

JAMESON TIMBA  
versus  
JASON PASSADE

10 AUG 2014  
D. D. D. D.

HIGH COURT OF ZIMBABWE  
BHUNU J  
HARARE 3, 4, 5, 10, 11, 11, 12, 13, 14, 17 and 24, February 2014  
and 3 March 2014 and 18 August 2014.

*T.Maanda*, for the Petitioner  
*J.S Mandizha*, for the Respondent

BHUNU J: The applicant Jameson Timba and the respondent Jason Passade and one Peter Muchadamano were contestants for the Mount Pleasant Constituency Parliamentary seat in the recent Harmonised National Assembly Elections held on 31 July 2013. The Mount Pleasant Constituency is made up of 2 wards being wards 7 and 17.

On 2 August 2013 the constituency elections officer collated returns from the 2 wards and declared the respondent to be the winner and duly elected Member of Parliament for the Mount Pleasant Constituency.

Each electoral candidate had his own set of electoral agents monitoring the electoral process to guard against electoral malpractices and fraud. There were also local regional and international observers all geared towards verifying that the elections were conducted in conformity with the electoral Act [*Cap 2:13*], regional and international democratic standards and principles.

The results sheet so collated was duly signed by the candidates' respective electoral agents, announced and pasted outside the Mount Pleasant Constituency centre under the watchful eyes of the electoral agents, local regional and international observers. The results announced at the constituency centre were as follows:

<u>NAME OF CANDIDATE AND PARTY.</u>	<u>VOTE CAST FOR CANDIDATE.</u>
1. Jason Passade ZANU PF .....	10 333
2. Jameson Zvidzai Timba MDC – T .....	6 893
3. Peter Mukuchamano MDC .....	796

The results announced and pasted outside the constituency centre were conveyed to the National Command Centre for announcement to the nation. The Chairperson of the Zimbabwe Electoral Commission announced the respondent as the winner but in error came up with a different set of figures as follows:

<u>NAME OF CANDIDATE AND PARTY.</u>	<u>VOTE CAST FOR CANDIDATE.</u>
1. Jason Passade ZANU PF .....	7 945
2. Jameson Zvidzai Timba MDC – T .....	3 817
3. Peter Mukuchamano MDC .....	403

On the evidence before me it is clear that the figures announced by the Chairperson of the Electoral Commission were announced in error. The authentic figures were however those appearing on the result slips signed by the parties' respective electoral agents and pasted outside the Mount Pleasant Constituency centre.

Aggrieved by the electoral results announced, the applicant filed an electoral petition to this Court in terms of s 167 of the Act on 16 August 2013. He seeks the nullification of the elections in the Mount Pleasant Constituency and a re-run of the elections in that constituency. His complaints are many and manifold but were condensed to 10 issues in the joint pre-trial conference minute as follows:

1. Whether respondent was not duly elected as a member of the National assembly for Mount Pleasant Constituency in the Harmonised Elections of 2013?
2. Whether the Parliamentary seat for that constituency should be declared to be vacant?
3. Whether the failure or refusal of Zimbabwe Electoral Commission to provide an electronic voters roll before the election is not in violation of the principles of democratic election in the Act and Constitution?
4. Whether there was an unconstitutional redrawing of the constituency boundaries and if so what is the effect thereof on the electoral result?
5. Whether irregularities in special voting existed? If so, in what respect?

6. Whether ineligible voters were unlawfully registered to vote in the constituency and eligible voters were excluded from the constituency voters roll? If so, what effect did this have on the electoral result?
7. Whether irregularities regarding ordinary voting process existed? If so, what are the irregularities and their effect on the result?
8. Was there any personation, bribery or incurring of undue election expenses? If so, what was the effect thereof on the electoral result?
9. Whether other electoral malpractices existed and if so, in what way and what is their effect on the electoral result?

As I have already pointed out the petition was filed on 16 August 2013. Section 182 of the Act provides that every electoral petition shall be determined within six months of its presentation. According to my calculation the prescribed six months period expired on 18 February 2014. It is now March 2014 without a determination having been made through no fault of anyone. The main reason for delay is that after filing the petition the petitioner launched an application in this court under case number EC112/13 seeking access to certain election material residue sealed in ballot boxes for use in this trial. This trial could therefore not start until that application had been determined. Judgment in that case was only issued on 9 January 2014, with the trial commencing on 3 February 2014. The issue that then arises is what effect the failure to comply with the provisions of s182 has on the petition. The respondent is of the view that failure to comply with the statutory provisions is fatal to the petitioner's case while the petitioner is of the contrary view.

