

SOUTH AFRICA / JUDGMENT

National Democratic Convention and Another v Electoral Commission and Others (EC011/06) [2006] ZAEC 1 (7 July 2006)

[2006] ZAEC 1

COURT

Electoral Court

BEFORE

Mthiyane JA, Pillay J, Masipa J, Ms S Moodley, Ms S W Abro

CASE / FILE NUMBER

EC011/06

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CASE

NO: EC011/06

IN THE

ELECTORAL COURT OF SOUTH AFRICA

In the

matter between:

THE
NATIONAL DEMOCRATIC
CONVENTION.....First
Appellant
CHRIS
VAN DER
HEYDE.....
.... Second Appellant
and
THE
ELECTORAL
COMMISSION.....First
Respondent
CHRISTIAN
DEMOCRATIC PARTY.....Second
Respondent
CITY
OF TSHWANE METROPOLITAN COUNCIL.....Third
Respondent
AFRICAN
NATIONAL CONGRESS
.....Fourth

Respondent

CORAM: MTHIYANE JA, PILLAY J, MASIPA J, Ms S MOODLEY (MEMBER)

DELIVERED: 7 JULY 2006

SUMMARY: Mis-posting of votes affecting outcome of the election surfacing sometime after the cut off date - Political party prejudiced thereby lodging its objection late - Whether it was competent under s 65 of the Local Government Municipal Electoral Act 27 of 2000 for the Electoral Commission to condone the late filing of the objection and to consider it, and whether good cause was shown.

JUDGMENT

Ms S W ABRO (Member)

1. After 1 March 2006 municipal elections for the Tshwane Metropolitan Council, the First Appellant (hereinafter referred to NADECO) was allocated one seat in the proportional representation elections.
2. The Second Appellant was NADECO's party list candidate elected in that seat.
3. The Second Respondent (CDP) lodged an objection in terms of Section 65 of the Local Government: Municipal Electoral Act, Act No. 27 of 2000 (the Municipal Electoral Act), alleging that after the counting of the votes in voting district number 86660949 in Tshwane Ward 14, it was incorrectly recorded on the result sheet that NADECO ward candidate, the Second Appellant, had received 681 votes and the African National Congress (ANC) candidate none.
4. It was further submitted that the correct result of the count was that the ANC candidate had received 681 and the NADECO candidate none.
5. The First Respondent noted that the incorrect recording did not affect the result of the ward election won by the ANC candidate, but it did affect the result of the proportional representation election.
6. For the purpose of the calculation to determine the number of seats (if any) to be allocated to each participating party, the votes won by that party's candidates in the ward election are added to the votes it won in the proportional representation election.
7. With the 681 votes incorrectly recorded to its credit, the NADECO's total number of votes came to 2,658 and that of the Christian

Democratic Party, the Second Respondent (CDP) to 2,607.

8. Based on these figures the First Respondent allocated one seat to the NADECO and none to the CDP.
9. If the incorrectly recorded 681 votes are deducted from NADECO's total, NADECO would have had a total of 1,977 votes to the CDP's 2,607 and the CDP would have been allocated the one seat and NADECO none. When the First Respondent conducted a comparison of the ward votes and the proportional representation votes recorded for the NADECO candidate with those recorded for the ANC candidate in other voting districts in Ward 14, and a comparison of the proportional representation votes recorded for the ANC and NADECO with the ward votes recorded for the two party candidates respectively in voting district 86660949, this exercise revealed such a large discrepancy that, prima facie, according to the First Respondent, the 681 votes in the latter voting district had indeed been incorrectly recorded for the NADECO candidate.
10. Consequently Mr R S Maseko, the presiding officer and counting officer in voting district 86660949 was approached by the First

Respondent for his comment on the discrepancy.

11. He submitted a statement to the effect that having had an opportunity to study the result sheets completed by him, he found that he had correctly recorded the proportional representation vote count, but that he had made an error in the recording of the ward vote count. In fact the NADECO candidate received no votes and the ANC candidate 681.
12. Mr Maseko stated that he had made mistake due to the format of the results sheet consisting of two pages, with NADECO at the bottom of page one and only the ANC on page two.
13. The First Respondent considered the evidence and found that the 681 votes had been incorrectly recorded for NADECO and that the total of NADECO's votes used in the determination of the proportional representation seat allocation must be reduced to 1977.
14. After then having caused the proportional representation seat allocation to be recalculated, the First Respondent decided on 31 March 2006 to amend the declared result of the election in terms of Section 65(4)(a)(n) of the Municipal Electoral Act, resulting in the proportional representation seat allocated to NADECO being reallocated to the CDP.

15 This is the decision that the Appellants are bringing on appeal to this Court in terms of Section 65(5) of the Municipal Electoral Act.

17. They submit that:

17.1 The legislation does not allow the granting of condonation after a period of seven days after the voting day has lapsed.

17.2 The First Respondent failed to comply with Section 65(4) (a) of the Municipal Electoral Act by reaching a decision after the prescribed time period for such a decision had lapsed.

