

SOUTH AFRICA / JUDGMENT

Shai v The Electoral Commission of South Africa and Others (013/21 EC)

[2022] ZAEC 4 (22 February 2022)

[2022] ZAEC 4

COURT

Electoral Court

BEFORE

Mbha, Shongwe, Ms Pather

CASE / FILE NUMBER

013/21 EC

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IN THE ELECTORAL COURT

OF SOUTH AFRICA

HELD AT BLOEMFONTEIN

Reportable

Case

no: 013/21 EC

In

the matter between:

PROFESSOR

KGOATHSO SHAI APPLICANT

and

ELECTORAL

COMMISSION OF SOUTH AFRICA FIRST

RESPONDENT

MARULENG

LOCAL MUNICIPALITY SECOND

RESPONDENT

AFRICAN

NATIONAL CONGRESS THIRD

RESPONDENT

Neutral

Citation: Shai v The Electoral

Commission of South Africa

and Others (Case no 013/21 EC) [2022] ZAEC 4

(22 February 2022)

BENCH: MBHA JA and

SHONGWE AJ and MS PATHER (MEMBER)

DATE:

22 February 2022

Summary: Municipal electoral legislation- Section 65 (1) of the Local Government: Municipal Electoral Act No, 27 of 2000 requires that an objection filed in terms of this Act must be material to the result of an election in respect of which the objection is made - held, that the objection filed lacked specificity and not substantiated - requirement of materiality not satisfied - application dismissed with no order as to costs.

JUDGMENT

Mbha JA (Shongwe AJ and Ms Pather – Member concurring)

[1] The applicant, Professor Kgothatso Shai, brought this application to be heard as an urgent matter, ostensibly under the provisions of section 65 of the Local Government: Municipal Electoral Act 27 of 2000 (the Act), read with the Electoral Code of Conduct, and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Notably, the applicant has brought this application as a voter in the 2021 Local Government Elections (the 2021 LGE), and as a

member of the public.

[2] The members of the Court, having considered the papers filed on record, and all the relevant issues raised therein, resolved to dispose of this matter on the papers without an oral hearing. This is in accordance with the directive that was issued to the parties on 11 February 2022.

[3] The applicant in essence seeks an order; (a) declaring that the dismissal of the applicant's objection dated 3 November 2021 by the first respondent, the Electoral Commission of South Africa (the IEC), was unfair and lacked substance; and (b) declaring the results of the 2021 LGE in Ward 2, Maruleng Municipality, to be null and void. I deem it appropriate to set out in exact terms the various forms of relief sought by the applicant in his Notice of Motion. The applicant seeks an order:

'3. Pronouncing that the Electoral Commission's failure to constructively engage the applicant and involve the law enforcement authorities in the investigation of the complaint and subsequent representations amount to complicity in the contravention of the Municipal Electoral Act No. 27 of 2000, read with the Electoral Code of Conduct and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

4. Preventing the 3rd respondent's Ward 2 Branch Executive Committee interfering with due legal processes including but not limited to investigation of the complaint. Thus the Executive Committee should refrain from intimidating and/or interfering with the constitutional rights of the applicant, witnesses and their associates.

