

SOUTH AFRICA / JUDGMENT

Liebenberg v Electoral Commission of South Africa (0023/24EC) [2024] ZAEC 16 (20 May 2024)

[2024] ZAEC 16

COURT

Electoral Court

BEFORE

Adams, Modiba, Yacoob, Phooko

CASE / FILE NUMBER

0023/24EC

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THE ELECTORAL COURT OF
SOUTH AFRICA,
BLOEMFONTEIN

Not

Reportable

Case

No: 0023/24EC

In

the matter between:

LOUIS

PETRUS

LIEBENBERG

Applicant

and

THE

ELECTORAL COMMISSION OF SOUTH AFRICA

Respondent

Neutral Citation:

Liebenberg v Electoral Commission of South Africa
(0023/2024EC) [2024] ZAEC 16 (20 May 2024)

Coram:

MODIBA J, ADAMS and YACOOB AJJ and PROFESSOR
PHOOKO (Additional Member)

Heard:

17 May 2024 – as a videoconference on Microsoft Teams

Delivered:	20 May 2024 – This 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 by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 20 May 2024.
Summary:	The Electoral Act – sections 31A, 31B (as 'read in' by the Constitutional Court in <i>One Movement SA</i>) and 31C – regulation 2A of the Regulations concerning the Submission of List of Candidates, 2004 – nomination of independent candidate – contesting elections in more than one region for the National Assembly – required to submit for each region a list of at least 1000 voter supporters in each of the contested regions – imposed by the Act and the regulations – non-compliance and failure to submit these lists disqualify an independent candidate <i>ex lege</i> to contest elections – factual disputes as to whether the applicant complied – to be decided in terms of <i>Plascon Evans</i> principle – Section 31C – gives the Chief Electoral Officer circumscribed powers to rectify limited failures of compliance with s 31B – namely in respect s 31B (3) (c), (d), (e), (f) or s 31B (4) – the section 31C only applies to those independent candidates who had submitted lists in compliance with s 31B(3)(a)(i) and (ii), read with regulation 2A of the Regulations concerning the Submission of List of Candidates, 2004 –. ORDER The application is dismissed with no order as to costs.

JUDGMENT

Adams AJ (Modiba J, Yacoob AJ, Professor Phooko (Additional Member) concurring):

- [1] The applicant (Mr Liebenberg) was nominated to contest, and he intended to participate in the upcoming national elections scheduled for 29 May 2024 as an independent candidate in the following four regions for the National Assembly: Free State, Gauteng, Limpopo and Mpumalanga. The respondent is the Electoral Commission of South Africa (Commission), which is the body constitutionally mandated to manage elections in this country.

[2] Mr Liebenberg's case is that he should be on the final published lists of independent candidates who are entitled to contest the elections for regional seats in the National Assembly in respect of the Limpopo and the Mpumalanga regions, in addition to being on the lists – on which his name presently appears – for the Free State and Gauteng regions. He complied with all of the statutory requirements, so Mr Liebenberg alleges, including the requirements provided for in s 31B(3)(a)(i) of the Electoral Act[1], relating to the submission of lists of voter supporters in the prescribed manner, accompanied by the supporting documentation,

entitling him to contest the said elections. This is confirmed, so the contention on behalf of Mr Liebenberg goes, by the fact that on 2 April 2024 he was advised by the Commission that his name was in fact placed on the National Provincial Election (NPE) lists to contest all four of the aforementioned regions, being Free State, Gauteng, Limpopo and Mpumalanga.

[3] According to the Commission, Mr Liebenberg is disqualified – by operation of law – from contesting the elections for the National Assembly in the Limpopo and the Mpumalanga regions as he did not comply timeously with the peremptory requirements of s 31B(3)(a)(i) of the Electoral Act, as read-in by the Constitutional Court in *One Movement SA*[2]. He failed, so it is alleged by the Commission, to submit, in the prescribed manner, the names, identity numbers and signatures of a sufficient number of voter supporters, that being at least 1000 supporters of his candidature, for each region in which Mr Liebenberg intended to contest an election. The case of the Commission is that, in respect of the Limpopo and the Mpumalanga regions, Mr Liebenberg failed to submit to the chief electoral officer the supporters lists in the prescribed manner by 8 March 2024, being the relevant date stated in the Election Timetable for the Election of the National Assembly and the Election of Provincial Legislatures (timetable) promulgated in terms of s 20 of the Electoral Act by the Commission.

