CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 33/11
[2011] ZACC 16

In the matter between:

ELECTORAL COMMISSION Applicant

and

INKATHA FREEDOM PARTY Respondent

Heard on : 6 May 2011

Decided on : 10 May 2011

JUDGMENT

NGCOBO CJ:

Introduction

[1] On 18 May 2011, local government elections are to be held in all 278 municipalities in this country. On 11 March 2011, the applicant, the Electoral Commission (Commission), published the election timetable for the 2011 local government elections.[1] According to the timetable, relevant documentation to contest the election had to be submitted by no later than 17h00 on 25 March 2011.

[1] Exercising its power under section 11 of the Local Government: Municipal Electoral Act 27 of 2000, the Commission published the election timetable in Government Notice 134, contained in Government Gazette 34114 of 11 March 2011.

[2] The respondent, the Inkatha Freedom Party (IFP), a registered political party with representatives in all spheres of government, desires to contest numerous municipal elections in the upcoming local government elections. It did not, however, submit its election documentation relating to the Umzumbe local government elections at the local offices of the Commission in Umzumbe by the time and date stipulated in the timetable. Its request to submit the relevant documentation at the Durban offices of the Commission on 25 March was rejected by the Commission, as was a subsequent request in writing to file the documentation after the deadline.

[3] The IFP subsequently approached the Electoral Court seeking leave to appeal against the decision of the Commission. In the alternative, and should leave to appeal be refused by the Chairperson of the Electoral Court, it sought an order reviewing and setting aside the decision of the Commission. Without notifying and hearing the Commission, the Court decided to consider the alternative relief sought by the IFP. It reviewed and set aside the decision of the Commission and made the following order on 7 April 2011:

> "1. The decision of the Respondent, the Electoral Commission, on 25 March 2011, refusing to allow the Applicant, Inkatha Freedom Party, to submit its necessary documentation in terms of Sections 14(1) and 17(1) and (2) of the Local Government: Municipal Electoral Act 2000, at the Respondent's Durban offices, is reviewed and set aside.
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> 2. The respondent is ordered to:
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> (a) allow the Applicant to forthwith file all its relevant documentation as set out in prayer 1(a) with the Respondent;

(b) forthwith place Applicant's name on the list of registered parties entitled to contest the Umzumbe local government election;

(c) forthwith place the names of Applicant's candidates for the various wards, as per the ward nomination forms attached as Annexures "NS3(a)" to "NS3(s)" to the founding affidavit, on the final list of candidates of the Umzumbe local government election;

(d) ensure that all ballot papers [are] printed reflecting the result of the orders set out above, alternatively to [the] extent that ballot papers have already been printed, to print forthwith ballot papers reflecting the result of the orders set out above.

3. There will be no order as to costs.

4. The reasons for this order will be filed with the Registrar of this court in due course."

[4] The Court indicated that the reasons for its order would be filed later. Those reasons were given on 20 April 2011.[2]

[5] On 19 April, and during our administrative recess, the Commission lodged the present urgent application for leave to appeal directly to this Court against the judgment and order of the Electoral Court. Two days later, this Court issued directions setting the application down for hearing on Friday, 6 May 2011, and setting the timetable for the lodging of the record and written submissions. The IFP opposed the application.

[6] The matter is one of great urgency, as the elections are due to take place in less than two weeks. While we would ordinarily have preferred to have had more time to

[2] *Inkatha Freedom Party v The Electoral Commission*, EC Case No 001/11, as yet unreported. The date stamp of the Registrar of the Supreme Court of Appeal on the judgment reflects 20 April 2011.

formulate our reasons for our conclusions, the urgency of the matter does not permit that. It is necessary that we announce our conclusions and reasons at once.

[7] The issue for determination on appeal is whether the Electoral Court erred in reversing the decision of the Commission to refuse to allow the IFP to submit its election documentation relating to the Umzumbe local government elections in Durban. The decision of the Commission was based on the ground that the provisions of sections 14 and 17 of the Local Government: Municipal Electoral Act[3] (Act), read with the election timetable, required the IFP to submit election documentation by no later than 17h00 on 25 March 2011 at the Commission's local representative in Umzumbe.

