

SOUTH AFRICA / JUDGMENT

Umkhonto Wesizwe Party and Another v Electoral Commission of South Africa and Others (0041/2024EC) [2025] ZAEC 2 (6 March 2025)

[2025] ZAEC 2

COURT

Electoral Court

BEFORE

Zondi, Modiba, Mhlambi, Ntlama-Makhanya, Phooko

CASE / FILE NUMBER

0041/2024EC

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THE ELECTORAL COURT OF SOUTH AFRICA

BLOEMFONTEIN

Not Reportable

Case no: 0041/24EC

In the matter between:

UMKHONTO WESIZWE PARTY

First Applicant

NKOSIKHONA CYPRIAN MSHENGU

Second Applicant

And

ELECTORAL COMMISSION OF SOUTH AFRICA First Respondent

KWAZI MBANJWA

Second Respondent

CEBISILE ZUMA

Third Respondent

SITHABISO SIBONISO NKABINDE Fourth Respondent

Neutral Citation: Umkhonto Wesizwe Party and Another v Electoral Commission of South Africa and Others (0041/2024EC)

[2024] ZAEC 02(6 March 2025)

Coram: Zondi DP, Modiba J, Mhlambi AJ, Professor Ntlama-Makhanya, and Professor Phooko (Additional Members)

Heard: Decided in chambers on the papers

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, by publication on the website of the Supreme Court of Appeal and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 6 March 2025.

Summary: Application to compel Electoral Commission (EC) to recognise nomination of candidate submitted by person other than one who is the registered contact of the party with EC – EC declines to do so – does not involve itself in internal party disputes – review of EC's decision to withdraw nomination of candidate submitted to it by a non-registered contact person of the party – no case made for the relief sought – application dismissed.

REASONS

Professor Phooko (Zondi DP, Modiba J, Mhlambi AJ, Professor Ntlama-Makhanya, (additional member) concurring):

Introduction

- [1] This matter highlights how important it is for registered political parties to diligently maintain their registered particulars with the Electoral Commission of South Africa (the Commission) and for the Commission to not only manage electoral processes thoroughly but to do so employing fair practices, lest the constitutional ideal of free and fair elections is imperilled.
- [2] A vacancy arose in Ward 2 of Msunduzi Municipality, Pietermaritzburg, KwaZulu-Natal due to the Inkatha Freedom Party's termination of one of its councillors' membership. The vacancy had to be filled within 90 days of its occurrence in terms of s 8 of the Local Government: Municipal Structures Act 117 of 1998. The MEC for Local Government proclaimed 18 December 2024 as the date for the holding of a by-election to fill the vacancy.
- [3] Following the proclamation of the by-election date, the Commission on 22 November 2024 published the Electoral Timetable (Timetable).[1] Item 5 of the Timetable required political parties to submit the names of a person nominated as their ward candidate to the Commission

to contest the by-election by no later than 25 November 2024, at 17h00.

- [4] On 11 November 2024, the applicant, Umkhonto Wesizwe Political Party (the MK Party) through its member, Mr Vusumusi Mvelase (Mr Mvelase), submitted the name of one of its nominated candidates, the second applicant, Mr Nkosinathi Cyprian Mshengu (Mr Mshengu) to the Commission.
- [5] On or about 25 November 2024 at 17h00, the Commission notified Mr Mvelase through SMS that it had received another submission from the third respondent, Ms Cebisile Zuma (Ms Zuma), nominating the fourth respondent, Mr Sithabiso Siboniso Nkabinde (Mr Nkabinde) as the MK Party's candidate for the by-election. Ms Zuma was authorised by the second respondent, Dr Kwazi Mbanjwa (Dr Mbanjwa) to submit Mr Nkabinde's name to the Commission. Consequently, the Commission withdrew Mr Mshengu's name as the candidate for the MK Party, replacing it with Mr Nkabinde's name. The Commission contends that Dr Mbanjwa's registration as contact person for the MK Party justifies its acceptance of the submission it received on his behalf, informing it who the MK Party candidate is.
- [6] Before the by-election could take place, the MK Party contacted the Commission and sought it to reverse its decision to replace Mr Nkabinde's name with that of Mr Mshengu. On 26 November 2024, the Commission informed the MK Party through Dr Mbanjwa that its system was closed and that it was only this Court that can reverse its decision.
- [7] Aggrieved by the decision of the Commission, the MK Party approached this Court on urgent basis seeking an order as follows:

'1.1 Applicants' failure to comply with the forms and service provided for in the Rules of Court be condoned and that the application be dealt with as an urgent application in terms of Rule 11 of the Rules of the above Honourable Court.

