

SOUTH AFRICA / JUDGMENT

United Democratic Movement v Electoral Commission (3/2004) [2004] ZAEC 1 (21 April 2004)

[2004] ZAEC 1

COURT

Electoral Court

BEFORE

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

CASE / FILE NUMBER

3/2004

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CASE NO:

3/2004
IN THE
ELECTORAL OF SOUTH AFRICA
HELD AT
BLOEMFONTEIN
In the

matter between:

UNITED
DEMOCRATIC
MOVEMENT.....
APPLICANT
and
ELECTORAL
COMMISSION
.....
.....RESPONDENT

CORAM:

MTHIYANE JA, PILLAY and MASIPA JJ; Ms S MOODLEY and Ms S ABRO
(Members)
DATE
OF HEARING: 15 APRIL 2004 (In Chambers)
DELIVERY
DATE: 21 APRIL 2004

Summary: Whether late service of objection lodged by a chief electoral officer in terms of s 30(2) of the Electoral Act 73 of 1998 and failure to disclose that fact, renders the decision of the Commission upholding the objection subject to review.

JUDGMENT

MTHIYANE JA:

- [1] Acting in the exercise of his executive prerogative the President of the Republic of South Africa announced that elections for the National Assembly and Provincial Legislatures would be held on 14 April 2004. On 27 February 2004 the applicant nominated certain candidates for the election and submitted a list of those candidates to the chief electoral officer (the CEO).
- [2] On 3 March 2004 the CEO notified the applicant that it had not complied with s 27 (2) (c) and (d) of the Electoral Act 73 of 1998 (the Act) in that no 'acceptance of nomination signed by each candidate' and an 'undertaking signed by each candidate, that the candidate will be bound by the code' had been submitted as required by the section.
- [3] On 8 March 2004 the applicant submitted an amended list of candidates as it was entitled to, in terms of s 28 (2) of the Act, together with acceptances by some of the candidates on that list. In terms of s 30
- (2) of the Act the CEO lodged an objection with the Independent Electoral Commission (the Commission) to candidates on the applicant's list in respect of whom no acceptances were submitted. The notice of objection was served by telefax transmitted to the applicant's offices on 15 March 2004 at 18:39. The telefax printout placed before us records that the transmission of the telefax was successfully completed at 18:42 but the secretary general of the applicant, Mr Malizole Diko, says that the telefax embodying the objection was not received by the applicant. The applicant does not, however, dispute that the telefax number (or address for lack of better word) to which the objection was transmitted was that of the applicant. The mode of service used by the CEO is provided for in s 1 of the Act.
- [4] The applicant did not respond to the objection. On 17 March 2004 the CEO, at the request of the Commission, gave written notice to the applicant, informing the applicant that it had until 12:00 on 18 March 2004 to comply with s 27 (c) of the Act (i e to file 'acceptances of nomination, signed by each candidate'). [5] The deadline came and went with no reaction from the applicant. On 18 March 2004 the Commission considered the matter and upheld the objection in respect of all the applicant's nominated candidates except for four of them who, it was found, had complied with s 27 (2)
- (c) of the Act.

[6] On 8 April 2004 the applicant launched the present application seeking an order that the decision of the Commission be reviewed and set aside and an order that the candidates on the applicant's lists are eligible to be elected to the political offices for which they were nominated.

[7] The applicant contends that the objection to its candidates is null and void and of no force and effect in that it was served on the applicant two days after the cut off date (15 March 2004). In a letter addressed to the CEO the applicant's attorney said: 'in

3

terms of the Election Time Table, your objection had to be lodged with the IEC [the Commission] and served on my client [the applicant] by 15 March 2004.' [8] The applicant contends further that had the lateness of the service of the notice of objection been brought to the attention of the Commission, the objection would not have been upheld. The applicant argues that the CEO's failure to advise the Commission that the objection had been served late renders the Commission's decision subject to review.