The relevant statutory provisions

[8] The relevant provisions of the Act are sections 14 and 17, in particular those portions which require documents to be submitted "to the office of the Commission's local representative". The provisions of these sections, with our emphasis added, are set out below.

[9] Section 14 provides:

> "(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—*
>
> (a) in the prescribed format and signed by the party's duly authorised

[3] 27 of 2000.

representative—

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

(ii) a party list;

(iii) an undertaking binding the party, its candidates, persons holding political or executive office in the party, its representatives, members and supporters, to the Code; and

(iv) a declaration that none of the candidates on the party list is disqualified from standing for election in terms of the Constitution or any applicable legislation; and

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

(2) If it is an election in a district municipality which has one or more district management areas, a party intending to contest the election in such an area must submit a separate party list for the election in that area.

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

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

(a) notify the party in writing by no later than the relevant date and time stated in the election timetable; and

(b) allow the party to submit the outstanding documents to the office of the Commission's local representative by no later than the date and time stated in the election timetable.

(5) The Commission must remove from a party list the name of a candidate—

(a) in respect of whom any outstanding document has not been submitted by the date and time referred to in subsection (4); and

(b) who is not registered as a voter on that municipality's segment of the voters' roll.

(6) The Commission must notify the party of the removal of the name of the candidate contemplated in subsection (5)."

[10] Section 17 provides:

"(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 it is submitted:

(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 municipality's segment of the voters' roll for any voting district in the contested ward;

(b) a prescribed acceptance of nomination signed by the candidate;

(c) a copy of the page of the candidate's identity document on which the candidate's photo, name and identity number appear;

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

(e) a prescribed undertaking, signed by the candidate, to be bound by the Code; and

(f) a prescribed declaration, signed by the candidate, that he or she is not disqualified from standing for election in terms of the Constitution or any applicable legislation.

(2A) If any document mentioned in paragraphs (b) and (c) of subsection (2) were not attached to the nomination, the Commission must—

(a) notify the nominating party or person in writing by no later than the date stated in the election timetable; and

(b) allow the nominating party or person to submit the outstanding document by no later than a date stated in the election timetable.

(3) The Commission must accept a nomination submitted to it and allow the nominated person to stand as a candidate in the ward if—

(a) the provisions of section 16 and this section have been complied with; and

(b) the candidate is registered as a voter on that municipality's segment of the voters' roll."

The factual background

[11] The background facts are common cause.

[12] As stated above, on 18 May 2011 separate elections for 278 municipal councils will be held, each in its own municipality. This case concerns only the election for Umzumbe Municipality. In terms of sections 14 and 17, the documentation necessary to contest the elections must be submitted at the local offices of the Commission. Local offices of the Commission are located in each of the 278 municipalities. As the IFP intends to contest municipal elections for Umzumbe Municipality, the Act required it to submit its election documentation to the Umzumbe office of the Commission by 17h00 on 25 March 2011. It did not do so.

[13] The IFP alleges that all the relevant documentation that was to be submitted in each municipality "was timeously collated and placed into separate marked envelopes for delivery" to the relevant offices of the Commission. This was done "before the stipulated deadline", it maintains. The IFP is silent on when this took place. What is clear, however, is that collating the documents destined for Gauteng "continued through the evening of 24 March 2011 and into the early hours of 25 March 2011." Despite having "double checked" the documents destined for Gauteng, once in Gauteng, it was discovered that documentation that was destined for Cape Town and Umzumbe had been erroneously included in the Gauteng bundles. This was discovered at "around 10am" on 25 March 2011.

[14] Arrangements were made to send the stray documents to their respective destinations by courier. Those destined for Umzumbe could be sent to Durban only on a 14h00 flight that would arrive at King Shaka International Airport in Durban at approximately 15h00. A helicopter was chartered to fly the documents to Umzumbe from Virginia Airport. This would have taken approximately 20 minutes. But a storm in the mid to late afternoon in Durban grounded the helicopter. At approximately 16h25, the IFP was advised that the helicopter had been grounded by the weather and that it would not be able to take off.

