

SOUTH AFRICA / JUDGMENT

Lotter v Electoral Commission and Others

(006/2014) [2014] ZAEC 3 (19 May 2014)

[2014] ZAEC 3

COURT

Electoral Court

BEFORE

Shongwe JA, Moshidi J, Wepener J

CASE / FILE NUMBER

006/2014

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REPUBLIC OF SOUTH AFRICA

ELECTORAL COURT HELD AT BLOEMFONTEIN

CASE NO: 006/2014

19 May 2014

In the matter between

ANDRÉ DAWID LÖTTERAPPLICANT

and

ELECTORAL COMMISSION.....FIRST RESPONDENT

FAITH DIKELEDI PANSY TLAKULA.....SECOND RESPONDENT

ISMAEL TERRY TSELANE.....THIRD RESPONDENT

GIDFONIA MLINDELWA MAKHANYA.....FOURTH RESPONDENT

BONGANI BLESSING FINCA.....FIFTH RESPONDENT

RAENETTE TALJAARD.....SIXTH RESPONDENT

Summary

Election Law - Urgent application to have commissioners of the IEC removed from office and postponement of the National and Provincial elections on the eve of the elections - No reasons for urgency - non joinder of President, Premier and political parties - Failure by applicant to comply with the Electoral Act (73 of 1998), Electoral Commission Act (51 of 1996) and the Rules of the Electoral court - application dismissed.

JUDGMENT

SHONGWE JA: (MOSHIDI ET WEPENER JJ CONCURRING)

- [1] On 6 May 2014, this court (sitting in chambers), issued an order dismissing the applicant's application and directed that reasons would follow in due course - these are the reasons.
- [2] This is an application in which this court is asked firstly, to recommend to the National Assembly the removal from office of all current Commissioners of the Electoral Commission (the Commission). Secondly, that the President of South Africa suspends all current Commissioners immediately. Thirdly, to postpone the national and provincial elections scheduled to take place on 7 May 2014.
- [3] The application is said to be brought in the public interest and on behalf of all South Africans. It was launched on 30 April 2014, seven days before the date of the national and provincial elections.
- [4] The applicant relies upon the grounds that the national common voters' roll is inaccurate because it includes names of people who are not entitled to vote and also that it does not reflect them in the correct segment of the roll.

He argues that the Commission, as the guardian of the voters' roll, should accept responsibility of the veracity of the roll. Further, that in some instances the voters' roll contained names of foreign nationals

- who come into the country only to vote.

- [5] The respondents attacked the application on many fronts - but emphasized the urgency, non - joinder, the implications of a postponement of the elections and the new issues raised by the applicant in his replying affidavit. The respondents also gave an explanation of why the answering affidavit was served just one minute after the stipulated time and asked for condonation therefor.
- [6] The issues for determination are whether applicant succeeded in establishing the threshold of what is required before a commissioner is removed from office - s 7 of the Electoral Commission Act 51 of 1996 (the Electoral Commission Act) -, whether the applicant complied with s 15 of the Electoral Act 73 of 1998 (the Electoral Act) dealing with objections to a voters' roll - and whether the applicant has satisfied the legislative requirements for the postponement of an election - national or provincial. (Section 21(1) of the Electoral Act).

- [7] Before I deal with the topics for determination mentioned in paragraph 6 above, it is instructive to deal with the question of urgency. The Electoral court is a specialised court that oversees the Electoral Commission and the conduct of elections in South Africa. It stands to reason that its function is mainly when there are elections, which events occur infrequently. It is in the nature of the work done at the Electoral Court that matters are dealt with as expeditiously as possible.
- [8] The applicant lodged his application on 30 April 2014, as mentioned before, 7 days before the election day. He then proposed 6 May 2014 as the date for hearing of his application. What is significant is that all the reasons and grounds upon which he basis his application and the relief sought are incidents which occurred long before the announcement of the national election date by the President. The election date was announced on 20 February 2014 in terms of the proclamation promulgated and signed by the Minister of Cabinet and President. As for the promulgation of the provincial elections by the various Premiers, it was also in or about February 2014. The application was brought on extremely truncated time frames without any explanation at all.
- [9] It is unexplained why the appellant waited up and until the eleventh hour to lodge his application. It is therefore unavoidable to conclude that any urgency in this application is self-created. This application can be dismissed on this ground alone. However, this court will deal with the merits because the issues involved include fundamental rights of suffrage which are protected by our Constitution.

