CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 10/06

AFRICAN CHRISTIAN DEMOCRATIC PARTY	Applicant
and	
THE ELECTORAL COMMISSION	First Respondent
THE MINISTER OF PROVINCIAL AND LOCAL GOVERNMENT	Second Respondent
THE MINISTER OF LOCAL GOVERNMENT AND HOUSING (WESTERN CAPE)	Third Respondent

Heard on: 23 February 2006

Decided on: 24 February 2006

JUDGMENT

O'REGAN J;

[1] This is an urgent application for leave to appeal against a judgment of the Electoral Court delivered on 15 February 2006[1] in which the Electoral Court refused to interfere with a decision by the Electoral Commission excluding the applicant, the African Christian Democratic Party, from contesting the imminent local government elections to be held in the Cape Town Metropolitan Council. The matter is clearly one

[1] *African Christian Democratic Party v The Electoral Commission and Others* Case No 1/2006 as yet unreported decision of the Electoral Court dated 15 February 2006.

of great urgency as the elections are due to be held in less than a week's time on 1 March 2006. This judgment has therefore been prepared in haste.

[2] The application was lodged in this Court on 20 February 2006; and on 21 February 2006 the first respondent lodged a notice of intention to oppose the application. On 22 February, this Court enrolled the matter for an urgent hearing on 23 February at 15h00. At the end of the hearing, the Court requested the Electoral Commission to furnish an affidavit by noon on 24 February indicating whether it would be possible to hold elections in the Cape Metropolitan Council as planned on 1 March 2006 if relief was ordered in favour of the applicant. The Commission lodged its affidavit timeously on 24 February indicating that although it would create significant difficulties for the Commission, and would place the elections at risk, such an order would not render the holding of the elections impossible. The Court is indebted to the Commission for its timely filing of the affidavit and for the positive and candid manner in which it informed the Court of the position. The Court also asked the applicant to file an affidavit in response to the Commission's affidavit by 16h00 today. That affidavit too has been filed. We are grateful also for the applicant's assistance.

[3] The crisp issue we must decide is whether the Electoral Commission's decision not to certify the applicant and its candidates, effectively disqualifying them from contesting the election in the Cape Metropolitan area, should be reviewed and set aside. The Electoral Commission reached its decision on the ground that the applicant

had not paid the prescribed deposit in terms of sections 14 and 17 of the Local Government: Municipal Electoral Act, 27 of 2000 (the Municipal Electoral Act).

[4] Section 14(1) of the Municipal Electoral Act provides as follows:

> "Requirements for parties contesting election by way of party lists
> (1) A party may contest an election in terms of section 13 (1) (a) or (c) only if the party by not later than a date stated in the timetable for the election has submitted to the office of the Commission's local representative-
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> (a) in the prescribed format-
>
> (i) a notice of its intention to contest the election; and
>
> (ii) a party list; and
>
> (b) a deposit equal to a prescribed amount, if any, payable by means of a bank guaranteed cheque in favour of the Commission."

Section 17 of the Act provides as follows:

> "Requirements for ward candidates to contest election
> (1) A person may contest an election as a ward candidate only if that person is nominated on a prescribed form and that form is submitted to the office of the Commission's local representative by not later than a date stated in the timetable for the election.
> (2) The following must be attached to a nomination when the nomination is submitted to the Commission:
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> (a) In the case of an independent ward candidate, a prescribed form with the signatures of at least 50 voters whose names appear on the segment of the voters' roll for any voting district in the ward;
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> (b) a prescribed acceptance of nomination signed by the ward candidate;
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> (c) a certified copy of the page of the candidate's identification document on which the candidate's photo, name and identity number appear; and
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> (d) a deposit equal to a prescribed amount, if any, payable by means of a bank guaranteed cheque in favour of the Commission.

> (3) The Commission must accept a nomination submitted to it and allow the nominated person to stand as a candidate in the ward if section 16 (1) and subsections (1) and (2) of this section have been complied with."

[5] It is plain from these provisions that no political party and no ward candidate may contest an election unless it has paid the prescribed deposit by the deadline set by the Electoral Commission. In this case, the deposit prescribed to contest elections in metropolitan areas was R3000.

[6] Local government elections are to be held in all 283 municipalities in South Africa on 1 March 2006. Elections were last held on 6 December 2000 and according to the provisions of the Constitution[2] and the Local Government: Municipal Structures Act[3] must be held by not later than 6 March 2006. On 6 January 2006, the Electoral Commission published the timetable for the 2006 local government elections. According to the timetable for the elections, the prescribed date and time for

[2] Section 159 provides as follows:

> "Terms of Municipal Councils
> (1) The term of a Municipal Council may be no more than five years, a determined by national legislation.
> (2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.
> (3) A Municipal Council, other than a Council that has been dissolved following an intervention in terms of section 139, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected."

