

SOUTH AFRICA / JUDGMENT

African Restoration Alliance v Electoral Commission of South Africa (0032/24EC)

[2024] ZAEC 31 (25 November 2024)

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COURT

Electoral Court

BEFORE

Zondi, Adams, Mhlambi, Ntlama-Makhanya

CASE / FILE NUMBER

0032/24EC

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THE

ELECTORAL COURT OF SOUTH AFRICA

BLOEMFONTEIN

Not Reportable

CASE No: 0032/24EC

In the matter between:

AFRICAN
RESTORATION ALLIANCE
APPLICANT
And
INDEPENDENT
ELECTORAL COMMISSION
OF
SOUTH AFRICA
RESPONDENT

Neutral

citation: African Restoration

Alliance v Electoral Commission of South Africa (0032/24EC)

ZAEC 31 (25 November 2024)

Coram:

ZONDI DP and ADAMS and MHLAMBI AJJA and PROFESSOR NTLAMA-MAKHANYA
(Additional Member)

Heard:

Decided in chambers on the papers.

Delivered:	On 25 November 2024. The judgment was handed down electronically by circulation to the parties' representatives via email, by publication on the website of the Supreme Court of Appeal and released to SAFLII.
Summary:	Application for leave to appeal – dismissal of the applicant's objection by the Electoral Commission for lack of compliance with s 55 of the Electoral Act 73 of 1998 read with Rule 31 of the Elections Regulations – application for leave to appeal against dismissal of objection - late explanation for delay not satisfactory – failure to join interested parties – appeal has no reasonable prospects of success –the application for condonation for the late filing of the application for leave to appeal is dismissed. ORDER 1. The application for condonation for the late filing of the application for leave to appeal is dismissed. 2. No order as to costs.

JUDGMENT

Professor Ntlama-Makhanya (Additional Member) (Zondi DP and Adams and Mhlambi AJJ concurring):

Introduction

[1] This is an application for leave to appeal against the decision of the Electoral Commission of South Africa (Commission) handed down on 2 June 2024, dismissing the objections raised and submitted by the applicant at 20h50 on 31 May 2024, following the National and Provincial Elections that were held on 29 May 2024. The application for leave to appeal was late, hence there is an application to condone its lateness.

[2] The application for leave to appeal is brought in terms of s 20(2)(b) of the Electoral Commission Act 51 of 1996 (Electoral Commission Act) in terms of which leave to appeal against the Commission's

decision must be sought and obtained from the chairperson of the Electoral Court. In support of both applications, the applicant

relies on the founding affidavit deposed to by its President, Mr. Jerome Benjamin Swartz (Mr. Swartz), who alleges that he is duly

authorized to bring the applications.

[3] The facts on which the applications must be determined are largely common cause. On 31 May 2024, pursuant to s 55 of the Electoral Act 73 of 1998 (the Electoral Act), the applicant lodged an objection with the Commission concerning the outcomes of elections held at certain voting districts during the National and Provincial elections held on 29 May 2024. The objections concern incidents that occurred in different wards in the Western Cape and Free State.

[4] According to Mr. Swartz, the following irregularities took place in different wards in the Western Cape:

‘Western Cape has 404 wards in total and [African Restoration Alliance] ARA represents at least 254 wards within the Western Cape. During the elections the following incidents occurred which [i]s Irregular and compromises the integrity of our electoral process.

Ward 66- Pelican Park Primary

Our party agent, Mr. Jullan Blake, In the morning requested to verify if the ballot box was empty by giving it a shake, however, the presiding officer was offended and singled out our party agent.

Ward 63 Hyde Park

ARA's party agent assigned to vote was Informed by the presiding officer that the party agents are not allowed to count the votes along with them. When Mr. Romeo Malgas raised an objection, he was Ignored and refused an objection. Therefore, he was forced to open a criminal case in terms of section 87 of the Electoral Act 73 of 1998.

Ward 68

Special Voter from Ward Maureen Corker who is registered as a special voter and attended ward 68-to-cast-her-vote, when she was given only a national ballot and was advised that she is not allowed to vote nationally and regionally.

Ward 75

Our party agent Mrs. Dedrl Benadine Dayce, was part of the vote count testified in an affidavit that the party agents were not allowed to walk around and was not allowed to take picture of the final count, the extent that no party agent was allowed Involve or verification of the ballots as well as the fact that the IEC officers fell asleep while counting.