1.2 Applicants' failure to comply with time period provided for in Rule 6(1) of the Rules of the above Honourable Court be condoned in terms of Rule 10 of the said Rules.

2. The First Respondent's decisions:

2.1 withdraw and/or not to place the Second Applicant's name as the candidate entitled to contest the election in Ward 52205002, KZN225 Msunduzi By- Election to be held on 18th December 2024, on behalf of the First Applicant (hereinafter referred to as "the election").

2.2 to place the name of the Fourth Respondent as the candidate entitled to contest the election in Ward 52205002, KZN225 Msunduzi By-Election to be held on 18th December 2024, on behalf of the First Applicant.

be and is hereby reviewed and set aside;

3. THAT is declared that the Second Respondent's representation to the First Respondent that the Third Respondent is dully authorized to register the Fourth Respondent as a candidate on behalf of the First Applicant is declared unlawful and set aside.

4. That the nomination of the Fourth Respondent as the candidate entitled to contest the election in Ward 52205002, KZN225 Msunduzi

By-Election to be held on 18th December 2024, on behalf of the First Applicant, is declared unlawful and set aside.

5. The First Respondent is ordered to forthwith place the Second Applicant's name on the list of candidates entitled to contest the election in Ward 52205002, KZN225 Msunduzi By-Election to be held on 18th December 2024, on behalf of the First Applicant.
6. The First Respondent is ordered to print forthwith the ballot papers reflecting the Second Applicant's name as the candidate entitled to contest the election in Ward 52205002, KZN225 Msunduzi By-Election to be held on 18th December 2024, on behalf of the First Applicant.
7. That if any of the Respondent/s who oppose/s the application pays the cost of the application jointly and severally, the one paying the other to be absolved.'
- [8] The Commission opposes the application. After reading and considering the papers filed, on 17 December 2024 this Court issued an order dismissing the application with reasons to follow. These are the reasons for the Court's order.

Issues

[9] The issues to be determined by this Court are as follows:

- (a) Whether this matter should be heard as one of urgency;
- (b) Whether the MK Party's late filing of the application should be condoned;
- (c) Whether the second respondent's late filing of their answering affidavit should be condoned;
- (d) Whether Dr Mbanjwa is duly authorised to make a submission to the Commission, that Mr Nkabinde is MK Party's candidate and if not, whether the submission should be declared unlawful and set aside;
- (e) Whether Mr Nkabinde's nomination as the by-election candidate for the MK Party should be declared unlawful and set aside; and
- (d) Whether the Commission acted unlawfully when it replaced Mr Mshengu with Mr Nkabinde as the MK Party's candidate for the

by-election and if so, whether that decision falls to be set aside.

Submission of the parties

[10] The MK Party submitted that the Dr Mbanjwa had no authority whatsoever to communicate with the Commission on behalf of the MK Party as he was released from his responsibilities as the party's provincial co-ordinator on 28 October 2024. Consequently, the MK Party contends that any decision taken by the Commission in so far as it relates to him, purporting to act on behalf of MK Party after the 28 October 2024 was unlawful.

[11] The MK Party further averred that it had demonstrated its democratic process which resulted in the nomination

of Mr Mshengu as its candidate for the by-election. He received 157 votes during the internal party nomination process. To this end, the MK Party contended, there is no evidence suggesting that Mr Nkabinde was nominated through a democratic process and had received the highest number of votes. It is, to the contrary, undisputed that Mr Nkabinde obtained 137 votes and was therefore the second highest candidate.

[12] Additionally, the MK Party's argument goes, Mr Nkabinde's nomination and registration is contrary to the will and wishes of the members of the MK Party.

[13] The MK Party argued that the Commission was missing the point when it submitted that no new submissions could be made as the name of the MK Party's duly nominated candidate was submitted timeously on 11 November 2024 by Mr Mvelase in conformity with the law regulating the election of Municipal Councillors. However, the Commission opted to withdraw his name and replace it with Mr Nkabinde's.

[14] About the Timetable, the MK Party further submitted that its case is not concerned with the amendment of the Timetable, but it was open to the Commission's powers as per s 20(2) of the Electoral Act 73 of 1997 (Electoral Act) to amend the Timetable where it is necessary to ensure that election would be free and fair. Consequently, the MK Party argued that the insistence of the Commission in that the last day for the submission of candidates was 25 November 2024 when the Commission itself withdrew Mr Mshengu's name was untenable.

