

SOUTH AFRICA / JUDGMENT

Freedom Front Plus v Electoral Commission of South Africa and Another (005/2019) [2019] ZAEC 1 (14 May 2019)

[2019] ZAEC 1

COURT
Electoral Court

BEFORE
W.L Wepener, B. Mbha, B. Lamont, Ms. S. Pather

CASE / FILE NUMBER
005/2019

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IN
THE ELECTORAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG
CASE
NUMBER: 005/2019
In

the matter of:

FREEDOM FRONT PLUS
Applicant
and
ELECTORAL
COMMISSION OF SOUTH AFRICA
First
Respondent
BLACK FIRST LAND
FIRST
Second Respondent
Date of Hearing: 29 April 2019
Date of Order: 29 April 2019
Date of Judgment: 14 May 2019
Coram
Mbha JA, Lamont et Wepener JJ, Ms Pather, Member
Summary: Electoral law – registration of
a political party by chief electoral officer in terms of s 15 of the
Electoral Act
51 of 1996. Act requires that registration be published
in the Government Gazette (Gazette). Chief electoral officer failing
to
publish decision to register political party. Right of aggrieved

parties to appeal decision to register a political party lies to Commission only after it receives notification of the registration. Such notification is the publication in the Gazette. The failure to publish in the Gazette results in the right to appeal not having accrued.

JUDGMENT

WEPENER J (MBHA JA, LAMONT J and MS PATHER (MEMBER), CONCURRING

[1] On Tuesday 29 April 2019 this court issued the following order and reasons therefor:

‘[1] The Chief Electoral Officer of the Commission is obliged to publish his or her decision in terms of section 15(5) of the Electoral Commission Act 51 of 1996 as soon as reasonably practicable after the decision has been taken.

[2] There was a failure to publish the registration of the Second Respondent in the Government Gazette. In consequence, the period of thirty days referred to in section 16(2) of the Electoral Commission Act 51 of 1996, did not commence.

Order

[1] The decision of the Electoral Commission to refuse condonation to the applicant and the consequent dismissal of the appeal, is reviewed and set aside.

[2] There is no order as to costs.’

[2] The applicant in the matter is the Freedom Front Plus, a registered political party which has seats both in the national and provincial legislators. The first respondent is the Electoral Commission (the Commission), a body established pursuant to chapter 9 of the Constitution and which conducts itself in terms of the Electoral Commission Act[1] (the Act). The second respondent is Black First Land First (the BLF), a political party, registered as such by officials of the first respondent.

[3] On 30 April 2019 the Commission requested reasons for the Court’s decision aforesaid. These were set out shortly when the court issued its decision. I now elaborate on the reasons and findings as published on 29 April 2019.

[4] The matter concerns the registration of a political party, the second respondent. During 2016 the second respondent applied to the Chief Electoral Officer (CEO) of the Commission and was registered as a political party. Such application was in terms of s 15 of the Act. The CEO of the Commission is the official that is authorised and empowered to deal with the registration of political parties. The person who acted in the stead of the CEO implemented the provisions of s 15, save for the provisions of s 15(5)[2]. The second respondent was duly registered but the CEO failed to publish the prescribed particulars of the registration in the

Government Gazette (the Gazette). He thus ignored the mandatory provisions of s 15(5).

[5] The importance of the publication in the Gazette is that it is that act (ie the publication) that triggers the rights of other parties. Pursuant to the provisions s 16, a party receiving notice of the registration of a new party, may appeal such decision to register a party. In terms of the provisions of s 16(2):

‘Any party which is aggrieved by a decision of the chief electoral officer to register or not to register a party, may within 30 days after the party has been notified of the decision, appeal against a decision to the Commission in prescribed manner.’

[6] A party is defined in the Act[3] to mean:

“party” means any registered party, and includes any organisation or movement of a political nature which publicly supports or opposes the policy, candidates or cause of any registered party, or which propagates non-participation in any election;’

and the term[4]

“(r)egistered party” means any party registered in terms of section 15’.

The result is that registered political parties may within 30 days of notification of the decision to register another political party, appeal that decision to the Commission.

[7] It was argued before us that the time to object to the registration of a new party, is during the period set out in s 15(1), and having regard to the provisions of s 16(1) of the Act[5], it was submitted that any objection had to be made during the period after the new party itself published particulars of its application

in the Gazette. I am of the view that such an objection, if raised, is one which the CEO must consider and deal with and not the

Commission. The CEO will be obliged to consider the application for registration against the prescripts contained in ss 15 and 16(1) and any objections that he or she may receive.

[8] In terms of s 16(2) of the Act all aggrieved parties, as defined, have a right to appeal the decision of the CEO to register a political party. This is a different right and a different procedure than that which is set out in ss 15 and 16(1). It is consequently clear that there is a pre-registration procedure contained in ss 15 and 16(1) and a post registration set out in s 16(2).

[9] Counsel for the Commission argued, in the alternative, that the only parties who may so appeal are parties who have previously taken part in the registration process by lodging an objection with the CEO during the process contemplated in s 16(1). There is nothing in this Act to indicate that the words ‘any party’ used in s 16(2) should be narrowly interpreted to refer to only a party who had previously lodged an objection with the CEO during the s 16(1) procedure. In my view, any aggrieved party has the

right to appeal the registration by the CEO of a new party within 30 days, which appeal must be lodged with the Commission. It is this aspect of the matter that needs closer attention. The right of a party to appeal is open for 30 days 'after the party has been notified of the decision. . .' of the CEO to register a new political party. The notification, counsel for the Commission

submitted, was the fact that all registered parties knew, or became aware of the fact of registration on the electronic website of the Commission. This, counsel submitted, is more accessible to political parties than a publication in a Gazette. I do not agree. In my view, the publication pursuant to s 15(5) of the Act constitutes the notification by the CEO of his decision to register a new party. That this is so is also supported by the regulations for the registration of political parties,[6] which regulations were formulated and issued by the Commission. Regulation 6 reads as follows:

'Notification of registration in Gazette

The particulars which must be published in the Gazette in terms of section 15(5) of the Act shall be the following, namely:

- (a) name and abbreviated name of the party;
- (b) symbol of the party;
- (c) that the party has been registered only in respect of a particular municipality, if that is the case;
- (d) date of registration of the party; and
- (e) a reference number.'

