

REPUBLIC OF SOUTH AFRICA



ELECTORAL COURT, BLOEMFONTEIN

CASE NO: 001/15 EC

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....
DATE	SIGNATURE

In the application between:

DEMOCRATIC ALLIANCE

1st Applicant for Rescission

PALESA MOBANGO

2nd Applicant for Rescission

In the matter between:

THE AFRICAN NATIONAL CONGRESS

1st Applicant

THABANG NATHANIEL MORUFANE

2nd Applicant

And

THE ELECTORAL COMMISSION

1st Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL:
CO-OPERATIVE GOVERNANCE AND TRADITIONAL
AFFAIRS, MPUMALANGA**

2nd Respondent

Neutral Citation: *Democratic Alliance and Another v The African National Congress and Others* (Case no 001/15 EC) [2015] ZAEC 1 (05 March 2015)

JUDGMENT

S PATHER, Member (SHONGWE J A and WEPENER J concurring)

- [1] For practical reasons, the parties are described as they are in the main application.
- [2] On 23 February 2015 this court made an order, *inter alia*, in the following terms:
- ‘(a) The application for the rescission of the order of this court of 8 February 2015 is dismissed.
- (b) The order of this court of 8 February 2015 stands and is confirmed.
- (c) There will be no order as to costs.’
- [3] Due to the urgency of the matter, the court indicated that reasons for judgment would be handed down later. The reasons are set out in what follows.
- [4] The first applicant is the African National Congress, a registered political party (the ANC).
- [5] The second applicant was a proposed candidate for the first applicant for a by-election to be held as set out below.
- [6] The first applicant in the rescission application is the Democratic Alliance, a registered political party (the DA).
- [7] The second applicant in the rescission application is a candidate for the DA in the by-election referred to below.
- [8] The first respondent in the rescission application is the Electoral Commission (the Commission), a body established pursuant to the Constitution, with its objects set out in s 4 of the Electoral Commission Act¹ as being to ‘strengthen

¹ Act 51 of 1996.

constitutional democracy and promote democratic electoral procedure.’ The Constitution obliges the Commission to manage elections in accordance with national legislation in this case the Local Government: Municipal Electoral Act² (the Act).

[9] Although this court directed that the parties should file affidavits in the main application provisionally, all the parties agreed that the matter be approached holistically in that the court should determine both the merits of the main application and the rescission application. Counsel who appeared for the Commission advised that the Commission had no further submissions to make.

[10] The following facts are common cause:

[10.1] The ANC wished to contest the municipal by-election of the Steve Tshwete Local Municipality in Ward 28, then to be held on 25 February 2015 and had nominated the 2nd Applicant, Thabang Nathaniel Morufane, as its candidate.

[10.2] The closing date and time for submission of nominated candidates to contest a Ward was 17h00 on 2 February 2015.

[10.3] The ANC’s representative, Lindiwe Mahlangu, arrived at the municipal office of the Commission, at 16h30 to submit the ANC’s nomination of Morufane as the Ward candidate. The Commission’s Messrs Dibakoane, Mndawe and Rupert Mahlangu as well as a representative of the DA were present.

[10.4] After checking the documents, Dibakoane pointed out to Mahlangu two deficiencies, namely that the nomination form was not accompanied by a bank guaranteed cheque as required by s 17 (2)(d) of the Act and that the ANC’s letter of authority had not been signed by its authorised representative. Mahlangu contacted the Regional Secretary and the required authorisation was faxed to the Commission’s office at approximately 16h45.

[10.5] As to the cheque, Mahlangu advised that this was on its way. She duly left the Commission’s offices and returned with the cheque at 16h58 only to find the door locked.

² Act 27 of 2000.

[10.6] Mahlangu knocked on the door to no avail, eventually pushing the cheque under the Commission's office door at 17h15.

[10.7] The Commission's officials and the DA representative who were still inside, left some time later, between 17h30 and 18h00. Nothing turns on this difference in their respective times of leaving.

[11] However, there is a dispute as to the precise time that Mahlangu knocked on the door. She states that she did so at 16h58 whereas the Commission and the DA maintain that she returned at 17h05.

[12] On 3 February 2015 and in response to the ANC's enquiry, the Commission indicated that its nominated candidate would not be registered as all the necessary documents had not been submitted by the cut-off time and date, namely 17h00 on 2 February 2015. A subsequent request made through its attorneys to the Commission to accept the ANC's compliance with the Act and the time-tables, and to register its candidate was unsuccessful. As a result, and on 5 February 2015, an urgent application to this court was made.

[13] In terms of the court's order of 8 February 2015, the Commission's decision not to register Morufane as the ANC's nominated candidate was reviewed and set aside. The Commission was further directed to accept the ANC's nomination of Morufane as its nominated candidate in the by-election and to include him in the list of candidates contesting Ward 28 as provided in s 18 (1)(a) of the Act.

[14] It is clear therefore that the only reason the Commission refused to register the ANC's candidate was that the cheque for the deposit in terms of section 17 (2)(d) of the Act did not accompany the nomination form. As stated in paragraph 4 above, on the DA's and the Commission's version the cheque was pushed under the door a few minutes after 17h00 and after Mahlangu had knocked on the door at 17h05 upon her return to the Commission's offices after collecting it

from colleagues outside. Even on this latter version, the ANC attempted to tender the cheque approximately five minutes late. There had therefore in my view, been substantial compliance with the requirements of s 17(2) in the submission of all other documents.

