

SOUTH AFRICA / JUDGMENT

National Peoples Party v Electoral Commission (002/11 IEC) [2011] ZAEC 3 (21 April 2011) [2011] ZAEC 3

COURT

Electoral Court

BEFORE

Pillay, Mthiyane, Masipa

CASE / FILE NUMBER

002/11 IEC

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ELECTORAL COURT, BLOEMFONTEIN

CASE NO:002/11 IEC

DATE:21/04/2011

In the matter between:

NATIONAL PEOPLES PARTY.....Applicant

and

THE ELECTORAL COMMISSION.....Respondent

SUMMARY

Election law – Municipal elections – s 11 of Local Government: Municipal Electoral Act 27 of 2000 – Time-table for management of elections by Electoral Commission – Strict adherence - Cut-off date and time for submission of documents – Party representative entered building of commission with necessary documents and deposit within time limit – Refusal to accept documents at office as cut-off time allegedly lapsed – Allowance for minimal time difference should be made as opposed to inflexible approach - Constitutional values and dictates should be adhered to in the circumstances – Application of s 2 of Act and s 1 (d) of Constitution – Party found to have complied with Act and therefore entitled to contest the forthcoming election.

J U D G M E N T

PILLAY, J:

[1] Municipal elections in South Africa have been set for 18 May 2011 and are regulated by the Local Government: Municipal Electoral Act 27 of 2000 ('the Act'). They are to be managed by the Electoral Commission ('Respondent') established in terms of the Electoral Commission Act 51 of 1996.

[2] In terms of section 11 of the Act, the respondent compiled a time-table ('time-table') which regulates, inter alia, the submission of certain documents and necessary payments to the respondent by certain specified dates and times. Compliance

therewith secures a registered party the right to participate in the elections.

[3] The respondent caused the time-table for these elections to be published in GOVERNMENT GAZETTE NO 34114 of 11 March 2011, under

NOTICE No. 134 of 2011.

[4] It is common cause that the respondent had set the cut-off date and time for the submission of notices of intention to contest the elections as well as candidate lists and the deposit of necessary payments at 17h00 on 25th March 2011.

[5] The applicant is a duly registered party with its registered office at 12 Riverside Terraces, Hout Bay, Western Cape. It is

desirous of contesting the Local Government Election for the City of Cape Town (Category A Metro) Local Election.

[6] On 25th March 2011, intending to comply with the time-table, and carrying an envelope containing the necessary documents and a bank guaranteed

cheque, the chairman of the applicant party, Badih Jamil Chaaban, entered the parking lot of the building at 304 Durban Road, Bellville, where the respondent's offices are located on the first floor. He did so before 17h00 on 25 March 2011. He then

entered the building in question and met an official of the respondent at the front door. This official is identified as one Shireen Adams who told him to "relax, don't panic, you've made it". This was witnessed by one Monwabisi Magadla who deposed to an affidavit confirming it.

[7] Having entered the building and accepting that he had 'made it', he proceeded to the first floor to submit the aforesaid documents. He entered the office through the door which was half open. When he attempted to submit the documents in the respondent's office, he was told by a Mr Sampson, the respondent's representative, that the documents could not be accepted as the 17h00 deadline had already passed.

[8] On Monday, 28th March 2011, applicant, through its attorneys, sent a letter by telefax to the respondent requesting that the documents be accepted.

The respondent did not respond to it.

- [9] The urgent application launched by the applicant, is couched in what appears to be one for an interdict to compel the respondent to accept the aforesaid documents and to be treated as any other party who has complied with the rules, alternatively, it seeks to have the decision of the respondent reviewed and set aside together with other relief intended to cure its predicament.
- [10] In the circumstances, it would be best that this application is dealt with as a review application. This is so because at the core of the applicant's complaint, is the procedure by which the applicant was dealt with when it tendered the documents as aforesaid. More-over, it is the conduct of Mr Sampson in refusing to accept the documents when they were tendered.
- [11] In response to the application, the respondent supports the refusal to accept the documents tendered by the applicant on the basis that they were submitted after the cut off time of 17h00 on 25th March 2011. It explained that Mr Granville Abrahams is the appointed Municipal Electoral Officer for the City of Cape Town Municipality.

It is also explained that he had synchronised the time with the Telkom Electronic Time Services.

- [12] The respondent's case is that at exactly 17h00, according to Abraham's synchronised time, he announced nominations

closed. It alleges that it was only some time thereafter, that the applicant's documents were sought to be submitted and therefore refused. Mr Sampson was probably Mr Abrahams' subordinate and was merely following instructions. This is not clearly set out but nothing turns on it.

- [13] The respondent further contends that the applicant's woes were self-inflicted by reason of the party officials not doing the necessary in good time - between 11 March 2011 and 25 March 2011.
- [14] The respondent also contends that it never took the decision (as envisaged by section 20 (1) (a) of the Electoral Commission Act 51 of 1996), which the applicant seeks to be reviewed by this court, and the application should therefore be dismissed. The import of this

contention is that the applicant is not entitled to have a decision of an official taken on review by this court but only a decision

taken by the Commission in terms of section 20 of the Electoral Commission Act 51 of 1996.