[9] In my view the failure of the CEO to bring it to the attention of the Commission that the objection had been served late had no influence on the Commission's decision, upholding the objection. It appears that the Commission of its own paid due regard to the fact that the notice of objection had been served late by 1 hour and 42 minutes on 15 March 2004. It is for this reason that on 17 March 2004 the Commission directed the CEO to give written notice to the applicant, calling upon the applicant to respond in

compliance with s 27 (2) of the Act by not later than 12:00 on 18 March 2004. The Commission was entitled to do so in terms of the relevant provisions. (See s 30 (6) of the Act (read with Item 9 of the election timetable)).

[10] In making its decision the Commission did not regard the notice of objection sent by the CEO as a nullity and considered the lateness of service of the objection as capable of being remedied (if need be) by a farther written notice being given to the applicant. In my view that approach falls within the Commission's powers and accords with the relevant statutory provisions. I discuss them briefly. The cut off date for objecting to a nominated candidate is 15 March 2004 (see Item 8 of the election timetable) and the objection has to be made to the Commission by not later than 17:00 (see Item 1 of the election timetable). Objections to lists of candidates are governed by s 30. Significantly it does not appear from a reading of s 30 (2) of the Act that the objection made to the Commission needs to be served on the registered party on the same day. It appears that the objection can be served on the registered party after the 17:00 deadline. See s 30 (2) which reads:

'The objection must be made to the Commission in the prescribed manner by not later than the relevant date stated in the election timetable, and must be served on the registered party that nominated the candidate.' [My underlining]

This may have been a deliberate omission by the legislature so as to relieve the CEO of the added burden of serving given the pressures

associated with the business of an election. Or, the legislature may have been minded to leave it to the Commission to do it in the knowledge that the Commission would not take a decision before ensuring that there has been service on the registered party. All of the above factors seem to indicate that the lateness of the service as such may not provide a sound basis for the contention that the objection was a nullity.

Otherwise than in sub-section (2), in sub-section (3), (4) and (5) all of the coupled acts referred to in these sub-sections are required to be done 'by not later than the relevant date'. (The relevant cut off date being 15 March 2004 and an act being required to be performed by not later than 17:00).

[11] There is, in my view, yet another consideration which militates against late service being regarded as a nullity. In terms of s 30

(6) of the Act (read with Item 9 of the election timetable) the Commission or the Electoral Court may allow a registered party (who has not met the 15 March 2004 deadline) an opportunity to comply with s 27 (2) up until 18 March 2004.

[12] It seems to me that all of the above considerations would have weighed with the Commission when it considered the objection, even though it did not say so in so many words. Our courts have consistently taken the position that a court will not usurp the

powers of an administrative functionary. (See discussion under the heading 'Administrative Structure' in 1 Laws para 59.) The question on review is not whether the court agrees with the functionary's decision but whether the

decision was properly taken in accordance with the regulating provisions and the tenets of natural justice. (See Johannesburg Stock Exchange and another v Witwatersrand Nigel Ltd and another 1988 (3) SA 132 (A)). To this principle the Constitution did not bring any change. (See Carephone (Pty) Ltd v Marcus NO and others 1999 (3) SA 304 (LAC); Bel Porto School Governing Body v Premier, Western Cape [2002] ZACC 2; 2002 (3) SA 265 (CC) para 89).

[13] The lateness of service of the notice of objection was given due weight by the Commission as indicated above. There is no explanation

why the applicant did not respond to the written notice submitted to it on 17 March 2004 at the instance of the Commission. There is no suggestion that it was impossible for the applicant to do so or to comply with s 27 (2) of the Act. The applicant has fixed its mast firmly and squarely on the alleged lateness of the notice of objection sent by the CEO and telefaxed to the applicant's office on 15 March 2004 and that the objection was on that account a nullity. Even if one assumes in favour of the applicant that the lateness was indeed an irregularity it is difficult to see how this could lead to a vitiation of the Commission's decision in the absence of prejudice to the applicant. No prejudice has been alleged or proved. It seems to me that any prejudice that might have

occurred was anticipated by the Commission when it directed the CEO to give written notice to the applicant, to afford the applicant an opportunity to comply with s 27 (2). (See s 30 (6) read with Item 9 of the election timetable as to the Commission's powers in this regard). There is no stronger indication of fair-mindedness and a proper application of one's mind in accordance with the behests of the relevant statutory provisions. (See Johannesburg Stock Exchange *supra*) In my view the failure on the part of the CEO to draw the Commission's attention to the late delivery of the objection did not detract from the evenhandedness adopted by the Commission and there is no basis for a finding to the contrary.