[15] As the deadline was fast approaching, the IFP telephoned the Commission's provincial electoral officer for KwaZulu-Natal and asked if the Commission might accept the documents in Durban instead of Umzumbe. The Commission advised that it would not. On the advice of the KwaZulu-Natal provincial electoral officer, the IFP instructed its local representative in Umzumbe to fill out the relevant party list and to submit it. This was done and the Commission's local representatives in Umzumbe accepted the emergency documentation which related to only three candidates, and which was "filed just before the 5pm deadline." At the hearing, the IFP explicitly disavowed any reliance on the submission of these documents.

[16] On the afternoon of Sunday, 27 March 2011, the IFP's legal representatives addressed a letter to the Commission's head office. The letter explained the circumstances that led to the failure of the IFP to submit its election documentation in Umzumbe timeously. It also set out the steps taken by the IFP to deliver the

documents in Durban and in Umzumbe. It urged the Commission to accept delivery of the documentation and allow the IFP to contest the elections in Umzumbe. As pointed out above, the Commission declined. In a letter dated 28 March 2011, it stated that the statutory provisions were peremptory, and that its processes were configured to capture the election data at the local level. This prompted the IFP to approach the Electoral Court on 30 March 2011 for the relief referred to above.

[17] The issues for determination must be understood in the light of the core reasoning of the Electoral Court, as well as the contentions of the parties.

The reasoning of the Electoral Court

[18] The Electoral Court placed much reliance on the decision of this Court in *African Christian Democratic Party* (*ACDP*).[4] In that case, this Court considered whether the establishment of a bulk payment facility by the Commission, after consulting the Party Liaison Committees, complied with the provisions of the Act. The facility contemplated that payment of the deposit required under sections 14 and 17 of the Act can be made elsewhere – at the national office of the Commission – than at the local office of the Commission.

[19] The question for decision was whether the provisions of sections 14 and 17 relating to the payment of deposits are peremptory so as to prevent the Commission

[4] *African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC).

from providing an alternative location for payment.[5] We held that "there is no central legislative purpose attached to the precise place *where the deposit is to be paid*."[6] We accordingly concluded that, properly construed, the provisions of sections 14 and 17, which require payment to be made at the local office of the Commission, do not prevent the Commission from establishing the central payment facility in question.[7] We also held that the ACDP's failure to notify the Commission that the surplus funds held to its credit at the central payment facility should be used to meet the deposit due in Cape Town did not constitute non-compliance with sections 14 and 17 of the Act.[8]

[20] The reasoning of the Electoral Court was that "there is no difference in principle between [this case and *ACDP*]"[9] and that "the principle laid down [in *ACDP*] in respect of the payment of the deposit by parity of reasoning applies with equal force to the submission of documents."[10] Borrowing from the language used in *ACDP*, it held that "there seems to be no central legislative purpose attached to the precise place where in a province the relevant documentation is submitted to the Commission."[11] The Court took the view that the Commission's "refusal to accept the documentation was not only obstructive . . . but involved an unduly narrow reading of

[5] Id at para 27.

[6] Id. (Emphasis added.)

[7] Id at para 28.

[8] Id at para 33.

[9] Above n 2 at para 15.

[10] Id.

[11] Id.

the provisions of sections 14 and 17, and a misunderstanding of the central purpose of the provisions."[12]

[21] The Electoral Court accordingly upheld the challenge to the decision of the Commission and made the order set out above.[13]

The contentions of the parties in this Court

[22] The Commission contends that the Electoral Court erred in four material respects. First, the Commission was not afforded the right to be heard. Second, it departed from the decision of this Court in *Liberal Party v The Electoral Commission and Others*, in which this Court answered the question whether the Commission "had any discretion to condone the late submission of a candidates' list"[14] in the negative. Third, its finding that the Commission can and should, under the circumstances, grant condonation for non-compliance with the Act is inimical to free and fair elections. Fourth, it made a material misdirection of fact in finding that there was no central legislative purpose to the local filing provisions in question, which are designed to prevent administrative dislocation where parties, at the eleventh hour, file in the wrong depot.

[23] For its part, the IFP supports the decision of the Electoral Court. And like that Court, the IFP places much store by our decision in *ACDP*. It contended that *ACDP*

[12] Id.