5. Rendering Ward 2's outcome of the 1st November 2021 local government elections as null and void, and/or until its credibility is proven otherwise.
 6. Alternatively, ordering the Electoral Commission to surrender all the electoral material including ballot papers, scanners and registers to the law enforcement authorities i.e. the Hawks, Special Investigating Unit (SIU).
 7. Declaring the future candidature or eligibility to serve in public office, those who are found to have actively participated in electoral wrong doings and other acts of criminality.'
- [4] On 3 November 2021, the applicant lodged an objection purportedly in terms of s 65 of the Act, alleging that certain electoral irregularities occurred during the 2021 LGE in Ward 2, Maruleng Municipality (Ward 2). In support of the objection, the applicant contended that the said alleged irregularities 'negatively impaired the legitimacy of the electoral outcome' in Ward 2.
- [5] The grounds upon which the objection was based, were as follows:
- '5.1 There is an alleged discrepancy between the number of casted ward councillor votes and the online attendance register and/or manual register. A case in point is Reagisheng Business College voting station where 4 special votes from home visits could not be accounted.
- 5.2 Physical address of some of the names in missing i.e. Chitje Theolah Khanyisa (670402).
- 5.3 Some of the names on the voters' roll do not have complete home/physical addresses i.e. Shiburi Ishmael (840522)
- 5.4 Some of the names are linked to falsified home addresses. For example, Harmse Hendrina Errol (940911).
- 5.5 Some of the names are linked to physical addresses outside the territorial jurisdiction of Ward 2. For instance, Akomolafe Nomsa Lucky (690102).
- 5.6 Non-residents of Ward 2 also feature on the voters' roll ie. Harmse Hendrina Errol (940911).
- 5.7 Applications of home visits special votes were forged without the consent of the affected voters i.e. Malape Mele Angelina (620805).'
- [6] In respect of the relief sought in the objection, the applicant requested that the ward councillor votes in respect of the third respondent, the African National Congress (the ANC) be rendered null and void. In the alternative, the applicant requested the IEC to disqualify the candidate or party responsible for the alleged irregularities once the IEC had completed a thorough investigation.

[7] On 7 November 2021 the IEC wrote to the applicant stating that it condoned the late lodgement of the objection but that after investigating and considering the issues raised therein, it had decided to dismiss the objection. The basis of the dismissal was two-fold. First, the issues raised therein did not give rise to an objection in terms of s 65 of the Act. Second, the alleged irregularities set out in the objection were not substantiated by any particulars and the relief sought was not competent in law.

[8] Section 65 (1) of the Act provides for an interested party to lodge an objection against the result of an election, provided that the objection is material to the result of the election. The objection must concern:

‘(a) any aspect of the voting or counting proceedings provided for in Chapter 5 or Chapter 6, respectively, or

(b) alleged unlawful –

(i) interference with or obstruction of election activities or processes in the vicinity of, at or in a voting station; or

(ii) interference with or influencing, intimidation or obstruction of voters or prospective voters in the vicinity of, at or in a voting station.’

[9] In *Pitso v Electoral Commission*[1] this Court held that:

‘In my view objections material to the declared results of an election in terms of section 65 of the Act will in the overwhelming majority of cases be concerned with the irregularities in the voting procedure, the ballot papers, the number of votes cast and the number of spoilt ballot papers and the reasons why those ballot papers were rejected. In other words, any irregularity which would affect the tally of votes to the extent that an unsuccessful candidate may gain sufficient votes to reverse the election results.’ (My emphasis.)

[10] The applicant’s objection was based on ‘electoral irregularities’ which allegedly occurred during the 2021 LGE in Ward 2. In support of the objection, the applicant contended that these irregularities ‘negatively impaired the legitimacy of the electoral outcome in Ward’. In my view, these are mere bald and unsubstantiated allegations and the applicant has failed to explain or to state how exactly the legitimacy of the electoral outcome was negatively impaired.

[11] Importantly, when the objection was lodged, the applicant failed to provide any supporting or corroborating evidence, thus ignoring the peremptory obligation specified in s 65(2)(h) of the Act.[2]

[12] In addition, the applicant failed to explain or demonstrate how the alleged ‘electoral irregularities’ objected to, related to any aspect of the voting or counting proceedings. Nor did he allege any unlawful interference with or obstruction of election activities or interference with or influencing, intimidation of voters or prospective voters.