Ward 75

Our party agent Mr. Chad Cornelius testified that, the number of ballots did not correspond with the voters that attended on the day to vote, this means that either false ballots and or votes were deliberately countered incorrectly.

Ward 66

In ward 66 Chrlatlan David Moravian Primary, our party agent by the name of Roger Winston Elliot, advised that people were queuing for approximately 5-6 hours, some left and despite there being a long queue after 21:00 the presiding officer elected to close the voting station early, consequently voters were turned away.

Ward 65

At the above-mentioned ward a voter, by the name of Justin Lawrence, was issued a ballot paper with the words "cancelled" written on it. Though the decision of the presiding officer was to inform all those present about the incident, we believe these actions were intentional and were only picked up once the voter raised the issue. Consequently, we believe that there was intentional tampering of votes.

Ward 63

Our Mr Clint Frank Collins from ward objected to the fact that three ballot boxes were tampered with.

On or about Mr Romeo Malgas requested that the deputy presiding officer disclose the vote count and display ballots accordingly the party agent was not allowed to address it, the party agent raised the objection, to no avail.

Ward 25

We had 141 active ARA members who attended at the aforesaid voting station, however, once the vote was counted only 20 national and 20 regional and zero provincial were allocated to ARA. Since we were not allowed to verify ballots, I verily believe that the votes were tampered with.

Ward 65 Primary School

A voter was allowed to vote without proper identification, the IEC official Ms. Muneeba (whose surname is unknown) was escorted out of the voting station for fraud, but then brought back. The presiding officer has no regard for the rules and WO had no choice but to open a criminal case against both the presiding officer and IEC officials, the voting station due to staff shortages.

Ward 65

At the above voting station voters were not inked, and certain people voted more than once. The IEC and equipment where I prepared for the elections and therefore compromised the fairness of the election procedure. A man from the Democratic Alliance named, Aslam Richards, was allowed to tell people within the boundaries of the voting station, to vote DA, which no other party was not allowed to do. Moreover, the IEC, said to a voter, thank you for voting for us, the voter is a DA supporter and so is the IEC official, The presiding officer and the ward counselor had conversation in the voting station and when confronted, their discussion outside.

A voter was not allowed to vote at the voting station, because according to the system she had already voted, despite not having been Inked, the official Inked her thumb but refused her further access.'

[5] Mr Swartz alleges that in ward 23, Free State its party agent complained that the ballot boxes were taken to the National Congress' vehicle while voters were queuing outside the voting station.

[6] On Sunday, 2 June 2024, the Commission responded to the applicant's objection as follows:

'1. The Electoral Commission ("Commission") refers to your notice of objection in terms of section 55 of the Electoral Act 73 of 1998 ('Act") dated 31 May 2024, pertaining to the outcome of the elections held at multiple districts, on 29 May 2024.

2. The Commission has received numerous objections from several parties and individuals, purportedly in terms of Section 55(1). Some of these objections are at face value not compliant with the requirements of Section 55(2), because: 2.1 The details of the objection and the proceedings concerned and/or detailed reasons for the objection are not contained in a sworn statement as required;

2.2 There Is no proof of service of copies of the notice and annexures on all other interested parties;

2.3 Even if the objector's allegations were accepted as true and correct, they would not have a material effect on the final results of the election.

3. This presents the question of whether the IEC should investigate each objection that is lodged, even if these objections are clearly non-compliant with the requirements of the Act as mentioned above. We discuss the issue under two topics: (a) lodgment in the prescribed manner and (b), materiality,

4. On inspection of the objection, it is evident that the objection does not comply with the provisions of Regulation 31 of the Election Regulations ("Regulations");

....

5. Your application is not compliant with section 55 read with Regulation 31. Therefore, it is rejected.'

[7] Section 55 of the Electoral Act referred to in the Commission's letter of 2 June 2024 provides as follows:

'Objections material to final results of election.

(1) Despite Parts 1 to 3 of this Chapter, any interested party may make an objection concerning any aspect of an election that is material to the final

result of the election.

