

SOUTH AFRICA / JUDGMENT

# Cape Party v Electoral Commission and Another (1/09) [2009] ZAEC 1 (1 January 2009)

[2009] ZAEC 1

COURT

Electoral Court

BEFORE

R Pillay

CASE / FILE NUMBER

1/09

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CASE

NO: 1/09

IN THE

ELECTORAL OF SOUTH AFRICA

HELD

AT BLOEMFONTEIN

In the

matter between:

THE

CAPE PARTY.....

.....Appellant

And

THE

ELECTORAL

COMMISSION.....First

Respondent

CONGRES

OF THE PEOPLE ("COPE").....Second

Respondent

CORAM:

DATE

OF HEARING:

DELIVERY

DATE:

**JUDGMENT**

PILLAY J:-

The Applicant, the Cape Party with an abbreviated name of 'CAPE', was registered as a political party in terms of the Electoral Commission

Act No 51 of 1996 ('The Act') on 21 April 2008. It was thereupon issued with a party reference no 467.

Second Respondent applied to the First Respondent for registration as a political party and this was published in terms of the law in the Government Gazette on 21 November 2008. The application included, inter alia, the designated abbreviation name of 'COPE'.

The Applicant then lodged an objection to the application for the registration of 'COPE' as the Second Respondent's abbreviated name with the Chief Electoral Officer ('the CEO').

On 19 December 2008, the CEO dismissed the objection and duly approved the registration of the Second Respondent, including its abbreviated name of 'COPE', as a political party.

Applicant then appealed against the decision of the CEO to the First Respondent on 6 January 2009. The Appeal was dismissed on 10 February 2009.

The Appellant now comes on appeal to this Court challenging the decision of the First Respondent to uphold the decision of the CEO to dismiss its objection.

It lists the following four grounds of appeal contending that the First Respondent had erred in its interpretation of the applicable law, in so far as:

- (a) It upheld the CEO's finding that "COPE", as abbreviated name of Second Respondent, did not resemble the abbreviated name of Applicant, a pre-existing and earlier-registered party, to such an extent that would deceive or confuse voters.
- (b) It applied the standard of notional "reasonable voter, reasonably informed", a test inconsistent with applicable law, and which defeats the purpose of the relevant statutory provision.
- (c) It upheld the CEO's failure to recognise that the relevant law demands no more than the potential of confusion as between different political parties, it thus being unnecessary that an objector demonstrate actual confusion
- (d) It failed to accord due weight to Applicant's showing that confusion between "CAPE" and "COPE" was being stimulated in the media and in COPE's campaign media.

It seems that all the rules regarding service have either been complied with or condoned.

The Applicant made written submissions in support of the appeal. Jack Miller, the Applicant's Treasurer General and a member of its President's Council deposed to an affidavit amplifying submissions in regard to the aforementioned grounds of appeal.

In examining the grounds of appeal it seems to me the first three are inter-related and can be dealt with simultaneously.

The Appellant objected to the abbreviated name of 'COPE' terms of Section 16(1) (b) of the Act which reads as follows:-

"1. The Chief Electoral officer may not register a party....., if -

- (a) .....
- (b) A proposed name, abbreviated name, distinguishing mark or symbol mentioned in the application resembles the name, abbreviated name, distinguishing mark or symbol, as the case may be, of any other registered party to such an extent that it may deceive or confuse voters;"

The Appellant contended that, the abbreviated name of the Second Respondent, viz 'COPE' is so similar to its abbreviated name viz

'CAPE' that it offends section 16 (1) (b) of the Act and should therefore not have been registered.

It argues that the resemblance is to be found in that both abbreviated names are made up of four letters with only the dominating vowel being different. It further argues that the resemblance is not unimportant because political parties in South Africa have developed a propensity to brand themselves by their abbreviated names (as in this case) and in fact the Second Respondent highlights its abbreviated name of 'COPE' in most cases, such as on its banners, posters, T-

Shirts etc. Furthermore, it contends the general media have taken to identify the Second Respondent by its abbreviate name.

The Appellant argues that Second Respondent clearly intends to continue referring to itself by its abbreviated name, on its various forms of campaigning mechanisms such as bumper stickers, T-shirts, posters, etc.

The Appellant also suggests that the abbreviated name of COPE is being deliberately inserted in campaign material to sow confusion by juxtapositioning the word 'COPE' for 'CAPE' in the name Cape Town. It further points that the written media (The Cape Times) on at least one occasion illustrated the similarity, albeit humorously, in a cartoon that many were regarding the 'new break-away party as the Cope of good hope'.

Therein argues the Appellant, lies also the potential for aural and phonetic confusion. This is more so in the light of many citizens having different levels of education, different dialects and the existence of geographical differences in area of birth or residence. The resultant low level of linguistic comprehension therefore raises the potential for confusion between the two parties.

All in all, it is argued by the Appellant, the resemblance would impact negatively on its campaigning strategy.

It will, upon perusal of the relevant section, be seen that there is no description or qualification of the 'voters' envisaged in the section.

It is common cause that the CEO rejected the objection by the Appellant on the basis that the abbreviated name COPE does not resemble CAPE 'to such an extent that it may deceive or confuse the reasonable voter who is reasonably informed'. It is implicit therein that there was also no potential for deceit or confusion.

In my view, this is the crux of this appeal.