[3] Section 24 of the Local Government: Municipal Structures Act 117 of 1998 provides as follows:

> "Term of municipal councils
> (1) The term of municipal councils is five years, calculated from the day following the date set for the previous election of all municipal councils in terms of subsection (2)."

compliance with the provisions of sections 14 and 17 of the Municipal Electoral Act was 17h00 on 19 January 2006.[4]

[7] The question that arises for consideration is whether the applicant did pay a deposit as contemplated by sections 14 and 17 in respect of the Cape Town Metropole. It is common cause that the applicant both lodged a party list and nominated ward candidates timeously on 19 January 2006 at the Cape Town offices of the Electoral Commission, but that no deposit was paid at the Cape Town office. It is also common cause that a bulk payment of R283 000 was made by the applicant by way of bank guaranteed cheque[5] to the National Office of the Electoral Commission in Pretoria on 17 January 2006 in respect of a range of municipalities indicated on a list accompanying the bulk payment and that the Cape Town Metropolitan area was not included in that list. Finally it is common cause that the omission of the Cape Town Metro from the list was an error on the part of the applicant.

[8] The facility for centralised payments was introduced by the Electoral Commission for this set of elections, although no regulations or legislation governing the system was promulgated. The system permitted a political party contesting more than one municipality to furnish one bank guaranteed cheque in respect of all the deposits due in relation to the municipalities it was contesting to the Electoral

[4] Notice 22 of 2006 published in Government Gazette 28386 of 6 January 2006.

[5] There are contradictory statements on the record as to whether the payment of R283 000 was made by way of one bank guaranteed cheque or two. Nothing turns on this.

Commission office in Pretoria. The system was discussed and explained at meetings of Party Liaison Committees[6] convened by the Electoral Commission with representatives of the political parties contesting the elections.

[9] In response to the bulk payment, the Electoral Commission wrote to the applicant stating that "we confirm that the Electoral Commission has received a bank guaranteed cheque in the amount of R283 000. We further confirm that the amount paid covers the election deposits in respect of the attached municipalities."

[10] Between making the bulk payment on 17 January and the deadline for the filing of notices contest elections and party lists on 19 January, the applicant decided not to contest some of the municipalities in respect of which it had paid the bulk deposit. Although it did not write to inform the Electoral Commission of this fact, it did not lodge notices to contest elections in those areas nor did it lodge party lists. On 19 January, therefore, when the deadline passed, the Commission was holding an amount of R10 000 on behalf of the applicant which had not been specifically allocated as a deposit in respect of any contested municipality.

[11] On 24 January 2006, the applicant was informed by the Electoral Commission's Cape Town office that it had not received a deposit in respect of the

[6] Party Liaison Committees were established by Regulations issued by the Electoral Commission in terms of the Electoral Commission Act. See R824 published in Government Gazette 18978 dated 19 June 1998. According to regulation 6, their function is to "serve as vehicles for consultation and co-operation between the Commission and the registered parties concerned on all electoral matters, aimed at the delivery of free and fair elections".

Cape Metro Council. The applicant then informed the Electoral Commission that it had a surplus of funds for the payment of deposits as a result of the bulk payment made on 17 January but the respondent indicated that it would not allocate those funds as a deposit for the Cape Town Metro. On 27 January the applicant's representative met with officials from the Electoral Commission to seek to resolve the matter without success. The Electoral Commission's view was that the provisions of sections 14 and 17 are peremptory and that it did not have the power to condone non-compliance with the provisions.

[12] The applicant then launched proceedings in the Electoral Court on 1 February 2006. We were informed from the bar that the Electoral Court did not hold a hearing but received written submissions from the Electoral Commission and the applicant. The Electoral Court handed down a written judgment on 15 February dismissing the applicant's complaint. It is against that judgment that the applicant now appeals.

[13] It will be helpful to bear in mind the provisions of the Electoral Commission Act which determine the powers of the Electoral Court in disputes of this sort. Section 20 of the Electoral Commission Act 51 of 1996 provides as follows:

> "(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 should be heard, considered and summarily determined upon written submissions submitted within three days after leave to appeal was granted in terms of paragraph (b).
> …".

[14] The first question to be considered is whether this Court has jurisdiction to consider an application for leave to appeal against the Electoral Court. The respondent argued that this Court did not have jurisdiction on two grounds. In the first place, it relied upon the provisions of section 96(1) of the Electoral Act, 73 of 1998 which states:

> "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."

[15] The question of this Court's jurisdiction to hear matters in the light of section 96 of the Electoral Act was expressly left open by this Court in *Liberal Party v The Electoral Commission*.[7] The legislation that, in the first place, governs municipal elections is the Municipal Electoral Act. Section 3(2) of the Electoral Act provides that:

[7] 2004 (8) BCLR 810 (CC) at para 15.

> "This Act applies to an election of a municipal council or a by-election for such council only to the extent stated in the Local Government: Municipal Electoral Act, 2000 (Act 27 of 2000)."

There is no provision in the Municipal Electoral Act which renders section 96 of the Electoral Act applicable to disputes arising from municipal elections. Accordingly, on a proper interpretation of the Municipal Electoral Act, read with the Electoral Act, section 96 of the Electoral Act is not applicable to disputes arising from municipal elections. It is true that the Municipal Electoral Act does not contain an express provision for an appeal against the decision of the Electoral Court. However, there is also no express provision in the Municipal Electoral Act stating that the decision of the Electoral Court is final. In my view, in these circumstances, it cannot be said that section 96 applies to disputes arising from municipal elections and accordingly cannot on any terms be held to oust the jurisdiction of this Court to entertain an appeal. I cannot accept therefore the respondent's argument that it could not have been the intention of Parliament to provide differently for provincial and national elections on the one hand and local government elections on the other. Legislation should not be presumed to have intended to oust this court's jurisdiction when it does not expressly state as such. The question of whether this Court's jurisdiction in constitutional matters can in fact be ousted without offending the Constitution is an important matter upon which we had little argument and on which it is not necessary to say more in this judgment. I should add only that I expressly refrain from considering the effect of section 96 in relation to disputes arising from national or provincial elections and the matter should be left open as it was in the *Liberal Party* case.

