

SOUTH AFRICA / JUDGMENT

Kortman and Another v Electoral Commission of South Africa and Others

(009/21 EC) [2022] ZAEC 3 (21 February 2022)

[2022] ZAEC 3

COURT
Electoral Court

BEFORE
Mbha JA, Shongwe AJ, Ms Pather

CASE / FILE NUMBER
009/21 EC

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REPUBLIC
OF SOUTH AFRICA
ELECTORAL
COURT, BLOEMFONTEIN
Reportable
CASE
NO: 009/21 EC
In

the matter between:

MARTHA
NTOMBEKHAYA KORTMAN FIRST
APPLICANT
THE
COMMUNITY OF TARKASTAD SECOND
APPLICANT
and
ELECTORAL
COMMISSION OF SOUTH AFRICA FIRST
RESPONDENT
MR
MSIMELELO MABUTO
N.O. SECOND
RESPONDENT
MR
XOLA
MTATI THIRD
RESPONDENT
MS
NOMATHAMSANQA MTATI N.O. FOURTH

RESPONDENT
SOUTH
AFRICAN POLICE SERVICE FIFTH
RESPONDENT
TARKASTAD
BRANCH OF THE AFRICAN
NATIONAL
CONGRESS SIXTH
RESPONDENT
Neutral
Citation: Kortman and Another v Electoral Commission of South
Africa and Others (Case no 009/21 EC) [2022] ZAEC 3 (21 February
2022)

Coram: MBHA JA, SHONGWE AJ with Ms PATHER (Member)

Date: 21 February 2022

Summary: Section 65(1) of the Local Government: Municipal Electoral Act, 27 of 2000, prohibits any unlawful conduct at or in a voting station amounting to unlawful interfering with or influencing, intimidating or obstructing voters or prospective voters – held that various act of intimidation at or around Nkosiyaakhe voting district rendered elections not to be free and fair – objection upheld and by-election ordered.

JUDGMENT

Shongwe AJ (Mbha JA and Ms Pather (Member) concurring):

- [1] This is an appeal against a decision of the Independent Electoral Commission (the Commission) in terms of section 65 (9) of the Local Government: Municipal Electoral Act 27 of 2000 (the EMA). The appeal is before this court in terms of section 20 of the Electoral Commission Act 73 of 1998 (the ECA), and the Rules of the Electoral Court. Section 65 (9) provides that a party involved in an objection and who feels aggrieved by the decision of the Commission, may lodge an appeal to this Court.

Factual

background

- [2] The first applicant, (Ms Kortman), was an independent contestant candidate in the local government elections held on 1st November 2021 in ward 33, Enock Mgijima Local Municipality, Eastern Cape (ward 33). The fourth respondent, (Mrs Mtati) also contested that election under the auspices of the African National Congress (ANC). Other political

parties also participated in the same election. Mrs Mtati received 819 votes to Ms Kortman's 815 votes. Consequently, Mrs Mtati was elected councillor by virtue of the highest number of votes received. Ms Kortman, aggrieved by the manner and circumstances under which the elections were conducted, lodged an objection in terms of section 65

(1) of the MEA. As enjoined by the provisions of section 65 (4) of the MEA, the Commission investigated and considered the objection and resolved to dismiss it on the ground that it lacked any merit. Furthermore, there was no evidence that it was material to the results of the election.

[3] It bears mentioning that ward 33 consisted of four voting districts. These are:

(3.1) Voting district no: 100990010 with its voting station located at Town Hall (the town Hall VD).

(3.2) Voting district no: 11020015, with its voting station located at Raymond Mhlaba Senior Secondary School (Raymond Mhlaba VD)

(3.3) Voting district no; 1150029, with its voting station located at Nkosiyakhe Primary School, Tarkastad (the Nkosiyakhe VD); and

(3.4) Voting district no: 11180056, with its voting station located at the Tarka Primary School (the Tarka Primary VD)

[4] It became common cause between the parties that the focus of the objection and of the investigation was on the allegations of irregularities and alleged unlawful conduct that took place at the Nkosiyakhe voting station. I may also mention that it is my understanding that all the objections are factually based. It is further common cause that after the objections were lodged, the Commission requested Ms Kortman to disclose the names of witnesses and to specify the particulars of the persons who were turned away without voting. Ms Kortman did provide the requested information and the Commission investigated the objection and thereafter made a decision as alluded to earlier in this judgment.

Discussion

[5] The objections raised by Ms Kortman were mainly and briefly that;

(5.1) Mrs Mtati, the ANC candidate, was seen campaigning inside the voting station and when confronted and reprimanded by the presiding officer (Mr T Sibhozo), she failed to refrain from the alleged conduct. She got involved in a loud altercation with the presiding officer and also used vulgar language, thereby breaching the electoral code of conduct. This incident was reported to the IEC regional manager, who failed to report back on how the matter was resolved.

(5.2) Mr Mtati, the husband of Mrs Mtati, who is also the ANC local branch secretary, was seen moving in and out of the voting station as he pleased. No official of the IEC confronted or stopped him from behaving in this manner. It was also alleged that he was seen carrying a big black plastic bag, under suspicious circumstances. It was also alleged that he was carrying a big black plastic bag which was suspected to contain ballot papers inside. Furthermore, he unlawfully

interacted with other voters canvassing for their votes and also accompanied them to the voting booths, while wearing ANC regalia in breach of the electoral code of conduct.