Whilst this section may be examined in isolation, it is, in my view, necessary to approach it holistically and within the context of the Act as well as the process of elections bearing in mind the ultimate purpose of elections. The importance hereof will become apparent below. To do otherwise would strain the general import and spirit of the Act and render it impractical.

The ground of Appeal relating to the resemblance between the two abbreviated names, has been challenged on behalf of the Second

Respondent in detail. In my view, it is not necessary to deal therewith in the light of the decision arrived at in this appeal.

While the Appellant has at times used the word of 'similarity' between the abbreviated name, I will hereinafter refer to 'resemble' as this is the word employed in the section.

It is clear that the ultimate interest of all political parties is the number of votes each obtain at the polls.

Not all possibilities can be set out or even foreseen in any particular law, especially when it is written.

It therefore requires to be put into perspective through judicial interpretation.

Clearly the Appellants case is not one which asserts an intention on the part of the Second Respondent to deceive the voters but rather one in which, because of the resemblance in the respective abbreviated names, the voters would be confused. It follows therefore that its fear is that it might not acquire the votes intended for it because the voter would be confused and vote for the party who carries an abbreviated name resembling its own..

In my view, the relevant legislation has been enacted for the protection of the voting public and not so much, if at all, for the protection of the parties and hence the notions of 'deceiving' and the 'confusing' of the voter.

In deciding this matter, it is essential to examine whether the voter would be deceived and/or confused when exercising his or her right to vote.

The Electoral Act No 73 of 1998 sets out, inter alia, procedures for voter registration, (Chapter 2) and actual voting procedure (Section 38). Section 39 also makes provisions for the assistance of a voter who requires assistance to exercise the right to vote at the voting station.

These are procedures which illustrate that a voter is a person who is registered to exercise a right to vote. They, though not difficult to follow, require some measure of understanding of the prescribed procedures and what it entails.

Essential in the procedure is that a voter who can read will proceed to a voting booth and mark the ballot paper as he or she wants to. Where a voter cannot read, section 39 makes provision for him or her to be assisted to exercise a right to vote.

Furthermore, the ballot paper, almost now by tradition, contains a picture of the 'face' of every party next to its name and logo. Most, if not all, citizens know that the faces and logos thereon are associated with and represent the respective political parties involved in the elections.

It consequently becomes clear that the ballot paper, such as it is, is a product of wide consideration of South African history, the backgrounds of citizens in general and has been designed to generally avoid any of its voting public from being deceived or confused in exercising the right to vote when marking the ballot paper.

The ballot paper has clearly been designed for use of voters of most, if not all, backgrounds whether formally literate or not.

Objectively, it follows therefore, that the registered voter as envisaged in Section 16 (1)(b) of the Act is the reasonable voter, who is reasonably informed of the political landscape prevailing at the material time.

Specifically, such a reasonable voter is one who would firstly be sufficiently literate to identify the party of choice by name in order give proper effect to the right to vote. The reasonable voter, reasonably informed would know the difference between 'CAPE' and 'COPE' because the literate voter will see the difference between the names or abbreviated names for that matter.

If a person is not sufficiently literate or unable to read, the reasonable voter will have reference to the 'face of the party' which would clearly assist him or her to identify the party of choice. It seems to me that there can be no confusion as to the identifying of the party from the 'face' thereof save perhaps in the case of two members of an identical multi-birth group of siblings serving as the face of different parties. This is not the position in this case.

Thirdly, if the voter is still uncertain, the respective logo's clearly serve as marks of different identities.

The Appellant's logo can be described as follows:-

"An elliptical outline with broadened sides tapering towards the narrower poles, containing a map which resembles the western hemisphere of South Africa wherein appears the word CAPE written in bold capital letters which is underlined by two stars on either side of an anchor. (It is not clear whether the said map includes portions of other provinces or not)".

The Second Appellants' logo can be described as follows:-

"A cross within a four pronged star inside two broad lined circles with the word 'COPE' appearing under that in bold and with the full name Congress of the People thereunder in smaller letters."

I might add that the papers depicting the logos are photo static copies in black and white and therefore the different colour choices of the Appellant and Second Respondent are not apparent to me. I assume the colours would also have a role in distinguishing the Appellant from the Second Respondent.

Clearly the respective logos also serve as differentials and cannot be confused.

In order to illustrate the potential for confusion, the Appellant has referred to two instances as examples of 'COPE' being deliberately

used in place of the word 'CAPE'.

Firstly it referred to an instance in which the Second Respondent distributed what is known as bumper stickers wherein the word 'COPE TOWN' appeared.

The second instance is a cartoon which referred to the 'COPE of Good Hope'.

In both instances it is clear that the play on the word 'COPE' was contextually too far removed from the name of the Appellant. The bumper sticker was obviously a play on CAPE TOWN, while the cartoon was a play on the Cape of Good Hope.

Both Cape Town and the Cape of Good Hope are long standing names of a city and geographical phenomenon respectively. They are too remote from the notion which the Appellant suggests as examples of potential to offend the rights to the use of the abbreviated name of CAPE.

Consequently the purpose of Section 16(1)(b) of the Act has been complied with and from the foregoing, it cannot be said voters will be deceived or confused at the polls or that the potential for that to occur exists.

In the circumstances, the Appellant has not shown the decision of the First Respondent to uphold the CEO's decision to be incorrect.

Costs of the appeal were not sought by any of the parties and in the circumstances I do not propose to award costs.

In the result the appeal is dismissed.

R PILLAY

JUDGE OF THE HIGH COURT

I agree

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