

REPUBLIC OF SOUTH AFRICA



ELECTORAL COURT, BLOEMFONTEIN

CASE NO: 004/22EC
Reportable / Not Reportable

In the matter between:

GAMAGARA COMMUNITY FORUM

Applicant

and

**THE ELECTORAL COMMISSION
OF SOUTH AFRICA**

First Respondent

FREEDOM FRONT PLUS

Second Respondent

DEMOCRATIC ALLIANCE

Third Respondent

ECONOMIC FREEDOM FIGHTERS

Fourth Respondent

AFRICAN NATIONAL CONGRESS

Fifth Respondent

Neutral Citation: *Gamagara Community Forum v Te Electoral Commission and Others*
(Case no 004/22 EC) [2022] ZAEC 6 (22 April 2022)

Coram: MBHA JA, MODIBA J and SHONGWE AJ and MS PATHER and PROFESSOR
NTLAMA-MAKHANYA (Members)

JUDGMENT

MS PATHER (MEMBER) (MBHA JA, MODIBA JA and SHONGWE AJ and PROFESSOR NTLAMA-MAKHANYA (Member) concurring):

Introduction

[1] This is an application for the review and setting aside of the first respondent's (Commission's) decision made on 11 November 2021. In terms of this decision, the Commission rejected the applicant's objection that was lodged on 5 November 2021. The objection was lodged in terms of s 65 (9) of the Local Government: Municipal Electoral Act No.27/2000 (the Electoral Act).

[2] According to annexure GCF2 to the founding affidavit, the Commission, after having investigated the objection, decided to reject it on the basis inter alia, that the allegations contained therein were not substantiated by evidence.

[3] The applicant is a registered political party. It took part in the 2021 Local Government Elections (the LGE 2021) and contested Ward 3 and Ward 4 in the Gamagara Local Municipality (GLM). It is represented in this application by Mr Shepherd Sebastian Mines, acting in his capacity as its 'duly elected secretary general'. Mr Mines was also the applicant's candidate in Ward 4.

[4] Only the Commission, a statutory body established by s 3 of the Electoral Commission Act 51 of 1996 (Commission Act), opposed the application. No relief was sought against the second to fifth respondents.

[5] The applicant sought the following relief, that:

- 5.1 The Court review and set aside the Commission's decision to reject its objection of 5 November 2021;
- 5.2 The LGE 2021 held on 1 November 2021 in Wards 3 and 4 of the GLM be set aside;

- 5.3 The Commission be directed to hold a by-election in terms of s 25(1)(b) of the Local Government: Municipal Structures Act No 117/1998 (the Structures Act); and
- 5.4 The Commission be ordered to pay the costs of this application.

[6] In support of the application, various irregularities, nine in total, are alleged to have taken place during the LGE 2021 in Wards 3 and 4 of the GLM. The irregularities complained of may be summarised as follows:

- 6.1 Eight voters who reside and were registered to vote in Ward 3 were now registered to vote and voted in Ward 4;
- 6.2 Despite an undertaking by the presiding officer of Ward 4 that the affected voters would only be issued with two ballot papers, namely a local ballot and a district ballot, they were issued with the third ward ballot paper for Ward 4. In this regard, reference was made to section 7 of the Electoral Act. The applicant also quoted ss 44(7) and 47, alleging that these irregularities amounted to contraventions of the said sections;
- 6.3 The Commission's officials refused to accept legible and valid identity documents during the 1 November 2021 elections in Ward 3. This was a further contravention of section 44 of the Electoral Act;
- 6.4 The thumb nails of some voters were not marked with the required ink;
- 6.5 He was informed that the names of some voters who had registered online using the 'sms' facility, did not appear on the voters' roll;
- 6.6 On 1 November 2021, the presiding officer of Ward 3, Ms Ingrid the Koker, was absent from the ward. This was in violation of s 44(2) of the Electoral Act;
- 6.7 The same presiding officer, acting in contravention of ss 37(6) and (7) of the Electoral Act, compromised her independence by posting a congratulatory birthday message to a newly elected councillor, referring to him as 'my Baas';
- 6.8 While an official of the Commission had indicated that 3 500 ballots were received, a count of the ballots revealed a total of 3 503 of which five questionable votes were for the applicant. Following a meeting at which ballots were recounted, the applicant was advised that 2 500 ballots had been allocated to Ward 4, not 3 500 as was reported earlier. After a recount, only two of the questionable ballots were votes for the applicant

as opposed to the five initially counted. These discrepancies were said to be extreme and alarming; and

