

CANNICIOUS NKALA
versus
THE CHAIRPERSON OF THE
ZIMBABWE ELECTORAL COMMISSION
and
ZIMBABWE ELECTORAL COMMISSION

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 20 JULY 2018 AND 26 JULY 2018

Urgent Application

T Muganyi with M Mahaso for the applicant
T M Kanengoni with S Mufara for the respondents

MOYO J: This is an application by an aspiring Member of Parliament for the Gwanda Central Constituency. The basis of the application is that the voter's roll prepared by second respondent has serious irregularities that affect the applicant's right to a free and fair election.

The applicant lists a number of people whose addresses he is challenging as either being incomplete or being from outside the Gwanda Central Constituency. The interim relief sought in the application is as follows:

“Pending the finalization of this matter by this Honourable Court, applicant is granted the following interim relief:

- (a) That the respondents be and are hereby ordered to immediately rectify the anomalies in the voter's roll for Gwanda Central Constituency in particular remove voters from foreign constituencies.
- (b) That the respondents be and are hereby ordered to furnish applicant with a corrected version of the voter's roll for Gwanda Central Constituency within 3 days of the interim relief herein.”

Of concern however, is that in his narration, applicant has not stated before the court, which geographic locations fall under the Gwanda Central Constituency. This court would have

expected him to first of all list all the names of the places/suburbs/areas that fall under the Gwanda Central Constituency. Applicant would then go on to list the addresses being condemned and explain how they are incomplete and why he avers that they fall outside the Gwanda Central Constituency. I say so, for it would be inadequate to just state that an address is incomplete without stating what precisely is missing in that address. I hold the view that even the information given on the inadequacy of the roll is insufficient, as the founding affidavit has failed to explicitly show such especially with regard to what areas fall under this constituency and what is lacking in the addresses making them incomplete. For it is not the mere say so of the applicant which renders the anomalies existent. A proper foundation for the complaint against the voters roll has to made be for the court to fully comprehend what the irregularities applicant concludes are existent and serious are.

The respondents raised points *in limine* against the application.

- 1) That applicant adopted the wrong procedure in bringing this application to court. The respondent's cited section 28 and section 33 of the Electoral Act [Chapter 2:13] wherein the procedure for a voter to challenge information on the voters' roll with a bid to have other voters removed is provided.

Section 28 provides as follows:

Objectives by voters

- 1) A voter may object to the retention of any name on the voters' roll of the constituency in which the objecting voter is registered, and to the removal of his or her name from the voter's roll in terms of section 33 (4).
- 2) An objection in terms of subsection (1) shall be
 - (a) in writing, setting forth the grounds of the objection, and
 - (b) lodged in duplicate with the voter registration officer and
 - (c) accompanied by the prescribed fee
- 3) If an objection in terms of subsection (1) if lodged and
 - (a) the voter registration officer upholds the objection, he or she shall give written notice accordingly to
 - (i) the voter who has objected and
 - (ii) the person to whom the objection relates, where the effect of upholding the objection relates off the voters roll, or place it on another voter's roll, as the case may be, within 14 days of the date when the voter registration officer gives notice in accordance within this paragraph, unless, within that period ---."

- (b) if the voter registration officer does not uphold the objection, he or she shall (after affording the objector an opportunity, to withdraw the objection in any case where it was based on an obvious error or misunderstanding on the part of the objector,
- (i) forth within set down the objection for hearing before a designated magistrate of the province in which the person to whom the objection relates resides,

Section 28 (5) provides thus:

“Notwithstanding anything in this section, if the voter registration officer, receives an objection in terms of subsection (1) during the same period of 30 days immediately prior to the polling day, or first polling day as the case may be, fixed for an election in the constituency in which the person to whom the objection relates is registered, he or she shall take no action on such objection until after the close of the polling day, or last polling day as the case may be.”

The applicant responded to this point *in limine* by submitting that section 67 of the constitution which provides that

“(1) Every Zimbabwean citizen has the right—

- (a) To a free, fair and regular elections for as elective public office established in terms of this constitution, or any other law, and (b) to make political choices freely”, protects his rights to be elected to political office in a free and fair manner and that the Electoral Act is subordinate to the constitution so if its provisions are not aligned to the constitution it should therefore not be followed in such instance. He further submitted that he is not approaching the court as a voter but as an aspiring candidate, and that the Electoral Act cannot take away his right to do so.

I hold the view that the Electoral Act is in line with the provisions of the constitution in that it provides a voter, who includes an aspiring candidate because an aspiring candidate is also a voter, with an avenue to approach second respondent for objections and it also provides for approaching the courts where the matter is not resolved. The Act establishes *locus standi* to challenge the information on the voters roll, on the basis of being a voter. This is correct in my view, for one to have an interest on the contents of the voters’ roll or otherwise they themselves must be a voter first. An aspiring candidate is also a voter in the constituency they are contesting in, so the Electoral Act covers even instances where an aspiring candidate seeks the removal of certain voters from the voter’s roll.

