**ELECTION WATCH 34/2018**

**18th July 2018**

**Presidential Ballot Paper**

It appears that the Zimbabwe Electoral Commission [ZEC] has printed presidential ballot papers with the presidential candidates listed in alphabetical order in two columns.  The President’s name, which would be towards the middle of a single column, heads the second column.

**What the Electoral Act and Regulations say about the Form of Ballot Papers**

Section 57(a)(i) of the Electoral Act states that on all ballot papers, including papers for the presidential election, the names of the candidates must be printed in type of equal size, “in alphabetical order of surnames”.  It can be inferred from this that the names should be printed one below the other.

The Electoral Regulations, 2005, elaborate on section 57 by stating that ballot papers for the presidential election must be in form V.10, which is as follows:

PRESIDENTIAL ELECTIONS : FORM OF BALLOT PAPER

FRONT

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| NAME OF CANDIDATE | NAME OF PARTY | SYMBOL | PHOTOGRAPH | MARKING SPACE |
|  |  |  |  |  |
|  |  |  |  |  |

Clearly the form envisages the names of the candidates being listed vertically, one below the other.

Section 3(11) of the regulations confirms this by saying that in form V.10 “the number of horizontal segments shall equate to the number of candidates nominated for election … to the office of President …”  To make it even plainer, the section goes on to specify what each of the “vertical segments” must contain:  the “first of the vertical segments” must contain the names of the candidates, the “second vertical segment” must contain the name or abbreviation of each candidate’s political party, and so on.

In terms of the regulations, therefore, the names of the candidates must be listed one below the other in alphabetical order of surnames.  This is important because in Zimbabwe as elsewhere people read lists from top to bottom, and the candidate whose name heads the list has a slight advantage over those whose names appear lower down.  Under the Act and the regulations that advantage goes to the candidate who, by chance of birth, has a surname that begins with a letter towards the beginning of the alphabet.

**What Happens when there are Many Candidates?**

What is to be done if the number of presidential candidates becomes so large that, if listed vertically, they will not fit on to a normal sheet of paper?  Neither the Act nor the regulations seem to have envisaged this – understandably perhaps, because until last November wise people thought twice before standing in opposition to the incumbent President.

There are two options:  either to split the list of candidates into two columns, as ZEC has apparently done, or to list the candidates in one long column on a long thin ballot paper, as the South Africans did in 2014.

Of the two, the second option accords more with what is implied in the Act and the regulations.  If the ballot paper has two columns, the names of the candidates in the second column are not contained in “the first of the vertical segments” as required by section 3(11) of the regulations:  their names are contained in the sixth vertical segment, i.e. the first segment of the second column.

One can say, therefore, that by listing the candidates in two columns ZEC’s presidential ballot paper does not comply with the Electoral Act and the regulations.  It does not comply with it in another respect, too:  ZEC has added an extra column numbering the candidates.

**Must ZEC Comply with the Electoral Act?**

Does ZEC have power to ignore what is laid down, if only by implication, in the Act and the regulations?  The chairperson of ZEC has suggested that her Commission can do so because section 236(g) of the Constitution states that one of its functions is:

“(g)    to design, print and distribute ballot papers …”

The constitutional power to design ballot papers, she argues, can be exercised regardless of any restrictions imposed by an Act of Parliament such as the Electoral Act and regulations made under it.

The chairperson’s argument does not hold water.

Section 157 of the Constitution gives Parliament the duty to enact an electoral law providing for the “conduct of elections”, and though the section does not specifically mention ballot papers they are an important part of the conduct of any election.  So section 57 of the Electoral Act, which states that ballot papers must list candidates in alphabetical order, is probably valid and binding on ZEC.  Furthermore the regulations, which go into specific detail about the design of ballot papers, were not enacted by Parliament but by ZEC itself under section 192 of the Electoral Act.  ZEC chose to make regulations for the design of ballot papers and those regulations are binding as law.  ZEC is not above the law, even laws which it itself has made.  If it wants to change the form of ballot papers it must amend the regulations – and it cannot do so at this stage of the electoral cycle because of section 157(5) of the Constitution.

If ZEC had free rein to design ballot papers in whatever way it chose, disregarding the Act and the regulations, why should it stop there?  It could disregard statutory time-limits, prepare voters rolls in any form that suited it, put polling stations wherever it wanted, and so on.  Obviously ZEC must obey the law, and the law lays down the form of ballot papers.

**Has ZEC Been Impartial?**

One further point needs to be made strongly.  Even if ZEC did have power to design ballot papers as it chose, it would have to do so fairly and impartially.  If there are compelling reasons for listing the presidential candidates in two columns, then the two columns must be of equal length, or as nearly equal as the numbers allow, so that the candidates who head each column get that advantage solely by virtue of the alphabetical order of their surnames.

In the present case, where there are 23 candidates, if the list had to be split the ballot paper should have had two columns, one with 11 names and the other with 12.  Instead, ZEC’s columns, one with 14 names and one with nine, are artfully designed to ensure that the President has the advantage of heading the second column.  There can be no legitimate reason for this.

A final point is that when ZEC’s officials have been asked why they cannot use their broad constitutional powers to fill in gaps in the electoral law, they have answered that they must stick to the letter of the law as contained in the Electoral Act and its regulations.  It is strange, to say the least, that in this instance they have chosen to ignore the clear provisions of the Act and regulations, and instead purported to rely on the Constitution.

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