

~~Provincial Division).~~  
~~Provinsiale Afdeling).~~

**Appeal in Civil Case.  
Appèl in Siviele Saak.**

NICOLAAS J. ERASMUS Appellant,

**VERSLUS**

JOHANNES J. N. FOURIE, NO Respondent.

Appellant's Attorney Reforius, G. Respondent's Attorney  
Prokureur vir Appellant Prokureur vir Respondent

Appellant's Advocate Respondent's Advocate  
Advokaat vir Appellant Advokaat vir Respondent

Set down for hearing on  
Op die rol geplaas vir verhoor op 11/11/2011

(TRD 1)

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

N. J. ERASMUS

Appellant

and

J. J. N. FOURIE, N.O.

Respondent

Coram: Schreiner, A.C.J., Hoexter J.A. et Brink A.J.A.

Heard: 18th. August, 1955.

Delivered: 24 - 8 - 1955

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J U D G M E N T

SCHREINER A.C.J. :- The appellant was re-elected a member of the Town Council of Kempton Park in October 1952 and his term of office was not due to expire until October 1955 or thereabouts. At a meeting of the council held on the 9th December 1954 the respondent, in his capacity as Mayor of Kempton Park and professing to act under section 7 of the Municipal Elections Ordinance (No. 4 of 1927 (Transvaal) ), as amended, declared the appellant's office of town councillor to be vacant on the ground that from the 30th January 1954 until the 3rd November 1954 the appellant's name had not appeared on the parliamentary voters' list framed under section 8 of Act 46 of 1946.

The/.....

The appellant petitioned the Transvaal Provincial Division for an order setting aside the declaration made by the respondent and declaring the appellant still to be a member of the Town Council of Kew<sup>yn</sup>ton Park. Upon reference to a divisional court by the full court the matter came before BLACKWELL J. who dismissed the petition with costs. From this order the appellant now appeals to this Court.

The basic provisions of Ordinance 4 of 1927 for present purposes are sections 4 and 7, which so far as material read:-

"4. Any person, male or female, qualified to be registered as a voter at elections of councillors under this Ordinance shall be qualified to be elected as councillor.

"7. Any councillor who shall cease to possess the qualifications by this Ordinance required.....shall ipso facto vacate his office, and the mayor.....shall at the next meeting of the council declare any such vacancy which may have occurred....."

These provisions have undergone no changes material to the present inquiry since their enactment. But the same does not apply to other provisions of the Ordinance. Prior to 1950 section 8, so far as

material/.....

material read:-

"8(a) Every white person, male or female, being a British  
"subject of the age of twenty-one years and upwards who  
"shall have resided within the municipality for a period  
"of six months.....shall subject to the disqualifications  
"hereinafter set out be entitled to be enrolled on the  
"voters' roll for the municipality....."

" (b) Every person, being qualified in all respects as  
"aforesaid except that of residence, who is the registered  
"owner of rateable property within the municipality.....  
"and who is not disqualified.....shall be entitled upon  
"application to be enrolled on the voters' roll....."

Until 1950 disqualification on  
the ground of unsoundness of mind was dealt with in section  
10 and on the ground of criminality in section 11.

The position in these pre-1950  
provisions clearly was that the qualifications, the loss  
of which by a councillor entailed vacation of his office  
under section 7, were those set out in section 8, i.e.  
being a white British subject of twenty-one years who came  
within the provisions regarding residence or the ownership  
of property. But Ordinance 19 of 1950 made important  
changes; the decision of this appeal depends on the effect

of/.....

"qualified in terms of section 8....."

Returning to section 8, paragraph (b) of sub-section (1) deals with an interim situation, applicable to elections in the years 1951, 1952 and 1953, to meet cases where a person's name was not on a parliamentary voters' list but was on the municipal voters' roll for 1949. In such cases the person could apply for enrolment on the municipal voters' roll under section 19(1). In terms of sub-section (2) of the new section 8 a similar application may be made by a person whose name appears on the parliamentary voters' list for a Transvaal division outside the municipality, if he owns rateable property in the municipality. When applications are made under section 19(1) the town clerk must enrol the applicant's name "on being satisfied that such person is qualified "under this Ordinance."

