

1. MORGAN TSVANGIRAYI **HC 11843/01**
and
REGISTRAR GENERAL OF ELECTIONS
and
THE MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS

2. MORGAN TSVANGIRAYI **HC 12015/01**
and
REGISTRAR GENERAL OF BIRTHS AND DEATHS
and
REGISTRAR GENERAL OF CITIZENSHIP
and
REGISTRAR GENERAL OF ELECTIONS
and
THE CHIEF IMMIGRATION OFFICER
and
THE MINISTER OF HOME AFFAIRS
and
THE MINISTER OF JUSTICE LEGAL & PARLIAMENTARY AFFAIRS
and
THE EDITOR, THE HERALD NEWSPAPER
and
THE ELECTORAL SUPERVISORY COMMISSION
and
SOBUSA GULA-NDEBELE
and
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
and
THE ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 18, 22 and 25 January 2002

Opposed Application

Mr *A P de Bourbon*, for applicant.
Mrs *C Machaka* for 1st 2nd 3rd 4th 5th 6th 8th 10th and 11th respondents.
Ms *Mukambi* for 7th and 9th respondents.

MAKARAU J: On 10 January 2002, following an urgent application filed by the Registrar General under case number HC 185/2002, I issued the following order:

“It is ordered that:

1. The hearing of cases HC 11843/01 and HC 12015/01 be and are hereby consolidated.
2. The applicants herein, (the Registrar General and the Minister of Justice Legal & Parliamentary Affairs), shall file and deliver their opposing affidavits in case No. HC 11843/01 by not later than the close of business on Friday 11 January, 2002;
3. The respondent herein (Morgan Tsvangirayi), shall file and deliver his answering affidavit by not later than the close of business on Monday 14 January, 2002;
4. The applicants shall file and deliver their heads of argument in case No. HC 11843/01 by not later than the close of business on Tuesday 15 January, 2002;
5. The respondent shall file and deliver his heads of argument in case No. HC 11843/01 by not later than the close of business on Thursday 17 January, 2002;
6. The respondents in case No. HC 12015 /01 shall file and deliver their heads of argument by not later than the close of business on Thursday, 17 January, 2002;
7. Both applications shall be set down for hearing at 11.15 am on Friday, 18 January, 2002; and
8. Costs of this application are reserved.

Interim relief

1. The applicant is hereby authorised to publish a notice in terms of section 94 (1) of the Electoral Act [Chapter 2:02] and setting a date in terms of paragraph (c) after the date of publication and after the set down date referred to in (7) above;
2. Each party shall have the right, on notice, to file arguments discharging or varying the provisions of paragraph (1) above."

It is on the basis of the above order that both applications were set down before me for determination.

It is common cause that the 3rd respondent in case No. HC 12015/01, ('the Registrar General'), in publishing the notice in terms of section 94(1)(c) of the Electoral Act [*Chapter 2:01*], did not comply with the provisions of the interim relief that I had granted.

When the matter was called and after hearing counsel, I ruled that I would not hear the Registrar General on account of his contempt. I indicated then that my reasons would follow.

The facts giving rise to the contempt issue are common cause. On 19 December 2001, this court gave an order under case No. HC 11843/01 interdicting the Registrar General from exercising any of the powers vested in him in terms of section 94(2) of the Electoral Act in relation to the registration of voters pending the outcome of the chamber application under case No. HC 12015/01. The court further ordered that any notice of appeal filed against that order would not have the effect of staying the relief granted.

I note in passing that the order granted by HUNGWE J under case No. HC 11843/01 was not opposed. Counsel did appear on behalf of the Registrar General but did not make any submissions against the granting of the order at all, or, in the terms outlined above, despite the grave limitations this imposed on the powers of the Registrar General to carry out his statutory duties in terms of the Electoral Act.

It is the usual practice of this court to refuse to hear a person who has disobeyed a court order until he has purged his contempt. This position was accepted by both counsel as the practice of our courts.

In adopting this practice, I was guided by the sentiments expressed by CHIDYAUSIKU JP (as he was then) in **Wilson v Minister of Defence and Another** 1999 (1) ZLR 144 (H). In that case, the Secretary for Defence had made certain remarks that a court order issued against the army would not be obeyed and that his Ministry would not be told on what to do by a judge. The then Judge President found the remarks and conduct by the Secretary “reprehensible in the extreme”. The Learned Judge concluded his sentiments on that issue by noting:

“ That attitude, I am happy to note is at variance with the attitude of his Minister. In his evidence to this court, the Minister’s attitude was

that court orders must be complied with.”