Removal of Commissioners from office

[10] Section 7(3) of the Electoral Commission Act provides as follows:

‘(3) A commissioner may-

(a) only be removed from office by the President-

(i) on the grounds of misconduct, incapacity or incompetence;

(ii) after a finding to that effect by a committee of the National Assembly upon the recommendation of the Electoral Court and;

(iii) the adoption by a majority of the members of that Assembly of a resolution, for that commissioner’s removal from office;

(b) be suspended from office by the President at any time after the start of the proceedings of the committee contemplated in paragraph (a) (ii);

(c) be reappointed, but only for one further term of office.’

Firstly, the applicant in this case relies on s 7(3) (a)(ii) which empowers this court to recommend to a committee of the National Assembly to hold an inquiry for such removal. Secondly, he relies on s 7(3) (b) which empowers the President to suspend a commissioner from office at any time after the start of the proceedings of the committee contemplated in paragraph (a)(ii) above.

[11] In an attempt to substantiate his reasons requesting this court to make a recommendation to the committee of the National Assembly, the applicant cites previous cases of by-elections at local government level where certain allegations of fraud were raised by him, which allegations were investigated and satisfactorily resolved by the Commission, as examples of misconduct, incapacity or incompetence of the commissioners. In some of the previous cases referred to, this court has held that the Commission has done everything possible within its powers to investigate and act on the allegations of fraudulent registration of voters with respect to ward 22 by - elections in Abaqulusi Local Municipality. The applicant has failed to cite any substantial incompetence, misconduct or incapacity which may warrant an investigation or inquiry by a committee of the National Assembly. Even an appeal to the constitutional court, in respect of the Abaqulusi matter, was unsuccessful. After the suspension of the by-election - and after the investigation by the Commission, the by-elections proceeded and the results were declared on 27 March 2014.

[12] Section 20(3) of the Electoral Commission Act provides that this court may determine its own practice and procedure and make its own rules. Subsec (7) further provides that this court may investigate any allegations of misconduct, incapacity or incompetence of a member of the Commission and make any recommendation to a committee of the National Assembly as referred to in s 7(3) (a)(ii) above. The applicant failed to comply with these provisions in good time. He waited up and until the day before the elections to request an investigation based on unsubstantiated allegations. The applicant did not attempt to comply with the provisions of rule 8 of the Rules of this court regulating the conduct of the proceedings of this court. Therefore, the applicant has failed to identify facts to justify any allegations of incompetence or misconduct on the part of any of the commissioners.

Objections to voters' roll

[13] It is useful to quote the entire provisions of s 15 of the Electoral Act - It reads as follows:

'15 Objections to voters' roll -

- (1) In relation to any segment of the voters' roll or a provisionally compiled voters' roll, any person may object to the Commission in the prescribed manner to-
 - (a) the exclusion of any person's name from that segment;
 - (b) the inclusion of any person's name in that segment; or
 - (c) the correctness of any person's registration details in that segment.

- (2) A person who objects to the exclusion or inclusion of the name of another person, or to the correctness of that person's registration details, must serve notice of the objection on that person.
 - (3) The Commission must decide an objection and, except for an objection in relation to a provisionally compiled voters' roll, by not later than 14 days after the objection was made, notify the following persons of the decision:
 - (a) The person who made the objection;
 - (b) the chief electoral officer; and
 - (c) in the case of an objection against the exclusion or inclusion of the name, or the correctness of the registration details, of a person other than the objector, that other person.'
 - (4) The chief electoral officer must give effect to a decision of the Commission in terms of subsection (3) within three days.
 - (5) No appeal may be brought against the Commission's decision, subject to section 20 (2) (a) of the Electoral Commission Act.'
- [14] The registration of voters and compilation of the voters' roll is governed by Chapter 2 of the Electoral Act. Any South African citizen in possession of an identity document may apply for registration as a voter. The Commission is not required by law to verify the address supplied by each voter when they register - the legal requirement is that the voter must be ordinarily resident in a voting district.
- [15] The applicant spent the greater part of his founding affidavit detailing local government by-elections which were previously the subject of litigation against the Commission. A survey of all those cases shows that the Commission responded quickly, efficiently and effectively to all allegations of fraud in the electoral process. I find it difficult to conclude that the Commission conducted itself in any manner contrary to its legislative and constitutional obligations.