[16] Secondly, the respondent argued that this Court does not have jurisdiction to entertain the appeal as it does not raise a constitutional matter. This argument too cannot be accepted. Section 19 of the Constitution entrenches the right of citizens to vote, to form political parties and to stand for election.[8] Any application for leave to appeal from the Electoral Court acting in terms of the Municipal Electoral Act which raises a challenge based on an interpretation of that Act in the light of the rights contained in section 19 will clearly raise a constitutional matter and fall within the jurisdiction of this Court. In this case, the key issue between the parties turns on the proper interpretation of sections 14 and 17 of the Municipal Electoral Act. The applicant argues that in terms of section 39(2) of the Constitution these provisions need to be interpreted in a manner which promotes the spirit, purport and objects of the Constitution.[9] The Municipal Electoral Act was enacted by Parliament specifically to give effect to the constitutional rights entrenched in section 19. Accordingly, its proper interpretation in the light of the provisions of the Constitution

[8] Section 19 of the Constitution provides as follows:

> "19 Political rights
> (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."

[9] Section 39(2) provides as follows:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

gives rise to a constitutional matter within the jurisdiction of this Court.[10] A further factor which makes plain that the matter at hand is a constitutional one is the fact that the Electoral Commission is an institution established by chapter 9 of the Constitution to perform a vitally important constitutional function.[11] The question whether it has properly performed its functions must, too, raise a constitutional matter.

[17] The more difficult question that arises is when it will be in the interests of justice to entertain such an appeal. This Court has elaborated the test of the interests of justice in many cases.[12] Determining the interests of justice requires a consideration of the prospects of success on appeal, as well as consideration of the public interest in the subject matter of the appeal as well as other considerations. In cases such as this, relevant also will be the respect owed to the decisions of the Electoral Court as a specialist court familiar with the electoral terrain and the problems associated with it.[13] In addition, it needs to be borne in mind that electoral appeals will often be of an extremely urgent nature as is acknowledged in section

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[10] See *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 14; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 7.

[11] See sections 190 and 191 of the Constitution.

[12] See, for example, *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) para 8; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32; *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) para 12; *Fraser v Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) para 10; *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 (CC) paras 15-19; *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) para 35; *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC); 2001 (2) BCLR 103 (CC) para 19; *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) para 8.

[13] See *Nehawu v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) para 30 – 31.

20(2)(c) of the Electoral Commission Act.[14] The closer the appeals are to the election, the greater the risk of disruption to the elections. It is clear that elections should not unnecessarily be disrupted. On the other hand, political rights are central to a democratic society and their protection is an important constitutional purpose.

[18] These two interests may at times point in opposite directions. For example, an appeal may raise the question of an applicant's political rights but entertaining the appeal and granting the relief may result in the disruption of the election in a manner quite disproportionate to the right claimed by the applicant. In each case, the court will therefore have to consider the nature and extent of the rights asserted by applicants in the light of any potential disruption to an election. The timing of the application for leave to appeal will be of great importance. In this case, the elections are imminent and disruption to them is a risk. However, the political rights at issue involve a large number of voters in one of our major metropolitan areas and are therefore substantial. Moreover, as will appear from what follows, the applicant has shown good prospects of success. We have also been informed, as stated above at para 2, by the Electoral Commission in an affidavit lodged this morning that should the Court give its judgment by close of business today, Friday 24 February, the municipal elections to be held in Cape Town should not be disrupted. In the circumstances we conclude that it is in the interests of justice to grant leave to appeal. We emphasise however that this is an exceptional case, given its closeness to the date of the election. In reaching the conclusion that it is in the interests of justice to

[14] Section 20(2)(c) is cited above at paragraph 13 .

entertain it despite that fact, we are persuaded by the significant number of people whose rights are being affected, the public importance of the issue and the fact that the Court's order should not disrupt the election. It is necessary now to consider the merits of the appeal.

Applicant's arguments

[19] The applicant argues that it complied with the provisions of sections 14 and 17 of the Municipal Electoral Act, alternatively that the steps it took in respect of the Cape Town Metro constitute substantive compliance with the Act. The respondent disputes this.

[20] In order to determine whether the applicant is correct, it is necessary to consider the proper interpretation to be given to sections 14 and 17. In so doing, it is important to bear in mind that section 2 of the Municipal Electoral Act provides that:

> "Any person interpreting or applying this Act must –
>
> (a) do so in a manner that gives effect to the constitutional declarations, guarantees and responsibilities contained in the Constitution; and
>
> (b) take into account any applicable Code."

[21] In interpreting and applying the Act, therefore, the provisions of section 19 must be considered. As importantly, however, the Act must be construed in the light of the foundational values of the Constitution which state:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> …
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness."[15]

[22] The importance of these values was emphasised by Sachs J in *August and Another v Electoral Commission and Others* as follows:

> "Universal adult suffrage on a common voters' roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement."[16]

[23] These foundational values require a court of law, and the Electoral Commission, when interpreting provisions in electoral statutes to seek to promote enfranchisement rather than disenfranchisement and participation rather than exclusion. The exercise, however, remains one of interpretation.