- [15] The first contention is impudent and simply lacks respect for the applicant's rights. It is not capable of being sustained.

The fact of the matter is that the time-table had been established and requirements can be fulfilled at anytime within the confines of that time table. That a particular party or person chose to comply therewith at the last minute does not detract from the right to participate in the election or exercising the right to do so. To suggest that the applicant has only itself to blame and

that the chairman would not have had to rush if the requirements had been complied with long before, is not helpful. The applicant was entitled to submit the documents at any time before 17h00 on 25 March 2011.

- [16] Furthermore, the contention that this application does not deal with a decision of the respondent because it did not take a decision, is incorrect. The respondent responded to the applicant's application and the nature of its response is to support the actions of its official(s) to refuse to accept the documents tendered by the applicant on the basis that it was too late. It is clear that the situation had been discussed by it and it had decided to uphold and confirm the decision of the official(s).
- [17] In addition, the letter sent to the respondent seeking that it reverse the decision of the official was not responded to. This failure to respond, in light of the urgency of the matter, can only be construed as having decided to support the decision of the official. This is fortified by the respondent's attitude in this review.
- [18] The respondent does not dispute that Shireen Adams is an official in its employ and acted on its behalf. Neither is it in

dispute that she indicated that Chaaban was in time to submit the documents nor that he was in the building within the time limit.

That she did so, is also supported by Monwabisi Magadla, a representative of another political party. This is also not disputed

by the respondent. Absent anything to the contrary, it must be accepted that the chairman of the applicant was in the building

housing the respondent before the cut-off time.

- [19] More importantly, he was in the building where the documents were to be submitted prior to 17h00 on 25 March 2011. Having had to make his way up to the first floor would have taken up crucial moments. Had he been required to submit the documents on the ground floor where he met Adams, he would conceivably have submitted the documents in time because he would not have had taken the extra time to proceed to the first floor.
- [20] It is not practical to synchronise all clocks and watches, or any time-keeping mechanism to reflect the same time (to the minute) for everyone. Some are guided by radio announcements and others by telephone company synchronisation or television announcements and so forth.
- [21] 'Time' will therefore generally differ from person to person and from place to place. It would be unreasonable to expect

otherwise and to adhere to one of those times on the assumption that it is the correct time. Consequently, it was unreasonable for Abrahams to measure the time so strictly, particularly when others might have synchronised their time with some established time measure, other than that of Telkom and especially when it is a matter of minutes or even seconds.

[22] Chaaban alleges that he was in time and the respondent contends that he was not. What is clear is that the difference is a matter of a few minutes, if not seconds. So even if Chaaban was late, it would only have been by a few minutes at most. In view of the conclusion herein, it is not necessary to determine who is correct or who is telling the truth. Even if the applicant attempted to submit the documents after 17h00, it would have been moments after – the respondent’s staff were still in the office and Adams was still on duty.

[23] The purpose of the time-table is to facilitate the smooth running of the election process. It is intended to allow the administration of elections to proceed without disruption and for officials to properly prepare for the election by, inter alia, the announcement of the contesting parties and candidates and preparation and distribution of ballot papers to mention a few aspects. It also serves to avoid unfair advantage, occasioned by late entry, to a particular party (or candidate). Most of all, it is intended to allow time for the voter to be timeously informed of everything he or she has to be aware of before casting a vote, for example who is participating in the election, which party is represented in a particular ward, and which individuals are running for election in a particular municipality.

[24] Adherence to the time table is peremptory since certain requirements have to be complied with within the time limits stipulated in the time-table in order to properly prepare for the elections.

[25] In *LIBERAL PARTY V THE ELECTORAL COMMISSION AND OTHERS* [2004] ZACC 1; 2004 (8) BCLR 810 (CC), the appellant, a registered party was late in submitting its candidates list. The deadline was set at 17h00 on 27 February 2004.

It tendered the list at 17h21 on 27 February 2004. It was held that the “applicants’ inability to contest the forthcoming

elections, therefore, arises solely from its failure to comply with the mandatory provisions of the electoral Act and regulation,”

[26] The minimal difference in the time lends itself to a more tolerant approach in this matter rather than an inflexible application of the regulations, so as to facilitate participation in the election. Allowance for this time difference should be made. The fact that Chaaban was already in the building before the cut-off time is also not insignificant. Such an approach is supported by the dictates of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’).

[27] The application of the time-table, as with the Act, must then also fall within the spirit of our constitutional values. These

values clearly encourage participation in democratic elections. Section 2 of the Act provides that:

“2 Interpretation of this Act.

Any person interpreting or applying this Act must - (a) do so in a manner that gives effect to the constitutional declarations, guarantees and responsibilities contained in the Constitution; and

(b) take into account any applicable Code.”

[28] Section 2 of the Act clearly compels that the interpretation and application of the Act (and indeed any regulation which flows from it) must be guided by giving affect to the constitutional declarations, guarantees or responsibilities appearing in the Constitution and any applicable code.