In resolving that dispute it is necessary to determine whether the statutory requirement to determine the petition within 6 months is mandatory or directory. If it is mandatory then failure to comply with the legal requirement is fatal to the petitioner's case. If however the legal provision is merely directory his claim is not extinguished by the passage of the prescribed 6 months period without a determination.

*Francis Bennion* in his book *Statutory Interpretation* 1984 at p 24 provides the following guidelines in determining whether a particular statutory provision is mandatory or directory:

“In deciding whether the step is mandatory or directory, the court considers the broad policy of the Act and the principle of fairness to the subject. The policy is not to be frustrated by a mere technicality. On the other hand the subject is not to be prejudiced by the neglect of a safeguard inserted by Parliament.”

At home, our courts have also endeavoured to provide useful guidelines in distinguishing mandatory statutory provisions from directory provisions. In *utter v Scheepers* 1932 AD 195 VESSELS JA provided some useful guidelines when he remarked without laying a hard and fast rules that:

“Without pretending to make an exhaustive list I would suggest the following test, not as comprehensive, but as useful guidelines. The word “shall” when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction: *Standard Bank Ltd v van Rhyn* (1925) AD 266).

1. If a provision is couched in a negative form it is to be regarded as a peremptory rather than as a directory mandate. To say that no power of attorney shall be accepted by the Deeds Office unless it complies with certain conditions rather discloses an intention to make the conditions peremptory than directory: though even such language is not conclusive.
2. If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory...
3. If, when we consider the scope and object of a provision, we find that terms would, if strictly carried out lead to injustice even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.
4. The history of the legislation will also afford a clue in some cases.”

Now, applying the law to the facts of this case, I accept Mr. *Maanda*'s submission that in crafting the provision in question Parliament intended that the Court must expeditiously determine election petitions within a period of 6 months. This was meant to avoid electoral disputes going beyond the life of Parliament without being determined as happened during the 2000 elections.

It is therefore, abundantly clear that the provision was meant for the benefit of the petitioner rather than the respondent who stands to benefit from the delay regardless of the outcome. The command is directed at the court over which both litigants have no control regarding the manner in which it discharges its duties. It would therefore lead to an absurdity if Parliament were to visit the petitioner with a penalty extinguishing his right to a fair hearing and determination of his claim within a reasonable time in circumstances where he is not at fault.

This explains why Parliament couched the provision in positive language and deliberately refrained from providing a penalty or sanction for failure to comply with its command. Surely visiting the petitioner with the penalty of extinguishing his claim in circumstances where the provision was meant for his benefit rather than detriment would defeat the whole purpose for which the law was meant.

For the foregoing reasons, I am satisfied that s 182 which requires that a petition be determined within 6 months is merely directory rather than mandatory. I now turn to determine the matter on the merits.

At the closure of the trial and in his address counsel for the Petitioner conceded and confessed that they had failed to establish on a balance of probabilities issues number 8 and 9. Both issues therefore become non issues. The net effect of such finding of fact is to cleanse and absolve the respondent of any wrong doing in the conduct of the elections. It also follows that apart from the electoral malpractices specifically mentioned in the pre-trial conference minute there are no other peripheral issues upon which the Petitioner's case may rest.

I propose to deal with the issues starting with issues number 3 to 7 and concluding with issues number 1 and 2 which deal with the question whether or not the petitioner was duly elected.

