

SOUTH AFRICA / JUDGMENT

National Freedom Party v Electoral Commission and Another (006/2016 EC) [2016] ZAEC 2 (5 July 2016)

[2016] ZAEC 2

COURT

Electoral Court

BEFORE

Shongwe, Moshidi, Wepener, Mthembu, Pather

CASE / FILE NUMBER

006/2016 EC

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IN THE ELECTORAL COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

CASE NO: 006/2016 EC

DATE: 05 JULY 2016

In the matter between:

NATIONAL FREEDOM PARTY.....Applicant

And

ELECTORAL COMMISSION.....Respondent

INKATHA FREEDOM PARTY.....Applicant to intervene

Coram: SHONGWE JA ET MOSHIDI ET WEPENER JJ (WITH Adv. MTHEMBU and Ms. PATHER – MEMBERS)

Heard: 1 July 2016

Delivered: 5 July 2016

J U D G M E N T

WEPENER J: (SHONGWE JA, MOSHIDI J, Adv MTHEMBU AND Ms PATHER – MEMBERS CONCURRING):

- [1] On Friday 1 July 2016 the applicant sought relief from this Court on an urgent basis. After hearing argument and considering the matter the Court issued the following order:

The application is dismissed with no order as to costs.

[2] What follows are the reasons for the dismissal of the application.

[3] The applicant is the National Freedom Party (NFP), a registered political party that intended participating in national municipal

elections called for 3 August 2016.

[4] The first respondent is Electoral Commission, commonly known as the Independent Electoral Commission or IEC (“the Commission”),

a body established pursuant to the Constitution with its objects set out in s 4 of the Electoral Commission Act (“the Electoral

Commission Act”), (as being to ‘strengthen constitutional democracy and promote democratic electoral processes’.

The Constitution obliges the Commission to manage elections in accordance with national legislation. In this case, inter alia, the Local Government: Municipal Electoral Act[1] (the Municipal Electoral Act).

[5] The applicant for leave to intervene is the Inkatha Freedom Party (IFP) a registered political party who is participating in the upcoming municipal elections in those wards where it has complied with the prescripts regarding participation in elections.

[6] On Friday 24 June 2016 the NFP lodged an application for leave to appeal to this Court against, what it termed, decisions of the Electoral Commission. The applicant gave notice that it

‘... hereby lodges an application for leave to appeal to the Electoral Court in which it will seek condonation from the court and does so having regard to the fact that the Electoral Commission (“the Commission”) lacks the power to condone late submission of the candidates or the late payment of election deposits and its consequent inability to grant condonation as set out in the email of Portia Mashakeni dated 23 June 2016 (attached). The court is enjoined to grant condonation in the light of the exceptional circumstances set out herein in respect of-

(a) The irregular electronic submission by the Applicant of the nomination of ward candidates for the Ladysmith / Waaihoek, Umvoti, Umhlaluyalingana and Mthubathuba Local Municipalities and directing the Commission to accept the nomination of ward candidates as specified in annexure “ALA1” hereto.

(b) The payment of the deposit payable in terms of Section 14 and 17 of the Local Government: Municipal Electoral Act No. 27 of 2000 on the 22 June 2016.’

[7] The notice of motion continues to set out the basis upon which the applicant averred that it should be granted the leave to appeal sought by it.

- [8] The Chairperson of this Court decided to hear argument before taking a decision whether to grant such leave pursuant to s 20(2)(a) of the Electoral Commission Act.
- [9] The Commission and the IFP responded to the application for leave to appeal as well as the grounds upon which the applicant's case was based.
- [10] During the course of argument on behalf of the NFP counsel advised that the NFP was no longer pursuing the relief as set out in the application for leave to appeal and which was responded to by the Commission and the IFP. No argument was submitted regarding the original notice of motion and in particular prayer (a) thereof. In the circumstances the question of an irregular electronic submission of ward candidates has become moot. Prayer (b) was not persisted with and in that sense it too has become a moot point in this Court.
- [11] The NFP advised that the applicant now sought the relief as formulated in the heads of argument, which is as follows:

'20. The Applicant accordingly seeks an order in the following terms:

- (a) That the Applicant be granted leave to appeal;
- (b) That the appeal be upheld and an order made:
 - (i) That the failure by the Applicant to pay the deposit payable in terms of sections 14 17 of the Local Government: Municipal Electoral Act, 2000 on or before 2 June 2016 and the payment of such deposit on 22 June 2016 is condoned and the Electoral Commission is directed to publish notice in the Government Gazette in terms of s 11(2) of the said Act amending the time for the payment of the deposit on the election timetable from 2 June 2016 to 22 June 2016;

alternatively

(ii) That the Electoral Commission is directed to give consideration to s 11(2)(b) of the Local Government: Municipal Electoral Act, 2000 and, if it is of the opinion that it is necessary for free and fair elections to allow the Applicant to participate in the election, it is directed to amend the electoral timetable to extend the date for payment of the deposit payable in terms of sections 14 and 17 of the said Act to 22 June 2016.

