

DISTRIBUTABLE (11)

TAVENGWA BUKAIBENYU

v

- (1) THE CHAIRMAN OF THE ZIMBABWE ELECTORAL
COMMISSION**
(2) THE REGISTRAR GENERAL OF VOTERS
(3) THE MINISTER OF CONSTITUTIONAL AND LEGAL AFFAIRS
(4) THE MINISTER OF JUSTICE AND LEGAL AFFAIRS

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA, GWAUNZA JA,
GARWE JA, GOWORA JA, HLATSHWAYO JA, PATEL JA & CHIWESHE AJA
HARARE, JUNE 26 & 28, 2013

D Ochieng, for the applicant

M Kanengoni, for the first respondent

T O Dodo, for the second, third and fourth respondents

MALABA DCJ: At the end of hearing argument for both parties the Court dismissed this application with no order as to costs. It was indicated at the time that reasons for the decision would follow in due course. These are they.

The applicant approached the Court in terms of s 24(1) of the former Constitution of Zimbabwe (“the Constitution”) which gave any person alleging that the Declaration of Rights has been, is being or is likely to be contravened in relation to himself the right to apply to the Supreme Court for redress.

The applicant challenged the constitutional validity of ss 23(3) and 71 of the Electoral Act [*Cap. 2:31*] (“the Act”) as interfering with his right to vote as enshrined in s 23A(2) of the Constitution. More specifically, the applicant alleged that s 23(3) of the Act,

which required that a voter be resident in a constituency in order to vote and that if such voter was absent from the constituency for a period of over twelve months his or her name be removed from the voters roll, infringed his right to vote.

The applicant further contended that s 71 of the Act, limiting the right to postal voting to any person who, on all polling days in the election, would be outside Zimbabwe on duty in the service of the Government or as the spouse of such a person and would be unable to vote at a polling station in his or her constituency, violated his right to vote. His contention was that every voter who is outside the country on polling days in an election must be afforded the opportunity to vote at a designated place in the country where he or she is at the time.

The applicant's personal circumstances made it evident why he had launched the application. The applicant averred that he is a Zimbabwean by birth residing in South Africa. He said he was gainfully employed in that country. The applicant did not say when he went to South Africa and how long he had been living in that country. He did not disclose the nature of employment he was engaged in. He was, however, emphatic that he was unlikely to return to Zimbabwe in the foreseeable future or at least until the economy recovered enough to guarantee him employment if he returned. The applicant further alleged that he was a registered voter in the Mabvuku constituency. The extract from the voters roll he provided as proof of the averment, however, indicated that his residential address at the time of registration as a voter was in Kadoma.

At the hearing of the application, Mr *Ochieng* for the applicant, argued that the provisions of s 23(3) of the Act, by requiring that a voter be resident in his or her constituency and must not have been absent therefrom for more than a continuous period of twelve months

in order to vote at a polling station in the constituency, imposed an unjustifiable limitation on the right to vote. It was his submission that s 71 of the Act, by restricting the right to vote by postal ballot only to those who were outside the country on duty in the service of the Government or their spouses, infringed the applicant's right to vote.

Mr *Ochieng* argued that s 23A(2) of the Constitution gave every Zimbabwean who was a registered voter the right to vote. As such the State had an obligation to put in place mechanisms in every country where there are Zimbabwean citizens to enable them to cast the ballot in every election. It was his suggestion that every Zimbabwean embassy should be turned into a polling station on election day to allow Zimbabwean citizens in the diaspora to vote.

The respondents opposed the application. The second respondent denied the allegation that ss 23(3) and 71 of the Act deprived a registered voter of the right to vote. He pointed out that the purposes of the provisions of s 23(3) of the Act were administrative in that they related to the conduct of the election. They were not intended to limit the right to vote. In his view, the provisions gave effect to the right to vote by prescribing the way that right was to be exercised. He argued that nothing stopped a registered voter who had voluntarily left the country from coming back to exercise his or her right to vote at a polling station in the constituency in which he or she is registered to vote.

The fourth respondent argued that the State was not under any legal duty to establish polling stations outside Zimbabwe or to extend the postal ballot to Zimbabwean citizens who left the country of their own accord and were unable to attend personally to cast their ballots at polling stations in the constituencies in which they were registered to vote.

