

MOVEMENT FOR DEMOCRATIC CHANGE
ALLIANCE (MDC ALLIANCE)

APPLICANT

versus

ZIMBABWE ELECTORAL COMMISSION
and
COMMISSIONER GENERAL – ZIMBABWE
REPUBLIC POLICE

1ST RESPONDENT

2ND RESPONDENT

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 17 July 2018

Urgent Chamber Application (Electoral)

P Nyakureba and C Maunga, for the applicant
T Kanegoni and C Nyika, for the 1st respondent
K Chimiti, for the 2nd respondent

MWAYERA J: The applicant approached the court through the urgent chamber book seeking a provisional order to interdict the Commissioner General Zimbabwe Republic Police and those acting under his instruction or command from conducting supervised postal ballot voting of any police officer. In the main the applicant sought a declaratur that the conduct of postal ballot voting of police officers of Zimbabwe Republic Police Ross Camp Bulawayo held on 12 July 2018 be declared null and void as it violated the constitution and applicable law. Further the applicant sought that the first respondent, Zimbabwe Electoral Commission (hereafter called ZEC) immediately organise, conduct and supervise fresh casting of postal ballots by all police officers.

For completeness the relief sought as discerned from the papers is as follows:

“TERMS OF THE FINAL ORDER SOUGHT

- 1.1. A declaration that postal ballot voting process conducted by 2nd respondent or his agents at the Zimbabwe Republic Police Ross Camp and or Fairbridge Police Station at Bulawayo or any other cantonment area on 12 July 2018 was not concluded in accordance with the Constitution and the applicable law rendering the process invalid, null and void.
- 1.2. 1st respondent immediately organise and conduct and or supervise a fresh casting of the postal ballots by all police officers who voted at Ross Camp and Fairbridge Police Station, Bulawayo or any other under the supervision of the 2nd respondent or his agents, in strict conformity with the constitution and the applicable election laws.

- 1.3. An order barring the 2nd respondent and all those acting under his instruction or command from conducting any further postal ballot voting of members of the Zimbabwe Republic Police at any police station cantonment area or any other place within Zimbabwe and that he allows the secret voting of police officers by not interfering with their right to a secret ballot.
- 1.4. The 1st and 2nd respondent are ordered to pay costs on attorney – client scale.

INTERIM RELIEF GRANTED

Pending the finalisation of the matter, the following relief is granted.

1. The 2nd respondent and all those acting under his instruction or command are barred from conducting supervised postal ballot voting of any police officer and from interfering with the secret voting of officers of the Zimbabwe Republic Police at any place within Zimbabwe.”

Having considered the written and oral submissions by the respective counsels, I gave a disposition of the matter wherein I dismissed the application with costs. I indicated that written reasons would be availed. These are they.

It was apparent at the hearing that the interim relief sought related to the second respondent only. It was also not in dispute that the nature of relief sought was an interdict to stop postal ballots. The induction sought, as at the hearing was after the event as correctly conceded by Mr *Nyakureba* for the applicant. The postal voting had been closed in terms of operation of the electoral law by 12 noon on 14 July 2018. The requirements for an interdict which include apprehension of harm likely to occur given no other postal ballots are to be conducted after the closing date cannot be met in the circumstances.

Despite the concession on the part of the applicant that the application was no longer factual the applicant persisted with the application and addressed the court on merits as it sought to argue that set down of the matter was beyond their control and that as a matter of principle the court ought to grant the interdict.

The basis of the applicant’s application is that the second respondent and its agents supervised and caused police officers who cast postal ballot to vote in groups thus infringing on the law which requires secret voting. In support of these allegations the applicant relied on a founding affidavit and supplementary affidavit by its secretary general one Douglas Togarasei Mwonzora. The affidavit among other things was tainted with hearsay and speculative unsubstantiated evidence for instance para 8:

- “8. On 12 July 2018 I learnt through the structures of the MDC Alliance that the 2nd respondent was conducting a mass postal ballot voting of members of the Zimbabwe Republic Police at Ross Camp in Bulawayo.
9. This information came through anonymous tip offs of members of the police who were not happy with the conduct of 2nd respondent and the lack of protection from the 1st respondent.
- 10 I verified this information through sympathetic sources within the rank and file of the 2nd respondent whom I cannot name for purposes of protecting them. They will not accept that they be named.
- 14 The casting of the postal ballot at Ross Camp I am advised was conducted by Senior Police Officers under the direct command of the 2nd respondent in the absence of the 1st respondent or polling agents of the applicant.
- 16 I have heard and learnt that the 2nd respondent has also conducted himself in the manner decreed ever since for a long time now since the establishment Republic in the past elections.”

Such speculation is what the applicant sought to place before the court as evidence to show that postal votes were conducted in a manner which ran foul of the Electoral Act and the Constitution. No affidavit or supporting affidavit was attached as evidence in support of the applicant’s assertion. As if the lack of evidence was not enough the applicant attached some newspaper cutting of a press conference and explained that such confirmed postal voting had occurred. This was not the issue and such cuttings did not assist in supporting the assertion of group postal voting offending against secret postal voting. The applicant did not impress the court as a serious litigant but one taking a gamble with the court on the unsubstantiated notion of “I smell a rat.” In fact my observation is fortified by the applicant’s demand that their agents and or ZEC officials were not there to supervise the postal voting. Section 75 which regulates postal voting is not ambiguous. It calls for the voter to vote secretly and does not require supervision by anyone including the first respondent as suggested in the founding affidavit attached to the applicant’s papers.