(iii) No order as to costs.'

In his replying argument, counsel for the NFP advised that the applicant no longer sought the relief in para 20(b)(i) of the heads of argument but only the alternative relief in para 20(b)(ii).

- [12] In essence it is clear that the NFP seeks leave to appeal and that the issue be referred back to the Commission for a consideration on a question whether the elections would be free and fair due to the NFP's exclusion and to allow the NFP to participate in the election. Upon questions by the Court counsel elected not to pin his colours to the mast of an appeal but submitted that the matter is an appeal stroke review.

- [13] The first question to be answered is what is it that the NFP seeks to appeal against? It is not apparent that there was any finding or order by the Commission which could form the basis of an appeal. In the absence of any finding or order or directive issued by the Commission it is difficult to find a basis for the case advanced by the NFP.
- [14] On the assumption that the Commission issued an order, and I do not find that it did so, the powers of this Court in matters of appeal to it must be considered.
- [15] Section 20(2)(a)[2] of the Act sets out the circumstances in which this Court may hear an appeal. The Commission did not interpret any law with the result that an appeal may be noted against 'any other matter for which an appeal is provided by law'. The instances where an appeal is provided for are limited.
- [16] Section 30(4) of the Electoral Act allows for an appeal against the decision of the Commission in relation to the nomination of a candidate where an objection was lodged against that candidate pursuant to s 30(1) on the grounds that the candidate is not qualified. These grounds are set out in s 30(1).[3] This is clearly not such a case.
- [17] Section 55(5) of the Electoral Act deals with an appeal against a decision of the Commission regarding the final result of an election – this too has no application in this matter.
- [18] Section 65(9) of the Local Government: Municipal Electoral Act[4] similarly deals with the decision of the Commission that can be appealed after an election has been held.
- [19] I have consequently come to the conclusion that there is no appeal procedure available to the NFP based on the facts alleged by it and that no leave to appeal can be granted to it pursuant to s 20(2)(b) of the Electoral Commission Act. The Chairperson of this Court consequently declined to grant the NFP leave to appeal.
- [20] Having come to this conclusion it is unnecessary to consider the merits of the IFP's argument in the application to intervene in the application for leave to appeal as such leave has not been granted to the NFP.
- [21] Despite the NFP having approached this Court on the basis of an appeal counsel submitted that it can also be approached as a review and that this Court has wide powers of review.[5]
- [22] In order to review something, the latter which is usually a decision taken by a person or body, a court is dependent on the

record of proceedings and the decision taken in order to consider it. In this regard the Rules Regulating the Conduct of the Proceedings of the Electoral Court provide:

'6. Review proceedings

- (1) A party who is entitled to and wants to take a decision of the Commission on review must lodge a comprehensive written submission with the Secretary within three day after the decision has been made.

- (2) The Commission must lodge a comprehensive written submission with the Secretary within three days of receipt of the submission referred to in subrule (1).
- (3) The party who takes the matter on review must –
 - (a) set out fully in its written submission –
 - (i) the decision or decisions which it requires to be reviewed; and
 - (ii) the grounds therefor; and
 - (b) attach, if possible, any relevant record or minutes of the proceedings concerned.’

[23] Apart from the fact that there exists no record or minutes of the proceedings concerned there is no identification of the decision

which may require a review.

[24] The relief now sought as referred to in counsels’ heads is a direction to the Commission to consider s 11(2)(b) of the Municipal Electoral Act and to form an opinion and then to act thereon. Nowhere is it indicated that the Commission took a decision while failing to have regard to s 11(2)(b) or what the relevant decision is. I am of the view that the failure to set out a specific decision to be reviewed and to set out a factual basis for the relief as formulated in the heads of argument, such decision has not been shown to have been taken and therefore the basis for an attack upon any decision is absent.

[25] If this view is too narrow an approach and I am to assume that the Commission took a decision, that decision was no more than a recital of its belief that it had no power to condone the late payment of the deposits which the NFP did not pay in accordance with the election timetable that has been officially published in the Government Gazette.

[26] That the NFP appealed against this belief expressed by the Commission is clear from the relief originally sought but abandoned when it sought that this Court should grant condonation for the late payment of the deposits.