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[15] Section 1 of the Constitution.

[16] 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) at para 17.

[24] Construed on its ordinary language, section 14 of the Municipal Electoral Act suggests that a political party may not contest an election if it has not, by the prescribed date, lodged with the Commission's local representative three things: a notice of intention to contest the election; a party list and a deposit in the prescribed amount payable by means of a bank guaranteed cheque.[17] Similarly section 17 provides that a ward candidate may not contest an election unless he or she has been nominated in the prescribed manner and on the prescribed form by the due date, and that form must have been submitted together with the prescribed deposit to the office of the Commission's local office.[18] In construing whether there has been compliance with these provisions I am mindful of the reasoning of Van Winsen AJA in *Maharaj and Others v Rampersad*:

> "The enquiry, I suggest, is not so much whether there has been 'exact', 'adequate' or 'substantial' compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved, are of importance."[19]

[17] The text of section 14 is reproduced in para 4 above.

[18] The text of section 17 is reproduced in para 4 above.

[19] 1964 (4) SA 638 (A) at 646 C. See also *Shalala v Klerksdorp Town Council &* Another 1969 (1) SA 582 (T) per Colman J at 587H – 588 C; *Kopel v Marshall and Another* 1981 (2) SA 521 (W) per Margo J at 524 E – F; *Beukes NO v Mdhlalose*, Mdhlalose v Mkhonza and Another 1990 (2) SA 768 (N) per Wilson J at 774 J – 775 C.

[25] The question thus formulated is whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose. A narrowly textual and legalistic approach is to be avoided as Olivier JA urged in *Weenen Transitional Local Council v Van Dyk* :

> "It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the ordinance is to follow a common-sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 434 A – B). Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should be read as 'may'; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have *a posteriori,* not *a priori* significance. The approach described above, identified as '… a trend in interpretation away from the strict legalistic to the substantive' by Van Dijkhorst J in *Ex parte Mothuloe (Law Society, Transvaal, Intervening)* 1996 (4) SA 1131 (T) at 1138 D – E, seems to be the correct one and does away with debates of secondary importance only."[20]

[26] It is common cause in this case that the applicant had lodged the notice of intention to contest the election and the party list with the local office of the Commission. The dispute turns on whether it had lodged an adequate deposit as required by the section. Before interpreting what section 14(1)(b) and section

[20] 2002 (4) SA 653 (SCA) at 659.

17(2)(d) mean when they stipulate "a deposit equal to a prescribed amount, if any, payable by means of a bank guaranteed cheque in favour of the Commission", it is necessary to consider the central payment facility instituted by the Commission in these elections.

[27] The first question that arises is whether that facility was in conflict with the provisions of sections 14 and 17. Sections 14 and 17 contemplate that the deposit will be paid at the local office of the Electoral Commission. The bulk payment facility contemplates however that the payment can be made elsewhere ─ at the head office of the Commission. The question that arises is whether to the extent sections 14 and 17 state that the payment is to be made at the local government office, it is a peremptory provision that prevented the Commission from providing an alternative location for payment, in this case, the national office of the Commission. The purpose of section 14 (and section 17) is to ensure that a deposit is paid by a political party (or ward candidate) to establish that they have a serious intention of contesting the election. There is no central legislative purpose attached to the precise place where the deposit is to be paid. In my view, to interpret sections 14 and 17 in a manner which prohibits the Commission from making such a facility available to political parties would be to read the provision unduly narrowly and to misunderstand its central purpose. In effect, what the Commission did, after consulting with the Party Liaison Committees,[21] was to make an additional method of payment available to parties in a manner which facilitated their participation in the elections. Many parties took

[21] See above n 6.

advantage of this system. In so doing, the Commission did not offend the intention of the legislature in requiring the payment of deposits as stipulated in sections 14 and 17 of the Municipal Electoral Act.

[28] An interpretation of sections 14 and 17 which accepts that the Commission had the power to act in such a manner facilitates the participation in elections and is far more consistent with our constitutional values, than reading the section strictly to prohibit such a payment system. I conclude therefore that the provisions in sections 14 and 17 which state that payment should be made at the local office of the Commission, properly construed, do not prevent the Commission from establishing a system such as the central payment facility under consideration here. That facility was available to all those who wished to contest the elections and permitted them to make payment at an alternative venue to facilitate participation in the municipal elections. The system was both fair and sensible and facilitated participation in the elections without undermining the obligation of candidates and parties to pay deposits to evidence the seriousness of their intention of contesting the elections. Payments made under the central payment system complied therefore with the provisions of sections 14 and 17.

[29] The next question that arises is how the words "deposit equal to a prescribed amount, if any, payable by means of a bank guaranteed cheque in favour of the Commission" in sections 14(1)(b) and 17(2)(d) should be construed. The applicant argues that at 17h00 on 19 January, the Commission was holding funds equivalent to

R10 000 on behalf of the applicant which had not been allocated to any particular local government election and that the availability of that surplus was sufficient to constitute a deposit for the Cape Metro within the terms of sections 14(1)(b) and 17(2)(d). Those funds had originally been paid to the Commission by way of bank guaranteed cheque at its national office of the Commission for the purposes of paying election deposits. The only shortcoming in the payment was that the applicant had failed, prior to the expiry of the deadline, to notify the Commission that those surplus funds should be used to meet the deposit due in Cape Town. The applicant argues that its failure to notify the Commission of this did not result in non-compliance with sections 14 and 17.