- [13] In my view, the applicant did not meet the materiality requirement of s 65 of the Act, and thus failed to address the very purpose of this section namely, addressing issues considered ‘material to the result of an election’. Furthermore, the relief the applicant sought namely, that the IEC must render votes in favour of the ANC null and void or disqualify a candidate or any other party, was misconceived as it clearly fell outside the provisions of s 65. The relief sought thus fell outside the scope of the IEC’s authority and was patently incompetent
- [14] In light of what is stated above, I am unable to find any fault with the IEC’s decision made on 7 November 2021, in terms of which the applicant’s objection was dismissed. That decision was, in my view, rational and reasonable in the circumstances.
- [15] I now turn to deal with the application subsequently lodged by the applicant appealing the IEC’s aforesaid decision. It must be noted that the IEC has magnanimously elected not to oppose the late filing of the application.
- [16] I have earlier set out in exact terms the various forms of relief the applicant seeks in this application. If regard is had to the Court’s specific statutory powers as set out in s 65(10) of the Act, it immediately becomes obvious that most of the relief sought is not only incompetent but also falls outside the scope of the provisions of the Act. Section 65(10) provides that in considering an appeal as in this case, the Court must either:
- ‘(i) reject the appeal;
 - (ii) amend the decision of the Commission;
 - (iii) set aside the election; or
 - (iv) make an appropriate order.’
- [17] In addition to the factor of incompetence of the various forms of relief sought, the averments contained therein lack sufficient clarity and particularity and are not even substantiated. For example, the order sought by the applicant pronouncing that the IEC’s failure to constructively engage the applicant and involve law enforcement authorities in the investigation of the complaint, amount to complicity in the contravention of the Act is not only outside the realms of the Act, but is undefined and lacks any modicum of specificity that it falls to be rejected outright. The same can be said about the relief sought preventing the ANC’s Ward 2 Branch Executive Committee from ‘interfering with due legal processes’ and from ‘intimidating or interfering with the constitutional rights of the applicant, witnesses and their associates’.
- [18] The relief sought in prayer 5 of the notice of motion is illogical and impractical as it asks the Court to render Ward 2’s outcome of the 2021 LGE null and void until its credibility is proven otherwise. In the alternative, the applicant wants this Court to order the IEC to surrender electoral material including ballot papers, scanners and registers to law enforcement authorities like the Hawks, and the SIU. Significantly, the applicant has expressly conceded, in both his founding and replying affidavits, that the relief sought ‘may be incompetent in

law'. In my view, this application fall to be dismissed on the sole ground of the incompetency of the relief sought as demonstrated above.

- [19] What remains to be determined is whether the applicant has made out any case in this application to be granted an order upholding his appeal and to amend the decision of the IEC dismissing the appeal. The grounds upon which the applicant relies have been enumerated in paragraph 5 above.
- [20] I have interrogated these grounds and found that no supporting evidence has been provided. In addition, no specificity and particularity is provided. Importantly, the applicant has failed to explain how the results in Ward 2 were materially affected. It also bears mentioning that the applicant was not a contestant in the 2021 LGE, and has lodged this application as a voter and a member of the public.
- [21] The IEC has stated that it investigated the complaints and found these to have no basis. Full details of such investigations are provided in the answering affidavit. None of this is challenged in reply, save for the applicant merely stating that the IEC 'had a hand in all these electoral shenanigans', and that '[t]he investigation was also done without the objector, who was in right position to guide the commission on all the material facts pertaining to these case'. On the basis of the Plascon-Evans[3] rule, the version of the IEC, insofar as it has not been validly disputed, has to prevail.
- [22] In light of what I have stated above, I accordingly conclude that this application is devoid of any merit, is not sustainable and falls outside of s 65 of the Act, and accordingly falls to be dismissed. In the circumstances, the following order is made:

1 The application is dismissed.

2 There is no order as to costs.

Mbha JA

Chairperson of the Electoral Court

- [1] Pitso v Electoral Commission [2001] ZAEC 2.
- [2] Section 65(2)(h) provides that the objection, which must be by written notice, must contain – 'a list of supporting documents accompanying the notice of objection'.
- [3] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A); [1984] 2 All SA 366 (A).

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