

Diaspora voting

*Casenote on the case of **Bukaibenyu v Chairman, ZEC, the Registrar-General of Voters, the Minister of Constitutional and Legal Affairs and the Minister of Justice and Legal Affairs & Ors** CC-12-17*

By G. Feltoe

The original application in this case was brought in 2012 before the Supreme Court as at that stage there was no separate Constitutional Court. The Supreme Court dismissed the application and indicated that the reasons for the decision would follow in due course. It took a very long time for reasons to follow and the court that finally provided the reasons in 2017 was not the Supreme Court but rather the full bench of the Constitutional Court. Malaba DCJ gave the judgment with the concurrence of Chidyausiku CJ and seven other judges. As Chidyausiku CJ had retired at the time the judgment was handed down his concurrence was noted at the end of the judgment as follows: “Chidyausiku CJ (Rtd): I agree.” This judgment was delivered at a time when the Zimbabwe Electoral Commission was being prevailed upon by some political parties to allow a Diaspora voting process after the necessary amendments were made to the electoral laws. This case was decided on the basis of the pre-2013 Constitution.

The decision made in terms of the pre-2013 Constitution will first be analysed and then consideration will be given to whether the decision would have been any different if made under the 2013 Constitution.

The application

The applicant, a Zimbabwean citizen by birth, was living and working in South Africa and had no intention of returning to Zimbabwe in the foreseeable future or at least until the economy had improved sufficiently to guarantee him employment if he returned. He claimed to be registered as a voter in the Mabvuku constituency but the voters’ roll indicated that his residential address at the time of registration as a voter was Kadoma.

The applicant argued that sections 23(3) and 71 of the Electoral Act [*Chapter 2:31*] interfered with his right to vote in an election as enshrined in section 23A(2) of the Constitution. He contended that section 23(3) of the Electoral Act infringed his right to vote in that it required that a voter must be resident in a constituency in order to be registered to vote in that constituency. It further laid down that if the voter was absent from the constituency for a period of over twelve months he would no longer be entitled to have his or her name retained on the roll for that constituency. He further argued that section 71 of the Electoral Act violated his right to vote because it did not afford persons working outside the country the right to vote at a designated place in the country in which he was residing at the time. Additionally, such persons were not entitled to vote by post as the law

restricted the right to vote by post to diplomats on Government service outside the country at the time of the election, and their spouses.

Applicant's counsel argued that these provisions in the Electoral Act imposed unjustifiable and unconstitutional limitations on the right to vote. He argued that the right to vote was a fundamental democratic right and a law limiting that right was not justifiable in a democratic society. He argued that section 23A(2) of the Constitution gave every Zimbabwean who was a registered voter the right to vote in an election. This, he maintained, meant that the State had an obligation to put in place mechanisms in every country where there are Zimbabwean citizens to enable them to cast their ballot in those countries.

He suggested that Zimbabwean embassies in these countries should operate as polling stations on the polling day or days. Alternatively, Zimbabweans outside the country who were unable to return to Zimbabwe to vote should be allowed to vote by post.

In his argument Counsel for the applicant relied heavily on the decision of the South African Constitutional Court in the case of *Richter v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)* [2009] ZACC 3. In that case the South African Constitutional Court dealt with the question whether or not South Africans living abroad had the right to vote. Mr. Richter was a South African citizen, a registered voter, who was teaching in the United Kingdom but who intended to return to South Africa some time after the upcoming election. He wanted to vote in the election but wished to be able to vote without having to return to South Africa. He could not do so as the South African Electoral Act limited the right to a special vote (i.e. a postal vote) to people who were temporarily outside the country for a holiday, or for a business trip or in order to participate in a sporting event. He argued that the restriction violated his right to vote under section 19(2) & (3) of the South African Constitution.