[13] See [3] above.

[14] [2004] ZACC 1; 2004 (8) BCLR 810 (CC) at paras 21-5.

laid to rest the question whether the provisions of sections 14 and 17 are peremptory by holding that they are not. The IFP submits that the Electoral Court had proper regard to the interpretive injunction articulated by this Court in *ACDP*, namely, that courts should favour an interpretation of the Act that promotes enfranchisement and participation over disenfranchisement.[15] The IFP stresses the importance of the right to vote, universal franchise, and multi-party democracy as foundational values of the Republic, and argues that the Commission has a positive obligation to promote enfranchisement.[16] In oral argument, the IFP contended that, in the light of these values, when the Durban officials applied the statute, they should have interpreted the provisions to allow acceptance of the documentation at Durban.

Issues for determination

[24] This case is not about whether the Commission has the power to grant condonation for non-compliance with the Act. Nor is it about the discretion to condone the late submission of the election documentation, as contended by the Commission. Accordingly, we are not considering whether the Commission has the power to condone non-compliance with the Act or whether it has the discretion to relax the requirements of the Act.

[25] Reduced to its essence, the debate between the parties turns upon two interrelated questions. The first is whether the present case is distinguishable from

[15] Above n 4 at para 23.

[16] The IFP refers as authority for this argument to this Court's ruling in *August and Another v Electoral Commission and Others* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) at para 17, which dealt specifically with the Commission's obligation to enable prisoners to register and vote.

ACDP. The Electoral Court held, and the IFP maintains, that it is not. However, the Commission asserts that it is. The second question, the answer to which depends upon the answer to the first, is whether submitting documents at the Durban office of the Commission instead of at its Umzumbe office constitutes compliance with the local filing requirements of sections 14 and 17 of the Act read in the light of their legislative purpose. The IFP maintains that it does and the Commission maintains that it does not.

[26] Before considering the central issues presented in this case, it is necessary to dispose of certain preliminary matters. These are: the issue raised by the Commission relating to the procedure adopted by the Electoral Court; condonation for the late filing of the record; and whether leave to appeal should be granted.

Preliminary issues

The procedure adopted by the Electoral Court

[27] The main relief sought by the IFP in the Electoral Court was leave to appeal. Leave to appeal to that Court is governed by rule 5 of the Rules Regulating the Conduct of the Proceedings of the Electoral Court.[17] Rule 5(3) requires the Secretary

[17] These are contained in General Notice 794 of 1998 published in Government Gazette 18908 dated 15 May 1998. Rule 5, entitled "Appeal proceedings", provides:

> "(1) An application for leave to appeal against a decision of the Commission must be made in writing and lodged within three days after the decision has been made.
>
> (2) The application in terms of subrule (1) must set out succinctly, fairly and clearly the points of law concerned and the information necessary to enable the Chairperson to consider the application.
>
> (3) The Secretary must inform the party who made the application and the Commission of the decision of the Chairperson regarding the application without delay.

of the Electoral Court to "inform the party who made the application *and the Commission* of the decision of the Chairperson regarding the application without delay."[18] The rest of rule 5 deals with the procedure to be followed if leave to appeal is granted, including the lodging of written submissions.

[28] When the Commission did not hear from the Secretary on the application for leave to appeal, it made enquiries on 7 April 2011 in writing to the Secretary as to whether the IFP was persisting in its application. More importantly, it drew attention to the provisions of rule 5(3) and (4) and specifically enquired whether it "must wait to be informed about the result of the application for leave to appeal (as it is doing now) or whether any other action is required from its side." It did not receive any response from the Secretary. The order of the Electoral Court was made on the very same day as the written enquiry by the Commission.

[29] In its judgment, the Electoral Court explained that it had decided to treat the matter as one for review, rather than for appeal, as this "allowed for more 'expeditious

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(4) If leave to appeal has been granted, the party who made the application and the Commission must lodge with the Secretary comprehensive written submissions within three days after being informed in terms of subrule (3).

(5) The party that lodges an appeal must—

(a) set out fully in its written submission—

(i) the findings of law and fact, where appropriate;

(ii) the order or orders against which the appeal is directed; and

(iii) the grounds on which its contentions are based; and

(b) attach, if possible, any relevant record or minutes of the proceedings concerned."

