

SOUTH AFRICA / JUDGMENT

Good Party v Electoral Commission of South Africa and Others (004/2023 EC) [2023] ZAEC 4 (20 September 2023)

[2023] ZAEC 4

COURT

Electoral Court

BEFORE

Zondi JA, Modiba J, Shongwe AJ, Professor Ntlama-Makhanya, Professor Phooko

CASE / FILE NUMBER

004/2023 EC

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IN THE ELECTORAL COURT OF SOUTH AFRICA

HELD AT BLOEMFONTEIN

Not Reportable

Case number: 004/2023 EC

In the matter between:

THE GOOD PARTY Applicant

and

ELECTORAL COMMISSION OF SOUTH AFRICA First Respondent

MEC LOCAL GOVERNMENT, ENVIRONMENTAL

AFFAIRS AND DEVELOPMENT PLANNING,

WESTERN CAPE Second Respondent

THE DEMOCRATIC ALLIANCE Third Respondent

THE AFRICAN NATIONAL CONGRESS Fourth Respondent

ECONOMIC FREEDOM FIGHTERS Fifth Respondent

DIE PLAASLIKE BESORGDE INWONERS Sixth Respondent

THE PATRIOTIC ALLIANCE Seventh Respondent

THE AFRICAN RESTORATION ALLIANCE Eighth Respondent

Neutral Citation: The Good Party v Electoral Commission of South Africa and Others (004/2023 EC) [2023] ZAEC 4 (20 September 2023)

Coram: Zondi JA, Modiba J, Shongwe AJ, and Professor Ntlama-Makhanya and Professor Phooko (Members)

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 12H00 am on 20 September 2023.

Summary: By-elections – objections to voters' roll based on allegations of electoral fraud – applicant failing to comply timeously with timelines set in the election timetable – urgency self-created.

REASONS

Professor Ntlama-Makhanya (Zondi JA and Modiba J and Shongwe AJ and Professor Phooko (member) concurring):

- [1] On 19 July 2023 we granted an order dismissing the application with no order as to costs and indicated that the reasons for the order would be furnished in due course. These are the reasons for the order that we made. The application was extremely late. The issues were whether sufficient reasons for the delay had been provided by the applicant and whether a case for the review of the Independent Electoral Commission's decision had been made out in the papers.
- [2] The applicant, the Good Party, is a registered political party with the first respondent, the Independent Electoral Commission (the Electoral Commission). Earlier this year, three Ward Councilor seats became vacant in the George Local Municipality: Wards 16, 20 and 27. Section 25(1)(d) of the Local Government: Municipal Structures Act 197 of 1998 (the Structures Act) requires a by-election to be held to fill those vacant seats.
- [3] Shortly after the vacancies arose, the Commission took steps to facilitate the three by-elections. The Electoral Commission hosted a voter registration weekend on 3 and 4 June 2023. The applicant was one of the political parties that contested the by-elections.
- [4] On 12 June 2023, the Electoral Commission published a timetable for the by-elections in Wards 16 and 20. That timetable provided 22 June 2023 as a deadline for objections to the voters' roll. The Electoral Commission also published a provisional segment of the voters' roll for those by-elections. The provisional voters' roll segments included the voters registered to vote on the voter registration weekend of 3 and 4 June 2023.