The Constitutional Court upheld Mr. Richter's argument, on the following grounds:

- The right to vote imposes an obligation on the State to take positive steps to ensure that it can be exercised.
- A citizen must be prepared to take reasonable steps to exercise the right to vote. For instance he or she must be prepared to travel to a polling station and stand in a long queue. However, the burden imposed on voters must be reasonable and must not prevent a voter who is prepared to take those reasonable steps from exercising his or her vote.
- If a statutory provision prevents a voter from voting despite the voter's taking reasonable steps to do so, the provision infringes the right to vote enshrined in section 19 of the South African Constitution and imposes a restriction which is not reasonably justifiable in a democratic society.
- To require registered voters who are living outside the country to return to the country to vote imposes an unreasonable obligation on them.

- Hence the restrictions on the right to a special or postal vote contained in the South African Electoral Act were unconstitutional.

The court went on to point out that South African citizens abroad benefited the country through remittances and in other ways. The court also referred to a survey in which it was found that 115 countries made provision for voting by absent voters, and only 14 restricted their entitlement to vote on the basis of the activity undertaken abroad by the absent voters.

In response to the arguments by applicant's counsel, counsel for the Registrar-General of Voters argued that the cited Electoral Act provisions were simply of an administrative nature and were not intended to limit or deny an eligible voter of the right to vote. They simply prescribed the way the right was to be exercised. They did not prevent a voter who had voluntarily left the country from returning to the country to vote in the constituency in which that voter was registered. Counsel for the Minister of Justice and Legal Affairs maintained that the State was under no obligation to establish polling stations outside the country or extend postal voting to Zimbabweans who had left the country of their own accord and were unable to come back to the country to cast their ballots at polling stations in constituencies in which they were registered to vote.

The judgment

Malaba DCJ in his judgment, in which the other judges concurred, started by pointing out that section 23A of the Constitution read with section 3(1)(a)¹ of the Third Schedule to the Constitution do not create an absolute right to vote that is exercisable without limitation. In particular, s 3(1)(a) to the Third Schedule provides for a residence requirement for the exercise of the right to vote. This requires a prospective voter to be registered on the roll of voters for the constituency in which he or she ordinarily resides. This provision thus validates the residential requirement in s 23 of the Electoral Act that provides that a person must be resident in the constituency to be registered as a voter in that constituency and that a voter who is registered in a constituency is not entitled to have his or her name retained on the constituency roll if he or she has not been resident in that constituency for a continuous period of twelve months. The legislature, the judge ruled, was also lawfully entitled to limit the right to vote by post to those who were on Government service outside the country.

Malaba DCJ decided that the *Richter* judgment was not applicable in Zimbabwe because it was based on a different electoral system from that of Zimbabwe. Under the South African system of proportional representation voters vote for a political party and not for individual candidates. The parliamentary seats are then allocated in proportion to the votes obtained for each political party. Each party then decides on who will fill the seats it has won from its party list. The voter is thus not voting for an individual to represent him or her in a constituency.

¹ At page 4 of the cyclostyled judgment, this is erroneously referred to as section 3(1)(g) but when the actual provision is cited later in the judgment it is referred to as 3(1)(a).

On the other hand, he said, in Zimbabwe voters vote in constituencies to elect candidates to represent them in their respective constituencies. The candidates may belong to a political party or may be independent candidates. A voter voting to elect a member of Parliament for the constituency in which her or she is registered is voting not only as a citizen but also to protect and advance the voter's rights and interests as a resident of his or her constituency, such as developmental issues in that constituency. A candidate for election is required to campaign in the constituency for which he or she seeks to be elected. If a voter is not resident in the constituency and has not been resident for a continuous period of twelve months, the presumption is that the voter has lost touch with the constituency and has insufficient information about the candidate's ability to address the needs for the constituency.

The Court therefore found that the applicant was not denied the right to vote; the law simply laid down the manner in which the right was to be exercised and the Constitution did not place an obligation to make arrangements for facilities for those who are unable to vote in person at polling stations in the constituency in which they are registered. It cited with approval the earlier Supreme Court judgment to this effect in *Madzingo & Ors v Minister of Justice & Ors* 2005 (1) ZLR 171 (S).

