the Kenyan Supreme Court in *Odinga v Independent Electoral and Boundaries Commission* (2017), where the court boldly vitiated a presidential election that was riddled with illegalities, superior courts in Africa tend to misconstrue the formulation of the theory in *Morgan v Simpson* (1974). The three requirements

for vitiation of an electoral outcome as articulated in *Simpson* case do not operate conjunctively; rather, they operate disjunctively. This means that satisfaction of any one requirement is sufficient to vitiate an election. Courts in Africa seem, almost invariably, to suppose that violation of electoral laws on its own may not vitiate the outcome. They reckon that such violation of the laws must affect the outcome the election in order for it to be the ground for vitiation of the entire result. This view is at variance with the *Morgan v Simpson* case; substantial violation of the laws alone can vitiate an election. The Court in *Simpson* said, 'if the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not'.

This position seems to have been captured instructively by the minority judgement in the case of Ghanaian Supreme Court in the *Akufo-Addo* case. Justice Ansah (p99) pointedly noted that courts in Africa unduly 'establish a higher standard by their requirement that a petitioner must establish *both* substantial non-compliance with electoral regulations and impact of the non-compliance on the election results'. He decreed that '*Morgan v Simpson* allows a petitioner to succeed upon establishing any one of the requirements' (p99). This is the best statement of the theory of adjudication of electoral dispute which, unfortunately, is not the dominant theory in African electoral adjudication practice.

African judiciaries, in their desperate search to justify the consistent dismissal of electoral petitions against the incumbents, have found another justification. The newfound ground for dismissal of election petition is the unduly high standard of evidential proof (Hatchard, 2015; Harrington, 2015; Murison, 2013). In election disputes the presumption is that elections were properly conducted. This presumption is manifested in the hallowed doctrine of *omnia praesumuntur rite et solemniter esse acta* (the presumption of correctness or validity of an election). This presumption has even found its way into the electoral laws of most African countries, including constitutions. For instance, section 69(9) of the Ghana Constitution of 1992 provides that an instrument in terms of which the Chairman of the Electoral Commission 'states that the person named in the instrument was declared elected as the President of Ghana at the election of the President, shall be prima facie evidence that the person named was so elected.' Similarly, section 110(3)(f)(ii) of the Zimbabwean

Electoral Act (2016) provides that the declaration of election is 'final subject to reversal on petition to the Electoral Court that such declaration be set aside or to the proceedings relating to that election being declared void'. In the case of *Chamisa v Mnangagwa* (2018), the Constitutional Court of Zimbabwe confirmed that, 'the declaration of results in terms of section 110(3)(f)(ii) of the Act creates a presumption of validity of that declaration'. Indeed, the presumption is rebuttable by production of evidence to the contrary. Judicial opinion is divided in Africa on the standard required for the petitioner to rebut this age-old presumption. On the one hand there is a view that the standard needed to prove electoral impropriety is on the balance of probabilities; which is the civil standard. On another hand is the standard beyond reasonable standard; which is the criminal standard. Indeed, an intermediate standard is being developed by some judiciaries which put the standard of proof in election petitions between the criminal standard and the civil standard.

The careful study of the most recent decisions on presidential election petitions demonstrates that the superior courts in Africa are falling more in favour of the intermediate standard than the other standards. This trajectory is led by the Ugandan Supreme Court in *Besigye v Museveni* (2001). In this case the court rejected the legion of decided cases in Uganda and elsewhere on the continent which suggested that the standard of proof in election petition is 'beyond reasonable doubt'. The court preferred the intermediate standard but used the language used in the Ugandan electoral law which is 'proof to the satisfaction of the court'. The court is disposing off the issue of the standard of proof said:

In my view, I would not deviate from what Parliament stated in the Act, especially when there is no ambiguity in Section 58(6) of the Presidential Elections Act. What is required of the petitioner who is seeking annulment of the election of the President is to adduce evidence and satisfy the court that the allegations he/she is making have been proved to the satisfaction of the court.

This intermediate standard was also adopted by the Supreme Court of Kenya in *Odinga v Independent Electoral and Boundaries Commission and Others* (2013) following the presidential election in 2013. The court confirmed that the threshold of proof should, in principle, be above the balance of probability, although not as high as beyond reasonable

doubt. The approach was later to be endorsed, albeit leading to a different outcome, in the contemporary judgement of the Supreme Court of Kenya in *Odinga v Independent Electoral and Boundaries Commission* (2017). The court decreed that:

...where no allegations of a criminal or quasi-criminal nature are made in an election petition, an "intermediate standard of proof", one beyond the ordinary civil litigation standard of proof on a balance of probabilities, but below the criminal standard of beyond reasonable doubt, is applied.