**“1 Whether the failure or refusal of Zimbabwe Electoral Commission to provide an electronic voters roll before the election is not in violation of the principles of democratic election in the Act and Constitution?”**

**Section 21 of the Electoral Act provides for the inspection and distribution of copies of voters' rolls to members of the public, contestants and political parties.**

**It reads:**

**21 Inspection of voter's rolls and provision of copies**

- (1) Every voters roll shall be a public document and open to inspection by the public, free of charge, during ordinary office hours at the office of the Commission or the constituency registrar where it is kept.
- (2) A person inspecting the voters roll for a constituency may, without removing the voters roll, make any written notes of anything contained therein during office hours.
- (3) The Commission shall without delay provide any person who requests it with a copy of the voters roll, upon payment of the prescribed fee:

Provided that—

- (i) the prescribed fee shall not exceed the reasonable cost of preparing the copy;
  - (ii) the Commission may impose reasonable conditions upon the provision of a voters roll in terms of this subsection, to prevent the roll from being used for commercial or other purposes unconnected with an election.
- (4) Notwithstanding subsection (3), the Commission shall, upon payment of the prescribed fee, not later than seven days after the calling of the election concerned, provide to every political party and candidate contesting the election, and every accredited observer group, one electronic copy of every voters roll to be used in the election:

Provided that in the event of any discrepancy between an electronic copy of a voters roll and a voters roll prepared in terms of subsection (3), the latter roll shall be deemed to be the authentic record of the voters”.

There is no factual dispute concerning this issue. It is common cause that the Zimbabwe electoral commission failed to provide all the parties concerned with a copy of the electronic voters’ roll upon demand according to law because the electronic machines responsible for generating the electronic voter’s rolls had broken down. The Registrar General Mr. Mudede gave impeccable incontrovertible evidence to that effect. It was his uncontroverted evidence that to date the machines have not been repaired because of lack of funds.

Ironically one of the Petitioner’s own witnesses from his political party the Movement for Democratic Change Tendai Biti was the Minister of Finance responsible for funding the repair of the electronic equipment in question. He did not provide funds for the necessary repairs. It was therefore virtually impossible for the Zimbabwe Electoral Commission to provide the petitioner with copies of a non-existent electronic voters’ roll. It is trite that our law does not compel the impossible. The Latin maxim *lex non cogit ad impossibilia* is apt. This explains why Minister Biti being the lawyer that he is with full knowledge waived his party’s right and entitlement to the electronic voters’ roll until the machines had been repaired.

On 20 July 2013 in the case of *Tendai Laxton Biti & Movement for Democratic Change (T) v The Zimbabwe Electoral Commission & Registrar of Deeds* HC 6238/13 he entered into a consent order on behalf of his party and members in his capacity as Secretary General before MAFUSIRE J in the following terms:

**“ PROVISIONAL ORDER GRANTED**

INTERIM RELIEF GRANTED BY CONSENT

It is ordered that pending the final resolution of this matter in the Court of first instance or on appeal, Respondent be and is hereby:

1. The Respondents shall avail to the applicants by 12:00 mid-day on 31 July 2013 all the constituency voters' rolls in Hard copy.
2. Further the respondent shall avail to the applicant the electronic copies of the voters' roll as soon as their electronic equipment becomes operational.
3. The provisional order may be served by the applicants' legal practitioners.
4. The terms of the rest of the provisional order and those of the final order sought shall remain as set out in the original draft order.”

The above consent order makes it clear that the petitioner through his party was conceding that the machines responsible for producing the electronic voter's roll were out of order. As a result he was waiving his right to be provided with copies of the electronic voters' roll until such time the machines were functional again. It is common cause that to date the machines are still out of order. The petitioner therefore elected to participate in the elections with the full knowledge that he had waived his rights. Now that he has lost the elections he cannot turn around and complain that he participated in the elections without the electronic voters' roll when with full knowledge he abandoned his rights. In our law no legal harm is done when one consents to it. In Latin parlance *volenti non fit injuria*.

The Chairperson of the Zimbabwe Electoral Commission MAKARAU JA gave impeccable convincing evidence to the effect that no one was prejudiced because everyone was equally affected by the non-availability of the electronic register. That indisputable evidence remained unchallenged through to the end as it was beyond reproach,

I accordingly come to the conclusion that the failure by the Zimbabwe Electoral Commission to provide *an electronic voters roll before the election is not in violation of the principles of democratic election* in the Act and the Constitution.