Comments on this judgment

In order to put the judgment into context it is first necessary to examine the reasons why so many Zimbabwean citizens are living and working outside the country and the ways in which they continue to have strong connections with their home country.

The poor state of the economy in Zimbabwe and the high rate of unemployment, as well as political instability, has led large numbers to Zimbabweans to take up residence and employment in other countries. Globalisation has also encouraged Zimbabweans to seek jobs outside the country, as in many other countries.

Zimbabweans living in countries such as Britain, the USA and South Africa remit considerable amounts of money to Zimbabwe every year to their relatives and also make investments in the country. The Reserve Bank of Zimbabwe Governor has projected that, by the end of 2017, \$750 million dollars would have been remitted by Zimbabweans over that year. The Reserve Bank has announced an incentive scheme called "Diaspora Remittance Incentive Scheme" to try to increase the remittances sent through formal channels.²

The Government of Zimbabwe has sought active engagement with the diaspora. In 2016 Cabinet approved the "Zimbabwe National Diaspora Policy" that seeks to harness the social and intellectual capital of people living outside the country for national development. The Ministry of Macro Economic Planning and Investment Promotion is establishing a web site for the purpose of promoting Diaspora engagement and participation of the Zimbabwean diaspora in national

² Daily News 10 May 2017

development. The website will showcase the opportunities in different sectors of the economy. The Ministry said the website was part of operationalising the Diaspora policy.³

All of this demonstrates the strong connections of Zimbabweans outside to Zimbabwe and their important stake in the future of the country. With this in mind the question that needs to be posed is whether they should be entitled to participate in Zimbabwean elections by voting outside the country if it is not reasonable for them to return to Zimbabwe to vote in person.

Despite the strong continuing linkage with Zimbabwe and their stake in the future of the country, the Constitutional Court nonetheless ruled that Zimbabweans living and working abroad do not have a constitutional right to vote outside the country.

The judgment by the Constitutional Court is based primarily upon the premise that the Constitution specifically gave power to the Legislature to impose residential qualifications on voters and thus limit the exercise of the right to vote and the legislature prescribed the residential requirements to vote and therefore what it had done was valid in terms of the Constitution. The requirement that a person must be ordinary resident in constituency to be registered to vote in that constituency is sensible because that would enable that person to vote on an informed basis about which candidate would best advance the needs in that constituency.

What must be pointed out that section 3(1)(a) of the Third Schedule refers to “such residence qualifications as may be prescribed in the Electoral Law.” The word “may” clearly gives the discretion to the legislature to impose residential qualifications. However, restrictions which are excessive, unnecessary, unreasonable and incompatible with democratic values surely violate the fundamental right of voters to vote in elections. It was observed in the *Richter* case at paragraph 57 that when designing an electoral system Government should seek to foster enfranchisement and, wherever possible, encourage electoral participation by its citizens. It also pointed out at paragraph 77 that it was important to bear in mind that “in many other open and democratic societies, facilities are afforded to citizens who will be abroad on polling day.” Although voters were obliged to take reasonable steps to exercise their right to vote, it found that the restrictions imposed on voters unable to return to South Africa were not reasonably justifiable in a democratic society. This surely was a crucial issue in the *Bukaibenyu* case. If the case had been dealt with after the 2013 Constitution had been in operation, the explicit provisions of section 86(2) which require a court to decide whether a limitation on fundamental rights as “fair, reasonable, necessary and justifiable in a democratic society” would have applied.