[30] The respondent disagrees. It argues that because the applicant had originally indicated that that surplus should be applied to the elections for other councils which it subsequently chose not to contest, the Commission was right in refusing to acknowledge a portion of the surplus as a deposit for the Cape Metro. The respondent argues that if the applicant had informed the Commission of its intention not to contest the elections in the other five councils before the deadline and asked that the surplus be applied to Cape Town, the situation would be different and the applicant would then have complied with the provisions of sections 14 and 17.

[31] In considering whether the surplus payment held by the Commission should be considered to be in compliance with the provisions of sections 14 and 17, the importance of promoting multi-party democracy and the political rights of citizens

should be borne in mind. Of crucial relevance also is the underlying statutory purpose of sections 14 and 17 which appears to be to ensure that candidates and political parties contesting elections declare their intentions to do so by a certain date and provide the Electoral Commission with the necessary information to enable them to organise the elections. The payment of an electoral deposit ensures that the participation of political parties and candidates in the elections is not frivolous. The payment of the deposit is complementary to the key notification required for organising the elections, namely, the notification of the intention to participate and the furnishing of details of candidates.

[32] In this case, the applicant had clearly notified the Commission of its intention to contest elections in the Cape Metro. Indeed, it had filed the information of the 105 candidates who were to contest the wards in the municipal area, as well as its party list. The Commission therefore knew that the applicant intended to contest that election. The Commission also had in its possession at the deadline an amount of R10 000 belonging to the applicant.

[33] There would be little purpose served by a narrow interpretation of sections 14 and 17 concluding that that surplus did not constitute adequate compliance with the section.[22] No other party or candidate is harmed by a more generous interpretation which would hold the provisions of sections 14 and 17 to have been met. The Electoral Commission itself had sought to relax the narrow manner in which the

[22] See the similar reasoning of Miller J in *Waxa and another v Returning Officer Butterworth Town Council and others* [1998] JOL 311 (Tk).

requirements of sections 14 and 17 could be met to facilitate participation in elections, in a manner consistent with the overall goals of our Constitution. To hold that the applicant had not complied with the provisions of sections 14 and 17 simply because it had failed expressly to ask the Commission to regard a portion of the surplus properly paid to the Commission for deposits in the elections to Cape Town promotes no legitimate purpose of the statute that I can discern.

[34] I should emphasise that this judgment holds that the applicant had complied with the provisions of sections 14 and 17 in respect of the payment of the deposit. No condonation for non-compliance is in issue. It holds that in approaching the interpretation of provisions of electoral legislation, courts and the Electoral Commission must understand those provisions in the light of their legislative purpose within the overall electoral framework. That framework must be understood in the light of the important constitutional rights and values that are relevant.

[35] In the circumstances, I conclude that the interpretation of sections 14 and 17 of the Municipal Electoral Act proffered by the respondent is not correct. Accordingly, the Electoral Commission erred in law in concluding that the applicant had not complied with the provisions of sections 14 and 17 of the Act and in disqualifying the applicant from contesting the elections to be held in the Cape Metropolitan area. Its decision must accordingly be set aside as must the decision of the Electoral Court.

[36] Although the applicant has been successful in this Court, we do not consider this an appropriate matter in which to order costs. There have been delays by the applicant as the judgment of the Electoral Court makes plain and the applicant acknowledges that the difficulty arose in this case as a result of an error it made. In the circumstances, we consider it just and equitable to make no order as to costs.

[37] The following order is made:

1. The application for leave to appeal is granted.

2. The appeal is upheld and the order of the Electoral Court is set aside.

3. The decision of the Electoral Commission disqualifying the applicant from contesting the elections in the Cape Metropolitan Council is set aside.

4. It is declared that the applicant has complied with the provisions of sections 14 and 17 of the Local Government: Municipal Electoral Act 27 of 2000, and is therefore entitled to contest the local government elections to be held in the Cape Metropolitan Area on 1 March 2006.

5. The Electoral Commission is instructed to take all reasonable steps to give effect to this order.

6. Should it prove necessary to return to this Court for further directions in the light of this judgment, either party may do so on notice to the other party.

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Ngcobo J, Nkabinde J, Sachs J, Van der Westhuizen J and Yacoob J concur in the judgment of O'Regan J.

SKWEYIYA J:

[38] I have had the opportunity of reading the judgment prepared by my colleague O'Regan J. I am unable to agree with the conclusion reached and the order that is proposed.

[39] The urgency of the matter makes it impossible that I give detailed reasons for my disagreement. The purpose of the application by the African Christian Democratic Party, a duly registered political party in terms of Chapter 4 of the Electoral Commission Act,[1] is to allow it to take part as a political party, and its candidates as candidates, in the Local Government Election for the City of Cape Town (Category A Municipality) which is to take place on 1 March 2006.

[40] The requirements for a registered political party to participate in local government elections are governed by section 14 of the Municipal Electoral Act.[2] Under this section:

> "(1) A party may contest an election in terms of section 13 (1) (a) or (c) only if the party by not later than a date stated in the timetable for the election has submitted to the office of the Commission's local representative-

[1] Act 51 of 1996

[2] Local Government: Municipal Electoral Act 27 of 2000.