**1. Whether there was an unconstitutional redrawing of the constituency boundaries and if so what is the effect thereof on the electoral result?**

In terms of the Constitution the electoral boundaries for the 2013 National Assembly harmonised elections were as defined in the 2008 elections. The petitioner's complaint is that the 2008 boundaries were not adhered to for the Mount Pleasant constituency. He alleged that

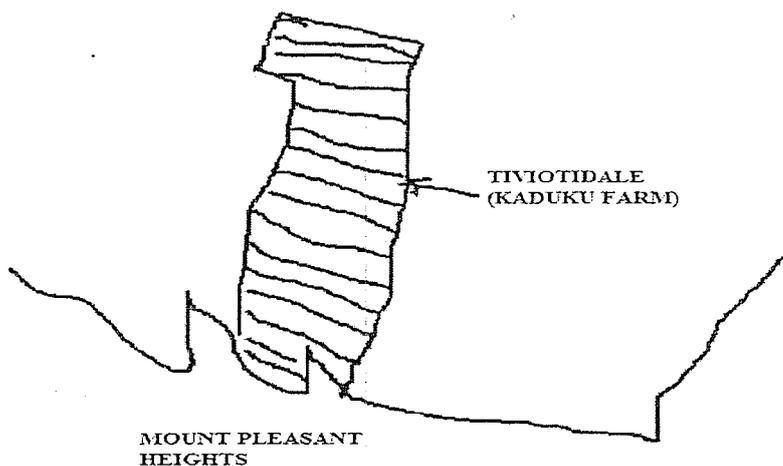
there was a shift in the boundary between Mount Pleasant heights and Mazoe South constituency in Mashonaland Central Province. As a result of the shift in boundaries people at Tiviotidale also Known as Kaduku farm were incorporated into ward 17 of Mount Pleasant constituency when Tiviotidale or Kaduku Farm is in Mazoe South constituency.

The Petitioner called the Director of Urban Planning Services in the City of Harare one psychology Chiwanga to tell the court that Tiviotidale or Kaduku farm is in Mazowe South Constituency. He told the Court that there are several properties with the name Tiviotidale. Tiviotidale is in Mazoe South but a portion of it being lots 1A and 1 are within the area of Harare commonly known as Mount Pleasant Heights. He produced a memorandum addressed to the mayor of Harare from his department advising him of that position.

This witness' evidence was not particularly helpful because his specialist knowledge is limited to city boundaries and not National Assembly Electoral boundaries. The petitioner then called the Registrar General Tobaiwa Mudede to enlighten the court on the issue at hand. He has more than 20 years experience. His duties include registering voters and compiling the voters' roll. He is a registered legal practitioner and an officer of this court.

This witness was best qualified to explain the issue of boundaries. He was anxious to explain and clarify issues concerning Tiviotidale or Kaduku Farm boundaries. Counsel for the petitioner was however not too kin to give him the opportunity to explain. He in fact attempted to block him from giving that evidence in chief with the result that he was only able to give a full explanation under re-examination.

The registrar produced the diagram map below and explained it in his own words as follows:



“Q. You wanted to explain about Kaduku Farm. Can you explain?”

A. That is Mount Pleasant. Kaduku Farm lies right at the end of that piece of land. Before the elections during the registration in 2013 an instrument required the people on that piece of land to move into the ward just below that piece of land.

There was an argument that came as a result of politicians challenging that. So a policy decision was taken. Proclamation Number 1 of 2012 SI 119 of 2012 then required these people to be registered under ward 17.

And a policy decision was taken as a result of disagreement that they should remain and vote. They had to be reassigned and vote in Kaduku where they belonged. No delimitation had been done for 2013 so people who had moved from Kaduku Farm had to go back and vote where they belonged in Kaduku Farm. And so what the registrar did was to move those people back to Kaduku Farm through a block system without carrying out a fresh registration. In other words the delimitation of 2008, the boundaries of that time applied. In other words the Registrar General did not carry out fresh registration of the voters but merely moved them back into Kaduku where they belonged.

The situation did not only pertain to Kaduku Farm. It applied to many, many situations to rely on the 2008 boundaries.”

In all fairness Mr. Maanda was given an opportunity to question the witness on this vital aspect of his evidence which he had been blocked from testifying on in his evidence in chief. Mr. Maanda asked the following questions.

“Q. Can you explain further?”

A. These people had by Statutory Instrument moved to ward 17 later on it was decided that they should remain in their original constituency because there had been no delimitation.