[27] It is common cause that the only relevant facts are that the deposits for the candidates had to be paid by 2 June 2016 in accordance with the election timetable and that the NFP did not do so.

[28] There is no provision which enables this Court to grant condonation for the non-compliance with the provisions of the relevant

legislation nor is there any provision for the Commission to grant condonation for anyone regarding that person’s non-compliance

with the law. The election timetable which was issued by the Commission is a timetable that regulates the process of the forthcoming elections which commenced with the promulgation of the date for the elections by the relevant minister. The timetable is required in terms of s 11 of the Municipal Electoral Act.[6] Once it is published it, in my view, becomes subordinate legislation with full force and effect and becomes binding on all

parties.[7] This law is of general application to all and does not provide for condonation for non-compliance therewith. There is no sanction for non-compliance other than placing oneself outside of the contest due to non-compliance.

[29] The NFP finally advised that the relief as set out in the heads of argument would be competent due to the provisions of s 11(2)(b) of the Municipal Electoral Act in that by the inclusion of the NFP in the elections it would lead to a free and fair election but that its exclusion would not. I do not agree. The freeness and fairness of elections commence when it is first called. From that date the prospective participants are required to observe the prescripts. Individuals or parties who fail to act fairly and correctly may pay the price by exclusion. Those who did act according to the prescripts acted fairly. They are entitled to complain of an unfair election should non-compliant candidates and parties be allowed to join in the process despite their failure to comply with the prescripts. If those who disregarded the prescripts are allowed to join in on the basis contended for by the NFP I am of the view that the inclusion would be unfair vis-à-vis those participants who acted lawfully. The election timetable being law, the NFP is not pursuing the application for condonation as there is no provision for such condonation, it is asking for the law to be bent in its favour so that it need not have complied with the relevant prescripts.

[30] The election timetable is a regulatory mechanism to ensure free and fair elections. It cannot and should not be changed at the whim of an individual or party – if it is changed to suit individuals, the timetable becomes an inefficient electoral tool.

[31] The electoral process as a whole must be free and fair. It must be free and fair for all parties and not advance the interests of one party only.

[32] The ad hoc amendment of the election timetable will unfairly prejudice those parties who complied with its provisions.

[33] The provisions of s 22(1)(b) allowing the Commission to extend the timetable must be seen against this background. The power should be exercised in circumstances where it applies to all participants in the election equally otherwise it will open the flood gates for ad hoc extensions of time which way lead to unfairness and is not sanctioned by the legal prescripts.

[34] In *Economic Freedom Fighters v President of the Republic of South Africa and Others*[8] it was held:

‘Failure to pay the deposit constitutes non-compliance, resulting in disqualification from participating in the elections. Although there is a limited scope to correct lists which have been submitted in terms of section 28, there is notably no scope for condonation or waiver of the deposit requirements by the Electoral Commission itself, in terms of the Electoral Act.’

[35] In *Electoral Commission v Inkatha Freedom Party*[9], Ngcobo CJ said:[10]

‘Contrary to the argument by the IFP that disallowing its filing in Durban undermined the foundation or values of universal suffrage and multi-party democracy, these values are best advanced through the Commission’s rigorous adherence to the provisions of the Act, read in the light of their legislative purpose. And this is crucial to the integrity of the electoral process. As this Court emphasised in *Liberal Party*:

“[an] applicant’s ability to contest the forthcoming elections therefore, arises solely from its failure to comply with the

mandatory provisions of the Electoral Act and regulations and cannot be laid at the door of the Commission.”

[36] I am of the view that the NFP’s inability arose from its own failure and that in order to promote the ‘fundamental values of universal suffrage and multi-party democracy . . . ’ the Commission is required to rigorously adhere to the provisions of the prescripts.[11]

[37] Counsel for the NFP argued that due to its relative good support base this is a matter which is exceptional and requires assistance.

However, this argument has been dealt with conclusively by the Constitutional Court in the *Electoral Commission v Inkatha Freedom Party*. [12]

‘Counsel for the IFP urged this Court to hold that this was an exceptional case. He emphasised the fact that once the administrative error was discovered the IFP did everything within its power to submit the documentation in Umzumbe, but bad will prevented it from doing so. He also drew attention to the fact that there are a number of IFP voters whose likely choice of candidates would be precluded from taking part in the elections, and to the IFP’s historic strength in Umzumbe. The provisions of the Act are, however, an insurmountable hurdle for the IFP. Once it is concluded, as this Court has done, that, construed in the light of their purpose, the provisions of s 14 and 17 require local notification, the hands of the Commission are tied. In addition because this case is not about condonation for non-compliance, the question of discretion exercised in the face of exceptional circumstances simply does not arise.’