[10] If regard is had to the purpose of the requirement of publication in the Gazette which, in my view, is to notify the general public that a new party has been registered, the notification referred to in s 16(2) is the fact that triggers the right of political parties to lodge an appeal with the Commission. There was no argument before the court that suggested that the provisions of s 15(5) regarding the duty of the CEO to publish particulars of the registration has any other purpose than being a general notification of such registration. The Supreme Court of Appeal in *Weenen Transitional Local Council v Van Dyk*[7] had the following to say on the subject:

'[13] It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the Ordinance is to follow a common sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 434 A

- B). Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should be read as 'may'; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have a posteriori, not a priori significance. The approach described above, identified as '... a trend in interpretation away from the strict legalistic to the substantive' by Van Dijkhorst J in *Ex parte Mothuloe (Law Society Transvaal, Intervening)* 1996 (4) SA 1131 (T) at 1138 D - E, seems to be the correct one and does away with debates of secondary importance only.

[14] It seems to be clear that the object of s 105 (1A) was to inform all the ratepayers in the particular borough of the council's estimates of its income and expenditure for the next financial year, and of the amount of the assessed rates. The estimates are to be made available for inspection at the municipal office for a period of at least seven

days after the publication of the notice.’[8]

[11] It is common cause that to date the CEO had not published the registration of the second respondent in the Gazette. Thus, this court made a finding set out in para 1 and 2 of the order above.

[12] The appellant in this matter lodged an appeal to the Commission earlier this year but that appeal was not preceded by a notification by means of a publication in the Gazette. Nevertheless, the Commission decided to dismiss the appeal on the basis that the appeal was well out of time. However, in my view, the period when an appeal may be lodged will only commence once the notice is given by publication in the Gazette.

[13] This court’s powers are, inter alia, set out in s 20 of the Act. In terms of s 20(1)(a) it may review any decision of the Commission, which powers of review are wide.

The Constitutional Court in *Kham and Others v Electoral Commission and Another* says the following on the subject[9]:

‘[38] The consideration of the jurisdiction and powers of the Electoral Court should commence with the Commission Act under which the Electoral Court was established. It is established for the whole of the Republic of South Africa with the status of the High Court. Its chairperson must be a judge of the Supreme Court of Appeal. It has two other members who are judges and two who are South African citizens. Its powers, duties and functions are spelled out in section

20. As regards the ambit of its jurisdiction this is defined in section 20(1), which reads that “[t]he Electoral Court may review any decision of the Commission relating to an electoral matter”. If the Electoral Court had jurisdiction in this case, it is in this provision that one would expect to find it.

[39] The point that strikes one immediately about section 20(1) is that the jurisdiction it confers on the Electoral Court is extremely broad. It is a power to review “any decision” by the IEC. Many years ago Innes CJ pointed out that

“[a]ny’ is, upon the face of it, a word of wide and unqualified generality. It may be restricted by the subject-matter or the context, but prima facie it is unlimited.”

The use of the word “any” to describe the decisions of the IEC that are subject to the review powers of the Electoral Court must be taken to mean each and every decision, unless there is something in the context that justifies a more restrictive meaning. But the only restriction is that the decisions that are subject to this judicial oversight are decisions “relating to an electoral matter”. In other words, decisions by the IEC over where to locate its offices, or how to source equipment, or who should be employed, are not included. But, if the decision relates to an electoral matter, then it is included and “any” decision in that regard is subject to review by the Electoral Court.’

[14] In the circumstances I am of the view that the decision of the Commission to refuse condonation was procedurally incorrect, as was the appeal procedure instituted by the applicant. In the result, the refusal and consequent dismissal of the appeal, falls to be reviewed and set aside.

[15] The rights of an aggrieved party will only arise once the notice by means of the publication in the Gazette occurs. For these reasons, this Court issued the order referred to above, on 30 April 2019.

W.L Wepener

Judge of the Electoral Court.

I agree.

B. Mbha

Judge and Chairperson of the Electoral Court

B. Lamont

Judge of the Electoral Court

Ms. S. Pather

Member of the Electoral Court

[1] Act 51 of 1996.

[2] ‘After a party has been registered the chief electoral officer shall issue that party with a registration certificate in the prescribed form and publish the prescribed particulars of such registration in the Gazette.’

[3] Section 1(1)(vi).

[4] Section 1(1)(ix).

[5] '(1) The chief electoral officer may not register a party in terms of section 15, if-

- (a) a proposed name, abbreviated name, distinguishing mark or symbol mentioned in the application- symbol, (i) resembles the name, abbreviated name, distinguishing mark or as the case may be, of any other registered party to such extent

that it may deceive or confuse voters ; or (ii) contains anything which portrays the propagation or incitement of violence or hatred or which may cause serious offence to any section of the population on the grounds of race, gender, sex, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. '

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- (a) a proposed name, abbreviated name, distinguishing mark or symbol mentioned in the application- symbol,
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[6] GNR13 in GG25894 of 7 January 2004 as amended.

[7] 2002 (4) SA 653 (SCA).

[8] This passage was cited with approval in *African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1; 2006 (3) SA 305 (CC) para 25.

[9] 2016 (2) SA 338 (CC) paras 38-39.

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