Q. Which ward is Kaduku Farm in?

A. It is above ward 17.

Q. So it's not in ward 17?

A. At the moment.

Q. Where did the people in Kaduku vote?

A. In the place where they voted before

Q. In 2008 they were not part of ward 17?

A. Yes.”

The petitioner through his lawyer made no attempt to challenge or contest the Registrar General’s clear evidence that the people on Kaduku Farm did not vote in ward 17. They voted in their previous constituency Mazowe South in accordance with constitutional provisions.

I accordingly find that there is no substance at all in the petitioner’s complaint that there was an unconstitutional redrawing of the constituency boundaries.

### **3 Whether irregularities in special voting existed? If so, in what respect?**

Whether or not there were irregularities in respect of the special voting is a matter of fact with the onus lying squarely on the petitioner to prove what he alleges on a balance of probabilities. The petitioner made a bald unproven allegation that 2340 people recently registered merely worked in the constituency but did not reside in that constituency.

The main basis of the petitioner’s complaint is that police recruits at Morris and Tomlison training deports were not qualified to register as voters in the constituency because they were not permanently resident in the constituency. They were only temporary residents in the area for the duration of their six months training. That argument is fatally defective in so far as the relevant section does not disqualify temporary residents in a constituency from registering as voters in that constituency. Section 23 which provides for residence qualification of voters provides that:

#### **“23 Residence qualifications of voters**

- (1) Subject to the Constitution and this Act, in order to have the requisite residence qualifications to be registered as a voter in a particular constituency, a claimant must be resident in that constituency at the date of his or her claim:

Provided that if a claimant satisfies the Registrar-General of Voters that he or she is or intends to be a candidate for election as a member of Parliament for a particular constituency in which he or she is not resident, the claimant may be registered as a voter in that constituency.

[Subsection amended by section 87 of Act 17 of 2007]

- (2) For the purposes of subsection (1), a claimant shall be deemed to be residing in a constituency while he or she is absent therefrom for a temporary purpose.”

It is plain that the Act confers the right to register and vote in a particular constituency depending on a person's residence as at the date of his claim to register as a voter in a given constituency regardless of the duration of residence. It is trite in our law that in interpreting statutes the courts must ensure that no right of a citizen should be interfered with except under clear authority of the law.

Thus the police recruits or anyone else for that matter cannot lose their constitutional right to vote on account that they were temporarily resident in the Mount Pleasant constituency at the time of registration. The same applies to all other persons particularly students, soldiers, workers and lodgers who may constantly be on the move frequently changing their places of residence.

The petitioner also argued that the accommodation facilities at Morris and Tomlison Police Deports as well as King George Barracks were inadequate to accommodate the huge numbers of people who used those addresses as their residences. Considering the well-known accommodation problems in the city one cannot discount the possibility of overcrowding.

The Registrar General explained that in the registration process he is not required to physically check whether a claimant requiring registration actually resides where he claims to reside. All what he requires is documentation as proof of residence in the form of utility bills, letters from employers or other acceptable documentation. It was his undisputed testimony that all the people concerned produced the required documentation as proof of residence.

Once it is accepted that the voters in question produced acceptable proof of residence it follows that they were entitled as of right to register in the Mount Pleasant constituency as voters. In the absence of clear evidence that they did not reside in the Mount Pleasant Constituency at the date of registration they could not be denied the right to register and vote in that constituency. The petitioner was unable to produce concrete evidence that any of the voters registered using the disputed addresses did not in fact reside at the given addresses as at the date of registration.

Mr. Worship Dumba the petitioner's Chief electoral agent declined to sign the necessary papers confirming that the special voting had been conducted in accordance with the Electoral Act. His main grievance was the Commission's failure to provide him with a separate special vote electoral voter's roll. It was however explained to him that the commission was using the main voters' roll for purposes of conducting the special vote. It stands to reason that the special vote is an extract from the main roll. Names of voters on the special voter's roll would also appear in the master voters' roll. Both served the same

purpose. The principle that the greater includes the lesser applies. There was substantial compliance with the Act. The need for a separate special voters' roll was merely for convenience's sake. Its non-availability to both parties could not have prejudiced either party in any way. I accordingly find that there was substantial compliance with statutory requirements.