I see little to distinguish between the conduct of the Secretary for Defence and that of the Registrar General in this case. Court orders must be complied with.

I have also been guided by several dicta from this and other jurisdictions on the purpose and rationale of the court’s stance when its orders are not complied with. In the case of **Scheelite King Mining Company (Private) Limited v Mahachi** 1998 (1) ZLR 173 (H), this court had occasion to opine on the purpose of contempt proceedings where a court order has not been complied with. It was the view of the court that, in addition to enforcing compliance with the order of the court, contempt proceedings also serve to protect and uphold the dignity and respect of the court.

The Judiciary as a third pillar of any democratic state is perhaps the weakest in that it has neither the sword (which is with the executive), nor the purse, (which is with Parliament). The strength of the Judiciary is neither physical force nor financial coercion but lies in the voluntary submission by the other two pillars of State and all citizens to its authority. Any willful violation of the dignity or authority of the Judiciary has the potential of weakening this pillar of the State and thereby threaten the whole. In my view, because of the need to preserve the State, such violation of the dignity and authority of the Judiciary deserves some condign sanction and should not be lightly suffered.

The purpose of holding a litigant in contempt is not to punish the litigant for punishment’s sake but rather to coerce the defaulter to comply with the orders of the court in future. (see **Lindsay v Lindsay** 1995 (1) ZLR 296 (S).

In view of the fact that the Registrar General has accepted his failure to comply with the order of this court, I did not make any other order against him apart from declining him audience.

I now turn to the merits of the two applications before me.

CASE NO. HC 12015/01

In this application, the applicant, (“Morgan Tsvangirayi”) filed a Court Application in which he sought nine specific orders against the respondents. These were as follows:

1. “In order to comply with Schedule 3 paragraph 3 of the Constitution of Zimbabwe, the First, Second and Fourth Respondents shall make available to the Third Respondent all the records in their possession or under their control containing the full names and particulars of all persons who have, as at the date of this order attained the age of 18 years or over and who
 - a) are citizens of Zimbabwe; or
 - b) Since 31 December 1985 have been regarded by virtue of a written law as permanent residents in Zimbabwe.
2. The Third Respondent shall compile a Common Roll in compliance with section 28 (2) of the Constitution of Zimbabwe within one month of the date of this order, containing a full list of all persons who have, as at the date of this order attained the age of 18 years or over and who :
 - a) are citizens of Zimbabwe; or
 - b) Since 31 December 1985 have been regarded by virtue of a written law as permanent residents in Zimbabwe.
3. The Third Respondent shall add to the Common Roll compiled in accordance with Clause (2) above all persons who provide reasonable proof to his office within one month of the date of this order that since 31 December 1985 they have been permanent residents in Zimbabwe.
4. The Common Roll to be compiled by the Third Respondent in accordance with Clause (2) and (3) above shall be in the form of one roll and shall consist of all those persons entered on the Common Roll who shall be deemed to be registered on the Common Roll.
5. Save as provided for in clause (3) herein, it shall not be necessary for any person entitled to be placed on the Common Roll to apply to register themselves on the Common Roll.

6. The Third Respondent shall allow the following persons to vote at the forthcoming presidential Election:
 - 6.1 All persons issued with a voter's confirmation card or a certificate of registration as a voter in accordance with section 23(1) of the Electoral Act [Chapter 2.01];
 - 6.2 All persons issued with a provisional identity document in accordance with section 23(3)(b) of the Electoral Act [Chapter 2.01];
 - 6.3 All persons issued with an identity document in accordance with section 23(3)(b) of the Electoral Act [Chapter 2.01].
7. All persons shall be entitled to vote at the forthcoming Presidential Elections at any designated polling booth in Zimbabwe.
8. Section 158 of the Electoral Act be and is hereby declared *ultra vires* of the Constitution of Zimbabwe and invalid.
9. Respondents 3, 6 and 10 shall pay the Applicant's costs of suit, jointly and severally (*sic*), the one paying the others to be absolved."

It is convenient for me to break the issues down into headings. Some of the prayers are inter-related and fall under one heading.

PRELIMINARY ISSUES

I have been addressed at great length on the current composition and competence of the Electoral Supervisory Commission to carry out its constitutional and other statutory duties. I have however not been called upon to make any pronouncement on the issue or on its possible effects on any of the issues properly before me. I therefore decline to express any views on the matter.