Section 28, directs the applicant to the second respondent's voter registration officer of the area concerned as obviously the voter registration officer for the area concerned is privy to the geographic places therein and the boundaries of different constituencies. As this court sits here, it does not have the tools of deducting whether indeed the addresses alleged to be incomplete are incomplete as even their incompleteness is not given in the founding affidavit. Even some of the areas alleged to be foreign this court has no technical means to factually find that indeed some of these addresses are indeed foreign or not. The voter registration officer for the district concerned would however, be in a good position to discern the information given by the applicant and establish its truthfulness or otherwise. Section 28 was crafted by the legislature which was mindful of the fact that the one who is challenging the voter's roll could be the one in error, or the one having a misunderstanding hence the need to deal with the second respondent's officers on the ground.

Section 28 also provides for the notification of the voter whose details are being challenged, and it also provides for a platform where they should be heard if they so wish unlike in this case where the voters whose details are being challenged have not been notified. It would be folly for this court to assume, without hearing the voters whose details are being challenged, that applicant's mere say so is correct. As respondent's counsel correctly submits its applicant's rights to a free and fair election against the alleged voter's rights to elect a person of their choice. This court has no basis upon which to exalt one right above the other hence the provisions of section 28. Section 28 allows for a challenge of a voter's retention in the roll by another voter, and allows for both parties to be heard before a local voter registration officer. It is important to note that the Electoral Act places the dispute concerning information on the voter's roll within the district where everyone has the geographic know how of the location and of the addresses being challenged. I do not believe that section 28 flouts the constitution, in fact section 28 enhances the spirit of the constitution in that a person can indeed challenge the data on the voters roll, but the process should be done in an transparent manner that allows for input by both the affected individuals. It is common cause that applicant did not approach second respondent in terms of section 28 of the Electoral Act and therefore it is my finding that the applicant has failed to bring himself within the ambit of the Electoral Laws of this country as read with the constitution and he therefore cannot be heard on this platform.

It is also important to note that section 28 (5) of the Electoral Act stipulates that if the objection is presented to the second respondent within 30 days to an Election, then the information on the voters roll will not be tampered with until the close of the last polling day. This in essence means that an order granted now directing second respondent to alter the voters' roll one week before an election flouts the provisions of the Electoral Act and is therefore unlawful.

Again, even if it were to be argued that applicant can approach this court outside the ambit of the Electoral Act and that he is not duty bound to follow the provisions of section 28, the question that immediately arises would be, whose rights or interests are affected by the relief sought by the applicant? It is the voters themselves, not second respondent. Applicant seeks an order that named voters be removed from the voters roll by the second respondent on the basis that either their addresses are incomplete or foreign. He has not cited these interested parties who have a right to vote. He wants this court to order that their right to vote be taken away from them, on the basis that his personal view (which has not been substantiated by any information on the geographic extension of the Gwanda Central Constituency), is that they have incomplete or foreign addresses? What if this fact according to the voters themselves is incorrect? Even outside the ambit of section 28, I hold the view that administrative justice demands that, if you are going to order that a right as important as the right to vote should be taken away from certain individuals, you should firstly have concrete information that it indeed should be taken away, and secondly you should have heard them to deduct factually that indeed they should not be on the voters' roll. Depriving a person their right to vote is a drastic and invasive step that cannot be taken lightly upon bold assertions having been made, which is precisely the reason why the Electoral Act provides for such a measure to be taken after an elaborate process has been undertaken to justify such an action. One's right to vote certainly cannot be taken away on the basis of another person's mere say so. It has to be fully established on facts that they should not be there before they are removed. This court can only do so through hearing them and not second respondent. Second respondent is merely exercising its mandate to register voters and conduct elections, it has no interest in who remains on the voters' roll and who is removed, it is the voters whose removal is being sought who have an interest at stake, and it is them who

should have a say and show cause why they should remain on the voters' roll with the addresses as given.

I accordingly hold the view that applicant has failed to adopt the correct procedure in bringing this matter before this court. I also hold the view that the founding affidavit does not provide sufficient information as to the inadequacy of the details relating to most of the voters therein. I also hold the view that all the voters whose details are being complained of, including the alleged "foreign" voters have a right to be heard before their right to vote is taken away from them as is being sought in the draft order.

I will not proceed to deal with the other points *in limine* as they are intertwined with the first one on failure to adopt the correct procedure.

I hold the view that the point *in limine* should be upheld.

The application is accordingly dismissed with costs.

Tanaka Law Chambers, applicant's legal practitioners
Nyika Kanengoni and Partners, respondents' legal practitioners