

IN THE ELECTORAL COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG



CASE NO: 005/2016 EC

In the matter between:

NATIONALIST COLOURED PARTY OF SOUTH AFRICA

Applicant

and

**THE INDEPENDENT ELECTORAL COMMISSION
OF SOUTH AFRICA**

First Respondent

MR ANDRE JACOBS

Second Respondent

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

Neutral Citation: *Nationalist Coloured Party of South Africa v The IEC and
Another* (Case no 005/2016 EC) [2016] ZAEC 3 (18 July 2016)

J U D G M E N T

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

[1] This court issued an order on 1ST JULY 2016 in the following terms:

- (a) The decision of the Electoral Commission to retract the change of name of the NCPSA and the amendment to its constitution, is set aside.
- (b) The Nationalist Coloured Party of South Africa (NCPSA), as represented by Mr Frank Martin, is the registered party.
- (c) Subject to the applicable Regulations, Mr Frank Martin must be recorded as the registered contact person of the NCPSA in place of Mr Andre Jacobs.
- (d) The list of candidates submitted by Mr Frank Martin on behalf of the NCPSA must be accepted by the Commission.
- (e) There is no order as to costs.

[2] The Court ordered that the reasons will follow in due course. What follows are the reasons for the above order.

[3] The applicant, Nationalist Coloured Party of South Africa (NCPSA), brought an application to review the decision of the Electoral Commission ('the Commission') in terms of section 20(1)(a) of the Electoral Commission Act 51 of 1996 ('the Act'). The application is also brought in accordance with Rule 6 of the Rules regulating the conduct of the proceedings of the Electoral Court (EC) (Government Gazette No 18908, Notice 749 of 1998). The decision which is the subject of the review is the retraction of the registration of the NCPSA and the reinstatement of the Nationalist Coloured Party (NCP) which was registered initially.

[4] It is significant to briefly deal with the background facts. It is common cause that the NCP was registered as a political party by the Commission in terms of section 15 of the Act in 2013. Mr Andre Jacobs was the party leader and the contact person. On 22/4/16 the commission received an application for the change of name, abbreviated name and logo of the NCP to NCPSA in terms of section 16A of the Act.

[5] The application for change of name was found to be in order, in other words, to be compliant with the requirements of the Act. It was also accompanied by a letter signed by Mr Jacobs authorising Mr Martin to

‘engage the media and to release related statements on behalf of the NCP ... Mr Martin is also fully authorized to engage the IEC on all matters pertaining to NCP business’. The change of name and logo was duly registered, on the strength of the letter of authority. The party leader Mr Andre Jacobs was duly notified by letter of the 23 May 2016.

[6] On 7 June 2016, the Commission received a complaint from Mr Jacobs to the effect that Mr Martin did not have the authority to deal with the Commission on behalf of the NCP and that he acted fraudulently. That Mr Martin had been expelled from the NCP in February 2016 by the patron Mr Badih Chaaban. On 9 June 2016 the Commission wrote to Mr Jacobs advising him that the Commission bona fide changed the name and logo and also that the change will be reversed and the NCP constitution will remain unchanged.

[7] On 14 June 2016 a letter was sent to Mr Martin informing him of the decision to retract the registration of the NCPSA on the basis of regulation 9 of the Regulations for the registration of Electoral Parties 2004 published under GN R13 in GG 25894 of 7 January 2004. Regulation 9 reads thus:

‘9 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.’

[8] The essence of the NCPSA’s complaint is that due process and the correct procedure was not followed by the Commission, in that it reversed the NCPSA’s registration before it could inform Mr Martin, who had been fully authorized to engage with the Commission in all matters pertaining to NCP business.

The Commission considered this complaint as an internal party dispute and therefore was not interested in getting involved.

[9] The disputed facts are that Mr Martin lacked the authority to change the name and the logo of NCP. The Commission revoked the registration of the NCPSA, without consulting Mr Martin. Mr Martin avers that Mr Jacobs authorized him to deal with the Commission in matters pertaining to the business of NCP. This authority was understood by Mr Martin to include changing the name and logo of the NCP.