It will be seen from the above extracts from the 1950 provisions that the municipal voters' list or roll was made to depend on the parliamentary voters' list compiled under section 8 of Act 46 of 1946, the qualifications for appearing on the latter list being set out in section 9 of the Act. From 1950 onward the municipal list was simply to follow the parliamentary

list/.....

question on the parliamentary list. The only additional factors that thenceforward had to be taken into account were the residential and property factors. From 1950 onwards if a person's name was not on the parliamentary list he was not entitled to be enrolled on the municipal roll or to vote at a municipal election.

What then was the effect of the 1950 changes on the position of councillors under sections 4 and 7 ? It was argued on behalf of the appellant that the words "qualified to be registered as a voter" in section 4 still refer to the same kinds of factor - age, race and nationality - that would have had to be taken into account before 1950, and that it could only be the presence of those factors that could properly be described, in the language of section 7, as the possession of qualifications. Merely to have your name on a list, while it may be an essential piece of the electoral machinery, is not, so it was argued, appropriately described as a qualification for a voter and, therefore, for a councillor; it would be absurd to say that a councillor had ceased to possess the necessary qualifications merely because his name had been omitted in error from a parliamentary voters' list. Point  
was/.....

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list and, in order to ~~induce~~ ensure proper relationship, the new section 15 (1) (d) provided that the municipal voters' list should be kept up to date by adding the name of "every person whose name is added to the voters' list "prepared in terms of section eight of the Act and who is "qualified to be enrolled in terms of section eight of the "Ordinance," or by deleting names deleted from the parliamentary voters' list. The presence of the words "and who is qualified to be enrolled etc.", is sufficiently explained by the factors of residence and ownership of rateable property. In connection with the deletion of names it should be observed that section 11 of the Ordinance, dealing with disqualification for criminality, was repealed by the 1950 Ordinance, except in the significant case where section 8(1)(b) applied, i.e. where during the years 1951, 1952 and 1953 a person whose name was not on a parliamentary list could vote if his name was on the 1949 municipal list, which was compiled according to the qualifications in the old section 8.

There is no doubt that, so far as the right to be enrolled on the municipal voters' list or roll is concerned, this in 1950 became wholly dependent on the presence or absence of the name of the person in

question/.....

question on the parliamentary list. The only additional factors that thenceforward had to be taken into account were the residential and property factors. From 1950 onwards if a person's name was not on the parliamentary list he was not entitled to be enrolled on the municipal roll or to vote at a municipal election.

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was/.....



was given to this contention by reference to the provisions of Act 46 of 1946 (sections 22 and 23) which deal with objections to the presence or absence of names from a parliamentary voters' list.

There is certainly force in these arguments, and it must, I think, be conceded that generally speaking qualifications are thought of rather as qualities or attributes of a person which he possesses because he is himself, than as the collateral effects of his name having been placed on or omitted from a list. But under the 1950 legislation the Provincial Council, while leaving the qualifications for a councillor to be found, via the qualifications for a voter, in section 8 alone, made the vital requirement the appearance of the person's name on the parliamentary voters' list. It is possible that the apparently disproportionate effect of the erroneous omission of a councillor's name from the parliamentary voters' list was overlooked in 1950, or it may be that it was thought that the chances of such a happening were too slight to require special treatment; or there may have been other considerations. But the form of the 1950 amendments points strongly to the view that the municipal officials were thenceforward to be relieved of enquiring

into/.....

into what had up to that date been the qualifications of voters and therefore of councillors and that the essential qualification was to be the appearance of one's name on the parliamentary list. If your name was there you were, subject to residence or property ownership, to be qualified; otherwise not, whatever you might be able to prove in regard to your age, race and nationality.