[18] Emphasis added.

disposal'". Under rule 6, the Commission was obliged to respond within three days of the review application.[19] This it did not do.

[30] The Commission was fully justified under the rules of the Electoral Court to make the enquiry that it made. And it should have been notified of the decision of the Court not to deal with the application for leave to appeal. In addition, the Commission was justified in expecting that the Court would first consider the main relief sought, the application for leave to appeal, and that, if the Court considered it "expeditious" to deal with the alternative relief, the Secretary would notify it. On the facts and circumstances of this case, the refusal of leave to appeal would have meant inevitably that the review would also fail.

[31] The Commission is the constitutionally designated authority to manage elections in the Republic and ensure that elections are free and fair.[20] In all matters involving a decision of the Commission, it must be given the opportunity to make submissions. Failure to notify the Commission of the Electoral Court's decision on

[19] Rule 6, entitled "Review proceedings", provides:

> "(1) A party who is entitled to and wants to take a decision of the Commission on review must lodge a comprehensive written submission with the Secretary within three days after the decision has been made.
>
> (2) The Commission must lodge a comprehensive written submission with the Secretary within three days of receipt of a submission referred to in subrule (1).
>
> (3) The party who takes a matter on review must—
>
> (a) set out fully in its written submission—
>
> (i) the decision or decisions which it requires to be reviewed; and
>
> (ii) the grounds therefor; and
>
> (b) attach, if possible, any relevant record or minutes of the proceedings concerned."

[20] Section 190(1)(a)-(b) of the Constitution.

the application for leave to appeal led regrettably to the exclusion of the Commission from participating in the proceedings in the Court. The IFP did not contend otherwise. Non-compliance with rule 5(3) constituted an irregularity which vitiated the proceedings in the Electoral Court. On this basis, alone, the order of the Electoral Court must be set aside. This, however, does not finally dispose of the issues in this case.

Condonation

[32] Our directions of 21 April 2011 required the record to be filed on 26 April. The Commission filed a ring-bound version of the record on that day, and despite this Court's indication that, given the urgency of the matter, a record in that form might suffice, a properly bound and paginated version of the record was nevertheless filed on 29 April. Given the attenuated timetable within which the record had to be filed and the intervening public holidays, the explanation for the delay in preparing and filing a record that complies with the rules of this Court is satisfactory. Having regard to the importance of the issues raised in this case and the fact that the Commission did not have the opportunity to present its case in the Electoral Court, it is in the interests of justice that the late filing of the record be condoned.

Leave to appeal

[33] There can be no doubt that this case concerns constitutional issues of importance which go to the right to vote[21] and the right to stand for public office.[22]

[21] Section 19(3)(a) of the Constitution.

The central question presented in this case concerns the nature and degree of compliance required by sections 14 and 17 when submitting documents to contest local government elections; in particular, whether they require, as the Commission puts it, anything other than "scrupulous compliance" with the requirements of these provisions. This is an important issue that will affect the way the Commission performs its constitutional duty to ensure free and fair local government elections both this month and in all local government elections in the future. Having regard to the imminence of the elections, this question must be adjudicated without delay.[23]

[34] In the Electoral Court, the case was adjudicated without the participation of the Commission, despite the Commission's importance as the body constitutionally mandated to manage elections and ensure that they are free and fair. It is undesirable that matters involving the conduct of elections should be decided without the benefit of the views of the Commission. Having regard to the importance of the question raised in these proceedings in the conduct of elections, I am satisfied that it is in the interests of justice to grant leave to appeal. An order to that effect will therefore be made at the end of this judgment.

[35] With those preliminary issues out of the way, I turn to consider the central question presented, namely, whether the provisions of sections 14 and 17 require that election documentation be submitted to the local offices of the Commission.

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[22] Section 19(3)(b) of the Constitution.

[23] As emphasised by this Court in *ACDP*, where it noted: "it needs to be borne in mind that electoral appeals will often be of an extremely urgent nature". See above n 4 at para 17.

Does the Act require local submission of election documents?