(5.3) Mr Mtati entered the voting station just before closing and when confronted by the police he said that he was part of the counting process, which was untrue. It was alleged that Mr Mtati incited violence and chaos and that he was generally throwing his weight as a local branch secretary of the ANC in Tarkastad.

(5.4) The conditions at the Nkosiyakhe voting station were not conducive to free and fair elections. The situation was chaotic and dangerous. There was at some stage insufficient lighting and it was dark. Voters were scared and vulnerable to possible thuggery. All these happenings were reported to warrant officer (w/o) Mendu, a member of the South African Police Service (SAPS). The police promised to produce a report of what took place at Nkosiyakhe voting station.

(5.5) Some voters were turned away and as a result could not vote. The Commission averred that, some were not registered to vote at ward 33 or their names did not appear on the voter's roll.

(5.6) It was further alleged that tyres were burnt in the vicinity of the voting station.

[6] The Commission could not contradict or dispute any of these complaints which, on their face, were material. In fact, the Commission conceded that tyres were burnt in the vicinity of Nkosiyakhe voting station, although their investigation revealed, so they claimed, that it was minor children who were playing around the burning tyres. What is significant is that it was clear that the objector did not merely thumb-suck the issue of tyres burning very close in the vicinity of the voting station. In other words, this was a real issue. The Commission also did not dispute that some voters were turned away without voting. All the Commission said was that not everyone was turned away but that some of the voters had invalid identification documents and that others' names did not appear on the voters roll, and that others were registered in other voting stations and not at Nkosiyakhe. For example, one Ms Nelani, a voter, was interviewed by Mr Kanyane, representing the Commission. He confirmed that Ms Nelani informed him that she felt intimidated and could not vote because it was unsafe for her to do so. In my view, the circumstances that existed at Nkosiyakhe voting station were not conducive to a free and fair election, even if it was only one person who confirmed this. One intimidation is one too many for a young democracy as that in South Africa.

[7] Mr and Mrs Mtati failed to file their answers to damning and serious allegations made against them. One wonders why they failed to dispute these accusations which invariably leads one to conclude that these are true. The Commission submitted that Ms Kortman had no personal knowledge of the allegations of irregularities and that she relied on inadmissible and hearsay evidence. And also that she bolstered her case by adducing new evidence of persons who claim to have been registered in ward 33. It argued that none of their statements accompanied the section 65 (1) objection and alleged a litigation by ambush. I noted earlier that the objections are factually based and that the incidents of irregularities and unlawfulness have not been

gainsaid by any of the parties involved in this appeal. The police officers confirmed the existence of burning of tyres and the incident of Mr Mtati moving in and out of the voting station with a black plastic bag. In this regard, the police say they searched the bag and found nothing untoward inside. Mrs Mtati's involvement in the altercation with officials was also confirmed. It was submitted on Ms Kortman's behalf that Ms Kortman did personally observe some of the incidents complained of on the day of the elections. This, accordingly, put paid to the Commission's contention that Ms Kortman relied on inadmissible hearsay evidence in support of her case.

[8] The Commission submitted that this Court should view and consider its decision as at the time when the decision was taken and not ex post facto. This submission may be correct. However, in my view, the uncontroverted, objective and factual situation that existed at the Nkosiyakhe voting station cannot be ignored. The entire situation was not conducive to a free and fair election. Section 190 of the Constitution provides, inter alia, that the Commission must ensure that elections are free and fair. A plethora of case law has emphasized and repeatedly confirmed what free and fair means. The Commission sought to rely on the case of *Pitso v Electoral Commission* [2001] 3 All SA 607a, where this Court said 'any irregularity which would affect the tally of votes to the extent that an unsuccessful candidate may gain sufficient votes to reverse the election results'. The Commission submitted there was insufficient ground in this case to justify a finding of any substantial irregularity in this appeal. In my view, it is trite that each case must be considered on its own merits and facts. I do not wish to overturn that finding. However, I add that the objective facts in this case clearly demonstrate that the circumstances were chaotic and dangerous. If this Court were to err, it must err on the side of justice. Even if this Court is wrong in its conclusion, the applicant sought justice and succeeded in showing that she is entitled to the remedy that she seeks. In my view, the appeal deserves to be upheld and a by-election must be conducted.

[9] The applicant abandoned the allegations against the police – hence there was no need for counsel of the 5th respondent to address the Court. The applicant complied with all the points raised by the parties in limine. What the Court considered are all the relevant and common cause facts in dispute. The second applicant clearly has no locus standi and Ms Kortman failed to make out a proper case on the standing of the Tarkastad community.

In

conclusion

[10] Mrs Mtati, the fourth respondent, won by 4 votes which is minimal, but a win all the same. Having considered the irregularities and the dangerous situation that existed, this Court unavoidably comes to the conclusion that the elections at ward 33 were not free and fair and therefore material to the results of the elections.

[11] In the result, the following order is made:

1. The appeal is upheld
2. The Electoral Commission of South Africa is ordered to hold a by- election in ward 33, Tarkastad, by not later than 60 days from the date of this order.
3. There is no order as to costs.

J B Z SHONGWE

JUDGE OF THE ELECTORAL COURT

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