(a) in the prescribed format-

(i) a notice of its intention to contest the election; and

(ii) a party list; and

(b) a deposit equal to a prescribed amount, if any, payable by means of a bank guaranteed cheque in favour of the Commission.

. . .

(3) The following documents must be attached to a party list when the list is submitted to the Commission:

(a) A prescribed acceptance of nomination signed by each party candidate; and

(b) a certified copy of that page of the candidate's identification document on which the candidate's photo, name and identity number appear.

(4) If a party omits to attach to its party list all the documents mentioned in subsection (3), the Commission must-

(a) notify the party in writing; and

(b) allow the party to submit the outstanding documents to the office of the Commission's local representative by not later than a date stated in the election timetable."

[41] Two things are clear from this section. First, in terms of section 14(1) the nomination forms and payment of the deposit must be submitted simultaneously in order for there to be compliance with that subsection. Second, there is an obligation on the Electoral Commision (the Commission) to inform a party if there has been non-compliance with subsection (3), but no such obligation arises in respect of subsection (1), and there is clearly no discretion to condone non-compliance in respect of either subsection after the date stated in the election timetable.

[42] It is clear from the provisions of this section that in order for there to be a valid nomination the prescribed form must be submitted and this must be accompanied by payment of the required deposit. In order for the form to be accepted there must have

been payment. An agreement made between the Commission and the parties intending to contest the Local Government Election scheduled for 1 March 2006, dispensed with requirement (1)(b) of section 14, and allowed for a deviation with regard to payment. Instead of having to submit a bank guaranteed cheque along with each nomination form, a bulk payment could be made at a central payment point to cover all of a party's intended nominations. Following that the party would then submit nomination forms individually as before.

[43] The new procedure did not override or replace the procedure prescribed in section 14, it merely presented an alternative for the convenience of the parties contesting the election. So the nature of the deposit did not change, only the place where it was to be paid. Accordingly, if the new system was utilised by a party, a deposit would have to have been made in respect of the relevant municipalities at the central payment point at the time that the nomination form was submitted. There has been argument made by the parties regarding the authority of the form that accompanies the bulk payment and its legal significance. This form must be seen as deriving its authority directly from section 14, it ensures that the same process happens in respect of the new payment system as with the original one – that at the time payment is made, it is made in respect of a specific municipality. To allow the new system to operate differently to the procedure required under section 14(1) results in the unequal treatment of parties. Depending on which system they choose to follow there will be different consequences for how payment operates. The requirements must be the same for all parties regardless of which system they use.

[44] On the facts, what occurred here was that the applicant submitted a bank guaranteed cheque for R283 000 at the central payment point, as well as a list indicating to which municipalities the bulk deposit was to be allocated, the Cape Town Metro was not on this list. Further, the amount paid by the applicant - by way of a bank guaranteed cheque which had been drawn prior to arrival at the central payment point - corresponded to the list which was handed in with the deposit, which meant that payment had not been made in respect of the Cape Town Metro at all at any time before the cut off date. The applicant's Cape Town representative then went to the local office there and submitted their nomination form. Therefore, the applicant submitted nomination forms to the relevant office, however, it failed to pay the deposit in respect of this area. This must be classified as non-compliance with section 14.

[45] The question is then whether the Commission is required to notify a party that there has been non-compliance prior to the cut off date. Section 14(4) expressly requires the Commission to notify a party before the cut off date where there is non-compliance with section 14(3), but nothing is said in relation to section 14(1). The fact that the Act is silent must be taken to mean that there is no such requirement on the Commission, and that the onus is on the party concerned to ensure that everything is in order. It is important to view the responsibilities of the Commission and a political party respectively in terms of section 14, in the context of the electoral process more generally.

[46] The affidavit of Norman William Du Plessis, Deputy Chief Electoral Officer of the Commission is most helpful as an indication of the immensity of the task which the Commission performs. In respect of preparation for the Cape Town Metro election alone, there are 105 wards, each with an individual ballot paper, totaling 1 525 100 ballot papers. In addition, one proportional ballot paper is required for the Cape Metro elections on which the details of each political party appear. There are currently 21 political parties contesting the proportional elections necessitating the preparation of 1 525 100 proportional ballot papers. In sum, the total number of ballot papers that the Commission has to prepare for the Cape Town Metro Elections alone exceeds 3 million.

[47] This process of preparation involves the following:

- Designing the ballot papers and arranging the parties in alphabetical order
- Printing and verifying draft ballot papers
- Submitting draft ballot papers to the local Party Liaison Committee for verification
- Compiling electronic copies of the final ballot papers
- Delivering electronic copies of the individual ballot papers to the printer
- Printing of proof ballots
- Approval of proof ballots
- Printing of approved ballots
- Binding of ballot papers in books of 100 ballots each

- Verification that each book contains 100 ballot papers (ballot papers are not numbered and exact quantities have to be verified in order to be able to reconcile during the counting process)
- The same verification needs to take place for the proportional party ballot
- Plastic wrapping of each ballot book (for protection and to prevent loss of individual ballots)
- Packing of wrapped ballot books in boxes and labelling of boxes indicating ward number(s) and quantities
- All of the above steps need to take place in a secure and supervised environment and with reliable and accountable staff to ensure the security of ballot papers
- Distribution to the office of the Municipal Electoral Officer (MEO)
- Unpacking and splitting into voting district parcels
- Distribution of individual ballot paper parcels to the 758 presiding officers concerned.[3]

[48] Note that all of this preparation needs to be repeated for every municipality. This is just what the Commission is required to do *after* the list of contesting parties and their nominated candidates are finalised. In light of the magnitude and complexity of this task, the need for political parties to do all they can to assist the Commission in its management of elections is quite clear. The Commission cannot be expected to bear the responsibility for ensuring that all the nomination and registration formalities have been complied with by every party in every instance. It is critical for

[3] Affidavit of Norman William Du Plessis, Deputy Chief Electoral Officer of the Independent Electoral Commission at para 8.

the fulfillment of our constitutional commitment to free and fair elections that parties engage with the democratic process and bear their share of the responsibility for its effective functioning.