Section 75 which regulates voting by post is instructive. It reads:

“(1) A person to whom a postal ballot has been sent shall

- (a) Signify the candidate for whom he or she wishes to vote by secretly placing on the ballot paper a cross in accordance with s 57 (c) ii and (underlining my emphasis)
- (b) then place the marked ballot paper in the unmarked envelop referred to in a 74 (i) (d), effectively close that envelope and then place it in the envelope and then place it in the envelope marked “Ballot paper Envelope” and effectively close that envelope; and

- (c) then place the envelope marked “Ballot Paper Envelope” in the covering envelope addressed to the Chief Elections Officer and
 - (d) then dispatch the covering envelope by registered post or by commercial courier service or diplomatic courier so that it is received by the Chief Elections Officer not later than noon on the fourteenth day before polling day or the first polling day as the case may be, in the election.
2. Where more than one election is being held concurrently, in a constituency so the voter marks more than one ballot paper, he or she shall
- (a) place each of the marked ballot papers in a separate unmarked envelope referred to in s 74 (1) (d); then
 - (b) place each of the marked ballot papers in a separate unmarked envelope referred to in paragraph (a) in a separate envelope marked “Ballot paper Envelope” then
 - (c) place each of the envelopes referred to in paragraph (b) in a single covering envelope addressed to the Chief Elections Officer”

A reading of the relevant legal provisions shows postal voting is individualistic and secretive in nature. Once ballot papers have been requested for and supplied, the voting could occur anywhere not under watch by anyone. The ZEC Chief Elections Officer has a mandate to receive applications for postal vote, issue postal ballot papers and after voting receive sealed postal ballots. The ZEC Chief Elections Officer then dispatches enclosed, sealed postal ballots paper envelopes to the constituencies’ election officer as reflected at the back of the envelope. The law does not give room for voting not to be in secret. See Sections 73-79 of the Electoral Act and also s 155 (1) of the Constitution on principles of electoral system.

“Section 155 (1) states:

- (1) Elections, which must be held regularly and referendums, to which this Constitution applies must be-
 - (a) peaceful, free and fair
 - (b) conducted by secret ballot;
 - (c) based on universal suffrage and equality of votes; and
 - (d) free from violence and other electoral malpractices”

On the court seeking to clarify the issue of there being no evidence in support of the allegation Mr *Nyakureba* pointed out that, the fact that the police command had knowledge postal votes were being conducted violated the secret nature of the vote. This he claimed emanated from the police spokesperson confirming voting went well. Clearly if the police command supply the ballot papers, one cannot pretend they do not have knowledge of the postal voting in progress. In any event s 73 of the Electoral Act gives room for the police commanding officers to have knowledge of the process of postal voting, as it is clear the

application for postal voting is done through the commanding officers. Section 73 (1) on application for postal vote is instructive, it reads:

“73 (1) A person who wishes to vote by post may apply to the Chief Elections Officer for a postal ballot paper.
Provided that application for postal ballot paper by members of a disciplined force may be made to the Chief Elections Officer only through the commanding officers.
(Underlining my emphasis)

Given that position of the law, the knowledge by commanding officers of postal votes process occurring is obvious but that does not take away the right to vote secretly. In situations where such a voter's rights to vote secretly are alleged to have been violated then the concerned voter's evidence is necessary as clearly no political party has more rights than the voters themselves in issues relating to their constitutionally enshrined right to vote secretly. The conspicuous absence of such evidence only points to speculative assumptions and misapprehension of the law.

The request that the court should not only concentrate with dispensing justice and issuing effective orders but as a matter of principle seek to regulate elections is improper. The applicant's request that the first respondent re-conducts postal votes is not backed up by legal provisions. In fact given the provisional order cannot be sustained the request by the applicant would have no basis on which to stand. Further compounding the applicants' problem is the lack of evidence on alleged violation of secret postal voting. The court has been requested to interfere with the voters' rights on basis of rumour and assumptions. The applicant is further seeking the court to apply the law on bald assertions. In other words the applicant is expecting the court to buy into presumptions and bald assertions and hold that based on unsubstantiated allegations and rumour that actual casting of ballots was not concealed or secretly done. Such a position not anchored on factual evidence is not tenable.

Section 75 of the Electoral Act and equally s 155 (1) (b) as read with 156 (a) and 239 (a) of the Constitution underscore the fundamental principle that the casting of the ballot must be secret, free and fair. This would not give room for any political agent, political party or ZEC elections officers being privy to the proper and actual casting of the vote be it postal or at the ballot booth. The opening is only done at the constituency after the voting, at the counting of votes stage. Voting secretly would not in any way mean that no one else should have knowledge that postal voting is occurring. The knowledge by the command, in the disciplined forces that voting is taking place is not knowledge of who and how an individual officer in receipt of a ballot paper and envelop has voted. In the absence of evidence to substantiate the violation of

the secret voting it would be stretching the imagination too far for one to just assume that the electoral laws were flouted. There is no established fact which the applicant sought the court to take judicial notice of. Whereas it is common cause postal voting occurred, it is not common cause that the voters did not cast their ballots in secret as envisaged by the law.

The applicant persisted with its speculative claim despite conceding the application had been over taken by events. Further the applicant had no evidence to substantiate their claims of violation of the law. The conduct of the applicant calls for costs to be awarded against it.

Accordingly it is ordered that the application be dismissed with costs.

Maunga Maanda & Associates, applicant's legal practitioners