In my view, the role of the court is not to run the office or the administration of any of the respondents but to pronounce on what the law is. How the respondents arrange their domestic affairs to give effect to the law remains an area within their discretion.

THE COMMON ROLL

A number of the prayers by the applicant relate to the issue of the Common Roll and I shall deal with all of them under this heading.

Section 28(2) of the Constitution provides that the President shall be elected by voters registered on the common roll. The term “common roll” has not been defined in the Constitution or in the Electoral Law. In addition to being used in section 28, the term has however been also used in subparagraph 3(1) of the 3rd Schedule to the Constitution.

Subparagraph 3 of the 3rd Schedule became part of the constitution in 1991 through Constitutional Amendment No. 11. It is instructive, in my view, to refer to the provision prior to this amendment. The subparagraph then provided for two rolls, the white roll and the common roll. The effect of the amendment was to abolish the white roll and to retain only one roll, the common roll.

However, for the purposes of determining these proceedings, it is largely unnecessary for me to define the term. This is so because the law is quite clear that there must be such a roll. The law also provides for who qualifies to be registered on that roll. From these two provisions, it is adequate, in my view, to determine these proceedings without giving the legal definition of the term. This is an issue that it appears proper to me to leave open. The point to be made, however, is that the Constitution clearly provides for a common roll and whose registrants shall elect the President. It follows therefore that the common roll must have the names of all the registered voters who qualify to vote for the President.

Whether the common roll for Zimbabwe is one continuous document or

is a set or series of rolls is a non-issue, in my view. The form and nature of the roll is an administrative matter for the public officials tasked with the compilation and maintenance of the roll to attend to. The Constitution simply provides for the existence of the common roll. In my view, the Constitution refers to the roll as an item in existence rather than as a concept or idea as advanced by the respondents. It is my opinion that if the Legislature intended for the president to be elected by all voters registered on some other voters' roll or the sum total of some other rolls, it would have said so. It did not.

It is therefore my finding that the law provides that there be a common roll of voters in Zimbabwe.

VOTER QUALIFICATION

I now turn to deal with the issue of who qualifies to be registered on the common roll.

Paragraph 3(1) of Schedule 3 to the Constitution provides as follows:

“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; or*
- b) *since 31st December, 1985, has been regarded by virtue of a written law as permanently resident in Zimbabwe;*

shall be qualified for registration as a voter on the common roll”

Two interpretations of subparagraph (3) of the 3rd Schedule have been urged upon me. The first one, advanced for the applicant, is that for any person to qualify to be registered on the common roll, he/she must be over 18 years of age, a citizen of Zimbabwe or a have been regarded as a

permanent resident in Zimbabwe since 1985. Residence qualification is immaterial for one to be registered on the common roll. It only becomes relevant if one wishes to be registered on the roll of a particular constituency, so the argument proceeds.

In terms of this argument, the common roll gives universal suffrage to all adult citizens or permanent residents in Zimbabwe. Thus a homeless vagrant in the shopping malls of Harare who cannot prove that he is resident in Harare by any of the conventional methods, is qualified to be on the common roll by virtue of his being a Zimbabwean Citizen who is over 18 years of age.

The second interpretation of the subparagraph that has been urged upon me is to the effect that for any person to qualify to be on the common roll, he/she must first meet the residential qualifications of any particular constituency. Thus still using the example of the homeless vagrant who sleeps in the shopping malls of Harare, if he cannot qualify to be on any particular constituency roll by virtue of being of no fixed address, he cannot be registered on the common roll. He therefore cannot vote for the President even if it is obvious that he resides in Zimbabwe, is over the age of 18 years of age and is a Zimbabwean. According to this argument, the Zimbabwean Constitution does not grant universal suffrage to the citizens and permanent residents, but limits the right to vote for the President only to those who can satisfy the residential requirements for a particular constituency as provided for in the Electoral Act.

The difficulty one has in interpreting subparagraph (3) of the 3rd Schedule is that it is in a Schedule that specifically provides for the qualification of Members of Parliament and voters. This reinforces the argument that the voters referred to herein can only be voters to be registered on a constituency roll from which Members of Parliament are to be

elected.

The crisp issue that then falls before me for determination is what was the intention of the legislature in enacting subparagraph (3) of the 3rd Schedule. Was it to grant universal suffrage to all adult citizens and permanent residents without regard to where these are resident, as argued by the applicant or to grant qualified suffrage as argued by the respondents.