17.3 The decision to grant condonation for the late submission of the objection in terms of Section 65 of the Municipal Electoral Act was wrong as the CDP had not shown "good cause".

17.4 The grounds advanced by the Second Respondent as evidenced in the Affidavit of the presiding officer, Mr Maseko, are inconclusive.

18. The objections to the election and how they are to be dealt with are governed by Section 65 of the Local Government Municipal Electoral Act, 27 of 2000. It provides as follows:

(1) An interested party may lodge an objection concerning any aspect of an

election that is material to the declared result of the election with the

Commission by serving, by not later than 17.00 on the second day after voting day, at its office in Pretoria a written notice containing:

- (a) a reference to the election concerned;
- (b) the full name and address of the objector;
- (c) the postal address and telephone number where the objector can be contacted;
- (d) the interest of the objector in the matter;
- (e) details of the objection and the aspect of the election concerned;
- (f) detailed reasons for the objection;
- (g) the relief sought;
- (h) a list of any supporting documents accompanying the notice of objection; and
- (i) proof of service of copies of the notice and annexures on other parties involved in the objection.

(2) The Commission, on good cause shown, may condone a late objection.

(3) In considering and deciding the objection, the Commission may:

- (a) investigate the factual basis of the objection;
- (b) afford interested parties an opportunity to make written or verbal submissions;
- (c) call for written or verbal submissions from other persons or parties;
- (d) call upon the objecting party to submit further information or arguments in writing or verbally; and
- (e) conduct a hearing on the objection.

(4) The Commission must:

- (a) consider the objection and decide it within three days after it was served on the Commission, and either:
 - (i) reject the objection;
 - (ii) amend the declared result of the election; or (iii) rescind the declared result of the election; and
- (b) immediately notify the objector and any other parties involved in the objection, of the decision.
- (5) An objector or other party involved in the objection who feels aggrieved by the decision of the Commission may, within three days of the Commission's decision, appeal to the Electoral Court in terms of Section 20 of the Electoral Commission Act and the Rules of the Electoral Court.
- (6) The Electoral Court must:
 - (a) consider the appeal and either.
 - (i) reject the appeal;
 - (ii) amend the decision of the Commission; or
 - (Hi) make another appropriate order; and
 - (b) notify the parties to the appeal of its decision.
- (7) The declared result of an election is not suspended by an appeal to the Electoral Court.
- 19. On a proper construction of the section I am satisfied that the First Respondent had the power to grant condonation. That is clear from section 65 (2). In terms of section 65 (3) the First Respondent was obliged to investigate the new facts raised by the CDP. It is clear from the affidavit put up by Ms Kerry Botha, the CDP's Gauteng Provincial leader, that the error was discovered only after the party was 'handed the WARD hard copy list' of the results on Wednesday 15 March 2006. When they examined the document on Saturday 18 March 2006 they discovered the discrepancy. On Monday 20 March 2006 Ms Botha addressed a letter to the First Respondent advising it of the discrepancy. The matter was investigated and this culminated in the statement by Mr Maseko on 29 March 2006, explaining how the discrepancy occurred. There was in my view no remissness on the part of the CDP and the First Respondent in the manner in which they dealt with the matter. In my view the First Respondent correctly granted condonation. To deal with the matter otherwise would have been tantamount to perpetuating Mr Maseko's obvious error in the calculation of votes, to the detriment of CDP, and to credit the appellants with votes to which they were not entitled. It can clearly not be contended that the interests of justice would be served by adopting that course. It is surprising that the Second Appellant, a practising Advocate and an officer of this Court, should persist in that line. The Appellants have had an opportunity to respond but have elected not deal with how the First Respondent should have dealt with the facts

contained in Mr Sibeko's statement, save only to persist in their bald contention that Mr Maseko's statement is inconclusive and that condonation should not have been granted. The stance adopted by the appellants is in my view not legally sound.

20. As already intimated the decision to rectify the error was made expeditiously by the First Respondent after the objection by the CDP was served upon it and due notice given to the Appellants.
21. It is as well to remind oneself that where a functionary is given a discretion to deal with a matter, as in the present case, a court can only interfere where there has been an improper exercise of that discretion. The Appellants have placed no evidence before us to suggest that the discretion was exercised improperly or unreasonably in this case. In my view good cause has been shown for the granting of condonation by the First Respondent on the basis of the information that subsequently came to its attention concerning Mr Maseko's error.
22. It is clear that there was an obvious mistake on Mr Maseko's part and the objective evidence makes his explanation plausible.
23. I am satisfied that good cause was shown, that the Second Respondent had a reasonable explanation, and that the First Respondent exercised its discretion appropriately.
24. The appeal is accordingly dismissed.

Ms S W ABRO

CONCUR

MTHIYANE JA

PILLAY J

T M MASIPA J

Ms S MOODLEY (MEMBER)

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Prepared on 11 October 2026 · Esheria