

SOUTH AFRICA / JUDGMENT

# Lötter v Electoral Commission and Others

## (001/14 EC) [2014] ZAEC 2 (3 April 2014)

### [2014] ZAEC 2

## COURT

Electoral Court

## BEFORE

Mthiyane, Moshidi, Wepener

## CASE / FILE NUMBER

001/14 EC

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IN THE ELECTORAL COURT OF SOUTH AFRICA

## JUDGMENT

Case No: 001/14 EC

Date: 3 April 2014

In the matter between:

ANDRÉ DAWID LÖTTER.....APPLICANT

and

ELECTORAL COMMISSION.....FIRST RESPONDENT

AFRICAN NATIONAL CONGRESS.....SECOND RESPONDENT

INKATHA FREEDOM PARTY.....THIRD RESPONDENT

NATIONAL FREEDOM PARTY.....FOURTH RESPONDENT

AFRICAN CHRISTIAN DEMOCRATIC

PARTY.....FIFTH RESPONDENT

DEMOCRATIC ALLIANCE.....SIXTH RESPONDENT

OWETHU RESIDENTS ASSOCIATION.....SEVENTH RESPONDENT

MINISTER OF POLICE.....EIGHTH RESPONDENT

NATIONAL PROSECUTING AUTHORITY.....NINTH RESPONDENT

MINISTER OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT.....TENTH RESPONDENT

MEC FOR CO-OPERATIVE GOVERNMENT AND TRADITIONAL

AFFAIRS.....ELEVENTH RESPONDENT

Summary: Application for an interdict to postpone a by-election — applicant failing to prove the requisites for the granting of an

interdict — supporting affidavit deficient — containing merely irrelevant and offensive allegations against certain specified individuals and political parties — respondent seeking costs order against applicant — Costs order not granted in the absence of argument and on the basis of this court's earlier

### **ruling.**

Mthiyane DP (Moshidi and Wepener JJ concurring):

- [1] On 18 March 2014 the applicant, André Dawid Lötter brought an urgent application seeking an order directing that the first and eleventh respondents postpone the municipal by-election scheduled to take place Ward 22 Abaqulusi Local Municipality (Ward
- 22) on 26 March 2014. The applicant also sought an order interdicting and restraining the first and the eleventh respondents from holding a by-election in Ward 22 prior to four events referred to herein after, from taking place.
- [2] On 25 March 2014 this court made an order dismissing the application and indicated then, that reasons for it will be handed down in due course. In what follows I set out those reasons.
- [3] The applicant sought an order in the following terms:
  - 1. That the first and eleventh respondents be ordered to postpone the by-election scheduled to take place in Ward 22 Abaqulusi Local

Municipality on 26 March 2014;

- 2. That the first and eleventh respondents be interdicted and restrained from convening a by-election in Ward 22 of the Abaqulusi Local

Municipality prior to:

2.1 the Applicant's appeal to the Electoral Court orders of 8 May 2013 and 9 December 2013 having been fully exhausted in the Constitutional Court and/or final order having been issued by the Constitutional Court in response to the Applicant's request for a review of the Constitutional Court order of 7 March 2014;

2.2 completion of the South African Police Service's investigation and publication of a final report on the various complaints of electoral fraud in Ward 22 of Abaqulusi Local Municipality;

2.3 the imposition by a court of justice of the criminal sanctions and penalties provided for by law on the perpetrators of electoral crimes in Ward 22 of Abaqulusi Local Municipality that have been identified by the investigation of the Electoral Commission and/or that may still be identified by SAPS and/or investigations conducted by other entities;

2.4 the imposition by a court of justice of the civil and electoral sanctions and penalties provided for by the law on the perpetrators of breaches of the Electoral Code of Conduct in Ward 22 of Abaqulusi Local Municipality that have been identified by the investigation of the Electoral Commission and/or that may still be identified by SAPS and/or investigations conducted by other entities.

[4] The first respondent is the Electoral Commission (the Commission) and the eleventh respondent is the Member of the Executive Council for Co-Operative Government and Traditional Affairs (the MEC). It appears that the other respondents are cited as no more than interested parties likely to be affected by the orders sought as no relief is sought against them.

[5] The relief sought by the applicant in prayers 1 and 2 of his Notice of Motion is in the nature of an interdict. It is trite that in application proceedings an applicant must stand or fall by the allegations made in his or her founding affidavit. In interdict

proceedings the applicant is required to establish three things: a clear right, a reasonably founded apprehension of irreparable harm if the interdict is not granted; the absence of any other remedy. Where an applicant seeks an interim interdict he or she is required to establish, firstly, a right which though prima facie established, may be open to doubt; secondly, a well-grounded apprehension of irreparable injury; thirdly, the absence of any other remedy and fourthly, that the balance of convenience favours the granting of the interim interdict. See *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton & others*[1]; *Chief Nchabeleng v Chief Phasha*. [2]

[6] The affidavit deposed to by the applicant in support of the application falls woefully short of the above requirements and does not make out any case for granting of either a final or an interim interdict, as it does not meet any of the above requirements. It commences with an assertion that the applicant is a 'a politician and a freelance translator residing on the Brandkraal Farm in the voting district of Silweni of Ward 22 of the Abaqulusi (Vryheid) Local Municipality, in the province of KwaZulu-Natal.' It thereafter gives reasons for including the eleven respondents and mentions vaguely that the elections will not be free and fair because 1800 cases remain unresolved and finally sets out what the applicant describes as the background to the application. The affidavit is interspersed with personal attacks on certain persons and political parties.