[15] The MK Party further argued that to remedy Mr Mshengu's withdrawal, the Commission will have to print a ballot paper that reflects his name. Adding that, if this cannot be done before the 18 December 2024, it was open to the Commission to amend the Timetable 'to give effect to the court order'.

[16] The MK Party further argued that the Commission contradicted itself when it accepted payment and communication from Mr Mvelase including the registration of Mr Mshengu as the MK Party candidate on 11 November 2024. In amplification of this, the MK Party asserted that by accepting communication from Mr Mvelase and notifying him that it has removed Mr Mshengu as the electoral

candidate for MK Party confirms its acceptance that Mr Mvelase had locus standi to communicate with the Commission on behalf of the MK Party. The Commission had never objected to Mr Mvelase's authority to act as aforesaid. Therefore, its conduct is inconsistent and amounts to procedural unfairness. According to the MK Party, the

Commission ought to have objected to Mr Mvelase's authority when he made submission.

[17] The MK Party further submitted that s 21 of the Electoral Act allows a person who has called for the election to postpone same if the postponement is necessary for free and fair election amongst other factors. Additionally, the MK Party averred that s 22(1) of the Electoral Act also allows the Commission to postpone election at a given voting station provided that 'it is not reasonably possible to conduct a free and fair election' on the date proclaimed. Based on these factors, the MK Party submitted that it was up to the Commission to ensure free and fair elections and that the Commission's 'internal administrative considerations should not [out]-weigh the applicant's

right to free and fair election'.

[18] According to the MK Party, this Court must embark on a balancing exercise and conclude that its order is capable of practical implementation.

[19] The MK Party emphasised that the Commission made a reviewable decision when it replaced Mr Mshengu's name with Mr Nkabinde's. Therefore, it incorrectly asserts that it did not make an administrative decision but merely disregarded communication from Mr Mvelase.

[20] The MK Party also contends that the Commission flouted the rules of natural justice when it unilaterally took a decision to replace Mr Mshengu's name without affording Mr Mvelase an opportunity to make representations in order to 'improve the quality and rationality of [its] administrative decision-making' process.

[21] The Commission argues that the MK Party may not rely on the fact that Mr Mvelase submitted the name of their

candidate and paid the required fee. Adding that the fact that an official of the Commission received a submission from Mr Mvelase and communicated with him does not render him [Mr Mvelase] the registered and contact person of the MK Party. The Commission acknowledges that it ought to have informed Mr Mvelase that he was not the registered contact person. However, even if this was not done earlier, it does not render him a registered contact person or confer him with the authority that he does not have.

[22] The Commission also argued that Mr Mvelase may not confer authority upon himself and further argued that the MK Party's submission in so far as it relates to Mr Mvelase should be 'regarded as pro non scripto from the outset'.

- [23] The Commission adds that it is apparent from the pleadings that the MK Party has an internal dispute about who should have been the party's candidate on the then 8 December 2024 by-election. According to the Commission, it is beyond its powers to deal with party positions and titles. Consequently, the Commission argued that the MK Party's submission that Dr Mbanjwa was removed as the MK Party's provincial co-ordinator on the 28 October 2024 was immaterial as he is still the registered contact person of the MK Party with the Commission.
- [24] The Commission submitted that the MK Party's prayer that the by-election should be postponed is misplaced because the Commission may amend the Timetable where necessary to ensure a free and fair election. That this may only occur as a matter of last resort and where there is a necessity for an amendment. Consequently, the Commission submitted that a party's failure to comply with the Timetable does not trigger the amendment of the Timetable. The Commission therefore argued that the MK Party's internal dispute resulted in the submission of 2 candidates giving rise to a further dispute regarding who was a legitimate person to contact the Commission. To this, the Commission submitted that the fact that Mr Mshengu will not be the MK Party's representative does not entail that the by-election will be not free and fair.
- [25] Relying on *Liberal Party v The Electoral Commission and Others*[2], the Commission argued that the MK Party inter alia seeks to put the Commission 'in a situation where it has to make ad hoc decisions about political parties and candidates who have not complied with the Act'. The Commission reasoned that with special votes cast, the by-elections had already begun and could no longer be postponed.
- [26] The Commission submitted that the MK Party's reliance on the SMS that was sent by the Commission's official to Mr Mvelase informing him of Mr Mshengu's replacement is misplaced because Mr Mvelase is not the registered contact person for the MK Party.
- [27] The Commission further highlighted that the MK Party's submission suggesting that it was denied the right to be heard is misguided as the Commission does not deal with internal party disputes on who has the authority to submit the party's nominated candidate.