- 6.9 Finally, despite the applicant's having reported the irregularities to the presiding office, she failed to attend thereto, claiming to have been too busy at the time.

[7] This entire application is, in my view, fundamentally flawed in various material respects which render it dismissable even without reference to the merits. I consider these flaws in turn:

- 7.1 Although the applicant seeks an order setting aside the results in both Ward 3 and Ward 4, the objection lodged on 5 November only relate to Ward 4. In that objection, the complaint is phrased as follows:
'I am lodging a Section 65 Objection against the election outcome in Ward 4, Gamagara Sub-Region, JTG Region, Northern Cape.'
- 7.2 One of the political parties that contested the LGE 2021 in Ward 3, namely, the South African Royal Kingdom Organisation, was not joined as a party;
- 7.3 The GLM is an interested party, and as such ought to have been cited and joined in these proceedings;
- 7.4 Mr Mines, according to the Commission's records, is not listed as the secretary general as he claims, nor is he listed as an office bearer. In any event, the Commission's records do not indicate that the applicant's secretary general is authorised to litigate on its behalf without reference to other office bearers;
- 7.5 Not only is the application 'very late', the application for condonation for the late lodging thereof is incomplete and no sufficient explanation has been given for the lateness.

[8] The Commission has raised the applicant's non-compliance with this Court's Rules. In terms of Rules 5 and 6, the application ought to have been lodged with the Court within three (3) days of the applicant being informed of the Commission's decision. Furthermore, in terms of s 65(9) of the Electoral Act, the appeal to this Court should have been lodged within seven (7) days of the Commission's decision to reject the applicant's objection.

[9] In this regard, although the Notice of Motion is dated 22 November 2021, the application dated 23 February 2022, was only lodged with the Court on or after the latter date. In regard to the application for condonation, the affidavit in support thereof was signed on 23 November 2021 but this too, was only lodged in court during February 2022. No explanation for the period of delay from 23 November 2021 to February 2022 has been furnished.

[10] On 1 March 2022, this Court issued directives to the parties. Despite a reminder, the applicant has to date failed to file any replying affidavit. The Court also reserved the right to dispose of the matter on the papers without referring it to an oral hearing. Members of the Court have unanimously agreed that this matter falls to be decided on the papers.

[11] The Commission has dealt extensively with the alleged irregularities raised by the applicant. The irregularities themselves, on the face of it, are in my view speculative, based on hearsay and suspicion, and are not substantiated by any evidence. In any event, the Commission's averments are not challenged as no replying affidavit was filed in this application.

[12] In terms of the Plascon Evans rule, formulated in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957(4) SA 234 C, in a case of a dispute of facts, a final interdict or an order as sought in this case, should be granted in motion proceedings only if the facts as stated by the respondent, together with the admitted facts in the applicant's affidavit, justify such an order, or where it is clear that the facts, although not formally admitted, cannot be denied and must be regarded as admitted. It has been said that exceptions to the rule may arise where the respondent's allegations or denials are so far-fetched or clearly untenable that the Court is justified in rejecting them on the papers.

[13] Therefore, applying the Plascon Evans rule, it is found that the Commission's submissions are neither far-fetched nor untenable. Moreover given that the applicant has not replied to the Commission's submissions and averments, the order sought by the applicant falls to be dismissed.

[14] In the circumstances, an order is granted as follows:

1 The application is dismissed.

2 There is no order as to costs.

S PATHER
MEMBER
OF THE ELECTORAL COURT

26 April 2022