

REPUBLIC OF SOUTH AFRICA**IN THE ELECTORAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG****CASE NO. 0017/16**

In the matter between:

KHAI-MA ONAFHANDLIKE KANDIDATE KOALISIE

Applicant

and

THE ELECTORAL COMMISSION OF SOUTH AFRICA

First Respondent

AFRICAN NATIONAL CONGRESS

Second Respondent

DEMOCRATIC ALLIANCE

Third Respondent

DIE FORUM

Fourth Respondent

FREEDOM FRONT PLUS

Fifth Respondent

Coram: Shongwe JA, Moshidi et Wepener JJ, et Ms Pather (member)**Heard:** 9 September 2016**Delivered:** 23 September 2016

Summary: Electoral law – Party seeking relief against Commission for failure to include its name on a district ballot paper – the inherent credibility of the applicant's version is to be taken into account when considering the disputes of fact raised by the respondents – the omission of a party from a ballot paper violates its constitutional right to participate in an election.

JUDGMENT

Wepener J et Ms Pather (member) (Shongwe JA and Moshidi J concurring):

[1] The applicant is Khai-Ma Onafhanklike Kandidaat Koalisie (KOKO), a political party duly registered as such and whose officials intended it to participate in the municipal elections scheduled for 3 August 2016.

[2] The First respondent is the Electoral Commission, commonly known as the Independent Electoral Commission or IEC ('the Commission'), a body established pursuant to the Constitution with its objects set out in s 4 of the Electoral Commission Act¹ ('the Electoral Commission Act'), as being to 'strengthen constitutional democracy and promote democratic electoral processes'. The Constitution obliges the Commission to manage elections in accordance with national legislation, in this case, inter alia, the Local Government: Municipal Electoral Act² (the Municipal Electoral Act).

[3] The third, fourth and fifth respondents are political parties who all participated in the elections which are relevant to this application.

[4] This is an application for a review of the decision of the first respondent, the Commission in terms of s 20(1)(a) of the Electoral Commission Act. The application is further made according to Rule 6 of the rules regulating the conduct of proceedings of the Electoral Court³. In addition, the appellant appeals against the

¹ Act 51 of 1996.

² Act 27 of 2000.

³ Government Gazette No 18908, Notice 794 of 1998.

decision of the Commission rejecting its objection to the election results or conduct of the election in the Namaqua District Council.

[5] The decision, which is the subject of this review application and appeal, is the Commission's failure or omission to include on the Namaqua District Council ballot paper for the elections held on 3 August 2016, the name of the applicant and failing to uphold the applicant's objection to its exclusion from the district ballot paper. In so far as the Commission has been in possession of the applicant's objection, at least from the time of the lodging of the application in this court (although it had received it well before), it places the matter within the ambit of an appeal in terms of s 65 of the Municipal Electoral Act. To insist upon compliance with the filing of a specific form would be placing form over substance, something that this Court cannot countenance⁴. The Commission's decision regarding the complaint is now known through its affidavit which it filed in this matter.

[6] At the hearing on 9 September 2016, this court granted condonation to the applicant for the late filing of the application. Condonation was also granted to the second respondent, the African National Congress, for the late filing of its answering affidavit. Furthermore, this court ruled that only the issue of the exclusion of the applicant's name from the Namaqua District Council ballot papers, that is, the applicant's objection which was material to the result of the election held on 3 August 2016, as provided in s 65 of Municipal Electoral Act would be dealt with. Other matters raised by the applicant relating to complaints about alleged violations of the Electoral Code of Conduct were to be referred to determined courts in accordance with Schedule 2 of the Rules Regulating Electoral Disputes and Complaints About Infringements of the Electoral Code of Conduct in Schedule 2 of the Electoral Act And Determination of Courts Having Jurisdiction⁵.

[7] Despite having been served, as interested parties having an interest in the matter, with the notice of motion and founding papers, the third, fourth and fifth respondents did not make any representations or submissions to the court. Like the second respondent, they, the third, fourth and fifth Respondents had participated in the elections of 3 August 2016 in the Khai-Ma Municipality and Namaqua District Council.

⁴ *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC) paras 21 and 49.

⁵ Government Gazette Vol. 402, No 19572, 4 December 1998 Notice 2915 of 1998.

[8] A summary of the common cause facts follows. Mr Jano, the applicant's president, in preparation for the elections of 3 August 2016 and intending to participate in it, registered the applicant with the Commission in respect of the Khai-Ma Local Municipality and was automatically also registered for the Namaqua District Municipality under which the Khai-Ma Municipality falls. At the heart of this review and appeal is the omission of the applicant's name from the district ballot paper.