Urgency/condonation

- [28] The MK Party applied for condonation as it brought the application outside the three-day period after the impugned decision was made by the Commission.
- [29] Rule 6(1) of this Court's rules require a party who seeks to take a decision of the Commission on review to do so within three days after the decision was made. Furthermore, Rule 10 provides that 'failure to comply with the prescribed time limits or directives of the Court will, by this mere fact thereof, result in a party being barred, unless the Court, on good cause shown, directs otherwise'.

- [30] I am of the view that satisfactory reasons have been provided by the MK Party about why this application was brought 5 days late. The MK Party extensively explained that it had inter alia tried to first engage with the Commission to try to find a solution and was only told on 25 November 2024 by the Commission that only a court of law can reverse its decision.
- [31] The Commission also seeks condonation for filing its answering affidavit late. Its explanation for the delay is that it had limited time to finalise its answering affidavit and have it signed and commissioned. The delay by a mere 30 minutes was not inordinate. In the matter of *Melane v Santam Insurance Co. Ltd*[3] it was held that when granting condonation, the court exercises a discretion having regard to all relevant factors including the degree of lateness, and the explanation thereof. I am satisfied that both parties have shown good cause and that they have made up a proper case to be granted condonation.
- [32] About the urgency, the MK Party was informed about the withdrawal of the name of the second applicant on the 25 of November 2024. The elections were to take place on 18 December 2024. There is no doubt that the MK Party had limited time within which to try and resolve its dissatisfaction with the decision of Commission. I say so because the MK Party had first sought to engage with the Commission to resolve the matter, but the Commission was clear in that it does not involve itself into party internal disputes. Consequently, the MK Party had to explore and eventually take the legal route so that the issue of their eligible ward candidate could be determined before the by-election. In *African Independent Congress v Electoral Commission of South Africa and Others*[4], this Court held that 'electoral matters are by their nature inherently urgent'. I therefore see no reason as to why this matter should not be heard as one of urgency given the then fast approaching date of the by-election.

Merits

- [33] Apart from all the other issues that have been raised by the parties in this matter, in my view the crux of this case centres around the registered contact person of the MK Party with the Commission. To this end, it is important that I refer to the applicable legal framework. On 27th August 2021 Regulation 9 for the Registration of Political Parties 2004 was amended by Gazette Notice 45060 Proclamation R35 of 27th August 2021 (Regulation 9). The current Regulation 9 reads as follows:

'Notification of change in registration particulars –

Any change in the particulars furnished in Annexure 1 must be notified to the Chief Electoral Officer in writing within 30 days after such change by the registered [contact person or the] leader of the party.'

- [34] In May 2024, in his capacity as the Provincial Convener for the MK Party, Mr Thobane Zuma wrote a letter to the Commission notifying it of a change in its provincial leadership. The letter reads as follows in relevant parts:

‘Dr Mbanjwa is the principal contact person who would represent our organization [the MK Party] in all Party matters’ (Emphasis added).

[35] It is common cause that the MK Party replaced Dr Mbanjwa with one, Mr Mchunu as its Commission contact person.

Therefore, Mr Mvelase had no authority to make a submission to the Commission regarding the MK Party’s nominated candidate for the election. It is unclear why the Commission never informed Mr Mvelase forthwith that it is not accepting his submission because he is not MK Party’s registered contact person. Had it done so, this application may not have seen the light of day because the Commission’s refusal to accept Mr Mvelase’s submission would have alerted the MK Party to set its Commission records in order.

[36] The Commission tries to extricate itself from this debacle by arguing that it does not involve itself in internal party disputes which is evident from the fact that the MK Party through its two officials, submitted two different names of ward candidates for the by-election. The Commission misses the point. This matter does not involve an internal party dispute because none is manifest in these proceedings. Lack of diligence in the management of their affairs by both MK Party and the Commission led to this debacle. The former by failing to comply with regulation 9 and the latter by accepting a submission from a party official who is not its duly registered contact person.