[14] I turn to consider whether there is any dispute of fact which might stand in the way of a ruling on the papers as they stand. In the founding affidavit deposed to by Mr Malizole Diko, he says that as at 8 March 2004 properly signed acceptances of nomination of its listed candidates were already in the CEO's possession. This was disputed by the CEO in the answering affidavit of Miss Tomsie Priscilla Phillips. In amplification of her denial she says:

'I emphatically deny that the signed copies were received by 8 March

2004. I wish to point out examples that show that the applicant could not have submitted the documents on or before 8 March 2004.

Annexure "MD7.6" was signed by the candidate in Elliotdale [Eastern Cape] on 8 March 2004.

Annexure UMD7.7" was signed on 17 March 2004, nine days after the date that "Diko" alleges he had submitted it to the respondent.

Annexure "MD7.10" reflects that the copy of the identity document was only certified by the Mount Frere Police Station on 17 March 2004.

Annexures "MD7.24, MD7.26 and MD7.32" were signed by the candidates on 17 March 2004. Therefore it could not have been received by the respondent on 8 March 2004 as "Diko" alleges in his affidavit.'

I must mention here that one of the acceptances numbered md7.31 it appears that the date was altered from 16.3.2004 to 16 .2.2004.

[15] Undaunted, Diko put up a replying affidavit in which he says:

'Except for the following acceptances referred to by Phillips, annexed to my founding affidavit ...every other acceptance, duly signed, was in the respondent's possession by 8 March 2004.

The annexures referred to above [meaning those referred to in the preceding paragraph] were inadvertently and incorrectly annexed to my founding affidavit.' [16] The contrasting positions adopted by Diko and Phillips created a suspicion of a potential dispute of fact which would have prevented the resolution of the matter on the papers. For the reasons which follow I do not

think that there is such a real and genuine dispute of fact in this case. It has been said that where the allegations or denials of a party are so far-fetched or clearly untenable the court is justified in rejecting them on the papers. (See *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) 623 (AD)). In my view the present matter is a case in point. It is clear that as soon as the deficiencies in acceptances put up by the applicant in these papers were exposed Diko claimed that the acceptances to which Phillips drew attention had been 'included in error' in the applicant's paper. How is that possible, given that the applicant persists in its relief in respect of all its candidates, (including candidates whose acceptances were 'included in error'). The applicant cannot plead one case in the founding papers and quite another in reply. The depositions of the applicant do not appear to be bona fide - which lack of bona fides is further illustrated below.

[17] Realising that it was late in bringing the present review proceedings the applicant seeks the court's indulgence. In the context of these types of cases the delay is considerable. The Commission made its decision on 18 March 2004 but the application for review was only launched on 8 April 2004. In terms of rule 6 (1) of the rules of this court the applicant should have lodged its application within three days after 18 March 2004. The explanation for the delay is far from satisfactory and is difficult to make sense of. In the founding affidavit Diko says that he was advised on 9 April 2004 to launch this application. Yet, the Notice of Motion was signed by the applicant's attorney on 7 April 2004. Diko himself signed his affidavit in Pretoria on the same date. But he somewhat strangely asserts on oath that he was in Cape Town on election business between 1 April 2004 and 10 April 2004. In terms of rule 10 of the rules of this court a party seeking the court's indulgence is required to show good cause. The explanation on behalf of the applicant bristles with discrepancies and inconsistencies. In any event in the view which I take of the matter as a whole I do not consider that it would be fair and equitable to bar the applicant from presenting its case even though it does not appear that the applicant is deserving of the court's indulgence.

[18] In my view it has not been shown that the Commission did not bring its mind properly bear on the matter or that any irregularity

justifying interference with its decision was committed. No order for costs is sought and I do not propose to make any.

[19] Accordingly the application is dismissed. No order is made as to costs.

K K MTHIYANE

JUDGE OF APPEAL

PILLAY J CONCURRED

MASIPA J

Ms S PILLAY

Ms S ABRO

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