This witness had a host of other complaints including that a police officer who was not part of ZEC took it upon himself to call out names on voting envelopes when some voters failed to find their own envelopes. There was a discrepancy of 390 special vote forms and khaki envelopes when they were supposed to tally. He also complained that there were no ink detecting machines. His evidence was hotly disputed by the respondent.

This witness being the petitioner's chief election agent one would have expected him to be his star witness and yet when the petitioner filed his petition he omitted his evidence. It is surprising that the petition was filed without a supporting affidavit from this witness. The petitioner had 4 electoral agents per polling station. Apart from this witness all the other electoral agents signed the result slips confirming that the elections were regular and conducted in accordance with the law.

The petitioner's failure to call any of his electoral agents on the ground except Dumba tends to suggest that having signed the result slips endorsing the elections as being in accordance with the law they were unwilling to come and perjure themselves in a court of law. Otherwise how does one fail to call his on electoral agents to back up his story if his own version of the case is not at variance with theirs?

His election to rely solely on the evidence of Dumba to the exclusion of all other electoral agents gives the impression of a divided house and such a house cannot stand. His evidence does not inspire any confidence because it stands uncorroborated, inconsistent, contradictory and discredited as it goes against the grain of evidence. The mere fact that his evidence was left out when the petition was filed tends to suggest that he was initially unwilling to support the petitioner's case. His incorporation at the last hour as the petitioner's witness appears to be an afterthought and a product of recent fabrication.

Although he now says that there were no ink detectors and that police interfered with voting procedures nowhere in his letter of 16 July 2013 written when facts were fresh in his mind does he make those allegations. The letter reads:

"Why I may not sign the SV 27 Form for 14 & 15<sup>th</sup> Special Voting

16 JUL 2013  
R. DUBA

To whom it may Concern

I am not going to sign the above mentioned form for the following two reasons:

- (a) The number of SV 2 forms is not corresponding with the envelopes in the three day voting by three hundred and ninety (390) more envelopes than the authorisation certificates.
- (b) The vote went beyond the gazetted dates of 14 and 15 July by extending to 0633 hours the 16 July 2013, I am convinced that all 59 votes cast after midnight of July 2013 are illegal.

Yours Faithfully  
Worship Dumba (CHIEF ELECTION AGENT FOR MR JZ TIMBA)

Signed.....

I Manfred Dube being the presiding officer I acknowledge receipt of this letter.

Signed.....  
16/07/13.”

The authenticity of the letter was put in doubt. It is vital to note that the letter is not addressed to the presiding officer or any other electoral official but To Whom It May Concern. There is no evidence that indeed Manfred Dube was the presiding officer. The letter makes no allegation that there were no ink detectors. It makes no allegation at all that police interfered with electoral procedures. There is no evidence that Manfred Dube if he exists at all received the letter as he was not called to give evidence. The exhibit produced appears to be a photocopy. If so, it is not clear how the witness managed to get a photocopy of the original if the original had been handed over to Dube as alleged.

When a person reduces his complaints to writing it is reasonable to expect that he has exhausted his complaints in that document. It is inconceivable and not in the least probable that Dumba as the chief electoral agent for the petitioner could have failed to raise these pertinent issues in his letter had the police interfered with the electoral process and there were no ink detectors to guard against double or multiple voting. It is also ridiculous that as overall supervisor of the petitioner's electoral agents he would have failed to marshal and instruct them not to sign the result sheets to avoid authentication of the results.

**4 Whether ineligible voters were unlawfully registered to vote in the constituency and eligible voters were excluded from the constituency voters roll? If so, what effect did this have on the electoral result?**

Apart from his mere say so the petitioner was unable to give any concrete proof that anyone who did not reside in the Mount Pleasant constituency was allowed to vote. All what he could prove was that a handful of people registered as voters using addresses outside the constituency were registered as voters. It is possible that there might have been a few irregularities here and there in compiling the constituency register. He was however unable to go as far as saying these ineligible people actually voted. This is because the evidence before me establishes that our voting system has built in self-correcting safeguards. There are checks and balances to ensure that on the date of voting no ineligible persons are allowed to vote. This is done through the employment of polling officers under the watchful eyes of the parties' own electoral agents, regional and international observers.

The petitioner's complaint that there was a high number of voters turned away on the day of voting is ample proof of the built in safeguards at play. He was however unable to proffer any credible concrete evidence that any eligible voter was denied the right to vote.