- (2) The objection must be made to the Commission in the prescribed manner not later than 21:00 on the second day after the voting day.
- (3) The Commission, on good cause shown, may condone a late objection.
- (4) The Commission, in the prescribed manner, must decide the objection, and must notify the objector and any other parties involved in the objection, of the decision.
- (5) An objector or other party involved in the objection and who feels aggrieved by the decision of the Commission, may appeal to the Electoral Court in the prescribed manner.
- (6) The Electoral Court, in the prescribed manner, must consider and decide the appeal and notify the parties to the appeal of its decision.
- (7) The result of an election is not suspended pending the decision of the Electoral Court.'
- [8] Regulation 31 of the Election Regulations provides:

'Objections material to the determination of the final results

- (1) Any interested party wishing to lodge an objection in terms of section 55 of the Act in respect of proceedings concerning voting and counting of votes, that is material to the determination of the final result of the election, must do so by serving on the Commission at its offices in Pretoria, by not later than 21:00 on the second day after the voting day, a written notice of objection containing-
 - (a) a reference to the election concerned and the section of the Act in terms of which the objection is brought;
 - (b) the full name and physical address of the objecting party;
 - (c) the postal address and telephone number where the party can be contacted;
 - (d) if available, the party's facsimile number and E-mail address;
 - (e) the interest of the party in the matter;
 - (f) details of the objection and the proceedings concerned;
 - (g) detailed reasons for the objection;
 - (h) the relief sought;
 - (i) a list of any supporting documents accompanying the notice of objection; and
 - (j) proof of service of copies of the notice and annexures on all other interested parties.'
- [9] As already alluded to above, the application for leave to appeal was late. It ought to have been lodged with this Court on or before Wednesday, 5 June 2024. It was lodged on 12 June 2024 which is seven
- (7) days late.

- [10] The applicant admits that the electoral process is by its very nature urgent and that the complaints relating to the handling of elections must be dealt with expeditiously. The applicant, however, contends that this fact should not be regarded as an overriding one. The applicant alleges that the delay in this matter was exacerbated by the 'rushed declaration' of the election results by the Commission on Sunday, 2 June 2024. It states that it requested the Commission to grant it an extension to submit further evidence of irregularities which occurred in other wards.
- [11] As for prospects of success the applicant states that it had received further affidavits from voting stations across South Africa, dealing with pertinent issues relating to the electoral process which, if investigated, would show that the voters' constitutional rights to free and fair elections were undermined. The applicant says it had at least 11 000 party agents participating in the election process across South Africa. The applicant argues that the number of votes allocated to it - approximately 11 000
- is improbable. It alleges that it had documentary evidence indicating it should, at worst, have received 67 000 votes, which it says could have entitled it to a seat in parliament.
- [12] The applicant submits that it will suffer prejudice if its application for condonation is refused. It seeks the following relief:
- (a) The voting stations must be instructed to do a recount of the votes.
 - (b) The votes, where the applicant was entitled to be included in the tally but were not, should be added in favour of the applicant.
 - (c) Certain votes that were cast in certain voting stations must be reviewed.
 - (d) The votes that might have been unlawfully and improperly allocated to other parties should be deducted from the tallies of those parties.
- [13] The Commission opposes both applications. As regards the merits, the Commission submits that the applicant's objections were correctly dismissed due to the applicant's failure to comply with s 55 of the Electoral Act and Rule 31. In relation to the delay and its explanation, the Commission argues that the applicant's application should be dismissed. It avers that after dismissing the applicant's objections it informed the applicant to lodge an appeal with this Court in the prescribed manner if not satisfied with its decision. The Commission alleges further that the applicant failed to join the affected parties and that the application should be dismissed for this reason.
- [14] The question is whether the applicant's failure to comply with the time periods prescribed by s 20(2)(b) of the Commission Act should be condoned. The Constitutional Court held in *Van Wyk v Unitas Hospital*[1] that:

‘The standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.’[2]

[15] Rule 5(1) of the Electoral Court Rules regulating the conduct of the proceedings of this Court requires the application to be brought ‘within three days after the decision has been made’. In terms of Rule 10 the consequence of ‘the failure to adhere to the limits or directives of the Court is that a party in default may be barred unless the Court, on good cause shown, directs otherwise’. The quest for compliance with the rules relating to the timely submission of applications was endorsed and given meaning by Bosielo AJ in *Grootboom v National Prosecuting Authority*. [3] He held that ‘the delay in filing the application put a serious hurdle in the way of the quest to be heard [in this court and] condoning a party for non-compliance with the rules of the courts is an indulgence [by] the court that is seized with the matter [to exercise the discretion whether to grant the condonation]’.[4] Although that case was not concerned with the electoral dispute, what was stated in that case as regards the quest for compliance

principle, applies with equal force to the present case.