[38] The Constitutional Court further said[13]:

‘It is necessary that the integrity of the electoral process be maintained. Indeed, the acceptance of the election as being free and fair depends upon that integrity. Elections must not only be free and fair but they must be perceived as being free and fair. Even-handedness in dealing with all political parties and candidates is crucial to that integrity and its

perception by voters. The Commission must not be placed in a situation where it has to make ad hoc decisions about political parties and candidates who have not complied with the Act. The requirement that documents must be submitted to the local offices of the Commission does not undermine the right to vote and to stand for election. It simply gives effect to that right and underscores the decentralised and local nature of municipal elections.’

[39] The NFP failed to comply with its obligations to pay the deposits resulting in its failure to utilise the process available to it in order to participate in the elections in those wards where it intended to do so. The consequence of such failure is non-participation in the elections.

[40] The effect of referring the matter ‘back’ to the Commission would be to require it to consider the inclusion of the NFP despite the latter’s failure to comply with the election timetable. The Commission has no such power. It cannot assist a party who failed to comply with the prescripts. Referring the matter to the Commission to request it to consider something for which it has no power^[14], would be futile.

[41] It is for the reasons set out hereinbefore that it is not necessary to consider the application for intervention by the IFP and no order is made thereon.

[42] The following order is issued:

1. The application is dismissed.
2. There is no order for costs.

WEPENER J

SHONGWE JA

MOSHIDI J

ADV. MTHEMBU – Member

Ms. PATHER - Member

Counsel for the Applicants: M. Pillemer SC with E. Crots

Attorneys of the Applicants: Strauss Daly Incorporated

Counsel for the Respondent: K. Tsatsawane

Attorneys for the Respondent: Gildenhuys Malatji Attorneys

Counsel for the Applicant for intervention: I. Veerasamy

Attorneys for the Applicant for intervention: Lourens de Klerk Attorneys

[1] 27 of 2000.

- [2] '(2)(a) The Electoral Court may hear and determine an appeal against any decision of the Commission only in so far as such decision relates to the interpretation of any law or any other matter for which an appeal is provided by law.'
- (b) No such appeal may be heard with the prior leave of the chairperson of the Electoral Court.'
- [2] '(2)(a) The Electoral Court may hear and determine an appeal against any decision of the Commission only in so far as such decision relates to the interpretation of any law or any other matter for which an appeal is provided by law.'
- (b) No such appeal may be heard with the prior leave of the chairperson of the Electoral Court.'
- [3] '30.
- (1) Any person including the Chief Electoral Officer, may object to the nomination of a candidate on the following grounds:
- (a) The candidate is not qualified to stand in the election; (b) There is no prescribed acceptance of nomination signed by the candidate; or (c) There is no prescribed undertaking, signed by the candidate, that the candidate is bound by the code.'
- [3] '30.
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- (a) The candidate is not qualified to stand in the election;
- (b) There is no prescribed acceptance of nomination signed by the candidate; or
- (c) There is no prescribed undertaking, signed by the candidate, that the candidate is bound by the code.'
- [4] Act 27 of 2000.
- [5] Kham and Others v Electoral Commission and Another 2016 (2) SA 338 (CC) para 39.
- [6] '11. Election timetable –
- (1) When an election has been called the Commission must – (a) compile a timetable for the election in accordance with Schedule 3; and (b) publish the election timetable in the Government Gazette, ...
- (2) The Commission may, by notice has required in subsection (1)(b), amend the election timetable if –
- (a) it considers it necessary for the free and fair election; or
- (b) the voting day is postponed.'
- [6] '11. Election timetable –

- (1) When an election has been called the Commission must –
- (a) compile a timetable for the election in accordance with Schedule 3; and
 - (b) publish the election timetable in the Government Gazette, ...
- (2) The Commission may, by notice has required in subsection (1)(b), amend the election timetable if –
- (a) it considers it necessary for the free and fair election; or
 - (b) the voting day is postponed.’
- [7] See *Western Bank Limited v Packer* 1977 (3) SA 141 (T) at 141B.
- [8] 2014 ZAGPPHC 109 (11 March 2014).
- [9] 2011
- (9) BCLR 943 (CC).
- [10] At para 52.
- [11] *Electoral Commission v Inkatha Freedom Party* *ibid*.
- [12] At para 54.
- [13] At para 55.
- [14] *African National Congress v Electoral Commission and Others* (001/2008)
- [2008] ZAEC 1 (9 December 2008) para 10.
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