[36] The Commission contended that, properly construed, in the light of their purpose, sections 14 and 17(1) and (2) of the Act require electoral documentation always to be submitted at the local offices of the Commission. The question as I see it is whether there is a discernible legislative purpose in requiring that election documentation be submitted at the local offices of the Commission. The issue is one of statutory construction.

[37] As we have held previously,[24] and as section 2 of the Act requires,[25] the provisions of the Act must be construed in a manner that gives effect to the right "to vote in elections"[26] and the right "to stand for public office".[27] In addition, the Act must be construed in the light of the foundational values of our constitutional democracy, which include "a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."[28] These foundational values require courts and the Commission to construe the electoral statutes in a manner that promotes enfranchisement rather than disenfranchisement and participation rather than

[24] Above n 4 at paras 20-3.

[25] Section 2, entitled "Interpretation of this Act", provides:

> "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."

[26] Section 19(3)(a) of the Constitution.

[27] Section 19(3)(b) of the Constitution.

[28] Section 1(d) of the Constitution.

exclusion.[29] But as we pointed out in *ACDP*, the exercise "remains one of interpretation."[30]

[38] It is within this context that the provisions of sections 14(1) and 17(1) and (2) must be understood and construed. The essential question is whether there is any discernible legislative purpose in requiring the election documentation to be submitted at "the office of the Commission's local representative".

[39] The two fundamental premises of the IFP's argument are that: (a) there is no discernible central legislative purpose attached to the precise place in a province where the necessary documentation required to contest an election should be submitted; and (b) this Court in *ACDP* authoritatively determined that the central purpose served by sections 14 and 17 was to ensure that election candidates declare their intentions and provide the Commission with the necessary information to organise the election by the deadline. This purpose, the IFP contends, applies to sections 14 and 17, generally, and not just to the payment of election deposits at issue in *ACDP*. In support of these propositions, the IFP drew our attention to the following statement in *ACDP*:

> "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

[29] Above n 4 at para 23; above n 16 at para 17.

[30] Above n 4 at para 23.

> Commission with the necessary information to enable them to organise the elections."[31]

[40] Both these premises are incorrect. The statement in *ACDP* relied upon was made on the acceptance that the election documentation necessary to contest an election had to be submitted at the local offices of the Commission. That is what the wording of the sections required and that was the factual situation in *ACDP*. As we pointed out in *ACDP*, it was "common cause in [that] 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*."[32] We also emphasised that the "dispute turns on whether [the applicant] had lodged an adequate deposit as required by the section."[33] Against this background, we considered the question whether the central payment facility instituted by the Commission was in conflict with the provisions of sections 14 and 17. And it was in this context that we concluded that "[t]here is no central legislative purpose attached to the precise place where the deposit is to be paid."[34]

[41] The conclusion we reached in *ACDP* related specifically to the payment of electoral deposits, as this Court went on to make clear in the passage cited by the IFP. The local filing requirements of sections 14 and 17, more generally, were not at issue in *ACDP*. In this regard, we pointed out that:

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[31] Id at para 31.

[32] Id at para 26. (Emphasis added.)

[33] Id.

[34] Id at para 27.

> "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."[35]

[42] What was significant in *ACDP* is that money is a fungible. The Commission's arrangement for central payment therefore had no impact on the character of local elections, nor on the requirements set out in the statute. By contrast, what is in issue, here, is the requirement that a party give local notice of its intention to contest a municipality and furnish its candidate lists and other election documents locally.

[43] We must immediately stress, however, that in describing the payment of the deposit as "complementary" we were not suggesting that the provisions dealing with the payment of the deposit are less important than those dealing with the submission of election documents.

[44] For these reasons, *ACDP* is distinguishable from this case.

[45] There is a manifest legislative purpose for the requirement that documents be submitted at the local offices of the Commission. That purpose is to promote the efficient processing and verification of election documents in order to ensure the fairness of an election. This purpose is evidenced by: first, the nature of the documents to be submitted pursuant to sections 14 and 17 for processing and verification; second, the requirement that the Commission ensure that it has the

[35] Id at para 31.

capacity to receive and process election documents locally; third, the administrative needs of the Commission in managing elections; and fourth, the necessarily local nature of the democratic process in the context of municipal elections.

