

REPUBLIC OF SOUTH AFRICA



IN THE ELECTORAL COURT OF SOUTH AFRICA

Case No: 006/2022EC

In the matter between:

ACADEMIC CONGRESS UNION

APPLICANT

and

INDEPENDENT ELECTORAL COMMISSION

RESPONDENT

Neutral Citation: *Academic Congress Union v Independent Electoral Commission* (Case no 006/22EC) [2022] ZAEK 10 (06 July 2022)

Coram: Mbha JA, Modiba J and Shongwe JA and Professor Ntlama-Makhanya (Member)

JUDGMENT

Ntlama-Makhanya – Member (Mbha JA; Modiba J and Shongwe AJ concurring):

[1] The Academic Congress Union (ACU) and an applicant in this matter, is represented by Mr Bongumusa Knoledge Ngwema, who is the Sub-Regional Chairperson of the said political party that participated on the Local Government Elections that were held on 01 November 2021 (the LGE2021) in the Mthonjaneni Municipality (KZ 285). The respondent (Electoral Commission: IEC) is a statutory body

established in terms of s 181(f) of the Constitution of the Republic of South Africa, 1996, with its functions entrenched in s 190 of the said Constitution.¹

[2] The applicant, with four other political parties namely, the Inkatha Freedom Party (IFP); African National Congress (ANC); Economic Freedom Fighters (EFF) and National Freedom Party (NFP) participated in the LGE 2021 at the Mthonjaneni Local Municipality.

[3] A total of 25 seats were allocated for the municipality, (13 for the ward and 12 for Proportional Representation). Each voter voted for the ward candidate and the political party in accordance with s 9(1) of the Municipal Structures Act of 1998.²

[4] On declaration of the results on 04 November 2021, the IFP won the elections. The ANC was second and applicant came third and was allocated one seat at the Municipality.

[5] It is this allocation with the resultant complaint that arose from it that is at the heart of this application in this Court.

[6] The applicant seeks an order for the re-counting of the Municipality wide votes comprised of 82 Districts; setting aside of the election results and seat allocation at Mthonjaneni Municipality (KZ 285) in respect of the above-mentioned election.

[7] The applicant objects to the election results and seat allocation of the election results on the basis that:

7.1 The IEC reneged from the preparatory commitments that were made in ensuring free and fair elections which included the provision of adequate space for the counting and verification of the votes. The applicant contends that it was agreed that the Old Council Chamber that is situated near the Library was an appropriate venue as opposed to the Mthonjaneni IEC office which 'is small'. This arrangement was never honoured on the election day. As a consequence,

¹ See also ss 3, 4 and 5 of the Electoral Commission Act 51 of 1996 (Electoral Act) which endorses the establishment of this body, its objects and powers.

² See Schedule 1 of the Local Government Municipal Structures Act 117 of 1998 (hereinafter referred as Municipal Structures Act).

the Auditor was placed separately from the Party Liaison Committee (PLC) members and IEC officials during the capturing of the results in the IEC system and could not see or observe the process.

- 7.2 The applicant contends that there are 'shenanigans that might have happened' during the capturing process which resulted in the discrepancy with reference to the seat allocation that ended with 26 seats instead of 25 (12 Proportional Representation (PR) and 13 Ward Seats).
- 7.3 On lodging the grievance with the IEC Commissioner after getting the results on 03 November 2021 at 19h23, they were told by the IEC office that they have missed the 17h00 time frame within which they could have lodged it although they only received the seat allocation documents at 16h50.
- 7.4 Overall, it is the applicant's assertion that the capturing of the votes was not free and fair and it prays that this Court order the re-counting of the Municipality wide votes of the 82 Districts and the setting aside of the declared results. In this regard, the applicant avers that it has photos that were taken by ACU members as proof of the non-corresponding outcomes of the results on the 'scene' and the ones presented by the IEC.