It would seem that it is now fairly established that the burden of proof in electoral disputes lies with the applicant; and the courts are increasingly favouring the intermediate standard of proof (Hatchard, 2015). However, the chase does not seem to end with the choice of the standard of proof. It is also about how, in the broader scheme of things, the standard is applied in each individual case. As will be more fully demonstrated in the succeeding discussion of the cases of Zambia and Zimbabwe, it would seem that the outcome is fairly the same – judiciaries in Africa are still not ready to vitiate a presidential election. They still cite the 'high standard of proof' as the ground for dismissal of the petitions.

3. Application of the Principles in Zambia and Zimbabwe

3.1 The Case of Zambia

Although Zambia has a longer history with parliamentary electoral petitions, its history with presidential elections petitions is relatively short (EISA, 2017). Much of the content of Zambian jurisprudence on presidential election petitions is based on the jurisprudence emerging in other African countries such as Uganda and Kenya (Musila *et al.*, 2013). The doctrine of substantial effect is, like in the majority of African countries, still a centrepiece of electoral law in Zambia. For instance, section 93(4) of the Electoral Act (repealed) of 2006 provided that,

'No election shall be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election if it appears to the High Court that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election.'

The same doctrine survived the repeal of 2006 electoral law. It subsists under the new 2016 electoral law. Section 97(4) thereof categorically provides that no election shall be vitiated by reason of an administrative error by an election official, 'if it appears to the High Court or a Tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election.' Taking a cue from the Kenyan Constitution of 2010, the new (2016) Constitution of Zambia elevates the broader notion of substantive justice to the constitutional level. Section 118 of the Zambian Constitution of 2016 provides that 'justice shall be administered without undue regard to procedural technicalities'. In the case of *Henry Kapoko v The People* (2016) the constitutional Court confirmed that the doctrine of substantial justice envisaged in the Constitution of Zambia has its taproots in Uganda and Kenya. However, the court watered down its importance by saying that, 'Article 118(2)(e) is not intended to do away with existing principles, laws and procedures, even where the same constitute technicalities'.

The mischief which the substantive justice doctrine sought to arrest in these countries was that cases, particularly election petitions, were invariably dismissed by courts of law on the basis of technicalities as opposed to their own merits. This technicist approach had wreaked electoral instability in both Uganda and Kenya. As demonstrated in the forgoing discussion, the elevation of the doctrine of substantial effect, which is a corollary of substantive justice, has not really affected the way judiciaries handle electoral petitions in Africa. A slight change was observed in Kenya in 2017 with the case of *Odinga v Independent Electoral and Boundaries Commission* (2017) wherein the Supreme Court of Kenya gathered the rare courage to vitiate a presidential election.

In Zambia the elevation of the doctrine to the constitutional level does not seem to have affected the technicity way in which courts approach electoral petitions. This approach was invoked in the most recent decision of the constitutional Court of Zambia in the case of *Hichilema and Another v Lungu* (2016). In this case Constitutional Court was confronted with an election petition following a presidential election of 2016. The decision is 'textbook case' of a court of law giving undue regard to technicalities – contrary to section 118 of the constitution. The court narrowly and literally followed Articles 101 (5) and 103 (2) which provide 'that the Constitutional Court must

hear a Presidential election petition within 14 days of the filing of the petition'. In this case, the 14 days lapsed when the matter was still proceeding because of the many technicalities that prolonged the hearing. When the 14 days lapsed, the court pronounced that it must hear an election petition within 14 days. The court brazenly, and pretty much to the chagrin of many observers (Zongwe, 2017), decreed that:

Our position, therefore, is that the Petition stood dismissed for want of prosecution when the time limited for its hearing lapsed and, therefore, failed by reason of that technicality. This is because the Petitioners failed to prosecute (sic) their case within fourteen days of its being filed. That being the case, there is no petition to be heard before this Court as at today.

