

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 10/04

LIBERAL
PARTY

Applicant

versus

THE ELECTORAL COMMISSION
Respondent

First

THE GOVERNMENT OF THE REPUBLIC OF SOUTH
Respondent
AFRICA

Second

PRESIDENT OF THE REPUBLIC OF SOUTH
Respondent
AFRICA

Third

Decided on : 5 April 2004

JUDGMENT

THE COURT:

[1] This is an urgent application for direct access to this Court and an appeal against a decision of the Electoral Court.

[2] The applicant, the Liberal Party, first approached this Court by way of a letter dated 10 March 2004 by Mr Mark Trimble, who appears to be the leader of the party. In the letter, under the heading “COMPLAINT: inequality and unfair discrimination”, the applicant mentioned a number of complaints about the actions of the Electoral Commission (the Commission). These complaints relate in substance to the question whether the applicant can participate as a political party in the forthcoming general elections which are to be held in less than two weeks’ time on 14 April 2004. The matter is therefore urgent and has been dealt with by this Court as expeditiously as possible. The applicant’s complaints included the Commission’s alleged failure to furnish the applicant with a registration certificate, and the Commission’s refusal to accept the applicant’s candidates’ list, which the applicant admits it sought to submit some 21 minutes after close of business on the final day for the submission of such lists, namely 27 February 2004. It appears from the documents lodged by the applicant in support of its application that it is a newcomer to the political scene. It has limited resources and was initially unaware of the formalities that had to be complied with to enable it to be registered as a political party and participate in the elections.

[3] On 15 March 2004 the Registrar of this Court informed the applicant in writing that although its letter did not comply with the rules of the Court, the complaint had been considered. The applicant was directed to approach the

Electoral Court, established to deal with complaints such as those raised in the applicant's letter.

[4] The applicant indeed approached the Electoral Court. From the correspondence available to this Court, it would appear that the applicant did so even before the above-mentioned letter to this Court. In a letter dated 1 March 2004, with a stamp of the Registrar of the Supreme Court of Appeal (where the Electoral Court is seated) indicating the same date, the applicant stated that it wished "to appeal against the decision of the Electoral Commission . . . for rejecting [the applicant's] late application to contest this coming national and provincial elections", again referring to the applicant's late submission of the list on 27 February 2004. The applicant also requested assistance with regard to the correct procedure to be followed.

[5] In a letter dated 2 March 2004 the Registrar of the Electoral Court advised the applicant in writing that the procedure in the court is governed by the Electoral Commission Act 51 of 1996 (the Commission Act) and the Electoral Act 73 of 1998 (the Electoral Act). The applicant was furthermore advised to obtain legal assistance.

[6] The Chairperson of the Electoral Court requested the Commission to furnish the Commission's view on the application and to respond to the points

raised therein. A copy of the letter by the Chairperson of the court to the Commission was made available to the applicant, under cover of a letter dated 23 March 2004.

[7] The Commission submitted a memorandum dated 23 March 2004 to the Electoral Court. A copy of this memorandum has been furnished to this Court. On 24 March 2004 the Chairperson of the Electoral Court informed the applicant in writing that the matter had been considered, resulting in the following order: “The (application for leave to) appeal is dismissed.” It would therefore appear that the Chairperson of the Electoral Court treated the applicant’s papers as an application for leave to appeal, in spite of apparent procedural shortcomings. No reasons for the order by the Chairperson were furnished.

[8] On 25 March 2004 the applicant again approached this Court with a document entitled “URGENT APPLICATION in terms of: section 15(5) of the Electoral Commission Act, No. 51 of 1996 section 27 and 28 of the Electoral Commission Act, No. 73 of 1998 sections 24 - 28 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 and section 9(2) of the Final Constitution of 1996”.

[9] The Registrar of this Court then – in a letter dated 26 March 2004 – instructed the applicant to lodge urgently a copy of the judgment and/or order of

the Electoral Court, as well as proof of service of the application on the respondents. The applicant consequently lodged a copy of the order of the Electoral Court. No proof of service on the respondents has been lodged with this Court. However, a copy of a letter dated 25 March 2004 by Mr Trimble to the Commission, has been made available to this Court. In the letter it is stated that the letter “serves as an Urgent Notice for an Application for leave to Appeal” It may therefore be assumed that the first respondent has knowledge of the application to this Court.