Postponement of national and provincial elections

- [16] Section 21(1) of the Electoral Act provides as follows: -

“(1) The Commission may request the person who called an election to postpone the voting day for that election, provided the Commission is satisfied that-

- (a) the postponement is necessary for ensuring a free and fair election; and
- (b) the voting day for the election will still fall within the period as required by the Constitution or national or provincial legislation

thereunder.”

- [17] The essence of the applicant's case in favour of a postponement of the elections is that the voters' roll is inaccurate because the address of each voter has not been verified. Unfortunately, the applicant has failed to place any evidence before this court showing that the voters' roll is inaccurate, other than vague unsubstantiated anecdotal comments about South Africans being bussed into the country to vote. The applicant has failed to comply with the provisions of s 21(1) of the Electoral Act. He has failed to join the President, the Premiers and political parties as parties who have a substantial interest in the postponement of elections.
- [18] The process of conducting national and provincial elections is a mammoth task which begins approximately 24 months beforehand
- not simply to ensure that elections take place efficiently but also to ensure that the rights and interest of candidates, political parties and voters are protected and given effect to. In *Matatiele Municipality & others v President of RSA & others* 2006
- (5) SA 47 (CC) at para 79 Ngcobo J remarked as follows:
- 'It is not desirable to disrupt elections. As a general matter, this must be resorted to only when it is in the interests of justice to do so. It will generally be the case where the postponement of elections is unavoidable. This will be the case, for example, where the adverse consequences of holding elections far exceed those that will ensue if the elections are not held.'
- [19] For the applicant simply to ask this court to postpone national and provincial elections without any consideration of the broader implications of this is grossly unreasonable and highly presumptuous. There is nothing in the founding as well as the replying affidavit of the applicant to indicate that the adverse consequences of holding elections far exceed those that would ensue from postponing them.
- [20] The appellant filed a lengthy replying affidavit in which he raises a series of new issues and new reasons for the relief sought. These include the fact that he is of the view that the President is shortly to be impeached and that the elections will not be free and fair, which is a speculation, in the absence of a final report by the Parliamentary Committee on Nkandla. He raises a pending application against the second respondent as constituting grounds justifying a postponement. He also, without any substantiation, raises the issue of my recusal.
- [21] It is an established principle of our law that the applicant is precluded from raising new matters in his replying affidavit unless the new matters relate to new facts previously unknown to the deponent or where the existence of a further ground of relief appears from the answering affidavit. (See *Finishing Touch 163 (Pty) Ltd v BH & Billiton Energy-Coal SA Ltd* 2013
- (2) SA 204 (SCA) at para 26).

[22] In conclusion, for the reasons set out above, I find that there is no factual or evidential basis laid by the applicant for such very far reaching and unprecedented relief. I also find that the applicant suffered no prejudice, for the answering affidavit was filed one minute after the stipulated time. Due to the nature of this application - this court is not in a position to make an in depth evaluation of the issue of costs against the applicant, though I am of the view that this particular application was frivolous and vexatious deserving of an adverse costs order against the applicant.

[23] In the result the application was dismissed.

SUBMISSIONS

APPLICANT: In Person

FIRST AND SECOND

RESPONDENTS: MTK Moerane SC with N Rajab-Budlender

Instructed by Gildenhuys Malatji Inc Pretoria

DATE OF HEARING: 6 May 2014

DATE OF ORDER: 6 May 2014

DATE OF JUDGMENT: 19 May 2014

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Prepared on 13 October 2026 · Esheria