In determining the intention of the legislature, I am to be guided by the wording used in the enactment. I have to establish whether or not the interpretations urged upon me can be supported by the words used in the subparagraph.

The applicant's argument is quite forceful but I am not persuaded that it finds a basis from the wording of the enactment.

I have been persuaded by the argument on behalf of the respondents. Counsel for respondents argues that the true meaning of the provisions of the subparagraph is that, to qualify to be on the common roll, a claimant must show that, in addition to being 18 years of age and a citizen or is regarded as a permanent resident since 1985, he or she meets the residence qualifications that are prescribed in the Electoral Law for inclusion on the electoral roll of a particular constituency.

In my view, the wording of the subparagraph (3) of the 3rd schedule is clear that all three criteria listed therein must be met before one can be registered on the common roll.

In my mind, for one to understand fully the provisions on who qualifies to be registered on the common roll, it is necessary to make reference to the provisions of the Electoral Act on the residential qualifications of voters. This

is to be found in section 20 (1), which provides:

“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 claim:

Provided that, if a claimant satisfies the Registrar General that, for reasons related to his place of origin, political affiliations or otherwise, it is appropriate for the claimant to be registered as a voter in a constituency in which he is not resident, the claimant may be registered as a voter in that constituency.”

The conclusion that I then come to is that it was the intention of the legislature that for one to be on the common roll, one has to be:

- over 18 years of age;
- a citizen of Zimbabwe or has been regarded in terms of a written law as a permanent resident since 1985; and,
- resident in a particular constituency or satisfies the Registrar General that for reasons related to his or her place of origin, political affiliations or otherwise, it is appropriate for him/her to be registered in a constituency he /she is not resident.

The practical effect of the above in my view, is to grant suffrage to all adult citizens and persons regarded as permanent residents who can prove residence in a particular constituency or can satisfy the Registrar General that they have a link with some other constituency in Zimbabwe by reason of place or origin, political affiliation or otherwise. Those failing to prove residence in a particular constituency and links to any other constituency by reason of place of origin or political affiliation or otherwise will fail to qualify to be on the common roll. This, to me, appears to have been the intention of the legislature in enacting subparagraph 3 of Schedule 3 of the Constitution.

In view of my findings on who qualifies to be on the common roll, it becomes unnecessary to determine whether or not those who since 31 December 1985 have been regarded as permanent residents in Zimbabwe

should be added on to the roll. They do qualify to be on the roll. This is so unless they have been disqualified by virtue of having lost their permanent residence. This court has already made a ruling on how people who have since become disqualified from registration as voters are to be dealt with.

WHO CAN VOTE?

In terms of section 28 (2) of the Constitution, the President shall be elected by voters on the common roll. Therefore in my opinion, all those who are on the common roll have the right to vote for the President. There are no further requirements necessary for one to exercise their right to vote other than to show that one is on the common roll. If the intention of the legislature were to impose any further qualifications, it would have specifically made that provision in the Constitution.

The applicant has argued that those on the common roll are entitled to vote. The respondents have advanced a rather half-hearted argument against this contention. It has been suggested by the respondents that residence remains an essential qualification at the voting stage particularly as regards voters who qualify *qua* permanent residence. I have not been referred to any provision in the Constitution which has the effect of derogating from the apparent right given voters on the common roll by section 28 of the Constitution. As such I am reluctant to add a residential qualification to the right. For those who would have qualified to be on the roll by virtue of being permanent residents the law is quite clear that they lose their qualification when they cease to be residents. They therefore lose the right to be on the roll.

It is therefore my finding that the law provides that all voters registered on the common roll are entitled to vote and the 3rd respondent

has to put in place the administrative machinery to give effect to that law.

The Electoral Act requires that voting be done in constituencies. The issue that arises is whether those voters who are on the common roll will be denied the right to vote if on polling days they are not in their constituencies. The respondents have not advanced any arguments in this regard. As I have indicated above, the supreme law grants a right to all voters on the common roll to vote for the President. In my mind, a subordinate piece of legislation in providing what are essentially administrative details of how and where the poll is to be taken cannot take away that constitutional right.

It has been submitted before me that the law will be amended to affect the rights of voters who will not be in the constituencies of their residence on polling days. I make my findings on the basis of the law that is on our statute books currently and not on what the law is to be in the future.

In my view, the Electoral Act does recognise that it cannot abrogate what is in effect a constitutional right and has made provision for voters who will legitimately be away from their constituencies on polling dates, to vote.

