

TRACY SMITH

Versus

**CHAIRPERSON OF THE ZIMBABWE
ELECTORAL COMMISSION**

And

ZIMBABWE ELECTORAL COMMISSION

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 20 JULY 2018 & 26 JULY 2018

Urgent Chamber Application

T. Muganyi for the applicant

T.M. Kanengoni for the respondents

MAKONESE J: The Electoral Court is a division of the High Court established in terms of s161 of the Electoral Act (Chapter 2:13). Its jurisdiction is set out under section 161(2) of the Act as follows:

“The Electoral Court shall have exclusive jurisdiction –

- (a) to hear appeals, applications and petitions in terms of this Act; and
- (b) to review any decision of the Commission or any other person made or purporting to have been made under this Act;

and shall have power to give such judgments, orders and directions in these matters as might be given by the High Court;

Provided that the Electoral Court shall have no jurisdiction to try any criminal case.”

Prior to the Electoral Amendment Act (No. 6 of 2018), the Electoral Court was a standalone court not related to the High Court. By virtue of Act No. 6 of 2018, subsection 1 of section 161 was enacted which established the Electoral Court as a division of the High Court. In enacting this provision, the legislature preserved the stipulations/limitations of the Electoral Court’s jurisdiction under subsection 2 and 3 of section 161. The legislature did not clothe the

Electoral Court with the same jurisdiction enjoyed by the General Division of the High Court when it was enacted under section 161 of the Act.

Being a creature of statute, the Electoral Court, being a division of the High Court does not enjoy jurisdiction beyond what is provided in section 161 of the Electoral Act. Its jurisdiction is regulated by section 161.

The applicant in this urgent chamber application is a registered voter and Independent candidate for councillorship of Ward 2 Gwanda Central Constituency in the upcoming harmonised general elections set for 30th July 2018. Applicant has approached this court on an urgent basis seeking to have what she perceives to be irregularities in the voters' roll for Ward 2, Gwanda Constituency to be rectified. In her interim relief the applicant seeks the following order:

- “(a) that the respondents be and are hereby ordered to immediately rectify the anomalies in the voter's roll for Ward 2, Gwanda Central Constituency in particular remove voters from foreign constituencies.
- (b) That respondents be and are hereby ordered to furnish applicant with a corrected version of the voters' roll for Ward 2, Gwanda Central Constituency within three (3) days of the interim relief herein.”

In the final order, the applicant prays for the following relief:-

- “(c) that the corrected version of the voter's roll pursuant to the interim relief under this case number for Ward 2, Gwanda Central Constituency be deemed the final binding voter's roll for the said ward for the harmonized elections of 30th July 2018.”

The respondents in this matter have filed opposing papers and have raised certain points *in limine* which ought to be disposed of before this matter can be entertained on the merits. I shall proceed to deal with each of the issues in turn.

Adoption of wrong procedure

The applicant has instituted proceedings before the Electoral Court seeking the “rectification” of the voters’ roll in respect of Ward 2 Gwanda Central Constituency. The application was filed on 13th July 2018, exactly seventeen (17) days before the general election. If the relief sought by the applicants is granted, certain names that appear on the voters’ roll for Ward 2, Gwanda Central Constituency shall be summarily removed from the voters’ roll. It is clear that the applicant has not adhered to any of the provisions of the Electoral Act. The application is not grounded on the provisions of the applicable law. It is trite that the vindication of constitutional rights must be done in the first instance, by resorting to appropriate remedies prescribed in any statute that is enacted to give effect to the said constitutional rights and the court will decline jurisdiction in instances where such statutory remedies are available but have not been pursued by a litigant seeking to vindicate constitutional rights. This is commonly referred to as the doctrine of ripeness. See; *Chawira v Minister of Justice and Parliamentary Affairs & Ors* CC 3/17

In this matter, the right to vote in a free and fair election is given effect through the provisions of the Electoral Act and the Constitution. For the purposes of this matter the relevant provisions are section 28 and section 33 of the Electoral Act. In terms of section 28 of the Act elaborate procedures by which a voter may raise an objection against the retention or removal of any name on the voters’ roll are laid out. The applicant has chosen to ignore the provisions under section 28. The procedure for the raising of such objection is initiated by a written objection setting forth the grounds of the objection, which objection is lodged with the appropriate voter registration officer in duplicate and accompanied by a prescribed fee. The provisions of section 28(2) are couched in peremptory terms and failure to follow the prescribed procedure is fatal.

The Electoral Act does not provide a scenario where an objection to the retention of a voter on a particular voters’ roll is pursued by way of an urgent chamber application before the

Electoral Court. The applicant has clearly adopted the wrong procedure and is consequently improperly before this court.

Absence of jurisdiction

For the Electoral Court to entertain the application it must be shown that it is an application made in terms of the Act. The issue for consideration is whether the Electoral Court affords a voter the right to seek relief from the court for the removal of another voter from the voters' roll. There can be no dispute that a voter may not remove the name of another voter outside the provisions of this Act. If there was indeed such a right in the Electoral Act to seek relief from the court for such removal, the right ought logically to have been expressed in that section. No such right is expressed. In terms of section 28(2) of the Act, the jurisdiction to determine an objection by a voter to the retention of another voter on a particular voters' roll is given in the first instance to the appropriate voter registration officer.

Section 28(5) of the Electoral Act provides as follows:

“Notwithstanding anything in this section, if a voter registration officer receives an objection in terms of subsection (1) during the period of thirty 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.”

It admits of no doubt that no removal of voters from any voters' roll based on an objection by another voter can be done where the objection is made (30) days or less from the polling day. In this instance, this application was filed (17) days before the polling day for the 2018 general election. It is clear therefore, that the applicant's application, does not comply with the preemptory provisions of the Electoral Act.

This court, therefore, does not have jurisdiction to entertain the application.

Before concluding, it is worth pointing out that section 86(1) of the Constitution of Zimbabwe (No. 20, 2013) provides as follows:

“The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.”

Every voter identified in the applicant’s founding affidavit enjoys the right to administrative justice in the way he/she is removed from the voters’ roll. This finds expression in the provisions of s28 and s33 of the Electoral Act. In applicant’s efforts to vindicate her rights before this court, she cannot, therefore, disregard the rights of all the persons listed in her founding affidavit whom she seeks to remove from the voters’ roll. The listed voters whose removal is sought have rights enshrined under the Constitution to exercise their democratic right to vote. Such a right may not be violated without resorting to administrative justice. The affected voters are entitled to be heard. This accords with the doctrine of *audi alteram partem*. In the result, and for the foregoing reasons, the points *in limine* are upheld and the following order is made:

1. This court declines jurisdiction to hear the matter.
2. The applicant shall pay the costs of suit.

Tanaka Law Chambers, applicant’s legal practitioners
Nyika Kanengoni & Partners, respondents’ legal practitioners