[49] In addition, part and parcel of the idea of sharing the load of responsibility between parties and the Commission is the notion that the Commission bears equal responsibility to each individual party. The functions the Commission is expected to perform in respect of each party cannot be heightened because of a party's failure to comply with a procedural requirement laid out in the Municipal Electoral Act. As succinctly put by the Electoral Court "if the election timetable is not adhered to equally by all parties, it will compromise the legitimacy and fairness of the elections."[4]

[50] This Court has considered the question of non-compliance with the electoral timetable in *Liberal Party v Electoral Commission and others*.[5] Although that case dealt with provisions of the Electoral Act[6] and not the Municipal Electoral Act, the principles elucidated therein are equally applicable to a consideration of non-compliance with the latter act. In particular, the following dictum is of significance:

[4] Record Vol 1 pg 28.

[5] 2004 (8) BCLR 810 (CC).

[6] Act 73 of 1998.

> "The applicant's inability to contest the forthcoming election, 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."[7]

[51] The applicant's non-compliance with section 14 has already been established. On 24 January, the applicant contacted the Commission and requested them to allocate R3000 of the R10 000 'surplus' to the Cape Town Metro. The Commission refused to do so. Had it agreed, it would in effect have been condoning non-compliance with the prescribed time limit. The question which then remains to be answered is whether the Commission has a discretion to condone non-compliance. The existence or otherwise of such a discretion must be determined in the context of the democratic process more broadly.

[52] In South Africa, free and fair multi-party elections form the high water mark of our democracy. The crucial importance of such elections in South Africa cannot be overstated. One need only look at our turbulent and painful history to get a powerful reminder of this. Section 1(d) of the founding provisions of our Constitution[8] declares that:

> "The Republic of South Africa is one, sovereign, democratic State founded on the following values:
>
> . . .
>
> Universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[7] Above n5 at para 30.

[8] The Constitution of the Republic of South Africa, 1996.

[53] The desired outcome of our constitutional commitment to democratic governance is the creation of an environment in which both voters and political parties alike feel free to participate in the democratic structures which give shape to our democracy. This case reminds us that if multi-party democratic governance is the end, then the democratic process is the means. Thus free and fair municipal elections can only be attained through the democratic process.

[54] A process by its very nature involves the operation of certain procedures. Moreover, adherence to such procedures is a critical precondition for the functioning of the process and hence the attainment of the desired outcome. This may seem an abstract construction. It is however capable of tangible illustration at the level of municipal elections. The development of the process from which municipal elections result, falls within the competence of the Commission which was created by the Constitution for the purpose of strengthening constitutional democracy.[9]

[55] The Commission has been hailed as a statutory body with wide powers in relation to elections, including their management.[10] Its objects are set out in section 4 of the Electoral Commission Act 51 of 1996 as being to 'strengthen constitutional democracy and promote democratic electoral processes'. At this juncture let the emphasis on process be noted. In order to achieve these objects, the functions of the

[9] Section 181(1)(f) of the Constitution.

[10] *Mketsu and others v African National Congress and others* 2003 (2) SA 1 (SCA).

Commission include managing any election,[11] ensuring that any election is free and fair[12] and promoting conditions conducive to free and fair elections.[13] Section 190(1)(a) of the Constitution requires the Commission to manage elections in accordance with national legislation. Such legislation exists in the form of the Municipal Electoral Act. In the context of municipal elections, this Act serves as the roadmap for the democratic process. The Commission is charged with administering the Municipal Electoral Act in a manner conducive to free and fair elections.[14]

[56] In order to empower the Commission to achieve its objects and perform its functions, it is given wide powers which encompass the performance of any act necessary.[15] One such power which is specifically mandated in section 11 of the Municipal Electoral Act directs the Commission to compile an election timetable as soon as an election has been called.[16] In fact there are no less that nine references to the election timetable in the Municipal Electoral Act. These can be found in sections 6(2), 14(1), 14(4)(b), 15(1), 15(3), 17(1), 18(1), 19(5) and 22(1). The fact that so

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[11] Above n1, section 5(1)(a).

[12] Id, section 5(1)(b).

[13] Id, section 5(1)(c). These functions mirror those set out in s190 of the Constitution.

[14] Above n2, section 4(2).

[15] Above n1, section 5(2)(d).