[37] It can also be deduced from the evidence before this Court that there are apparent weaknesses in both the Commission’s internal systems and the MK Party’s internal communication channels. If the Commission’s internal systems were effective, it ought to have immediately identified that Dr Mbanjwa is the registered contact person for the MK Party and notified Mr Mvelase immediately. It did not have to wait until it received the second submission from Dr Mbanjwa to realise that it should not have accepted Mr Mvelase’s submission. Similarly, MK Party ought to have notified the Commission of the change in its contact person within thirty days of the change as required by regulation 9.

[38] In terms of regulation 9, the Commission should accept a nomination of the MK Party’s by-election candidate from its registered contact person and no other person. Thus legally, it was correct in rejecting Mr Mvelase’s submission. It is unfortunate that it communicated its decision so late, thus denying MK Party an opportunity it would have enjoyed had the Commission responded promptly to Mr Mvelase’s submission.

[39] Notwithstanding the above finding, it is important for this Court to express its displeasure about the conduct of the Commission in its handling of the MK Party’s nomination for the candidate for the by-election. The Commission conducted itself imprudently and inefficiently. It has failed to offer an adequate explanation for its inefficient conduct of which should never be repeated. In *Labour Party of South Africa and Others v Electoral Commission of South Africa and Others*,^[5] there Professor Phooko writing for the minority emphasised that:

‘Electoral justice is a process and not an event, it starts not only when one casts his or her vote at the ballot box but from the initial stage that eventually lead to the election day. In other words, both the pre- and post-election processes should be seen as being free and fair’ (Emphasis added.)

[40] The Commission has a constitutional obligation to manage elections and to ensure that the elections are free and fair.[6] The Commission is one of the pillars supporting our hard-earned constitutional democracy. Its ‘processes must create an environment that do not place a doubt about our democratic processes.’[7] The Commission’s processes are a means towards the attainment of free and fair elections which in turn contribute to the overall scheme of electoral justice. The Commission should ensure that its systems are beyond reproach otherwise it is failing in fulfilling its constitutional mandate as set out in s 190(1)(a) and (b) of the Constitution.

[41] Regrettably for the MK Party, this Court is not satisfied that it has made out a proper case for the relief it seeks. Its failure to comply with regulation 9 and the fact that when it ultimately instituted this application, the horse had already bolted. The by-election had already commenced. Therefore, ordering that the election be postponed is not a just and equitable remedy under these circumstances. It would not be fair to registered political parties and the electorate who followed all legal processes to participate in the by-election.

[42] For these reasons, I conclude that the application falls to be dismissed.

Costs

[43] As a general rule, costs orders are not imposed upon a losing party in electoral matters unless such party’s conduct has been vexatious, frivolous or abusive of the court processes. [8] In my view, both parties’ internal communication channels somehow failed or were inadequate. In the circumstances, there is no order as to costs.

Order

[44] In the result, the following order granted on 18 December 2024 is confirmed:

1. The applicant’s failure to comply with the forms and service provided for in the Rules of Court is condoned, and the application is dealt with as one of urgency in terms of Rule 11 of the Rules of this Court.
2. The applicant’s late filing of the application is condoned.
3. The Commission’s late filing of the answering affidavit is condoned.
4. The application is dismissed with no order as to costs.

PROFESSOR MR PHOOKO

Additional Member of the Electoral Court

APPEARANCES

For the applicant:

SK Xulu

Instructed by:

Njabulo Gordon Zungu INC, Durban

For the first respondent:

M Tsele

Instructed by:

DMO Attorneys, Sandton

[1] S 11 of the Local Government: Municipal Structures Act 117 of 1998.

[2] Liberal Party v The Electoral Commission and Others [2004] ZACC 1; 2004

(8) BCLR 810 (CC).

[3] 1962

(4) SA 531 (A) At 532B-E.

[4] (003/2024EC)

[2024] ZAEC 19 at para 14. See also African National Congress v Electoral Commission of South Africa and Others (001/2024EC) [2024] ZAEC 03 at para 29.

[5] Labour Party of South Africa and Others v Electoral Commission of South Africa and Others (008/2024EC; 012/2024EC; 011/2024EC; 009/2023EC; 010/2024EC) [2024] ZAEC 04 at para 54.

[6] S 190 1(a) and (b) of the Constitution, 1996. See also S 5 of the Electoral Commission Act 51 of 1996 .

[6] S 190 1(a) and (b) of the Constitution, 1996. See also S 5 of the Electoral Commission Act 51 of

[7] Ibid at para 56.

[8] Arise Afrika Arise (AAAR) v Electoral Commission of South Africa (008/2023 EC) [2024] ZAEC 1 at para 31.

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Prepared on 12 October 2026 · Esheria