

DIANA ELIZABETH FELTOE
versus
THE CONSTITUENCY REGISTRAR, HARARE
and
THE REGISTRAR GENERAL OF ELECTIONS

HIGH COURT OF ZIMBABWE
GARWE JP
HARARE 5 and 14 February 2002

Mr *Bryant Walter-Elliot*, for the applicant
Mr *Majuru*, for the respondents

GARWE JP: The facts of this case are to a large extent common cause or at least not seriously in dispute. The dispute is largely on the law. The applicant was born in Zimbabwe in 1940. Her parents however were born in England. She says she has lived in Zimbabwe for most of her life. Over the years she has been the holder of a Zimbabwean passport. At the beginning of 2001 she applied for and was issued with a British passport. Following the promulgation of the Citizenship of Zimbabwe Amendment Act 12/01 she decided to renounce her Zimbabwean citizenship. She consequently surrendered her passport and national identity card in August 2001. In September 2001 she approached the Department of Immigration who inserted in her passport a permanent resident stamp. Over the years the applicant has also been a registered voter. Following her renunciation of Zimbabwean citizenship, she lost her entitlement to vote on the basis of citizenship. Consequently the constituency registrar (the first respondent)

forwarded to her a notice of objection on 25 January 2002 advising that he had reason to believe that she was no longer entitled to be registered as a voter and advising her of her right to lodge a notice of appeal so that the matter can then be determined before a magistrate. The appellant indeed lodged an appeal and the matter is currently awaiting determination before a magistrate.

In the present application, filed on the basis of urgency, the applicant seeks the following relief:

“TERMS OF FINAL ORDER SOUGHT

1. That you show cause to this Honourable Court why a final order should not be made in the following terms:-
 - (a) That section 3(3) of the Third Schedule of the Constitution of Zimbabwe relates only to Parliamentary Elections and not to Presidential Elections and that consequently the purported notice of objection issued by the first respondent to the applicant is invalid and of no force or effect.
 - (b) That as the Proclamation for the holding of the forthcoming Presidential Election to be held on 9-10 March 2002 has already been issued in terms of the Electoral (Presidential Election) Notice 2002 (S.I. 3A of 2002) dated 10 January 2002 and as the voters roll for that election has already been closed in terms of section 4 of the said notice then the purported notice of objection issued by the first respondent to the applicant is invalid and has no force or effect.
 - (c) That the second respondent shall forthwith produce to this Honourable Court a copy of the “Claim form for Registration as a voter in a Constituency in which claimant is resident”

(Form VI) which the applicant completed when she registered as a voter and if such form shows that the applicant has been a permanent resident in Zimbabwe since 31 December 1985, the purported notice of objection issued to the applicant is invalid and has no force or effect.

- (d) That as the voters roll for the forthcoming Presidential election to be held on 9-10 March 2002 has closed, then the applicant is being deprived of her Constitutional right to apply to register as a voter by virtue of the fact that she has resided in Zimbabwe since before 31 December 1985. Consequently, the purported notice of objection issued by the first respondent to the applicant is invalid and of no force or effect.
- (e) That the first respondent has not been legally appointed in terms of section 16 of the Electoral Act (Chapter 2:01) and that consequently the notice of objection purportedly signed by the first respondent and addressed to the applicant is invalid and has no force or effect.
- (f) That the Respondents shall pay the applicant's costs of suit, jointly and severally, the one paying the other to be absolved.

2. INTERIM RELIEF

Pending the determination of the final order sought, the respondents shall not strike off the applicant's name from the voters roll.

3. It is further directed

- (a) That the respondents are to file and serve their opposing affidavits, if any, by Monday 11 February 2002.
- (b) That the applicant is to file and serve her

answering affidavit and heads of argument by Friday 15 February 2002.

- (c) That the respondents are to file and serve their heads of argument by Wednesday 20 February 2002.
- (d) That thereafter, the Registrar of this Honourable Court shall allocate a date for the hearing of this application as a matter of urgency on the first available date.
- (e) That the costs of this application be costs on (*sic*) the cause."

From the above it is clear that what the applicant seeks is an order interdicting the respondents from removing her name from the voter's roll pending the final determination of this matter.

The Applicant's case

The applicant relies on five grounds. The first is that since Schedule 3 section 3(3) of the Constitution refers to an election held "for that constituency", she is not disqualified from voting since the forthcoming election is presidential and not parliamentary. The second is that in terms of section 25(1) of the Electoral Act, no objection shall be taken or a notice sent during the period between the issue of a proclamation and the close of polling at the election. In this case although the proclamation was gazetted on 10 January 2002 the notice of objection was issued on 25 January 2000. She therefore argues that the notice of objection is invalid. The third is that she is entitled to remain on the voters roll by virtue of the fact that she

HH 30-2002

is a permanent residence since 1985 as provided for in section 3(1)(b) of the Third Schedule of the Constitution. The fourth is that since she is no longer entitled to vote on the basis of citizenship, she must be given the opportunity to apply to register on the basis of residence in this country since 1985. The fifth and last submission is that since in terms of section 16 of the Electoral Act no constituency registrar has been appointed, no official therefore could properly take an objection in terms of section 25. For these reasons the applicant submits that the respondents should accordingly be interdicted from removing her name from the voters' roll pending determination of all the issues raised in this application.