Section 23A of the Constitution provided:

“23A Political rights

(1) Subject to the provisions of this Constitution, every Zimbabwean citizen shall have the right to -

- (a) free, fair and regular elections for any legislative body, including a local authority, established under this Constitution or any Act of Parliament;
- (b) free, fair and regular elections to the office of the President and to any other elective office;
- (c) free and fair referendums whenever they are called in terms of this Constitution or an Act of Parliament.

(2) Subject to this Constitution, every adult Zimbabwean citizen shall have the right -

- (a) to vote in referendums and elections for any legislative body established under this Constitution and to do so in secret; and
- (b) to stand for public office and, if elected, to hold office.”

The above section could not be read in isolation. It had to be read together with s 3(1) of the Third Schedule to the Constitution which provided:

“Qualifications and disqualifications for voters

(1) Subject to the provisions of this paragraph and to such residence qualifications as may be prescribed in the Electoral Law for inclusion on the electoral roll of a particular constituency, any person who has attained the age of eighteen years and who

—

- (a) is a citizen of Zimbabwe; ...

shall be qualified for registration as a voter.”

Reading the two sections together makes it obvious that the right to vote is not an absolute right that can be exercised without limitation. The Constitution limited the exercise of the right to vote to a citizen who had attained the age of eighteen. Consistent with the provisions of s 3(1)(g) of the Third Schedule to the Constitution, the Legislature added the residence qualification as one of the conditions of the exercise of the right to vote. It required

that the prospective voter be registered on the roll of voters for the constituency in which he or she ordinarily resided. There can be no doubt that the provisions of s 23(3)(g) of the Act were authorised under s 3(1)(g) of the Third Schedule of the Constitution.

Section 23 of the Act provided:

“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.

(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.

(3) A voter who is registered on the voters roll for a constituency, other than a voter who has been registered in that constituency in terms of the proviso to subsection (1), shall not be entitled to have his or her name retained on such roll if, for a continuous period of twelve months, he or she has ceased to reside in that constituency. ...” (The emphasis is mine)

Section 71 of the Act also provided:

“71 Applications for postal ballot papers

(1) When an election is to take place in a constituency, a voter ordinarily resident in Zimbabwe who is resident in that constituency, or was, within twelve months preceding the polling day or first polling day, as the case may be, fixed in relation to that constituency, resident therein and has good reason to believe that he or she will be absent from the constituency or unable to attend at the polling station by reason of being:

- (a) on duty as a member of a disciplined force or as an electoral officer or monitor; or
- (b) absent from Zimbabwe in the service of the Government of Zimbabwe; or
- (c) a spouse of a person referred to in paragraph(a) or (b);

may apply to the Chief Elections Officer for a postal ballot paper.”

The two sections are clear and unambiguous. Section 23(3) required that a voter be ordinarily resident in the constituency in which he or she was to vote for purposes of being qualified for registration on the voters roll for that constituency. If the voter became absent from the constituency in which he or she was registered as a voter for a continuous period of twelve months, his or her name had to be removed from the voters roll of that constituency as he or she would be deemed to have ceased being a resident of that constituency. The postal ballot was reserved for a specific class of registered voters who, because they would be on duty in the service of the Government, would be forced to be absent from their constituencies on the polling days in the election. The class of registered voters with the right of access to the use of the postal ballot was clearly defined. The definition was exclusive of any other registered voter not belonging to that class. The applicant and other registered voters who would have been outside the country on polling days in the election and unable to attend personally to cast their votes at the polling stations in the constituencies where they were registered as voters are excluded because they did not satisfy the prescribed criteria for the members of the class entitled to the use of the postal ballot.

There could be no serious argument that the Legislature acted unlawfully in enacting the two sections, when the Constitution specifically vested it with the power to impose residence qualifications on voters and thus limit the exercise of the right to vote. The Legislature clearly had the power to prescribe conditions for the exercise of the right to vote.