- [7] The applicant is not standing as a candidate in the municipal by election in Ward 22. In those circumstances it is not readily apparent on what facts the clear right to an interdict are based. The applicant does not satisfy the first requirement of the granting of an interdict, namely a clear right. The same can be said for the second requirement. It is difficult to see how the applicant could claim to suffer or to have suffered any harm when he is not a candidate for the election. As a voter there is nothing stopping him from voting in the by-election and he has not alleged any inability in this regard. One does not commence to consider the third and fourth requirements of an interim interdict being the absence of any other remedy. In my view, if the applicant fails on the first and second requirements for the granting of the orders, that is the end of the matter. There is nothing contained in the papers to suggest that the applicant is acting in the public interest or on behalf of someone else. All the indications point to him acting personally. The applicant has not provided a shred of evidence to suggest that he has a clear right to the relief he seeks or that he might suffer irreparable harm if the orders were not granted.
- [8] However, there are other reasons why the application is bad in law. This is to be found in the reasons the applicant gives and the order he seeks to postpone the election. Firstly, he states that the by-election should not be held until his request for review of the order made by the Constitutional Court is analysed. The point is ill-founded and misconceived. The order of the Constitutional Court, as the highest Court in the land, is not capable of review by any court in this country. It appears that after the Constitutional Court dismissed the applicant's application for leave to appeal, he wrote a letter to the Chief Justice requesting him to review the decision made by the Constitutional Court. The Chief Justice is not empowered to review an order of the Constitutional Court and we have not been referred to any authority for such a proposition. The relief sought is incompetent and is therefore clearly ill-conceived.
- [9] Secondly, the applicant seeks the by-election to be postponed until the 'completion of the South African Police Service's investigation and publication of a final report on the various complaints of electoral fraud in Ward 22'. The election fraud referred to relates to the previous election called in 2013 in that ward. The allegations were fully investigated by the Commission and as a result of that 1800 voters' names were removed from the roll. There is not a shred of evidence that the current roll has voters whose names have fraudulently found their way into the roll, other than the bald assertion by the applicant that he is 'convinced that up to date about 1000 more fraudulent voters remain on the lists of Ward 22'. The applicant has placed no evidence before this court to prove these allegations.
- [10] The third and fourth reasons for seeking the elections to be postponed do not take the matter any further. It is difficult to see how the imposition of sanctions for the commission of crimes and breaches of the electoral code in respect of a proposed by-election in 2013 is of any relevance to the by-election in March 2014. In my view, the applicant has failed to make out a case for the granting of the relief sought.

- [11] The disturbing aspects of the applicant's case is that he appears to have spent more time launching personal attacks against several persons and devoted less energy providing essential evidence to prove his case. He has taken the liberty to vilify the Registrar of the Constitutional Court and claims that he was treated unconstitutionally in the Constitutional Court; he has lashed out at the Commission, he has accused the SAPS as being in cahoots with the second respondent. It is a source of great concern that a man of the applicant's calibre, who claims to be 'a seasoned politician', takes liberty to treat people, including officials of the court, with such disrespect. He exhibits inexhaustible resources of energy which are misdirected and misplaced, to the point where he overlooks the basic aspects necessary to support the relief he seeks.
- [12] Even before delivery of this judgment the applicant wrote a letter to the Secretary of this Court asking her to inform this Court that he required the reasons for its order because he intended to appeal it. This court has never indicated that it would not give reasons. In fact the order we issued on 25 March 2014 states clearly that reasons for it would be furnished. The applicant set himself to appeal the decision even before he had seen the reasons for the dismissal of his application. Clearly therefore to him, the merits of the litigation does not matter so long as he can unleash on the court with a wad of papers.
- [13] The Commission, in understandable frustration, has asked that the applicant be ordered to pay costs for abusing the process of court. I have no doubt that the applicant indeed comes close to that. Even though this court has in the past ruled that the litigants in this court, who are pursuing their constitutional right to participate in an election should not be made to pay costs, it is difficult to argue against it where you have an applicant who seizes every opportunity to spew out one frivolous application after another, and spares no effort in vilifying members of the Court and its officials. Perhaps the time has come for this court to reconsider its earlier decision on the costs question of or to approach the legislature to make the necessary amendment to legislation to empower this Court to make costs orders where frivolous litigation is instituted.
- [14] I do not, however, think that costs should be ordered in the present matter, especially where the question of costs has not been argued.
- [15] For the above reasons the application was dismissed.

K K Mthiyane

Deputy President

[1] Eriksen Motor (Welkom) Pty Ltd v Protea Motors, Warrenton & Others 1973

(3) SA 658 (A) at 691D-E.

[2] Chief Nchabeleng v Chief Phasha 1998 (3) SA 578 (LCC) para 6

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Prepared on 12 October 2026 · Esheria