The Respondents' submissions

Mr *Majuru*, for the respondents, submitted that he has no difficulty at this stage with the five submissions made by the applicant which are still to be argued and determined on the return date. He submitted however that he has difficulty with the interim relief sought. All that the first respondent has done is follow the procedure laid down in section 25 of the Electoral Act. Until such time as the matter is determined by a magistrate as provided for in the Electoral Act, the applicant's name will remain on the voter's roll. For that reason this Court cannot order that the name remains on the voter's roll when in terms of the Act it should so remain unless and until a magistrate in terms of section 27 determines that the Constituency registrar is to strike off the name from the voter's roll.

The Issues

There are therefore two issues before me at this stage. The first is whether I should grant the order sought calling upon the respondents to show cause why a final order should not be made as prayed. The second is whether I should grant the immediate relief sought by the applicant, namely that her name should not be struck off pending final determination of this matter.

No issues arise as far as the terms of the final order sought are concerned. Subject to satisfactory proof that she has been a permanent resident since 1985 the applicant may be entitled in terms of Schedule 3 section 3(1)(b) of the Constitution to vote on the basis of permanent residence and not citizenship. Whether or not she is so entitled is an issue still to be determined. That issue however is one she has also raised in her appeal. In her notice of appeal she states that she qualifies as a voter "in terms of Schedule 3, section 3(1)(b) of the Constitution of Zimbabwe ... having been permanently resident in Zimbabwe since 31 December 1985". Obviously if the presiding magistrate finds that she is entitled to vote on the basis that she has been a permanent resident since 31 December 1985 then it will follow that the notice of objection issued by the first respondent would have been wrongly issued and consequently of no force or effect. The issue remains the same although worded differently.

Turning to the issue of the temporary relief sought I agree with Mr *Majuru* that the applicant's name is currently on the voter's roll pending determination by the magistrate. There is no provision in the law for the name to be removed prior to such determination. The blanket relief sought that the name should not be removed is therefore unnecessary. However it appears the applicant is looking beyond the determination by the presiding magistrate. The applicant is saying even if the magistrate were to dismiss her appeal, there are other grounds on which the notice of objection should be declared invalid. On that basis I am satisfied that her name should not be removed from the voters roll pending the final determination of the issues raised on the papers. The temporary relief sought should accordingly be granted.

For obvious reasons this matter is urgent. It is necessary that a final determination be made before the Presidential election. Accordingly time limits will be prescribed to ensure that a determination is made as soon as possible.

I accordingly grant the provisional order as follows:-

1. TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should be made in the following terms:

- (a) That section 3(3) of the Third Schedule of the Constitution of Zimbabwe relates only to

Parliamentary Elections and not to Presidential Elections and that consequently the purported notice of objection issued by the First Respondent to the Applicant is invalid and of no force or effect.

- (b) That as the Proclamation for the holding of the forthcoming Presidential Election to be held on 9-10 March 2002 has already been issued in terms of the Electoral (Presidential Election) Notice 2002 (S.I. 3A of 2002) dated 10 January 2002 and as the voters roll for that election has already been closed in terms of section 4 of the said notice then the purported notice of objection issued by the First Respondent to the Applicant is invalid and has no force or effect.
- (c) That the Second Respondent shall forthwith produce to this Honourable Court a copy of the "Claim form for Registration as a Voter in a Constituency in which claimant is resident" (Form VI) which the Applicant completed when she registered as a voter and if such form shows that the Applicant has been a permanent resident in Zimbabwe since 31 December 1985, the purported notice of objection issued to the applicant is invalid and has no force or effect.
- (d) That as the voters roll for the forthcoming Presidential election to be held on 9-10 March 2002 has closed, then the applicant is being deprived of her

Constitutional right to apply to register as a voter by virtue of the fact that she has resided in Zimbabwe since before 31 December 1985. Consequently, the purported notice of objection issued by the First Respondent to the Applicant is invalid and of no force or effect.

- (e) That the First Respondent has not been legally appointed in terms of section 16 of the Electoral Act [*Chapter 2:01*] and that consequently the notice of objection purportedly signed by the First Respondent and addressed to the Applicant is invalid and has no force or effect.
- (f) That the Respondents shall pay the applicant's costs of suit, jointly and severally, the one paying the other to be absolved.

2. INTERIM RELIEF GRANTED

Pending the determination of the final order sought, and irrespective of the outcome of the appeal before the magistrate the Respondents shall not strike off the Applicant's name from the voters' roll.

3. IT IS FURTHER DIRECTED:

- (a) That the Respondents are to file and serve their

opposing papers, by Monday 18 February 2002.

- (b) That the Applicant is to file and serve her answering affidavit and heads of argument by Wednesday 20 February 2002.
- (c) That the Respondents are to file and serve their heads of argument by Friday 22 February 2002.
- (d) That thereafter the Registrar of this Honourable Court shall allocate a date for the hearing of this application as a matter of urgency on the first available date.

Gill, Godlonton & Gerrans, applicant's legal practitioners.

Civil Division of the Attorney General's Office, respondents' legal practitioners.