[10] The Commission submitted a memorandum dated 30 March 2004 to this Court, after being requested to do so. The Registrar of the Court made the two memoranda of the Commission available to the applicant on 30 March 2004, and directed the applicant to lodge any possible reply with this Court in writing before 10h00 on 1 April 2004, as a result of which the applicant lodged written submissions with the Court.

[11] Section 20^[11] of the Commission Act and section 96^[21] of the Electoral Act deal with the powers, duties, functions and jurisdiction of the Electoral Court. From these provisions, as well as the legislative context within which they appear, it is clear that the Electoral Court is intended by the legislature to be a mechanism to deal expeditiously and urgently with reviews of and appeals against decisions of the Commission. Section 20(1)(b), states for example that any review shall be

disposed of as expeditiously as possible. In terms of section 20(2)(b) no appeal may be heard save with the prior leave of the Chairperson of the Electoral Court.

[12] In terms of section 96 the Electoral Court has final jurisdiction in respect of all electoral disputes and complaints about infringements of the Electoral Code, and no decision or order of the Electoral Court is subject to appeal or review.

[13] In terms of section 167 of the Constitution this Court is the highest court in all constitutional matters. A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution. A person may bring a matter directly to this Court, or apply to appeal directly to the Court from any other court, when it is in the interests of justice and with leave of the Court.^[3]

[14] Section 19 of the Constitution provides:

- “(1) Every citizen is free to make political choices, which includes the right—
 - (a) to form a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; and
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right—
 - (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - (b) to stand for public office and, if elected, to hold office.”

Section 190 of the Constitution furthermore provides that the Commission must ensure that elections are free and fair.

[15] We are prepared to assume in favour of the applicant, for the purposes of deciding this case, that its complaint raises a constitutional matter and that this Court has jurisdiction to consider this application for direct access, notwithstanding the provisions of section 96, read with section 20,^[4] to which no constitutional challenges have been made. Moreover, we are prepared to overlook in favour of the applicant, the procedural shortcomings of its application, including its failure to prove service on the respondents.

[16] The relevant issue to be considered is whether there are reasonable prospects of success as far as the applicant's appeal against the decision of the Electoral Court is concerned. The applicant seeks relief in various forms, ranging from being "afforded the opportunity and the right to contest the coming election", and to be issued with its party registration certificate, to "postponement of the elections to allow the appellant a fair opportunity to stage a mini-election campaign", as well as exemptions from, and even the amendment of, several statutory provisions applicable to elections.

[17] It is evident from the documentation submitted to this Court by the Commission that the Liberal Party is a registered party. The certificate of that registration was issued on 19 February 2004, the particulars of which were published in the Government Gazette 26077 GN 278, 20 February 2004. This was done in accordance with section 15(5) of the Commission Act. Thus, the applicant's contention that it was not so registered is incorrect.

[18] Having established that the applicant is indeed a registered party, we turn to consider the contention that the Commission erred in not allowing the applicant to submit its candidates' list, in terms of section 27, read with section 28, of the Electoral Act. It is this issue which lies at the heart of the applicant's complaint, because it was this decision which effectively precludes the applicant from contesting the forthcoming elections.

[19] It is common cause that the applicant attempted to submit its candidates' list 21 minutes later than the prescribed deadline: 17h00 on 27 February 2004. This was the date and time set by the Commission in the election timetable which it published in Government Gazette 26039 GN 248, 13 February 2004, as required by section 20(1) of the Electoral Act. In terms of section 26(b) of the Electoral Act a registered party may only contest the elections if it has submitted a list of candidates as prescribed in section 27 of the same Act.^{[\[5\]](#)}

[20] Section 27(1) of the Electoral Act provides:

“A **registered party intending to contest an election must** nominate candidates and **submit a list** or lists of those candidates for that election to the chief electoral officer in the prescribed manner by **not later than the relevant date stated in the election timetable.**” (Emphasis added)

It is not disputed that the applicant did not comply with the requirements set down by section 27(1), as it failed to submit its list “by not later than the relevant date stated in the election timetable”, that being 17h00 on 27 February 2004.^[6] Consequently, it cannot contest the elections.

[21] This thus raises the question whether the Commission had any discretion to condone the late submission of a candidates’ list by the applicant. Section 28 provides:

“(1) If a registered party **that has submitted a list of candidates** has not fully complied with section 27, the chief electoral officer must notify that party of its non-compliance.