[16] Govindjee J held in *Kona v Premier Eastern Cape* [5] that ‘failure to adhere to prescribed time frames is not a mere asking but a proper explanation that is necessary for the courts in the exercise of its judicial discretion whether it would be in the interests of justice to grant it’.[6] A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause. The Judge went on to consider the factors that weigh heavily for the courts to grant condonation and held those to be the ‘nature of the relief sought; the extent and cause of the delay and its effect on the administration of justice; the reasonableness of the explanation for the delay; whether or not the delay has caused prejudiced to the other parties; the importance of the issue for determination to the parties and the applicant’s prospects of success [and] the overarching focus remains of what outcome would be in the interests of justice’, (para 16, footnotes omitted). [7] Of great significance, as drawn from that judgment, the explanation must be reasonable enough to excuse the default [8] as the party is required to fully explain the non-compliance with the rules. The ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors, but it is not necessarily limited to those mentioned above. The

circumstances and merits of each case will determine which of these factors are relevant. [9] This application fails to give a satisfactory explanation for the delay of seven (7) days.

[17] I am not satisfied that a reasonable explanation for the delay has been given by the applicant in this case and that the appeal would have prospect of success. The applicant dragged its feet. In this case, as in any election, the outcome of the elections must be announced within seven

(7) days after an election as envisaged in s 57(2) of the Electoral Act. I reject the applicant's contention that the announcement of the election results was 'rushed' and that the consideration of the time limits 'cannot be an overriding factor.' The announcement of the election results is prescribed by law and the Commission had to act in compliance with the provisions of the law.

[18] Additionally, the applicant has failed to cite the parties who are likely to be affected by the relief sought. In *Amalgamated Engineering Union v Minister of Labour*, [10] this Court held:

'Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests.' [11]

In the circumstances, the application must fail.

[19] As regards costs, it is the practice in this Court not to award costs against the losing litigant unless a party has conducted the proceedings in a vexatious manner. This application was grounded in s 34 of the Constitution of the Republic of South Africa, 1996 that serves as an affirmation of access to an independent court that will decide the matter fairly without any interference as a direct response to the judicial authority that is vested in the courts as envisaged in s 165 of the Constitution. However, s 34 does not amount to free trade of abusing the court processes but provides a framework against which to determine the substance of the alleged dispute as in this matter. The applicant was not reckless and vexatious in bringing the application and therefore there is no reason to award costs against the applicant.

[20] Accordingly, the following order is made:

1. The application for condonation for the late filing of the application for leave to appeal is dismissed.
2. No order as to costs.

PROFESSOR N NTLAMA-MAKHANYA

ADDITIONAL MEMBER: ELECTORAL COURT

Appearances:

For the applicant: W A Fisher AL Inc, Durbanville For the respondent: M De Beer Barnard Incorporated, Pretoria

- [1] Van Wyk v Unitas Hospital and Another [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) (Van Wyk).
- [2] Ibid para 20.
- [3] Grootboom v National Prosecuting Authority
- [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (Grootboom).
- [4] Ibid para 20.
- [5] Kona v Premier Eastern Cape (3277/2018)
- [2023] ZAECMKHC 75 (20 June 2023).
- [6] Ibid para 16.
- [7] See also Van Wyk v Unitas Hospital (Open Democratic Advice Centre as amicus curiae) [2007] ZACC 24; 2008 (2) SA 472 (CC) at 477A.
- [8] Grootboom fn 3 above. See also Steenkamp and Others v Edcon Limited
- [2019] ZACC 17; 2019 (7) BCLR826 (CC); (2019) 40 ILJ 1731 (CC);
- [2019] 11 BLLR 1189 (CC) para 36.
- [9] Van Wyk fn 1 above.
- [10] Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 659.
- [11] Ibid para 659.

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