[29] Furthermore, Section 1 of the Constitution reflects as one of its founding values:

“... (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic

government, to ensure accountability, responsiveness and openness.”

[30] In *AUGUST AND ANOTHER V ELECTORAL COMMISSION AND OTHERS* 1999 (3) SA 1 (CC) PARA 17 Sachs J (as he then was), stated the following:

“Universal adult suffrage on a common voters’ roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.”

[31] Consequently, the interpretation of the time-table must gel with its legislative purpose. It must be applied in such a way that it facilitates participation instead of limiting participation, as envisaged by the Constitution and the values upon which the latter is based.

[32] This matter is not unlike *AFRICAN CHRISTIAN DEMOCRATIC PARTY v ELECTORAL COMMISSION AND OTHERS* [2006] ZACC 1; 2006 (3) SA 305 (CC). It concerned the application and interpretation of sections 14 and 17 of the Act. The particular problem arose when the applicant had paid a lump sum deposit as allowed by the Commission, to its Pretoria office, in respect of all the municipalities it intended to contest in the wider Cape Town Metropole. The applicant omitted to include the name of one of the municipalities in which it intended to compete for seats viz Cape Town Metro on the allocation schedule that accompanied the payment, while it was included on the party list of municipalities it

intended to contest. When the party list was finalised after the cut-off date and time, it differed from the allocation schedule submitted with the payment in that the applicant had by then decided not to contest certain elections and officially withdrew from those elections. The applicant was thereafter informed that no deposit was made in respect of the Cape Town Metro. Despite having sufficient surplus funds which resulted from the withdrawal of contesting certain elections, the respondent refused the request by the appellant to allocate funds from its surplus to cover the deposit for the Cape Town Metro on the basis that sections 14 and 17 of the Act were preemptory and that it did not have the power to condone non-compliance with the provisions. The Electoral Court entertained proceedings in regard thereto, and in effect upheld the decision of the Commission. It is that decision which was taken on appeal to the Constitutional Court.

- [33] O'Regan J, (as she then was) dealt with the issue and concluded that little purpose would be served by a narrow interpretation of section 14 and 17 of the Act. Furthermore, that a more generous interpretation to hold that section 14 and 17 have been met, as opposed to a strict one, would not harm any other party or candidate. She found that the failure to timeously inform the respondent to allocate part of the surplus for the Cape Town Metro election would serve no legitimate purpose. I am in respectful agreement with her approach to the interpretation and application of section 14 and 17 of the Act.
- [34] I now turn back to the application at hand.
- [35] Sampson and/or Abrahams clearly did not adopt this approach when refusing to accept the applicant's documents. Neither did the respondent when it considered and upheld his actions.
- [36] Mr Sampson's actions were clearly unreasonable because even if the submission of the applicant's documents was late (which is not necessarily the case), it missed the deadline of 17h00 by very little time. Further, the representative of the applicant was in the building before 17h00 and it seems to me that in such circumstances the refusal to accept the documents and payment is unreasonable and its effect is contrary to the aforesaid constitutional values.
- [37] The circumstances are such that a margin of error in time as referred to above ought to have been factored in when considering the approach to be adopted instead of adopting such an inflexible position based on the time relied upon by the commission.
- [38] While it must be recognised that the time-table is to be adhered to, it is hardly likely that any subsequent steps as set out in the time-table would have been commenced with when the applicant's documents were tendered. No harm would have been caused by him accepting the documents when it was tendered even on the assumption that it was after 17h00 on the 25 March 2011, because it would not have resulted in any disadvantage or prejudice to anyone. The respondent would not have been inconvenienced thereby because the next segment of the process of preparing for the election had not yet started, for example starting to check the documents and informing parties and candidates of outstanding or

faulty documents.

[39] In the circumstances, the respondent's (and that of Abrahams and Sampson) strict and inflexible application of the time

table was unreasonable in the circumstances and contrary to its legislative purpose.

[40] In the foregoing, the respondent's decision to refuse to accept the applicant's documents falls to be reviewed and set aside and replaced with the order issued on and reads as:

1. That the decision of the respondent on or about 4th April 2011 in support of the decision of its official, Mr Sampson, taken on 25th April 2011 to refuse to accept the documents of the applicant, is hereby reviewed and set aside;
2. (a) It is declared that the applicant has timeously complied with all the requirements as set out in sections 14 and 17 of Act 27 of

2000 in order to contest Local Government Elections for the City of Cape Town - Category A Metro Local Election, scheduled for 18th May 2011 and tendered on 25th March 2011 by the applicant;

(b) The respondent is directed to accept the said documents and to forthwith:

place the applicant's name on the list of the registered parties entitled to contest the said elections;

(ii) place the candidates of the applicant for the various wards in the said elections on the final list of candidates.

PILLAY J

JUDGE OF THE ELECTORAL COURT

CONCURRED:

MTHIYANE JA

MASIPA J

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Prepared on 12 October 2026 · Esheria