(2) The notification must be given in the prescribed manner by not later than the relevant date stated in the election timetable, and must indicate that the party has an opportunity to comply with section 27 by not later than the relevant date stated in the election timetable.

(3) The opportunity provided for in subsection (2) includes an opportunity to substitute a candidate and to re-order the names on that list as a result of that substitution.” (Emphasis added)

[22] Section 28(1) provides for condonation and rectification “[i]f a registered party that has submitted a list of candidates has not fully complied with section 27”. As such, contrary to the applicant’s submission, section 28 does not vest the Commission with a discretion to condone late submission of candidates’ lists, but only to allow the rectification of other failures to comply with section 27. The applicant had not submitted a list by the deadline and is therefore not entitled to rectify its non-performance in terms of section 28.

[23] The applicant also sought to contend that the Commission acted in a discriminatory manner by allowing two other parties, the Peace and Development Party (the PDP) and the Sindawonye Progressive Party (the SPP), to rectify their non-compliance with section 27 but denied it the same concession. While there is no evidence before this Court as to the nature of the SPP’s non-compliance, it is evident that the PDP did submit its candidates’ list prior to the deadline, and the issue was merely whether the deposit required by it could be tendered by way of a bank guaranteed cheque deposited directly into the Commission’s bank account. A court settlement in relation to this was reached prior to 17h00 on 27 February 2004.

[24] This situation is different from the factual circumstances in the present case. As noted above,^[7] non-compliance can be rectified in terms of section 28,

but a late submission cannot. Consequently, the PDP's rectification can hardly be used as a point of comparison on which to claim discrimination.

[25] The Commission is bound by the provisions of the Electoral Act and the Commission Act. Neither of these Acts empowers the Commission to condone the late submission of candidates' lists. Moreover, there is nothing on the papers to indicate that the Commission has ever done so; the only rectification indicated undoubtedly fell within the parameters of the powers conferred by section 28.

[26] Furthermore, even if the applicant's contentions regarding other parties were correct, the fact that the Commission may have exceeded its powers by permitting another party to submit a list of candidates after the peremptory time limit may be grounds for challenging that party's candidacy, but could not afford the applicant the right to be treated similarly.

[27] The only possible way to avoid the consequences of section 27 would be for the Commission to change the actual election timetable, which it is empowered to do in terms of section 20 of the Electoral Act. Section 20 provides:

- (1) The Commission must after consultation with the party national liaison committee—
 - (a) compile an election timetable for each election substantially in accordance with Schedule 1; and
 - (b) publish the election timetable in the Government Gazette.

(2) The Commission may amend the election timetable by notice in the Government Gazette—

- (a) if it considers it necessary for a free and fair election; or
- (b) if the voting day is postponed in terms of section 21.

Thus, this option may only be exercised if “it is necessary for a free and fair election”. We find that changing the election timetable in order to circumvent the provisions of section 27 to accommodate the applicant’s late submission, is not *necessary* for a free and fair election. It is important to note that the election date cannot be changed by the Commission: the date is set by the President.^[8] As such, an extension of time would contract the time available prior to elections. This would place the Commission under increased strain, and could prejudice other parties’ election build-ups and indeed free and fair elections. It would also open the door for other parties to seek further changes in the timetable.

[28] Moreover, the election timetable referred to in paragraph 19 is a timetable which the Commission had to compile and publish in the Government Gazette after consultation with the party national liaison committee (the liaison committee).^[9] The published timetable set the cut-off time for the nomination and submission by registered parties of a list of candidates for the elections, to be held on the 14 April 2004, to be 17h00 on 27 February 2004. There is no suggestion that the compilation and publication of the timetable was done without prior consultation with the liaison committee.

[29] To amend the timetable would in essence be to disregard the consultative process that led to the finalisation of the published timetable. Its amendment, unlike a party specific rectification under section 28, would affect all the parties contesting the election, not to mention the Commission itself, as the new timetable would be applicable to all parties. As such, changing this timetable must be viewed as a last resort, not occasioned by the mere late submission of a candidates' list by one party.

[30] The applicant's inability to contest the forthcoming elections, therefore, arises solely from its failure to comply with the mandatory provisions of the Electoral Act and regulations and cannot be laid at the door of the Commission. The application must therefore fail. In the circumstances, we do not consider it necessary to consider the peripheral issues raised by the applicant in this case. Should the applicant wish to pursue these issues, it may do so in a proper forum in the proper manner.

[31] On the basis of this finding we accordingly make an order dismissing the application for direct access and leave to appeal to this Court.