[4] Section 31B(3), after the read-in by the Constitutional Court, now provides in the relevant part, in peremptory terms, as follows: -

‘(3) The following must be attached to a nomination when it is submitted:

- (a) A completed prescribed form confirming that the independent candidate has submitted, in the prescribed manner, the names, identity numbers and signatures of voters whose names appear –
- (i) in the case of an election of the National Assembly in respect of regional seats, on the national segment of the voters' roll and who support his or her candidature, totalling 1000 signatures for each region in which the candidate intends to contest an election;
- (ii) in the case of an election of a provincial legislature, on the segment of the voters' roll for the province and who support his or her candidature, totalling 1000 signatures,

provided that an independent candidate who was elected to either the National Assembly or a provincial legislature as an independent candidate in the preceding election shall be exempt from this requirement.' (Emphasis added)

- [5] As already indicated, Mr Liebenberg intended contesting the elections for regional seats in the National Assembly in respect of the Free State, Gauteng, Limpopo and the Mpumalanga regions. He was therefore required to submit to the chief electoral officer the details and signatures of at least 1000 voter supporters from each of these regions. He failed to comply, so the case on behalf of the Commission goes, as he only submitted verified details, particulars and signatures of the following number of voter supporters for the following regions: (a) In respect of the Free State region, 1087 supporter signatures were verified and valid; (b) In respect of the Gauteng region, 1356 supporter signatures were verified and valid; (c) In respect of the Limpopo region, 428 supporter signatures were verified and valid; and
- (d) In respect of the Mpumalanga region, 574 supporter signatures were verified and valid. Thus, he fell short of the prerequisite numbers in relation to the Limpopo and the Mpumalanga regions.
- [6] Mr Liebenberg is, however, able to contest the National Assembly elections for the Free State and the Gauteng regions. In a nutshell, Mr Liebenberg was disqualified from contesting the other elections because his verified lists of supporters fell short of the required numbers prescribed by s 31B(3)(a)(i). In this application, he in effect applies for a review and a setting aside of such disqualification. It may be apposite to cite from the notice of motion; in which he asks for an order in the following terms: -
- ‘(1) That the decision by the respondent and/or its Chief Electoral Officer, Mr S Y Mamabolo, dated 15 April 2024, in terms of which the respondent decided to remove the name of [Mr Liebenberg] from the lists of candidates for the 2024 elections for the Regional Provinces of Limpopo and Mpumalanga [be reviewed and set aside].
- (2) Alternatively, that the decision referred to in prayer 1 above be replaced with a finding that [Mr Liebenberg] be afforded the opportunity of two (2) days to correct any shortcomings in its submission papers for the Limpopo and Mpumalanga Provinces.’
- [7] During the hearing of the matter on Friday, 17 May 2024, Mr Liebenberg indicated that he no longer intends pursuing the alternative relief sought by him in paragraph (2) of the notice of motion. The only relief prayed for is therefore for an order reviewing and setting aside his ‘disqualification’ from contesting the elections for the Limpopo and Mpumalanga regional seats in the National Assembly.
- [8] The Commission opposes the application on the basis that Mr Liebenberg did not comply with the peremptory requirements of s 31B(3)(a)(i) of the Electoral Act (as amended by the read-in provisions of the Constitutional Court in *One Movement SA*) read with regulation 2A of the Regulations concerning the Submission of List of Candidates,