It is interesting that the court, in its overdrive to self-avowedly dismiss the petition on the basis of technicalities, never considered the doctrine of substantive justice as envisaged under section 118 of the Constitution of Zambia (2016). This approach gave credence to the strong allegations of bias in the case (Zongwe, 2017), which is a common feature with African judiciaries (Vondoepp & Rachel, 2011). The consistent pattern of the courts being timid to upset the electoral results where there are alleged malpractices in Zambia started with the first presidential election petition in the case of *Lewanika and Others v Chiluba* (1998). This is the petition that challenged the validity of the 1996 election – which was the second election since the country returned to multiparty politics and under the new Constitution of 1991 (Rakner & Svasand 2004). The petitioners challenged the re-election of Frederick Chiluba as President on the basis that he was not qualified to be a candidate of election as president since neither he nor his parents were citizens of Zambia by birth or by decent. They also alleged other electoral irregularities. The challenge on the eligibility of Chiluba was clearly frivolous because it was not the first time Chiluba stood for election in Zambia in 1996; he won the election with Movement for Multiparty Democracy (MMD) in 1991 (Rakner & Svasand, 2004). But on the allegation of electoral irregularities, the court used the intermediate standard of proof. The court said that in parliamentary election petitions are proved:

'a standard higher than on a mere balance of probability and therefore in this, where the petition had been brought under constitutional provisions and

would impact upon the governance of the nation and deployment of constitutional power, no less a standard of proof was required' (para 4).

It would seem that Zambia is no exception to the general pattern emerging in African adjudication of presidential electoral petitions; that courts will, as a matter of practice, will not ordinarily upset the election outcome. They will use all sorts of reasoning - either the abuse of substantial effect doctrine or they will unduly raise the standard of proof - to justify their natural inclination not to change the status quo. To a very great extent, this relates to the broader question of the independence of the judiciaries in Africa (Vondoepp, 2005, 2006).

3.2 The Case of Zimbabwe

Zimbabwe is an epitome of African judiciaries in election disputes par excellence. As Manyatera and Fombad (2014:89) contend that 'political turmoil that Zimbabwe has gone through in the last two decades has affected most of its institutions, especially the judiciary'.

The role of the judiciary in electoral conflicts in Zimbabwe has left one big perception that the judiciary's routine dismissal of presidential electoral petitions is nothing more than a smokescreen for the clear partiality of the institution. The perception is captured much more accurately by Tsvangirai (quoted by Daily News 2017) as thus, 'the judiciary is controlled and it is dominated by the executive. As long as ZEC is controlling the election, and ZEC is being controlled by the executive, it's a vicious circle'. This 'vicious circle' is not unique to Zimbabwe. Studies have demonstrated that in countries where there is no fundamental change in political power, institution of government (including the judiciary) become entrapped in widespread 'agreement'; disagreement on any aspect becomes a rarity (Prothro & Grigg, 1960).

The country has a long history of parliamentary election petitions through which the doctrine of substantial effect was consolidated. The doctrine has been codified under section 177 of the Electoral Act. It provides that an election may not be vitiated except under two conditions, namely: '(a) the election was not conducted in accordance with the principles laid down in [the] Act; and (b) such mistake or non-compliance did affect the result of the election'. It would seem that these two requirements

for invalidation of an election are couched conjunctively by the Act - that is, (a) alone is not sufficient to invalidate an election. This formulation is at variance with the classical formulation from the case *Morgan v Simpson* (1974) which is the basis for the doctrine of substantial effect as it applies today in Africa. The principle from Morgan is crystal clear that substantial violation of electoral laws alone is sufficient to vitiate an election; even when such violation does not affect the outcome of the election.

It would seem that Zimbabwe is a classic case of misconstruction and misapplication of the doctrine. This misconstruction is best demonstrated by the most recent judgement of the Constitutional Court of Zimbabwe in *Chamisa v Mnangagwa* (2018). This was an election petition following the harmonised parliamentary, local government and presidential elections held on the 30th July 2018. In particular, the challenge was on presidential election on the basis of alleged irregularities. As is the norm, the constitutional court dismissed the petition. For purposes of this paper, what is intriguing are the reasons provided by the Court. The Court reasoned, amongst others, that,

The general position of the law is that no election is declared to be invalid by reason of any act or omission by a returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate electoral rules if it appears to the Court that the election was conducted substantially in accordance with the law...

This is clearly the conjunctive approach which only serves one purpose; to make it almost impossible for anyone aggrieved with the management and outcome of the election to vent such a grievance in the courts of law. In the *Chamisa* case, the court complicated the application of principles even further by introducing what it called an 'exception' to the above 'rule'. It said that the exception is that:

the Court will declare an election void when it is satisfied from the evidence provided by an applicant that the legal trespasses are of such a magnitude that they have resulted in substantial non-compliance with the existing electoral laws.