[15] I am persuaded by counsel for the ANC's submission that the delivery of the cheque, even a few minutes after the 17h00 cut-off time, demonstrated that the ANC's intention to participate in the by-election was not frivolous, although Mahlangu insists that she returned at 16h58, before the cut-off time. On the other hand, the Commission's representative inside the locked office was aware that Mahlangu had returned at the very latest at 17h05 after leaving to fetch the required cheque. The question arises: does the fact that the cheque was submitted a few minutes after the cut-off time and after submission of the nomination form constitute a fatal flaw thereby resulting in the rejection of a candidate's application to contest an election? In this regard, Pillay J as he was then, stated as follows in *National Peoples Party v Electoral Commission*³:

[26] The minimal difference in the time lends itself to a more tolerant approach in this matter rather than an inflexible application of the regulations, so as to facilitate participation in the election. Allowance for this time difference should be made."

And further:

"Such an approach is supported by the dictates of the Constitution of the Republic of South Africa, 1996 ('the Constitution')."

[27] The application of the time-table, as with the Act, must then also fall within the spirit of our constitutional values. These values clearly encourage participation in democratic elections. Section 2 of the Act provides that:

"2. Interpretation of this Act.

³ (002/11 IEC) [2011] ZAEC 3 (21 April 2011).

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.”

[28] Section 2 of the Act clearly compels that the interpretation and application of the Act (and indeed any regulation which flows from it) must be guided by giving effect to the constitutional declarations, guarantees or responsibilities appearing in the Constitution and any applicable code.

[29] Furthermore, s 1 of the Constitution reflects as one of its founding 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.”

[16] While it may be argued that “a more tolerant approach”, which clearly accords with the purposive interpretation of the Act and which, in turn, encourages participation in rather than exclusion from an election, would lead to uncertainty, as submitted by counsel for the DA, in my view, reasonableness should always apply in any attempt at adopting a flexible approach to the requirements of the Act. This would entail a court having to consider each case on its own merits; a minimal difference in time coupled with a party’s conduct which clearly demonstrates a serious intention to contest an election, must surely favour flexibility in the application of the requirements.

[17] In *National Peoples Party*⁴, Pillay J said:

[38] While it must be recognised that the time-table is to be adhered to, it is hardly likely that any subsequent steps as set out in the time-table would have been commenced with when the applicant’s documents were tendered. No harm would have

⁴ Supra.

been caused by him accepting the documents when it was tendered even on the assumption that it was after 17h00 on the 25 March 2011, because it would not have resulted in any disadvantage or prejudice to anyone. The respondent would not have been inconvenienced thereby because the next segment of the process of preparing for the election had not yet started, for example starting to check the documents and informing parties and candidates of outstanding or faulty documents.

[39] In the circumstances, the respondent's (and that of Abrahams and Sampson) strict and inflexible application of the time table was unreasonable in the circumstances and contrary to its legislative purpose.'

[18] In addition, in their affidavits the DA and the Commission contradicted each other regarding the time when Mahlangu left the office to fetch the cheque. According to the Commission, she left at 16h56 and according to the DA she left at 16h55. I refer to this time difference to demonstrate that her return to the office should either have been 17h05 or 17h04 when she knocked on the door on the version of the DA and the Commission. However, when a party relies on a cut-off time such drastic consequences as to exclude a candidate from an election, its mere say-so of the time when the difference is so miniscule, must be considered carefully. According to the DA, the time for the cut-off was determined with reference to the time displayed on the computer of the Commission as conveyed to it by the Commission officials. This hearsay evidence was not corroborated by the Commission. There was no effective determination of the cut-off time and the mere say-so that the ANC was four or five minutes late, is insufficient to exclude a candidate from participating in an election.

[19] Pillay J further said in *National Peoples Party*:⁵

'[20] It is not practical to synchronise all clocks and watches, or any time-keeping mechanism to reflect the same time (to the minute) for everyone. Some are guided by

⁵ At para 20 and 21.

radio announcements and others by telephone company synchronisation or television announcements and so forth.

[21] "Time" will therefore generally differ from person to person and from place to place. It would be unreasonable to expect otherwise and to adhere to one of those times on the assumption that it is the correct time. Consequently, it was unreasonable for Abrahams to measure the time so strictly, particularly when others might have synchronised their time with some established time measure, other than that of Telkom and especially when it is a matter of minutes or even seconds.'

I can see no reason to depart from the views expressed by Pillay J.

[20] In the result, the order referred to in paragraph [13] above was issued on an urgent basis.

[21] At the hearing of this matter the parties agreed that the rescission application brought by the DA against the order of this court on 8 February 2015 be argued simultaneously with the main application. In view of the finding of this court on the main application, the rescission application became academic.

S PATHER

MEMBER OF THE ELECTORAL COURT

CONCURRED:

SHONGWE JA

WEPENER J

Counsel for the ANC: M.R. Hellens SC with H. Van Eeden SC

Attorneys for the ANC: Adendorff Attorneys

Counsel for the DA: E. Labuschagne SC with M. Bishop

Attorneys for the DA: Minde Shapiro Smith Attorneys

Attorney for the Commission: P.M. Kanyane

Attorneys for the Commission: Gildenhuis Malatji Incorporated