In desperation the petitioner sought to rely on the incredible rather fictitious evidence of his party's secretary general one Tendai Biti who happens to be a lawyer and officer of this court. Ordinarily the courts have great faith and respect for the evidence of its officers. Mr. Biti's evidence to the effect that some foreigners were bussed in from some West African countries to illicitly vote in the Mount Pleasant constituency was however outrageously fictitious and not worth of belief by any reasonable court of law. This is particularly so if one takes into account that the petitioner has expressly in open court absolved the respondent from any wrong doing during the conduct of the elections. This then begs the question who could have taken the trouble and expense to ferry foreigners to vote in the constituency if the respondent is not to blame?

Although Mr. Biti claims to have been an eye witness at the scene it is incredible that none of his electoral agents including Mr. Dumba the chief electoral agent made any mention of foreigners being bussed to vote in the constituency. It is therefore, not reasonably possible and not in the least probable that Mr. Dumba would have failed to raise the issue with the electoral authorities had such an event in fact occurred. I therefore has no hesitation whatsoever in rejecting Mr. Biti's evidence as false in fact and a product of recent fabrication.

In the result I can only come to the conclusion that the applicant has failed to establish on a balance of probabilities that any ineligible voters were registered and actually voted in the disputed elections.

**5. Whether irregularities regarding ordinary voting process existed? If so, what are the irregularities and their effect on the result?**

This issue was vague and embarrassingly too wide requiring the court to go on a fishing expedition in search for irregularities. The petitioner bearing the onus of proof, had the burden to specify the irregularities complained of and to proffer evidence of their existence. He failed to discharge that onus on a balance of probabilities. The respondent was however able to rebut the existence of any irregularities by pointing to the signatures of the petitioner's own agents affirming that the elections were properly conducted according to law.

The adage that *he who does a thing through another does it himself* applies. Thus the petitioner through his agents' signatures is **deemed** to have affirmed that there were no irregularities affecting the outcome of the disputed elections.

I accordingly I come to the conclusion that there were no irregularities proved regarding the ordinary voting process.

**6. Was there any personation, bribery or incurring of undue election expenses? If so, what was the effect thereof on the electoral result?**

The petitioner did not persist with this issue at the hearing thereby absolving the respondent of any wrong doing.

**7. Whether other electoral malpractices existed and if so, in what way and what is their effect on the electoral result?**

This issue was also embarrassingly too wide requiring the court to go on a fishing expedition for irregularities in circumstances where the petitioner as demonstrated above had dismally failed to prove his claim on a balance of probabilities.

**Conclusion.**

The petitioner's case was riddled with irreconcilable irregularities such that it could not be reasonably sustained. While the petitioner raised a host of alleged irregularities his chief election agent officially raised only two complaints which were both successfully rebutted by the respondent. His chief electoral agent raised complaints in circumstances

where his electoral agents on the ground raised no complaints at all and dully signed the electoral result sheets signifying the absence of any electoral irregularities.

In the circumstances of this case the petitioner portrays himself as someone groping in the dark for non-existent reasons to reverse the outcome of the elections duly endorsed by his own electoral agents as having been conducted according to the prevailing laws of the land. He failed to call his electoral agents to explain their conduct in endorsing the elections if they were riddled with glaring electoral irregularities as he now alleges. In the absence of any cogent reason explaining the conduct of his electoral agents the petition cannot succeed.

For the foregoing reasons I can only come to the conclusion that the respondent Jason Passade of ZANU PF was duly elected as a member of the National Assembly for the mount Pleasant Constituency in the harmonised elections of 2013.

It is accordingly ordered:

1. That the petitioner's petition in this case be and is hereby dismissed with costs.
2. That JASON PASSADE be and is hereby declared to be the duly elected Member of Parliament for the Mount Pleasant Constituency in the National Assembly Elections held on 31 July 2013.
3. That the Registrar be and is hereby directed to proceed in terms of s 171 (3) (a) (ii) of the Electoral Act [*Cap, 2:13*]

*Atherstone and Cook*, the Petitioner's Legal Practitioners  
*Mandizha & Company*, the Respondent's Legal Practitioners

10 AUG 2014  
[Signature]