[9] On 1 June 2016, Mr Jano paid the deposit of R3 000 at the Commission's head office in Centurion. Of this amount, R1 000 was the fee payable in respect of the applicant's participation in the Namaqua District Municipality and the remaining R2 000 was applicable in respect of its participation in all wards falling within the Khai-Ma Local Municipality. The applicant's list of candidates was submitted manually at the Commission's local office in Pofadder. Mr Jano had then dealt with Ms Brandt, the Commission's representative in Pofadder.

[10] On 4 July 2016, Mr Jano became aware that the applicant's name does not appear on the Namaqua District Municipality ballot papers. And on 3 August 2016, the day of the elections, this was confirmed when he saw that the applicant's name was not included in the ballot papers for the Namaqua District Municipality.

[11] The next day, 4 August 2016, Mr Jano went to the Commission's local office in Pofadder in an effort to raise the issue of the applicant's name not being on the ballot papers. As the offices were closed for the afternoon at 14h00 on that day, he communicated by WhatsApp message service with Ms Brandt, about the fact that the ballot papers for the Namaqua District Municipality did not have the applicant's name on it.

[12] On 10 August 2016, Mr Jano had a discussion with the Commission's Mr Topkin from its Kimberly office about his complaint.

[13] The facts in dispute are that when paying the deposit at the Commission's head office, Mr Jano was advised by both Mr Molefe from that office and a short while later, Mr Kgosi who took over when Mr Molefe had to leave for a meeting, that he should submit his party's nomination of candidate forms at the Commission's local office in the municipality. Neither Mr Molefe nor Mr Kgosi informed him that district council proportional representation nominations had to be submitted to the Commission's district office, in this case, at Springbok. Moreover, when asked to

explain certain aspects of the forms for the nomination of candidates, specifically that part relating to the district proportional representation candidates, Ms Brandt advised Mr Jano that no specific distinct form for this purpose existed, that the name of the applicant's district candidate could be added to its local proportional representation list. Following this conversation, Mr Jano was left with the clear impression that only one form existed and that there was no separation between district municipal nomination forms and those for local municipalities. Mr Jano consequently added the applicants district proportional candidate's name to the same form as the applicant's local municipal candidates.

[14] The Commission's version was that there had simply been no submission on behalf of the applicant of a candidate nomination list for the district municipality. Therefore, so the argument went, the Commission could not be blamed for the non-appearance of the applicant on the district municipal ballot papers. Counsel for the Commission argued that the applicant relies on a document, which on the face of it refers only to the Khai-Ma Municipality. Mr Jano on the other hand, in presenting his case submitted that in keeping with the information given him by Ms Brandt, there was no specific form for district candidates and that this nomination could be added to the party's local municipal proportional representation list. According to Mr Jano, Mr Strauss who had been chosen as the applicant's district municipal candidate and whose name therefore was listed at number 4 on the party's list of candidates, resides in Springbok, the seat of the Namaqua District Municipality. It would therefore have been convenient had the applicant done well in the 3 August 2016 elections, for Mr Strauss to be its district representative. It was for this reason too, in view of the fact that Mr Strauss was not meant to be a ward candidate nominee, that his name was listed at number 4 on the applicant's party list. Mr Jano submitted that he did not insert a ward number in the space provided on the form as he had done with the other candidates as Mr Strauss was never meant to have been the applicant's nominee as ward candidate. According to the Commission, the applicant ought to have inserted Namaqua District Municipality in the space provided for the name of the municipality. This would therefore have been a clear indication of the applicant's intention to participate in the district municipal elections as well.

[15] However, Mr Jano's submission that he would not have asked Mr Strauss as he did on 2 June 2016 to come all the way from Springbok to Pofadder, a distance of

some 193 kilometres to bring his, Mr Strauss' identity document, and to sign the acceptance of the nomination form for submission at the Commission's local municipal office, if these documents were required to be handed in at the district office in Springbok, is inherently credible. More significantly, Springbok is where Mr Strauss ordinarily resides. But these being motion proceedings, the *Plascon-Evans* rule, as enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* must be considered. In *Jako-Wutu v Ntabankulu Local Municipality*⁶, Lagrange J stated:

'... This is a factual dispute which the municipality contends should be decided in its favour. In this regard it is useful to set out the complete formulation of the rule laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* to determine factual disputes in applications for final relief:

"In such a case the general rule was stated by VAN WYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 at 235 E – G, to be:

"... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order. . . . Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

This rule has been referred to several times by this Court (see *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) at 938A-B; *Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd* 1982 (1) SA 398 (A) at 430-1; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 923G - 924 D). It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this

⁶ [2016] ZALCPE 1 (16 February 2016) para 17.

regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 – 5; *Da Mata v Otto* NO 1972 (3) SA 858 (A) at 882 D –H).