[10] The applicant is a lay person who is legally unrepresented and therefore the form in which he launched his application should not prejudice his case. It is the substance of all the facts before this court that should be considered as a whole. The court should deal with the evidence before it. Because these are motion proceedings, it is advisable to be guided by the principle known as the 'Plascon Evans Rule' (*Plascon-Evans Paint Ltd v Van Riebeck Paints Ltd* 1984(3) SA 620(A)) which directs that when factual disputes arise, therefore, relief should be granted only if the facts stated by the respondent together with the admitted facts in the applicant's affidavit, justify the order. In this matter, there is a dispute as to who is the contact person or leader of the party and whether Mr Martin was relieved of his duties as a member of the NCP. Also whether Mr Martin had the authority to change the name, logo and the constitution of the NCP.

[11] Mr Jacobs, as the second respondent, is, in my view, vague in his answers to the allegations by Mr Martin. He fails to explain why and how was Mr Martin's authority terminated, save to state that he was expelled in February 2016. The expulsion is denied by Mr Martin, on the contrary he furnishes evidence showing that he had numerous and continuous conversations with Mr Jacobs well into the month of May 2016 via a series of emails and Whatsapp messages.

[12] For instance on 15 May 2016, via Whatsapp Mr Jacobs wrote to Mr Martin as follows: 'Morning Frank, (this is Mr Martin) Could we please meet soonest to discuss possible way forward?... but let me know for today before 3pm or Friday eve when I return. Beste, Andre' (this is Mr Jacobs). On 17 May 2016 another Whatsapp series of communication started when Andre stated:

'Posters can go up 19 May. Its 11 weeks to election'. There are about 18 bits of communication in all between Mr Jacobs and Mr Martin. This interaction went on until 26 May 2016, Andre at 3.09 pm (Probably quoting from a website – '25/5/16 SAnews.gov.za (Tshwane) South Africa: IEC Welcomes Proclamation of Elections "Nominations for independent candidates to contest ward elections must also be submitted by 17H00 on 2 June," said the commission this I find on internet google hope it will help'

On 27/5/16, at 7.49 pm, Frank: 'A PC (Presidential Council) meeting took a decision that the administrator will deal with all registration for submission. So we are sorted thanks'. At 8.46am a response from Andre: "Ok". A few Whatsapp messages were exchanged when the registration of candidates was discussed.

[13] Mr Jacobs does not deal with all these series of Whatsapp messages, does not deny them either. In terms of the Plascon-Evans rule, where the allegations or denials of the respondent, in this case Mr Jacobs, are far-fetched or clearly untenable, the court would be justified in rejecting them merely on the papers. Based on the Plascon-Evans rule, I am of the view that the second respondent's failure to deny the applicant's allegations is untenable and falls to be rejected on the papers. I may add that Mr Jacobs failed to attend the hearing and did not even furnish heads of argument, after he had been requested to do so.

[14] When the Commission received a letter of authority from Mr Jacobs, authorising Mr Martin to engage the Commission on all the business of the NCP, which authority is not denied by Mr Jacobs, the Commission should have recorded the name of Mr Martin as the contact person and leader of the party in accordance with the provisions of Regulation 9 – and also in accordance with the new constitution which recorded Mr Martin's portfolio as the national leader of the party. Had that happened, the Commission would have contacted Mr Martin first before retracting the registration of the NCPSA. Therefore this court is of the view that the decision taken by the Commission was procedurally unfair as contemplated in section 6(2)(c), of the Promotion

of Administrative Justice Act 3 of 2000 (PAJA). Simply on the say so of Mr Jacobs the Commission took his word without consulting an authorized person, Mr Martin, regarding such serious allegations of fraud. Mr Jacobs mentioned that he opened a criminal case against Mr Martin. Save for quoting a case number, nothing further substantiated the allegation of fraud – nowhere is it said that Mr Martin forged his signature and no proof thereof was proffered.

[15] This court is empowered to substitute or vary the decision of the Commission in exceptional circumstances as contemplated in section 8(1)(c)(ii)(aa)of *PAJA*. I believe that the applicant has succeeded in showing exceptional circumstances, in that the elections are hardly a month away and further that inclusion outweighs exclusion in the circumstances of this case. The electoral court is a specialized court, which in most cases deals with inherently urgent matters.

[16] The Commission as a public body should be seen to be pro-active in certain instances. It should play a reconciliatory role as the public depends on it in giving direction and advice to the public or political parties. This court is not oblivious of the mammoth task on its shoulders, however calling the belligerent parties and trying to reconcile them will cause no harm, instead it would do more good and build confidence on the Commission by society.

[17] In the result the above order was made based on the reasons mentioned.

SHONGWE JA

MOSHIDI J

WEPENER J

ADV. MTHEMBU – Member

Ms. PATHER - Member