- [5] On 13 July 2023, five days before the by-elections, the applicant addressed a letter to the Provincial Electoral Officer to bring to his attention 'the out of the ordinary increase' in the voter registrations in the three wards. He asked the Provincial Electoral Officer to investigate the matter as it suspected that there was some irregularity. The applicant did not submit any evidence to substantiate its claims, neither did it request a postponement of the by-elections.
- [6] On 14 July 2023 the Electoral Commission dismissed the objection on the ground that an increase in registration alone was too general and vague to warrant investigation. On 14 July 2023 it came to the applicant's attention that some of the Democratic Alliance's (DA) election agents had been instructed by the DA to canvass members from Thembaletu, George to register in Ward 20, Borchers, for the upcoming by-elections knowing that those persons did not live in Ward 20. The applicant thereafter obtained affidavits from the agents concerned.
- [7] The gist of the applicant's complaint was that the agents were instructed by the DA to visit residents of Thembaletu, George and persuade them to register or re-register in the wards where they were not ordinarily resident to enhance the DA's prospects of winning the by-election in those wards.
- [8] On 15 July 2023, the applicant, armed with those affidavits, lodged a formal objection with the Electoral Commission alleging that an instance of electoral fraud had been committed. It requested the Electoral Commission to investigate the allegations. On the same day the applicant's attorneys of record wrote to the Electoral Commission demanding that the by-elections be postponed pending the investigation of the allegations of electoral fraud. On 17 July 2023 the Electoral Commission rejected the applicant's objection in terms of s 51 (1A) of the Local Government: Municipal Electoral Act 27 of 2000[1] (Municipal Electoral Act) on the ground that the objection could only be made at a voting station and that the applicant could not invoke the provisions of the section before the date of the election. It further stated that the allegations underpinning the applicant's objection were lacking in substance to justify an investigation.
- [9] Aggrieved by the Electoral Commission's decision dismissing its objection and refusing to postpone the by-elections, the applicant, on 17 July 2023, filed an urgent application in this Court in which it sought the following relief:
- (i) That the applicant's non-compliance with the Rules of the above Court relating to forms and service be condoned and that this application
- be heard as a matter of urgency in terms of Rule 11 of this Court.
- (ii) That, to the extent necessary, the Electoral Commission's decision to dismiss the applicant's request that the by-elections to be held on 18 and 19 July 2023 in Wards 16, 20 and 27 of the George Municipality, Western Cape be postponed for it to investigate

allegations of fraud, be reviewed and set aside.

(iii) That the Electoral Commission be ordered to immediately request, in terms of s 8 of the Municipal Electoral Act, the member of the Executive Council to postpone the by-elections to be held on 18 and 19 July 2023 in Wards 16, 20 and 27 of the George Municipality, Western Cape.

(iv) That the first respondent be ordered to investigate the allegations of fraud raised by the applicant in this application in relation to the voters' roll of Wards 16, 20 and 27 of the George Municipality, Western Cape.

[10] The basis upon which it is alleged that the application is urgent is set out in para 32 of the applicant's founding affidavit as quoted below:

'This application is urgent for the reasons which I have dealt with above and the simple fact that the by-election will take place on 19 July 2023. If the by-election proceeds, with the special vote scheduled for 18 July 2023, the prejudice that the Good Party will suffer is irreparable, and if this Court finds that election was not free and fair, a re-run of the elections have to take place, or a votes deduction will have to take place after an investigation, which would amount to a significant waste of time and resources.'

[11] The applicant alleges that when, on 14 July 2023 it became aware of the allegations of electoral fraud, it brought them to the attention of the Electoral Commission for investigation. It further alleges that its attorneys of record wrote to the Electoral Commission demanding that it gives an undertaking that it would postpone the by-elections pending investigations. The Electoral Commission was given up until 19 July 2023 at 11h30 am to provide an undertaking.

The applicant states that the Electoral Commission failed to meet the deadline and to accede to its demand. It contends that it is the Electoral Commission's failure to give an undertaking which rendered this matter urgent.

[12] Only the Electoral Commission and the DA opposed the application. The Electoral Commission contended that the applicant failed to show that the application was urgent. It asserted that the urgency relied upon by the applicant was self-created, as the applicant was aware of the scheduled dates of the by-elections, having been published in advance in the relevant Government Gazette. It further contended that the two affidavits in support of the allegations of fraud did not provide sufficient and credible evidence to justify the postponement of the by-elections. The Electoral Commission argued that the applicant provided no plausible reason for its delay in approaching this Court sooner for the postponement. It stated that during the period between publishing the times of the elections and holding them, it had undertaken extensive preparation, logistics and expenses in preparation for those by-elections. It contended that if the order sought were to be granted, it would throw off and undermine the steps it had taken to ensure the fairness of the elections.

[13] Additionally, the Electoral Commission contended that to the extent that the order was sought to interdict the holding of the special voting, that relief had become moot and could no longer be granted as the event it sought to interdict had already occurred. It pointed to the fact that the special voting commenced at 7.00 AM on Tuesday, 18 July 2023. I agree with this submission, and I do not understand the applicant to have disputed its correctness. The Constitutional Court held in *MEC for Cooperative Governance and Traditional Affairs, KwaZulu-Natal v Nkandla Local Municipality and Others*[2] that:

'Courts should not decide matters that are abstract or academic and which do not have any practical effect, either on the parties before the court or the public at large. The question is a positive one, namely whether a judgment or order of the court will have a practical effect and not whether it will be of importance for a hypothetical future case. A matter is also moot and not justiciable if it no longer presents an existing or live controversy.'