This is not an exception; it is an integral part of the of the substantial effect rule. The first inquiry in the

application of the substantial effect rule is whether there has been substantial non-compliance with the law regulating elections. If the answer is in the affirmative, the enquiry ends there; the election is vitiated. It does not proceed to the second leg of whether the non-compliance affected the outcome. The apparent disinclination of the court to upset the outcome of elections in Zimbabwe is compounded further by the standard of proof. The courts seem to agree with the general position in Africa that the burden of proof rests with the applicant and that the standard of proof is intermediary. However, the courts disregard the brute reality that the best evidence for election petitions is the election material which, almost invariably, is in the hands of the respondents - the election management body in particular. When a court is entrapped within this 'burden of proof technicism', it may not properly dispense the electoral justice because certainly the applicant has no access to the election material. Why should a court of law insist on the burden of proof that it knows very well that it is near-impossible to discharge?

This frustration was demonstrated by the applicants in the case of *Tsvangirai v Mugabe* (2013). This was an election petition following the 2013 presidential election. The petitioner launched the petition alleging the irregularities in the elections. He also launched other urgent applications in seeking access to the voting materials in order to discharge his burden in the main petition. The court reserved the judgment on the urgent applications indefinitely, until the time allocated for presidential petitions became imminent. The petitioner had to withdraw the main petition because, as he said:

In the petition various allegations regarding the conduct of the election by the second respondent were made, which allegations touch on the credibility and authenticity of the voting material which is currently under the control of the second and third respondents (emphasis supplied).

Clearly it was impossible for the petitioner to proceed with the main application without access to the voting materials. The withdrawal of the main petition was inevitable in the circumstances. That notwithstanding, the court dismissed the application for withdrawal and mulcted him with costs. This approach was in keeping with the broader approach whose net effect is to discourage the venting of electoral disputes in the courts of law.

4. Conclusion and Recommendations

This paper set out to investigate the increasing role of judiciaries in Africa in elections; using the two Southern African countries - Zambia and Zimbabwe - as microcosms. The study was guided by two overarching questions. The first one was whether judiciaries have any role to play in the electoral process at all. Electoral processes are purely political processes. There are strong views that courts should not be dealing with political questions. The second question has been whether the participation of African judiciaries in the electoral process, which is on the upsurge anyway, adds any value to the process of consolidation of democracy in Africa. On the first question - which could safely be dubbed 'the political question' - it would seem that the African continent is not an exception to the globular pattern where courts are increasingly becoming influential in the political and policy spaces. The upsurge is a natural response to the political phenomenon wherein at independence most countries in Africa inherited strong executives and parliaments that were not balanced (Mphaisha, 2000; Ellet, 2008). Thus, the emergence of judicialism is a natural response to the imbalance. These two Southern African countries - Zambia and Zimbabwe - provide very good examples. These are the two countries that, immediately after independence, fell into the hands of strong executives that overshadowed both the legislatures and the judiciaries. The other two branches became more of appendages of executive dominance (Cranenburgh, 2008; Bratton & Masunungure, 2006).

On the second question (the democracy question), which took the good part of the foregoing discussion, it is apparent that African judiciaries have not yet reached the stage where they can make a meaningful contribution to electoral democracy in Africa. What is apparent is that they have not yet outgrown the trappings of the post-independence era where they were by and large the appendages of the dominant alliance of the executives and the legislatures (Baylies & Szeftel, 1997). The executives are still disproportionately strong in Africa (Posner and Young 2007; van Cranenburgh, 2008). As such they deploy their hegemony in almost every institution, including the elections management bodies and the judiciaries. The foregoing discussion shows that the pattern of judiciaries being used to legitimate, rather than vitiate, questionable elections in Africa is surging. The most recent case in point is the

Zimbabwean Constitutional Court judgement in the case of *Chamisa v Mnangagwa* (2018). The impatience of the court with the petitioner's case, particularly the evidential (technical) part of it, was indicative of utter disinclination of the court to investigate the merits (substance) of case. In that sense, the court is not adding any value to the electoral process. That is why in many African countries, instability follows the courts' verdicts because courts are failing spectacularly to discharge electoral justice. They have amassed the technical machinery of legalism by way of the concepts such as 'burden of proof', 'standard of proof', 'substantial effect' and 'presumption of validity' as smokescreen for their clear partiality and non-independence. As demonstrated in the forgoing discussion, African judiciaries have cast these otherwise important legal doctrines as insurmountable hurdles for people dissatisfied with electoral processes. In the end elections are increasing getting weaker as a mechanism for replacing rulers. The courts of law are being deployed as important agents in the grand plan to perpetuate incumbency.

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