[8] The respondent prays for the dismissal of the application on the basis of the following preliminary points:

- 8.1 The application is fatally defective due to the non-joinder of interested parties;
- 8.2 Considering the manner in which the relief sought is couched, in particular in the Notice of Motion, it is unclear whether this is an application for a review or an appeal. Nonetheless regardless of the nature of the application, it is time barred by non – compliance with the prescribed statutory time frames;
- 8.3 The applicant has not pleaded irregularities that would justify the alteration of the results and re-ordering of the Municipality-wide recount;
- 8.4 Most importantly, there is no formal objection lodged with the IEC in terms of s 65 of Local Government: Municipal Electoral Act 27 of 2000 (MEA).

[9] Against this background, the application to this Court is misplaced for the following reasons:

- 9.1 The four other parties that participated in these elections have not been joined nor cited in this case. Furthermore, there is no indication that they were served

with the application papers. Similarly, the Mthonjaneni Municipality ought to have been joined in this application. There is no question that they all have an interest in the outcome of these court proceedings.³

- 9.2 From the papers, it appears that the applicant was told that it was late in submitting the grievance without a formal communication that details the investigation into the lateness and reasons of the response given.
- 9.3 The reasons for missing the 17h00 time frame for submission of objections whilst having received the seat allocation documents at 16h50 could have been investigated and determined by the IEC. Thereof, the IEC could have also provided formal reasons on the outcome of its investigation.
- 9.4 According to the IEC, it has no record that the applicant's objection was sent to it. The objection ought to have been lodged as envisaged in s 65(2) of MEA.
- 9.5 The applicant's letter dated 03/11/2021 does not indicate the outcome of the investigation and determination of the grievance by the IEC. This letter, if a formal objection was lodged, could have stated the resultant outcome of the IEC investigation that could have formed the basis for the review or an appeal of such findings in this Court.
- 9.6 It is also uncertain whether this is an application for the review of the irregularity made or an appeal on the merits of the decision taken on the formal objection of the outcome of the declared results that was lodged with the IEC.
- 9.7 The IEC was denied an opportunity to investigate the objection in ensuring that the outcomes of the elections were not just free and fair but contribute to the substantive evolution of the right to vote as entrenched in s 19 of the Constitution of the Republic of South Africa, 1996.
- 9.8 The Court has also not been presented with the photos that show the discrepancy on the outcome of the results.
- 9.9 The presentation of further evidence 'on lot of shenanigans if the applicant is given an opportunity' amounts to an abuse of the court processes without being determined at first by the trusted body (IEC) that is charged with the responsibility of ensuring a credible electoral process.

[10] In light of what is stated above, the application is defective due to its non-compliance with the prescripts of the law. The missing of the timeline within which to lodge the grievance could have been saved by the application of s 65(2) of MEA as it

³ See *Judicial Services Commission v Cape Bar Council* 2012 (11) BCLR 1239 (SCA) para 12.

requires 'good cause to be shown for the late submission of the objection in order to be condoned'. Justifiable reasons which could have been presented by the applicant could have provided an opportunity for the IEC to use its discretion to consider the objection.

[11] The alleged 'shenanigans', which have not been detailed in this application is also not within the scope of this Court and would need to be channeled through appropriate fora that are meant to investigate such conduct.

[12] There are also no proved irregularities for purposes of either a review or an appeal which could have been foundational to this application in this Court as the IEC, as a catalyst in ensuring the integrity of the electoral process, has not determined the gist and core content of any objection.

[13] Since there is no outcome of the decision made by the IEC following the submission of an objection, which could have determined the impact on the declared results, there is no reason or any ground that exists for the consideration of this application.

[14] The Court unanimously agreed to dismiss the application on the papers without an oral hearing.

[15] Accordingly the following order is made:

- 1 The application is dismissed.
- 2 There is no order as to costs.

PROFESSOR N NTLAMA-MAKHANYA
MEMBER
ELECTORAL COURT

06 July 2022