[14] The DA submitted that the application was flawed, that the applicant failed to make out a case for the review of the Electoral Commission's decision and that the applicant failed to explain its delay in bringing the application. It denied that its Campaign Manager, the deponent to the answering affidavit, of the Ward 20 by-election gave instruction to the canvassers to register people not staying within the boundaries of the ward. The Campaign Manager herself denied that she took the canvassers to Thembaletu to register people there.

[15] With this background, I turn to consider the issues identified in para 1 of the judgment. With regards to urgency, I am not satisfied that the applicant has provided sufficient reasons why it delayed in bringing the application. An applicant instituting an urgent application must justify the necessity to circumvent the ordinary time periods set out in the rules of this Court. It is required of the applicant to adequately set out in its founding affidavit the reasons for urgency and to satisfy the court why its application should be heard urgently. The fact that the applicant wants to have the matter heard urgently does not automatically render the matter urgent. In terms of rule 6 of the Rules of this Court a party wishing to take a decision of the Electoral Commission on review must do so within three days after decision has been made. Section 20(1)(a) of the Electoral Commission Act 51 of 1996 empowers the court to review any decision taken by the Electoral Commission relating to an electoral matter, but such reviews must be done urgently.

[16] In terms of the Election Timetables published by the Electoral Commission on 12 June 2023 in respect of Wards 16 and 20 and on 14 June 2023 in respect of Ward 27, in terms of the Municipal Electoral Act the period for the pre-inspection and submission of objections to the Electoral Commission was between 12 June 2023 and 19 June 2023 in respect of Wards 16 and 20 and in respect of Ward 27, between 15 June 2023 and 22 June 2023. The Election Timetables, as published, stated that the Chief Electoral Officer had to make available segments of the voters' roll for pre-inspection and objections to the Commission. The applicant did not make a prior pre-inspection of the voters' roll until the 11th hour. Timelines stipulated in the Election Timetables must be strictly adhered to as they perform

an important function in the electoral process. They minimize the risks of possible disruptions in the preparation process and assist the Electoral Commission to remain focused on its objective of delivering the elections that are free and fair.

[17] With regards to the merits of the review application, I find that the applicant failed to set out the grounds for the review of the Electoral Commission's decision. In terms of rule 6 of the Rules of this Court a party who takes the matter on review must set out the decision which it requires to be reviewed and

the grounds therefor. The conclusion was ineluctable that the application was lacking in substance and had to be dismissed. The

application was extremely late and the reasons for lateness were lacking. The applicant failed to establish grounds which would

justify the court granting this extra-ordinary remedy of postponing the by-elections on such short notice.

Professor Ntlama-Makhanya

MEMBER

ELECTORAL COURT

Appearances

For the Applicant: J

F Louw

Instructed by: Lionel

Murray Schwormstedt & Louw, Cape Town

For the 1st Respondent: R S Patel

Instructed by: DMO

Attorneys, Bryanston

For the 2nd Respondent: A Stallenberg

Instructed by: State

Attorney, Cape Town

For the 3rd Respondent: E Jonker

Instructed by: Minde

Schapiro & Smith Inc, Bellville

[1] Local Government: Municipal Electoral Act 27 of 2000: '51. Objections concerning voting. – (1) Subject to subsection (1A), at any time before a voter has been handed a ballot paper, an agent or ward candidate may object to that voter being allowed to vote or to vote at the voting station concerned. (1A) Where a voter's name appears on the relevant segment of the voters' roll concerned, an objection to that voter in terms of subsection (1) may only be made where- (a) it is based on the contention that the voter was included on the relevant segment of the voters' roll due to fraud; or (b) exceptional circumstances exist which justify the objection being made outside the period referred to in terms of section 11 (3).'

[1] Local Government: Municipal Electoral Act 27 of 2000:

'51. Objections concerning voting. – (1) Subject to subsection (1A), at any time before a voter has been handed a ballot paper, an agent or ward candidate may object to that voter being allowed to vote or to vote at the voting station concerned.

(1A) Where a voter's name appears on the relevant segment of the voters' roll concerned, an objection to that voter in terms of subsection (1) may only be made where-

- (a) it is based on the contention that the voter was included on the relevant segment of the voters' roll due to fraud; or
- (b) exceptional circumstances exist which justify the objection being made outside the period referred to in terms of section 11 (3).'

[2] MEC for Cooperative Governance and Traditional Affairs, KwaZulu-Natal v Nkandla Local Municipality and Others [2021] ZACC 46; 2022 (8) BCLR 959 (CC) para 16.

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