Chaskalson CJ, Madala J, Mokgoro J, Moseneke J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J.

^[1] Section 20 provides:

- “(1) (a) The Electoral Court may review any decision of the Commission relating to an electoral matter.
(b) Any such review shall be conducted on an urgent basis and be disposed of as expeditiously as possible.
(2) (a) The Electoral Court may hear and determine an appeal against any decision of the Commission only in so far as such decision relates to the interpretation of any law or any other matter for which an appeal is provided by law.
(b) No such appeal may be heard save with the prior leave of the chairperson of the Electoral Court granted on application within the period and in the manner determined by that Court.
(c) Such an appeal shall be heard, considered and summarily determined upon written submissions submitted within three days after leave to appeal was granted in terms of paragraph (b)
(3) The Electoral Court may determine its own practice and procedures and make its own rules.
(4) The Electoral Court shall—
(a) make rules in terms of which electoral disputes and complaints about infringements of the Electoral Code of Conduct as defined in section 1 of the Electoral Act, 1993 (Act No. 202 of 1993), and appeals against decisions thereon may be brought before courts of law; and
(b) determine which courts of law shall have jurisdiction to hear particular disputes and complaints about infringements, and appeals against decisions arising from such hearings.
(5) The hearings and appeals referred to in subsection (4) shall enjoy precedence in the courts of law determined in accordance with that subsection.
(6) The Electoral Court may hear and determine any matter that relates to the interpretation of any law referred to it by the Commission.
(7) The Electoral Court may investigate any allegation of misconduct, incapacity or incompetence of a member of the Commission and make any recommendation to a committee of the National Assembly referred to in section 7 (3) (a) (ii)
(8)”

^[2] Section 96 provides:

- “(1) The Electoral Court has final jurisdiction in respect of all electoral disputes and complaints about infringements of the Code, and no decision or order of the Electoral Court is subject to appeal or review.
(2) If a court having jurisdiction by virtue of section 20 (4) (b) of the Electoral Commission Act finds that a person or registered party has contravened a provision of Part 1 of this Chapter it may in the interest of a free and fair election impose any appropriate penalty or sanction on that person or party, including—
(a) a formal warning;
(b) a fine not exceeding R200 000;

- (c) the forfeiture of any deposit paid by that person or party in terms of section 27 (2) (e);
 - (d) an order prohibiting that person or party from—
 - (i) using any public media;
 - (ii) holding any public meeting, demonstration, march or other political event;
 - (iii) entering any voting district for the purpose of canvassing voters or for any other election purpose;
 - (iv) erecting or publishing billboards, placards or posters at or in any place;
 - (v) publishing or distributing any campaign literature;
 - (vi) electoral advertising; or
 - (vii) receiving any funds from the State or from any foreign sources;
 - (e) an order imposing limits on the right of that person or party to perform any of the activities mentioned in paragraph (d);
 - (f) an order excluding that person or any agents of that person or any candidates or agents of that party from entering a voting station;
 - (g) an order reducing the number of votes cast in favour of that person or party;
 - (h) an order disqualifying the candidature of that person or of any candidate of that party; or
 - (i) an order cancelling the registration of that party.
- (3) Any penalty or sanction provided for in this section will be in addition to any penalty provided for in Part 3 of this Chapter.”

^[3] See Rules 18 and 19 of the Constitutional Court Rules, 2003.

^[4] See paras 11-12.

^[5] Section 26 provides:

- “A party may contest an election only if that party —
- (a) is a registered party; and
 - (b) has submitted a list of candidates in terms of section 27.”

^[6] See para 19.

^[7] See para 22.

^[8] See section 49(2) of the Constitution, as amended, read with section 17 of the Electoral Act. Section 49(2) provides:

“If the National Assembly is dissolved in terms of section 50, or when its term expires, the President, by proclamation must call and set dates for an election, which must be held within 90 days of the date the Assembly was dissolved or its term expired. A proclamation calling and setting dates for an election may be issued before or after the expiry of the term of the National Assembly.”

Section 17 provides:

- “(1) Whenever the President or Acting President calls an election of the National Assembly the proclamation concerned must set a single day and date for voting.

(2) The voting day must be determined after consultation with the Commission.”

^[9] The ‘party liaison committee’ is defined in section 1 of the Electoral Act as, “a committee established in terms of the Regulations on Party Liaison Committees published in terms of the Electoral Commission Act.”