[16] Section 11 reads:
(1) When an election has been called, the Commission must-
(a) compile a timetable for the election; and
(b) publish the election timetable in the Government Gazette , or, in the case of a by-election, in the Provincial Gazette of the province concerned.
(2) The Commission may, by notice as required in subsection (1) (b) , amend the election timetable if-
(a) it considers it necessary for a free and fair election; or
(b) the voting day is postponed

many provisions of the Act are made subject to the election timetable is indicative of the importance of adhering to the timeframe established by the Commission for the running of free and fair elections. Given the immense task of organising an election of unimpeachable integrity at municipal level in South Africa, such adherence takes on added significance.

[57] The link between the attainment of free and fair elections and the way in which elections are structured emerges clearly from this Court's finding in *New National Party of South Africa v Government of the Republic of South Africa and Others.*[17] In that case, the applicant contended that certain provisions of the Electoral Act were inconsistent with the Constitution because only bar-coded identity documents could be used for the purposes of voting and registering for the 1999 national and provincial elections.

[58] Thus what was in issue in that case was the way in which citizens had to register and vote. Before answering the question whether these requirements constituted an infringement of the right to vote, this Court outlined the context of such an enquiry. What is significant for our purposes is that an important part of that context involved an examination of "the importance of the need for an effective exercise of the right to vote and the degree of regulation required to facilitate the effective exercise of the right."[18] (my emphasis)

[17] 1999 (3) SA 191 (CC).

[18] Id at para 10.

[59] This Court highlighted that:

> "[t]he importance of the right to vote is self-evident and can never be overstated. There is, however, no point in belabouring its importance and it is sufficient to say that the right is fundamental to a democracy, for without it there can be no democracy. But the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless."[19] (my emphasis)

[60] The Court went on to declare that:

> "The right to vote is, of course, indispensable to, and empty without, the right to free and fair elections; the latter gives content and meaning to the former. The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised. Two of these implications are material for this case: each citizen entitled to do so must not vote more than once in any election; any person not entitled to vote must not be permitted to do so. The extent to which these deviations occur will have an impact on the fairness of the election. This means that the regulation of the exercise of the right to vote is necessary. . . in order to ensure the proper implementation of the right to vote."[20]

[61] Further that:

> "The Constitution recognises that it is necessary to regulate the exercise of the right to vote so as to give substantive content to the right. Section 1(d) contemplates the existence of a national common voters roll. Sections 46(1), 105(1) and 157(5) of the

[19] Id at para 11.

[20] Id at para 12.

> Constitution all make significant provisions relevant to the regulation of the exercise of the right to vote. . . .
>
> The right to vote contemplated by s 19(3) is therefore a right to vote in free and fair elections in terms of an electoral system prescribed by national legislation which complies with the aforementioned requirements laid down by the Constitution. The details of the system are left to Parliament. The national legislation which prescribes the electoral system is the Electoral Act."[21]

[62] Significantly for our purposes, Yacoob J went on to point out that:

> "The process of registration and voting needs to be managed and regulated in order to ensure that the elections are free and fair. The creation of a Commission to manage the elections is a further essential, though not sufficient, ingredient in this process. In order to understand the enormity of the problem, one has just to picture the spectre of millions of South Africans arriving at registration points or voting stations armed with all manner of evidence that they are entitled to register or to vote, only to have the registration or electoral officer sift through this evidence in order to determine whether or not each of such persons is entitled to register or to vote. It is to avoid this difficulty that the Electoral Act makes detailed provisions concerning registration, voting and related matters, including the way in which voters are to identify themselves in order to register on the common voters roll and to vote."[22]

[63] The above statement deals with the critical importance of regulation from the perspective of those doing the voting. The issue before this Court is the importance of regulation but from the perspective of those being voted for. Just as the spectre of millions of South Africans arriving at registration points or voting stations armed with all manner of evidence that they are entitled to register or to vote is unthinkable, so too is the thought of hundreds of political parties attempting to stand for elections with

[21] Id at paras 13-14.

[22] Id at para 16.

a hodge-podge of compliance with Commission procedures between them.

[64] What the dicta in the New National Party case point to is the fact that participation in free and fair elections is underscored by effective management of the process of such elections. The more procedural aspects of the management of elections may not be particularly glamorous. Functions like the issuing of an election timetable as well as ensuring that all relevant parties comply with that timetable is part of the nitty gritty of the running of an election. But the importance of such nuts and bolts is paramount. Should the procedural matrix for the running of an election crumble, a citizen's right to vote becomes an empty right in the absence of an effective framework in which to stage elections. Viewed in this context, absolute compliance with the procedures laid down by the Commission acquires increased import. To me, the process is as important as the actual exercise of the citizen's right to vote. This case does not require us to consider whether "sufficient" compliance with a relatively inconsequential technicality exists, but rather whether absolute compliance with a procedural requirement forming part of the framework which enables the right to vote in free and fair elections to be enjoyed in a meaningful way, has been achieved.

[65] In conclusion, non-compliance with the procedures required by section 14 of the Municipal Electoral Act has been shown. The applicant failed to submit a deposit in respect of the Cape Town Metro before the cut off date as contained in the election timetable published in the Government Gazette. Given this finding, the only way in

which the applicant would be able to contest the election in the Cape Town Metro would be if the Commission is entitled to exercise a discretion to condone procedural non-compliance. As has been demonstrated above, the Commission cannot enjoy such discretion if the integrity of the democratic process is to remain intact. Therefore, the applicant must fail in its attempt to compel the Commission to enrol them in the election.

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For the respondent:	JC Heunis SC instructed by L Mbanjwa Incorporated.