We were referred to the cases of Flintham v. Roxburgh (17 Q.B.D. 44), Perry v. Returning Officer, Stanger (1935 N.P.D. 573) and Herholdt v. Brummer N.O. (1951(4) S.A.624), as showing that there may be a distinction, under particular electoral provisions, between the qualification of a voter and the right to vote. Such a distinction is, of course, quite possible under appropriate provisions but as appears from the sections of the 1950 Ordinance quoted above, no consistent use of the expressions "qualified" and "entitled" to be "registered" or to be "enrolled" is discernible, which <sup>might</sup> points away from the view that a qualification for enrolment on the municipal roll is the presence of one's name on the parliamentary list. It is not necessary to decide whether a distinction was properly drawn by de WET J. in the last-named/.....

named case between qualified (bevoeg) and entitled (gerechtig) for the purposes of applying section 4 to a case falling under section 8(2); in that case the applicant's name appeared on a parliamentary voters' list and that factor was not in issue.

The 1950 change, in my view, had the effect, not that the qualifications for a councillor have now to be sought in what Act 46 of 1946 has to say about the age, race and nationality of a voter, but that the qualifications must still be sought in section 8 of the Ordinance, <sup>the</sup> ~~a~~ most important one being that the person's name should appear on the parliamentary voters' list. Whatever the <sup>a</sup> ~~reason~~ why the appellant's name disappeared from the parliamentary list, by that disappearance he ceased to possess the qualifications for a councillor and had to be dealt with under section 7.

The appeal accordingly fails and must be dismissed with costs.

Hoexter J.A. )  
                  ) (concur  
Brink A.J.A. )

  
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IN THE SUPREME COURT OF SOUTH AFRICA  
(Transvaal Provincial Division)

17th February, 1955.

ERASMUS v. FOURIE

BLACKWELL, J.: This is an application by a town councillor or former town councillor of the Municipality of Kempton Park for an order setting aside an order made by the Mayor of that Municipality on the 9th December last declaring him to be disqualified from sitting as a councillor. The mayor, after taking opinion and enquiring 10 into the facts came to the conclusion that in terms of section 7 of the Municipal Elections Ordinance No.4 of 1927 the applicant had vacated his office in that he had ceased to possess the qualifications required by the Ordinance, and that it was the duty of the mayor to give effect to that by declaring his seat vacant. The sole question in this case is whether as at the date that declaration was made the applicant had ceased to be qualified.

Section 4 of the Ordinance deals with the qualifi- 20 cation of councillors. It says this. "Any person, male or female, qualified to be registered as a voter at elections of councillors under this Ordinance shall be qualified to be elected a councillor." That raises the question who are then qualified to be registered as voters, that is to say, on the Municipal Roll. That matter is governed by section 8, as amended, of the Municipal Elections Ordinance 19 of 1950 and it is claimed that the applicant was qualified to be registered under section 8(1)(a) and (b) of section 8 as amended. I will deal first of all 30 with section 8(1)(b) as amended. It reads as follows:

"Any person whose name does not appear on a voters' list prepared in terms of section 8 of the Act but whose name lawfully appeared on a voters' roll or list in force in the municipality under the provisions of this Ordinance in respect of any election held thereunder during the month of October 1949, shall, upon application in terms of section nineteen, be entitled to be enrolled on the voters' roll or list of the municipality in respect of any annual election or election to fill a casual vacancy held during the years 1951, 1952 and 1953." I shall assume in favour 10 of the applicant that he was on the roll in force for the elections of 1949 and I shall assume that the fact that he is entitled to make application is, in terms of a decision to which my attention has been drawn, sufficient to qualify him. That decision is Herholdt v. Brummer, N.O. and Others, 1951(4) S.A. 624 (T). But the difficulty is the interpretation to be given to the last three lines of this section. Is its operation limited solely to the years 1951, 1952 and 1953 or are those operative words to be held solely to relate to the words "casual vacancy". 20 Mr. Kuper has argued that the words "annual election" have no time qualification whatever, that may mean an annual election whenever that is held, and that the qualifying words as to the years 1951, 1952 and 1953 relate solely to a casual vacancy. I do not agree with that view. I think that the words "during the years 1951, 1952 and 1953" apply to both classes of elections, namely, an annual election or an election to fill a casual vacancy and, therefore, that the virtue of this clause as providing a possible qualification for the applicant did not exist 30 in 1954, and that sub-section 8(1)(b) affords no relief to the applicant in the present case.