2004. It did not disqualify Mr Liebenberg from contesting the elections, so it is contended by the Commission – he was disqualified by operation of the law. Therefore, so the Commission’s contention continues, there is no decision, which it took that can and should be reviewed and set aside.
- [9] The issues to be considered in this application is therefore of a factual nature. The question to be considered by this Court is whether or not factually Mr Liebenberg had submitted lists with sufficient numbers of supporters (1000 in total in respect of each of the contested regions) in compliance with s 31B(3)(a)(i).
- [10] As alluded to above, it is the case of the Commission that Mr Liebenberg failed to submit the required number of voter signatures to contest the elections for the Limpopo and the Mpumalanga regions of the National Assembly by the deadline in the electoral timetable. How they arrive at this conclusion, is set out extensively by the Commission in pre-litigation correspondence between it and Mr Liebenberg and in the Commission’s answering affidavit.
- [11] The Commission explained that Mr Liebenberg, in support of his intention to contest the elections for a seat in the National Assembly across the above four regions, had electronically submitted 13 427 identity numbers of voter supporters. An analysis of the 13 427 identity numbers submitted revealed the following: (a) 3 222 identity numbers were duplicated; (b) 2 031 were invalid identity numbers; (c) 2 090 were identity numbers of voters who are registered outside the region/s in which he had been nominated; (d) 25 were from people who held an invalid voter status, such as deceased persons or non-South Africans; and (e) 739 were from people who are not on the voters’ roll – in other words, while the identity number is valid, the holder is not a registered voter.
- [12] The result of the foregoing analysis is that only 5 320 identity numbers electronically submitted were verified and validated. Thereafter, the Commission did an analysis and a comparison of the electronically submitted identity numbers and the prescribed forms signed by voter supporters and submitted to the Commission, together with the nomination forms. This comparison revealed that of the 5 320 identity numbers submitted, physical signatures were provided only in respect of 3 445 identity numbers of these voter supporters, which related to the regions in the following numbers: The Free State (1 087 verified supporter signatures); Gauteng (1 356 valid and verified supporter details and signatures); Limpopo (428 verified supporter details and signatures); and Mpumalanga (574 valid and verified supporter details and signatures).
- [13] Accordingly, so the Commission’s case is concluded, Mr Liebenberg’s nominations in respect of the regions of Limpopo and Mpumalanga did not meet the voter supporter signature requirement of 1000. As a result, his name was removed from the list of candidates in these two regions (Limpopo and Mpumalanga).

[14] In contrast to this detailed explanation and exposition by the Commission in relation to the submission of voter supporter lists, Mr Liebenberg's version on this aspect seems to be nothing more than a challenge to the correctness of the procedure followed by the Commission in arriving at its conclusion that his name be removed from the list of independent candidates in respect of the Limpopo and Mpumalanga regions. So, for example, Mr Liebenberg makes the following averments in his founding affidavit: -

'(4.4) The [Commission] proceeded to entertain the objection and complaint by the Freedom Front Plus and on 15 April 2024 issued a ruling to the matter (without my input or participation) as will appear from the ruling attached hereto marked Annexure "LL3". In terms of Annexure "LL3" the [Commission] made the decision to remove my name from the list of candidates for the Regional Provinces of Limpopo and Mpumalanga as there were apparently invalid nomination forms lodged for these regions.' (Emphasis added).

[15] Moreover, on my reading of Mr Liebenberg's papers, he does not genuinely dispute the numbers subscribed to by the Commission. In his replying affidavit, Mr Liebenberg makes the rather bald and unsubstantiated averment that he disputes that he did not receive one thousand signatures for the provinces of Limpopo and Mpumalanga, as stated by the Commission in its founding affidavit. This denial rings hollow and is difficult to comprehend because Mr Liebenberg, in a letter from his attorney dated 16 April 2024, sought an opportunity from the Commission to 'correct any shortcomings in [his] submission papers for the Limpopo and Mpumalanga Provinces'. This request for a further indulgence, which was repeated on behalf of Mr Liebenberg by his representatives at a meeting with the Commission at its offices on 17 April 2024, was refused by the Commission. In that regard, the following averments by the Commission in para 47 of its answering affidavit are unchallenged and undisputed:

'47 Mr Liebenberg's representatives indicated that he wanted to provide more signatures that he had collected to supplement the inadequate lists he had supplied. Mr Aphane [the Commission's representative] indicated that this was not possible. Mr Cronje [Mr Liebenberg's representative] then appeared to have acknowledged that, without additional signatures, Mr Liebenberg was not compliant with the requirements to compete in the elections. They then left the meeting.'