It is true that in our electoral system when Parliamentarians are elected within constituencies one would normally expect voters who are voting for a constituency Member of Parliament to be ordinarily resident in the constituency in question, although the law already permits exceptions to this. Diplomats and their spouses can vote by post from the countries in which they are on diplomatic service as can security personnel and electoral officials who will on duty on polling

³ Herald April 27, 2017

day away from their constituencies.⁴ Further, a person who is a candidate for election as a member of Parliament for a particular constituency in which he or she is not resident may be registered in that constituency.⁵

The basis of the judgment, of course, would only apply to the election of members of Parliament but would not apply to the election of the President who is elected on the basis of a national vote. Despite the fact that voters vote in their wards in constituencies for a Presidential candidate, a diaspora vote could be allowed for that election. Indeed, some countries that allow for an external vote limit the external voters to vote only in the Presidential election. Countries such as Mozambique allow citizens outside to vote not only in the Presidential election but they have also provided for them to elect two Parliamentarians in two electoral districts, one for persons in Africa and one for persons in the rest of the world.

Zimbabwean citizens living and working outside the country have a continuing stake in Zimbabwe and have the right to participate in an election of persons who will run the country. If for reasonable reasons they are not able to return to the country to vote in person, a feasible mechanism should be found to allow them to have a say in the electoral process. If a residential requirement is to be retained to be registered to vote in a constituency, the law could be amended to create, as in Mozambique, a limited number of special constituencies for Zimbabweans abroad which would allow them to vote to elect a few Parliamentarians to represent their interests without having to return to Zimbabwe to vote. Alternatively, if they own houses or businesses in Zimbabwe they should also be entitled to vote in the Presidential election. A system could also be introduced to allow Zimbabwean citizens to register to vote in the Diaspora constituencies without having to return to Zimbabwe to register.

The objection often raised to having a Diaspora vote is that it is logistically difficult to organize and is extremely expensive. However, the diaspora is contributing greatly to the Zimbabwean economy and their contribution should be acknowledged by setting up a simple postal voting system to allow external Zimbabweans to participate in the elections.

The position post-2013

It should first be noted that the provisions in the 2013 Constitution regarding requirements for voter registration are significantly different from those in the pre-2013 constitution. The current provisions are contained in section 1(2) of the Fourth Schedule. This provides that in addition the citizenship and age requirements:

- (2) The Electoral Law may prescribe additional residential requirements to ensure that voters are registered on the most appropriate voters roll, but any such requirements must be consistent with this Constitution, in particular with section 67.

⁴ Section 72 of the Electoral Act

⁵ Proviso to section 23(1) of the Electoral Act

Section 67 of the Constitution guarantees various political rights including the right, subject to this Constitution, of Zimbabwean citizens over 18 to vote in all elections.

Thus, the 2013 Constitution emphatically lays down although residential requirements may be required to ensure enrolment on the most appropriate roll, these requirements must not take away the fundamental right of citizens to vote in elections. This points to the need to take active steps to ensure that potential voters are enrolled and may vote.

With the 2018 general election in the near future it is unlikely that any sort of diaspora voting system will be put in place prior to this election. The necessary laws would have to be put in place and the operational details of a new system would have to be decided upon. Additionally, the financial constraints facing Zimbabwe Electoral Commission would stand in the way of implementing any new system at this stage.

Further complications would make it difficult to introduce a new system at this juncture. The biggest problem would be that the new Biometric voting system requires that all eligible voters would have to register afresh and must do so in Zimbabwe. This means that all eligible voters outside the country would have to come back to register in person to be able to vote in the next election. There is no facility for persons to register to vote by post and this potentially will affect diplomats outside the country. Secondly, each vote must now be registered to vote at a specific polling station and a voter must vote at the polling station at which he or she is registered to vote.

Thus, unless some sort of external voter registration system is established, persons living abroad would have to come to the country to register. As the voter registration process is an ongoing exercise persons outside might be able to come back and register at any time prior to the closing of the roll. On the other hand, it may not be possible for external voters who are registered to vote to come back and vote in person on the polling day or polling days.

Conclusion

It seems insensitive for Zimbabwe to benefit considerably from the continuing involvement of its citizens outside the country, but then to turn around and deny them a voice in the governance of the country. This matter should be seriously reconsidered and reasonable mechanisms should be found to allow these persons to vote in general elections.