In support of the contention that the restriction of the right to the use of the postal ballot to the specific class of registered voters specified in s 71 of the Act was an unjustifiable limitation of the right to vote, the applicant referred to the case of *Richter v The*

Minister of 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 Constitutional Court of South Africa held that s 33(1)(e) of the South African Electoral Act constituted an unjustifiable limitation of the right to vote by restricting classes of registered voters who were absent from the Republic on election day who were afforded the opportunity to participate in the election. In that case the Constitutional Court of South Africa held that such a limitation infringed the right to vote.

The applicant argued on the authority of *Richter's* case *supra* that the right to vote is a democratic right and no law limiting the right could be justifiable in a democratic society. He urged the Court to hold that every registered voter was entitled to exercise the right to vote where he or she was and the State had to ensure that facilities were made available to record his or her vote.

The Court was not persuaded by the argument. The *Richter case supra* could not be applied to the applicant's case. Zimbabwe and South Africa have different electoral systems. The South African electoral system is based on the concept of proportional representation. This means that voters vote for a political party, not individuals. The political party then gets a share of seats in Parliament in direct proportion to the number of votes it got in the election. Each party then decides on members who fill the seats it won. As such, no matter where the voter casts his or her vote from, he or she would not be voting for an individual to represent him or her as a resident of a constituency.

The Zimbabwean electoral system is different. It is based on the concept of constituency representation. Section 38 of the Constitution provided that there shall be 210

members of the House of Assembly, each elected by and representing 210 constituencies. Registered voters vote for individual candidates, even though they may belong to political parties that sponsor them. Any person who is qualified to stand for elected office can offer himself or herself for election in the capacity of an independent candidate and be voted for as such.

Under the Zimbabwean electoral system, a voter votes not only as a citizen of this country but also to protect his or her rights and interests as a resident of the constituency in which he or she is registered. He or she votes for a candidate best suited to address the developmental problems of the constituency.

The constituency based electoral system requires that a candidate should 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 so resident for a continuous period of twelve months, the presumption is that he or she has lost touch with the constituency and has insufficient information about the candidate's ability to address the developmental problems of the constituency.

A distinction must be drawn between a situation where there is no right to vote and one where the right to vote is provided for under the law but a voter chooses not to exercise the right. In *Registrar General of Elections & Ors v Morgan Tsvangirai* SC 2002(1) ZLR (S) 204, CHIDYAUSIKU CJ, in a case in which the applicants alleged that failure by the State to put in place mechanisms to enable voters outside their constituencies to vote violated their right to vote, said at 211E:

“The contention that the failure to provide the above facility amounts to the disenfranchisement of a voter is simply untenable. The voter does not lose his right to vote. He is disabled from exercising the right by being in a wrong constituency at the time he is expected to vote. The disability would not, in the circumstances, have resulted from any action by the Registrar General.”

The Constitution did not place an obligation upon the State to make arrangements for voters who for personal reasons were unable to attend at the polling stations to vote. *In Madzingo and Others v Minister of Justice and Others* 2005 (1) ZLR 171 (S) at 177F-G, it was said that:

“It is important to appreciate the fact that there is no express provision in the Constitution and the Act requiring electoral authorities to establish machinery in foreign countries to record votes of Zimbabwean citizens registered as voters on voters rolls for constituencies who live in those countries. The provisions that are there require a registered voter to attend personally on polling day to cast his or her ballot at a polling station in the constituency for which he or she is enrolled. The requirement applies to every registered voter and its object is to give effect to the entitlement to vote provided under s 3 of Schedule 3 of the Constitution. The only exception to this general rule is created in s 71 of the Act.”

It was for these reasons that the Court was satisfied that ss 23(3) and 71 of the Electoral Act did not violate the applicant’s right to vote and consequently dismissed the application with no order as to costs.

CHIDYAUSIKU CJ (Rtd): I agree

ZIYAMBI JA: I agree

GWAUNZA JA: I agree

GARWE JA: I agree

GOWORA JA: I agree

HLATSHWAYO JA: I agree

PATEL JA: I agree

CHIWESHE AJA: I agree

D Ochieng, applicant's legal practitioner

Messrs Nyika, Kanengoni & Partners, first respondent's legal practitioners

Civil Division of the Attorney-General's Office, second, third and fourth respondents' legal practitioners