If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under rule 6 (5)(g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case supra at 1164) and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E – H). Moreover there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the *Associated South African Bakeries* case, supra at 924A).'

[16] This summary reflects the law as it stands. In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*⁷ the Constitutional Court described the *Plascon-Evans* rule thus:

'In assessing a dispute of fact on motion proceedings, the rules developed by our courts to address such disputes will be applied by this Court in constitutional matters. Ordinarily, the Court will consider those facts alleged by the applicant and admitted by the respondent together with the facts as stated by the respondent to consider whether relief should be granted. Where however a denial by a respondent is not real, genuine or in good faith, the respondent has not sought that the dispute be referred to evidence, and the Court is persuaded of the inherent credibility of the facts asserted by an applicant, the Court may adjudicate the matter on the basis of the facts asserted by the applicant. Given that it is the applicant who institutes proceedings, and who can therefore choose whether to proceed on motion or by way of summons, this rule restated and refined as it was in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* is a fair and equitable one.'

[17] The facts and circumstances of this matter call for the adoption of a common sense and robust approach⁸.

[18] Taking this approach, it was not disputed that Mr Jano was not present at a meeting at the Commission's local office in Pofadder on 1 July 2016 when

⁷ 2005 (2) SA 359 (CC) para 53.

⁸ *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G; *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA) para 26; *Buffalo Freight Systems (Pty) Ltd and Another* 2011 (1) SA 8 (SCA) at 14,15 para 21.

certificates of candidates and notices of disqualification were handed out by Ms Brandt and when Mr Strauss was disqualified as a local municipal candidate because he resided in Springbok, outside of the Kai-Ma local municipality. However, Mr Jano's explanation for his absence was that he had been at that time, driving back to Pofadder from Kimberly where he had attended the signing of the Electoral Code of Conduct ceremony the previous day, 30 June 2016. As the distance between Kimberly and Pofadder was approximately 650kms, it was not possible for him to have attended the meeting on 1 July 2016. In regard to the next meeting held by the Commission on 5 July which he also did not attend, Mr Jano explained that he was at about the same time, meeting with possible funders in Springbok, but that he had made his way to the Commission's office later in the day, to sign off the ballot papers. As he had done the day before, 4 July when he first became aware that the applicant's name was not included on the district municipality's ballot papers, he again raised the matter with Ms Brandt who, according to Mr Jano, attempted to discuss the matter telephonically with a colleague in the Commission's district office. Nothing came of this however as the colleague was not in at the time. Ms Brandt had also undertaken to revert to Mr Jano regarding his complaint about the applicant's name missing from the district ballot papers. She however, never did revert.

[19] Counsel for the Commission argued further that Mr Jano became aware of the absence of the applicant's name from the district ballot papers as early as 13 June 2016, that the second occasion was on 4 July 2016 and that he, Mr Jano ought to have challenged the Commission on 14 June 2016. However, Mr Jano's actions right from the outset and throughout the period up to the application to this court was consistent in that he approached the local representative of the Commission in the person of Ms Brandt who had undertaken on more than one occasion to revert to him. He sent correspondence in the form of emails to the Commission's regional and national offices and he attempted unsuccessfully to speak with the Commission's personnel on more than one occasion. There is also the payment of the deposit on due date proof of which was submitted along with the party's list of candidates. The Commission, noticing as it must have, the payment of that amount which covered both the local and district municipalities had a duty to assist political parties in the interests of strengthening the country's multi-party democracy. As was stated by

Shongwe JA in *Nationalist Coloured Party of South Africa and The Independent Electoral Commission of South Africa and Mr Andre Jacobs*⁹:

‘The Commission as a public body should be seen to be pro-active in certain circumstance’.

In *Johnson and Others v Electoral Commission and Others*¹⁰ this Court held that the Commission is duty bound to assist both voters and prospective candidates. One can almost sense Mr Jano’s utter frustration at the lack of response to the seriousness of his party’s situation – that of being denied an opportunity to participate in the elections in the relevant district municipality in which the party had been properly registered and he not being given a hearing. While it is understandable that during the period leading up to the elections and beyond, the Commission would have been inundated with calls from members of the public and political parties alike, all invariably requiring immediate attention and assistance, it ought to have been prepared for such situations and given attention to complaints. In desperation, Mr Jano turned to the media. As soon as his grievance was aired on national television, a senior official of the Commission contacted Mr Jano. None of these steps which he had taken in trying to obtain a resolution of the matter were disputed. Whereas the Commission’s witnesses’ statements are found to be bald and lacking in particularity against the applicant’s detailed allegations of fact.