3rd respondent is obliged to give effect to the constitutional right of the voters by putting in place an administrative machinery that will enable all voters who are not within their constituencies on polling dates, to cast their votes.

The Secretary for Justice in his opposing affidavit has intimated that the Registrar General may encounter administrative problems in making available copies of the common roll at each polling station. The Registrar General himself has not made this confession in his own opposing affidavit but I do take note of this possible and practical difficulty. Without seeking in any way to advise on how to administer the office of the Registrar General, I may venture to suggest that those voters who for legitimate reasons are out of their constituencies on polling days, may be accommodated at strategic polling stations in each constituency where copies of the common roll will be available. I hasten to repeat that this is a suggestion and not a finding. I

make this suggestion on the understanding that the Registrar General will have copies of parts and not the whole of the common roll at most polling stations.

SECTION 158 OF THE ELECTORAL ACT

I have been invited by the applicant to consider whether or not section 158 of the Electoral Act is *ultra vires* the Constitution and should be declared invalid. It has been urged upon me to accept that although the President has not used the powers granted him by that section for the current elections, he might use such powers. As correctly pointed out by the respondents, the court cannot exercise its jurisdiction over the speculative assumptions of the applicant that the powers might be used. I therefore do not think that it is necessary for me to express an opinion on the issue.

CASE NO. HC 11843/00

Having made my findings in case No. HC 12025/01, the provisional order in case No. HC 11843/01 ceases to have any effect. This is so because in the order which was issued by this court on 19 December 2001, the 3rd respondent was called upon to show cause why:

1. he should not be restrained from closing the registration of voters in terms of section 94 of the electoral Act and should continue registering voters until the application under case No. HC 12015/01 had been determined;
2. he should not be ordered to cause to remain open the Voters' Rolls Inspection Centres including the Mobile Inspection Centres;
3. he should not be restrained from exercising any of the powers vested in him in terms of section 94 of the Electoral Act in relation to the registration of voters pending the determination of the application under case No. HC 12015/01.

It is common cause that on January 10, 2002, I varied the above order to the extent of allowing the 3rd respondent to publish the requisite notice under section 94 of the Act. The reason why I allowed 3rd respondent to publish the notice was a realisation that this was a duty he had to perform in terms of a statute. The earlier order, because it had not been dealt with timeously, had the effect of restraining the respondent from doing that which he is obliged by law to do.

On the basis of the foregoing, I make no order in this case.

THE RELIEF SOUGHT

As I indicated at the beginning of this judgment, applicant's draft order has nine specific prayers. Some of these require the court to give directions to the 1st to 3rd respondents on matters that in my view, are administrative. The role of the court should always remain that of exposing the law on elections and to leave the details of how to give effect to that law to the duly appointed officials.

It has been submitted that the above applications seek to ensure that there is compliance with the Constitution and the Electoral Laws in the Presidential election scheduled for the 9th and 10th March 2002. It has further been submitted that these applications seek to clarify the law for the contestants in that election so that they know in advance what the governing rules are. With these submissions in mind, I make the following order:

1. In order to comply with section 28 (2) of the Constitution of Zimbabwe, for the Presidential elections scheduled for 9 and 10 March 2002, the Registrar General shall ensure that there is in place a common roll.

2. The Common roll referred to in 1 above, shall contain the names and such other information as may be necessary, of all persons who have attained the age of 18 years, are citizens of Zimbabwe or, since 1985, have been regarded by a written law to be permanent residents in Zimbabwe and who meet the residential requirements of any particular constituency or have satisfied the Registrar General that for reasons related to place of origin, political affiliation or otherwise, it is appropriate that they be registered in a constituency in which they do not reside;
3. The Registrar General shall restore to the voters roll of any constituency, all voters who, on or before January 18, 2002, were on that roll or were eligible but were refused to be on that roll, who may have lost or renounced their citizenship of Zimbabwe, but who since 1985, have been regarded by a written law to be permanently resident in Zimbabwe;
4. The 3rd respondent shall make adequate and reasonable administrative arrangements for all voters registered on the common roll who will not be in their constituencies on the polling days, to exercise their vote; and
5. Each party shall bear its own costs.

Messrs Gill, Godlonton & Gerrans, applicant' legal practitioners
Civil Division, Attorney General's Office, 1st 2nd 3rd 4th 5th 6th 8th 10th & 11th
respondents' legal practitioners
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