That brings me to the main point which has been

argued before me with much persuasiveness by Mr. Kuper this morning. The facts do not admit of doubt. The voters' roll, for the relevant period, came into force as at the 30th January, 1954, and the name of the applicant did not appear on that voters' roll. It seems to be the case that the omission of his name on that roll was accidental or due to the negligence possibly of the registering authorities, and his name was eventually put on the roll as at the 3rd November, 1954. When, therefore, the matter came before the Council on the 9th December, 1954, the position was that his name had not been on the roll as originally framed and Gazetted, and had not been on the roll from the period January 30th to November 3rd, but it had been restored to the roll or put on the roll, the phrase does not matter, as from about November 3rd and was on the roll when the matter came before the Town Council at Kempton Park. I have to decide what is the effect of section 8(1)(a) of Ordinance 19 of 1950 read with section 4 of Ordinance 4 of 1927. Mr. Kuper argues that inasmuch as the applicant's name was left off by negligence or inadvertence and inasmuch as it was restored, this restoration must relate back. He was in effect put on the voters' roll, the authorised gazetted voters' roll of January 30th 1954 and, therefore, any disqualification that he did suffer from was not only removed as at the 3rd November 1954, but never really existed. He never really was a disqualified man; he never really was subject to removal under section 7 of the main Ordinance. 10

I go back to that section and read it. "Any councillor who shall cease to possess the qualifications by this Ordinance required" and the Ordinance says that in order to possess the qualifications of a councillor you must be qualified to be registered as a voter. Section 8(1)(a) says in the plainest language "Any person 30

whose name appears on a voters' list". It does not say "ought to appear" or "whose name ought never to have been omitted" or "whose name is restored", it uses the word "appears" and that is a question of fact. It is not denied that the name of the applicant did not appear on this voters' list as at the 30th January and did not appear on that voters' list until the 3rd November. It seems to me to be perfectly plain that if any Parliamentary or Provincial election had been held in the constituency which included Kempton Park and the applicant had turned up at the polling booth and claimed to record his vote he would have been refused that right. The test is, was his name on the voters' list. It was not. It may well have been no fault of his that his name was not there, it may well have been that by taking proper steps he would get his name put on the list, but unless and until that was done he could not have voted. From the 30th January to the 3rd November his name did not appear on the voters' list and as soon as the voters' list came out dated 30th January, effective from the 30th January, and his name was not on the list, then in the view I take of the matter, he ceased to be qualified in terms of section 4, and was liable to be removed in terms of section 7 of the Ordinance. His disqualification existed throughout the whole period January 30th to November 3rd, 1954. 10 20

The only other question I have to consider is whether on the 9th December the mayor was justified in taking the step that he did inasmuch as his name now appeared on the voters' list, inasmuch as it now appeared that the omission of his name from the voters' list was through a mistake on the part of the registering authorities. I cannot say that that has any relevance. If he became disqualified it was as at the 30th January, 1954, 30

and at any time from then onwards, on the matter coming to the notice of the municipal authorities it was the duty of the mayor to declare that he had vacated his seat. That the mayor did not carry out this duty until December 1954 seems to be irrelevant. He had forfeited his seat, he had become disqualified as at the 30th January and it is, in my opinion, immaterial that when the law was enforced on the 9th December he had put himself back on the roll.

The application, therefore, must fail. It is 10  
dismissed with costs.

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