[46] The documentation required to be submitted under sections 14 and 17 would, by its nature, be more efficiently processed at the local level. Section 14(1)(a), for example, requires a party contesting an election to submit its notice of intention to contest the election and a party list at the local office of the Commission. Section 14(2) then provides that parties intending to contest elections in municipalities with multiple district management areas must submit separate lists for each area they wish to contest.

[47] It makes administrative sense that the processing of documents and checking whether all the required documentation has been properly filed would be done more efficiently in a decentralised manner. This is where, with regard to the provisions of section 14(1)(a) and (2), the local office of the Commission would immediately know whether the municipality in which it functions requires, as a result of its division into different management areas, a party to submit multiple lists in order to comply with the Act.

[48] Similarly, section 17(2)(a) requires a person who wishes to contest an election as a ward candidate to accompany the submission of his or her nomination with "the signatures of at least 50 voters whose names appear on the municipality's segment of

the voters' roll for any voting district in the contested ward". The verification of the documentation submitted against that part of the voters' roll in a particular municipality evidently involves the local office of the Commission. That part of the voters' roll for each municipality is recorded and monitored by the individual municipalities themselves.

[49] One of the benefits of a decentralised system of local document processing and verification is therefore that local offices can expeditiously process documents submitted in relation to the elections they are required to manage, and can coordinate, as necessary, with local parties and candidates to ensure that documents submitted comply with the provisions of the Act. It is telling that the Act specifically contemplates that the Commission will establish local facilities to manage municipal elections. Section 12 requires the Commission, once an election has been called, to "appoint, for the area of the municipality in which the election will be held, an employee or other person as its representative for the purpose of the election."[36] Sections 14(1) and 17(1) then contemplate that the Commission has established local offices where election documents can be submitted and processed.

[36] Section 12, entitled "Appointment of local representatives", provides:

> "(1) When an election has been called, the Commission must appoint, for the area of the municipality in which the election will be held, an employee or other person as its representative for the purpose of the election.
>
> (2) A local representative of the Commission—
>
> (a) may exercise the powers and must perform the duties conferred on or assigned to a local representative by or under this Act;
>
> (b) performs those functions of office subject to the directions, control and disciplinary authority of the chief electoral officer; and
>
> (c) holds office subject to section 37."

[50] Not only does a decentralised system facilitate the expeditious processing and verification of documents, but it also facilitates the Commission's work in efficiently distributing its own resources in administering municipal elections nationwide. Having parties submit documents in those local offices where they intend to contest elections prevents uneven and unpredictable application flows and resultant pressure in local offices. This helps to avoid uncertainty on the part of the Commission as to how it can best allocate its financial and human resources between its various offices. It therefore prevents the severe administrative burden that would no doubt follow if parties could freely submit documents in the Commission office of their choosing, regardless of the proximity of that office to the location of the election to be contested.[37]

[51] Perhaps most importantly, the requirement that election documents be submitted locally pays deference to the necessarily local nature of the democratic process in the context of municipal elections.[38] By providing for the local processing and verification of election documents, the submission requirements of sections 14 and 17 promote participation and transparency in the democratic process at the very heart of where the democratic process is going to have its effect. Voters' perception

[37] That the local submission requirements of sections 14 and 17 facilitate administrative efficiency in the application review process is evidenced by the supplementary affidavit filed on behalf of the Commission. The Commission maintains local offices in order to provide the necessary support to a decentralised processing of documents under sections 14 and 17. The local representative, supported by the relevant municipal local office, receives documents, issues an acknowledgment receipt, screens the documents for completeness and captures the data therein. Local representatives also provide notice to local parties of non-compliance so that they may take steps to come into compliance with the rules. Supplementary documents are also processed at the local level.

[38] The Preamble to the Act states, in part, that the Act is "[t]o regulate municipal elections".

that elections have been undertaken in a free and fair manner requires that democracy be seen to be done at the local level. The submission requirements of sections 14 and 17 provide voters access to the democratic process not just on the day that they visit the ballot box, but long before, so that interested voters may actually go to the local Commission offices and confirm, for themselves, that the documents relating to the parties and candidates contesting their local elections have been duly submitted.