[20] There are clear factors which favour the version of Mr Jano. These are that:

1. The Commission has a duty to assist parties.
2. A party registered for ward elections is automatically registered for district municipal elections.
3. The applicant paid the deposit for participation in the district elections – that should have elicited an enquiry from the Commission, especially where a candidate living in Springbok and eligible for the district ballot, was on the party list.
4. Mr Strauss could only qualify for the district election as his address was in the district and not in the area of the local municipality.

⁹ Case No 005/2016 EC.

¹⁰ (001/2013) [2013] ZAEC2; 2014 (1) SA 71 (EC) para 31.

5. The inherent credibility of the applicants allegation that it was advised that no separate form was required for the district council, having regard to Mr Jano's conduct surrounding such advice, allows for the matter to be adjudicated on the basis of the facts asserted by the applicant.

[21] Even on the basis that there was an error on the side of both or either Mr Jano and the representatives of the Commission who assisted him, that error caused the exclusion of Mr Strauss on the district ballot paper. That exclusion could and should have been prevented if the officials of the Commission took reasonable care when advising Mr Jano. Such care and assistance was absent.

[22] Relying on *Pitso v Electoral Commission*¹¹ the Commission and the ANC submitted that the objection would not be material to the result of the election and therefore it does not qualify as an appeal in terms of s 65. We do not agree. The Constitutional Court has taken a different view regarding materiality to the outcome of an election. In *Kham*¹² it was said:

'In many countries, where elections are conducted on a constituency basis the only ground for setting aside an election is proof that the exclusion of votes tainted by irregularity would mean that the result of the election could have been different. That was the basis upon which electoral petitions were disposed of under the pre democratic dispensation, drawing upon precedents in electoral law from England. The Court's sole task was to determine whether the irregularities would have affected the result of the election. In doing so it would examine and rule on disputed votes and then re-count the votes to see whether the outcome would have been any different. It is the basis for what is referred to in Canada as the "magic number" test, that being the number of irregular votes that a claimant must prove were admitted in order to have the result of an election set aside. But in South Africa that cannot be the sole determinant of just and equitable relief, where the elections conducted by the IEC were not free and fair and the constitutional right to participate in and contest those elections was infringed. In any event it is always difficult to predict what would have occurred had those electoral irregularities been absent.'

The materiality of the result does not only lie in the number of votes cast for persons or parties. If there is prima facie evidence of some wrongdoing or negligence or a mistake which is material to the outcome of the elections in so far as it speaks to the

¹¹ (2001) JOL 8227 (ELECT Ct).

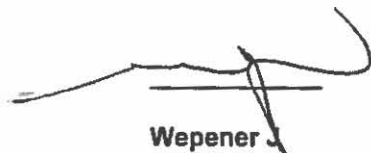
¹² Supra para 100.

credibility of the outcome of the election, such would, in our view, suffice for purposes of s 65. The absence of the applicant's name from the ballot paper and its constitutional right to participate in the district election is accordingly material to the outcome of the elections as not a single vote could have been recorded for it in the district.

[23] The Commission submitted that the non-joinder of the district council in these proceedings was fatal to the application. There is no merit in the submission as the council itself had nothing to do with the election but is a product as a result of the votes that were cast during the election. If its constitution has to change because of the result of a revote it, as such, has no interest in the particular representatives who constitute the council. Our order ensures that the council can continue to function pending the outcome of the revote which we envisage.

[24] In all of the circumstances, the applicant's omission from the district ballot papers caused it prejudice. It violated its rights to participate in the local government elections on district level. It is entitled to assistance and the following order is issued:

1. The failure of the Commission to entertain the applicant's objection to its exclusion from the Namaqua District Municipality ballot paper is reviewed and set aside.
2. The results of the Namaqua District Municipality elections of 3 August 2016 are set aside.
3. The status quo of the results of the Namaqua District Municipality of the elections held on 3 August 2016 remains in place until the outcome of the revote referred to in 4 below.
4. The Commission is directed to arrange for a revote in the Namaqua District Municipality forthwith.
5. There is no order as to costs.



Wepener




Ms. Pather (member)



Shongwe JA

I agree.



Moshidi J

For the Applicant: Mr Jano

Counsel for the First Respondent: N. Luthuli

Attorneys for the First Respondent: Gildenhuys Malatji Inc.

Counsel for the Second Respondent: F. Petersen

Attorneys for the Second Respondent: Mjila and Partners