[16] The rhetorical question to be asked is why he had sought to submit additional signatures if he had already done so.

[17] Even more telling is the following averment made by Mr Liebenberg in his replying affidavit, with reference to the furnishing by the Commission of hundreds of pages of documentation, including the audit report they compiled in response to the complaint by the registered represented political party, Freedom Front Plus: -

‘(4.5) These documents could not be made available to my representatives on the 17th of April 2024 and are now made available for the first time. I confirm that none of these documents were ever provided to me or my representatives. Given the short period it is impossible me to conduct a verification process before 16h00 on the 26th of April 2024 and once my own audit process has been concluded I will approach the Honourable Court for permission to provide a supplementary affidavit.’

- [18] By the time the matter was heard by us on 17 May 2024, Mr Liebenberg had had the documents for a full two weeks and, I think, it can safely be assumed that he has had an opportunity to peruse and consider the documentation provided by the Commission and which support their conclusion that he had not complied with s 31B(3)(a)(i). However, he had not filed the supplementary affidavit and he therefore failed to deal with these allegations in the answering affidavit. The ineluctable conclusion to be drawn from Mr Liebenberg’s quiescence is that he cannot take issue with the numbers and the figures attested to by the Commission.
- [19] The point about the factual dispute in this application is that the Commission provides a detailed plausible explanation regarding the submission of the number of voter supporters. On the other hand, there is a half-hearted bald denial by Mr Liebenberg, which denial is unsubstantiated. Moreover, as contended by the Commission, the quotas are to be met not by numbers submitted, but by the number of ‘verified’ voter supporters, which means that the lists of names and signatures must be those of registered voters in a particular region, for example. The audit process to which the Commission subjected the details and signatures of the voter supporters of Mr Liebenberg verified the identity number of a supporter and whether he or she is a registered voter and whether he or she is eligible to be a voter supporter. If so, such a voter supporter would be counted towards the requisite quota. If not, the details of such a person would be disregarded. This process resulted in the figures referred to above, which demonstrated conclusively that Mr Liebenberg did not meet the quotas prescribed in terms of s 31B(3)(a)(i).
- [20] In the context of this opposed application, which implies that the principle in *Plascon Evans*[3] finds application, it cannot possibly be said that the version of the Commission is so far-fetched and untenable that this Court can reject it out of hand. Put another way, the Commission’s version on the facts cannot and should not be rejected by this Court out of hand, as one being patently implausible and far-fetched. If anything, the version of the Commission should be accepted as being more probable than that of Mr Liebenberg.
- [21] In my view, having regard to the evidence before Court, the version of the Commission is more probable than the bald and unsubstantiated denial by Mr Liebenberg that the right number of voter supporters was not submitted to the Commission. The Commission’s version, in addition to being supported by the details and particulars relating to exact figures, has a ring of truth to it. Therefore, factually it has to be accepted that Mr Liebenberg failed to submit the voter supporters lists with the requisite number of supporters. It has

therefore not complied with the peremptory requirements of s 31B(3)(a)(i) of the Electoral Act. He is accordingly disqualified from contesting those elections in respect of which there has been non-compliance.