[52] Contrary to the argument by the IFP that disallowing its filing in Durban undermines the foundational values of universal suffrage and multi-party democracy, these values are best advanced through the Commission's rigorous adherence to the provisions of the Act, read in the light of their legislative purpose. And this is crucial to the integrity of the electoral process. As this Court emphasised in *Liberal Party*—

> "[an] 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."[39]

[53] For all these reasons, we conclude that there is a central and significant legislative purpose in requiring that election documentation be submitted at the local offices of the Commission. The submission of documentation at a place other than "the office of the Commission's local representative" does not, therefore, constitute compliance with the provisions of sections 14(1) and 17(1) and (2) of the Act. It follows that the Commission was fully justified in refusing to allow the IFP to submit

[39] Above n 14 at para 30.

its election documentation for Umzumbe Municipality at its Durban office. The order made by the Electoral Court can therefore not stand.

[54] Counsel for the IFP urged this Court to hold that this was an exceptional case. He emphasised the fact that once the administrative error was discovered, the IFP did everything within its power to submit the documentation in Umzumbe, but bad weather prevented it from doing so. He also drew attention to the fact that there are a number of IFP voters whose likely choice of candidates would be precluded from taking part in the elections, and to the IFP's historic strength in Umzumbe. The provisions of the Act are, however, an insurmountable hurdle for the IFP. Once it is concluded, as this Court has done, that, construed in the light of their purpose, the provisions of sections 14 and 17 require local notification, the hands of the Commission are tied. In addition, because this case is not about condonation for non-compliance, the question of discretion exercised in the face of exceptional circumstances simply does not arise.

[55] It is necessary that the integrity of the electoral process be maintained. Indeed, the acceptance of the election as being free and fair depends upon that integrity. Elections must not only be free and fair, but they must be *perceived* as being free and fair. Even-handedness in dealing with all political parties and candidates is crucial to that integrity and its perception by voters. The Commission must not be placed in a situation where it has to make ad hoc decisions about political parties and candidates who have not complied with the Act. The requirement that documents must be

submitted to the local offices of the Commission does not undermine the right to vote and to stand for election. It simply gives effect to that right and underscores the decentralised and local nature of municipal elections.

[56] Finally, counsel for the IFP urged us to exercise our just and equitable jurisdiction under section 172(1)(b)[40] of the Constitution and direct the Commission to allow the IFP to take part in the Umzumbe election even if we are against it on the law. The argument rests upon the fact that the Commission has made contingent plans to include the IFP in the election in the event this Court confirms the order of the Electoral Court.

[57] This Court does not have the power to grant relief that amounts to allowing the IFP's participation in the election when it has not fulfilled the requirements of the Act. It further cannot be just and equitable for a court to penalise the successful party for making contingency plans to comply with the order of a court in the event that such order is confirmed on appeal. To do otherwise would not only be contrary to the law, but it would also undermine the efficiency of the Commission, which may be reluctant, in the future, to make contingency plans.

[40] Section 172(1)(b) of the Constitution provides:

> "(1) When deciding a constitutional matter within its power, a court—
>
> . . . .
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

Costs

[58] The Commission did not ask for costs. And this is not an appropriate case in which an order for costs should be made.

Conclusion

[59] In all circumstances, the Electoral Court should have refused leave to appeal and dismissed the application by the IFP. The order of the Electoral Court should, therefore, be set aside and replaced with one to that effect.

Order

[60] In the event, the following order is made:

a) Condonation of the late filing of the record is granted.

b) Leave to appeal is granted.

c) The appeal is upheld.

d) The order of the Electoral Court is set aside and is replaced with an order refusing leave to appeal and dismissing the application.

e) There is no order for costs.

Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Van der Westhuizen J and Yacoob J concur in the judgment of Ngcobo CJ.

For the Applicant:	Advocate JJ Gauntlett SC and Advocate FB Pelser, instructed by Gildenhuys Lessing Malatji Inc.
For the Respondent:	Advocate Max du Plessis and Advocate Andreas Coutsoudis, instructed by Lourens De Klerk Attorneys.