- [22] Mr Liebenberg makes much of the fact that the Commission failed to notify him of the fact that he did not comply with the requirements of s 31B(3)(a)(i). He also takes issue with the fact that the audit of his voter supporter signatures was triggered by an objection against his nomination by Freedom Front Plus. He objects to the fact that he was not advised of the complaint against him and his nomination and the fact that he was not afforded the opportunity to respond to the said complaint.
- [23] Insofar as Mr Liebenberg in that regard relies on s 31C of the Electoral Act, such reliance is misplaced. That section gives the Chief Electoral Officer highly circumscribed powers to rectify limited failures of compliance with s 31B – namely in respect s 31B (3) (c), (d), (e), (f) or section 31B (4). The section does not require of the Commission to afford an independent candidate an opportunity to rectify its failure or omission to submit a list of voter supporters in the prescribed manner. Section 31C only applies to those independent candidates who had submitted the nomination forms in the prescribed manner, accompanied by the list of voter supporter lists and the details and identity numbers of the required number of voter supporters in compliance with the provisions of s 31B(3)(a)(i) in the case of elections for the National Assembly.
- [24] In my view, it matters not how it came about that the Commission became aware of an independent candidate's non-compliance with the provisions of s 31B(3)(a)(i). Once there is non-compliance with this provision, an independent candidate is disqualified.
- [25] As was held by this Court in *Labour Party of South Africa v Electoral Commission of South Africa*[4], relying on the Constitutional Court authority in *Liberal Party v The Electoral Commission and Others*[5], albeit in the context of the equivalent provision relating to unrepresented political parties 'section 28 does not vest the Commission with a discretion to condone late submission of candidates' lists, but only to allow the rectification of other failures to comply with section 27'. Because the applicant in that matter 'had not submitted a list by the deadline',

the Court held that it was 'not entitled to rectify its non-performance in terms of section 28'. What is more is that

the Commission cannot condone failures to meet deadlines in the electoral timetable – this is consonant with an elementary

principle of public law. In *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd*,[6] the Supreme Court of Appeal articulated the principle as follows:

‘As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so.’

- [26] The absence of a discretion to condone non-compliance with deadlines is by design. The deadlines serve the important function of ensuring the fairness of the elections and of ensuring that the Commission can manage the elections properly. A power to relax deadlines for certain parties would undermine the very purpose of the deadlines. It would place the Commission in the impossible position of having to decide on a case-by-case basis whether to condone or not. Howsoever the Commission acted, it would risk being accused of favouring one party over another. That would undermine its role as a neutral facilitator of the elections.
- [27] Mr Liebenberg’s contention that the Commission contravened s 31C or failed to comply with it falls to be rejected – the Commission and the CEO were under no obligation to notify him of his failure to meet the deadline. An independent candidate who fails to submit lists of voter supporters, with the prescribed supporter details and signatures before the deadline in the electoral timetable never becomes eligible to contest the election.
- [28] For all of these reasons, Mr Liebenberg’s application falls to be dismissed.

Costs

- [29] The award of costs is a matter which is within the discretion of the Court considering the issue of costs. This discretion must be exercised judicially having regard to all the relevant considerations. One such consideration is the principle, in line with

Biowatch Trust v Registrar, Genetic Resources, and Others[7], that in general in this Court an unsuccessful party ought not to be ordered to pay costs. But this is not an inflexible rule, and it can be departed from where there are strong reasons justifying such departure such as in instances where the litigation is frivolous or vexatious.

- [30] I can think of no reason why the foregoing general rule should be departed from. Each party should therefore bear his/its own costs.

Order

- [31] In the result and for these reasons, the following order is granted:

L R ADAMS

ACTING JUDGE OF THE ELECTORAL COURT

Bloemfontein

APPEARANCES

For the applicant: W Niedinger Instructed by: WN Attorneys Incorporate, Pretoria For the respondent: M Bishop Instructed by: Goldberg & De Villiers Incorporated, Gqeberha

[1] Electoral Act 73 of 1998.

[2] One Movement SA NPC v President of the Republic of South Africa and Others 2024 (2) SA 148 (CC).

[3] Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 at pp 634 and 635 held as follows: - 'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers ...'.

[3] Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd

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[4] Labour Party of South Africa v Electoral Commission of South Africa 2024 JDR 1554 (EC).

[5] Liberal Party v The Electoral Commission and Others

[2004] ZACC 1; 2004 (8) BCLR 810 (CC)

[6] Minister of Environmental Affairs and Tourism & Others v Pepper Bay Fishing 2003 6 SA 407 (SCA); Minister of Environmental Affairs and Tourism & Others v Smith 2004 (1) SA 308 (SCA).

[7] As per the ratio in *Biowatch Trust v Registrar Genetic Resources and Others*

[2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC), in which it was held that private parties that lost in constitutional litigation against the State should not as a rule be mulcted in costs. This means that when a private party sought to assert a constitutional right against the government and failed, each party should bear its own costs.

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