

THE
SOUTH



ELECTORAL COURT OF
AFRICA
BLOEMFONTEIN

Not Reportable

Case No: 0016/24EC

In the matter between:

DEFENDERS OF THE PEOPLE
MOSES SAKO

First Applicant
Second Applicant

And

THE ELECTORAL COMMISSION OF SOUTH AFRICA First Respondent
THE CHIEF ELECTORAL OFFICER OF THE ELECTORAL Second
Respondent
COMMISSION OF SOUTH AFRICA

Neutral Citation: *Defenders of the People and Another v Electoral Commission of South Africa and Another* (016/2024EC) [2024] ZAEC 10 (09 May 2024)

Coram: Zondi JA, Shongwe AJ, Adams AJ, Professors Ntlama-Makhanya and Phooko (Additional Members)

Heard: 15 April 2024 – via videoconference on *Microsoft Teams*

Delivered: 09 May 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by publication on the website of the Supreme Court of Appeal and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 09 May 2024.

Summary: Section 27(2) of the Electoral Act – *Election Timetable for the Election* – non-compliance by applicants with requirements to submit the required number of voter signatures to contest regional and provincial elections by the deadline set in

the electoral timetable – non-compliance and failure to meet deadlines in timetable factually to be blamed on the applicants and not on the Electoral Commission – therefore, nothing irrational about the Electoral Commission’s insistence on compliance with the deadlines in the timetable.

ORDER

The application is dismissed, and each party is ordered to pay its own costs.

JUDGMENT

Professor Phooko (Zondi JA, Shongwe and Adams AJJ and Professor Ntlama-Makhanya (Additional Member) concurring):

[1] The upcoming general elections have attracted interest from various political parties and independent candidates who wish to contest the elections. The Electoral Act 73 of 1998 (“the Electoral Act”) sets out the requirements that must be met by all role players for the smooth running of the entire election process. A failure to comply with one or more of the requirements may result in a political party not being able to contest the election.

[2] The first applicant is the Defenders of the People (“DoP”), a registered unrepresented political party and is represented by the second applicant who is its secretary general. As it desirous of participating in, and contesting, the upcoming national and provincial elections scheduled for 29 May 2024 DoP submitted on 8 March 2024 its list of candidates and supporters’ signatures to the Electoral Commission (Commission). The Commission informed DoP that the documentation it submitted did not meet the requirements of the Electoral Act and that as a result it could not contest the elections. DoP is challenging the Commission’s decision to exclude it. It seeks an order declaring that the Commission’s decision to disqualify and remove it and its candidates from contesting the national and provincial elections is unlawful and invalid. It further seeks an order reviewing and setting aside the Commission’s decision of 28 March 2024 in terms of which the Commission dismissed the DoP’s objection to the Commission’s decision to exclude it from participating in the national election. As a remedy, the DoP seeks an order directing

the Commission to reinstate it and its candidates in the national list and to allow it to participate in the elections.

[3] In support of its case DoP alleges that on 8 March 2024, it submitted its national lists, regional list in respect of the following provinces: Limpopo Province, Mpumalanga Province, Kwa Zulu-Natal Province and Gauteng Province and Provincial legislature in respect of Limpopo Province. It states that it delivered its list of candidates at the Commission's Centurion office after paying the prescribed deposit.

[4] DoP states that on 27 March 2024, it became aware through one of the social media platforms that the Commission had disqualified and removed it from contesting the 2024 elections. The second applicant thereupon wrote a letter to the Commission objecting to DoP's removal and disqualification from participating in the 2024 general election. The objection reads thus:

'...we as Defenders of the People have submitted a national list and regional list for four provinces and Limpopo as the only one for legislature, we are surprised that only national list is appearing and nothing on the regional which we paid for, can we get explanation'.

[5] On 28 March 2024, the Commission rejected the objection. It denied that it had received a list. That denial was erroneous, and the Commission has upon further investigation confirmed that it had received the list and retracted the statement. But it is still adamant that the exclusion of DoP was lawful in that DoP had failed to comply with the s 27 requirements regarding the submission of the voters' signatures.

[6] The Commission opposes the application. It denies that the DoP complied with the provisions of the Electoral Act and the election timetable. It concedes that the DoP submitted candidates lists for Gauteng, KwaZulu-Natal and Mpumalanga regions. The Commission, however, states that DoP did not submit candidate lists for the other six regions. It submitted a candidate list for the Limpopo provincial legislature election. It did not qualify to contest the elections as it did not submit enough supporter signatures to meet the quota in s 27(2)(cB). The Commission

states further that DoP failed to submit the necessary number of supporter signatures totalling 15% of the quota for a seat in the previous elections for the Gauteng, KwaZulu-Natal and Mpumalanga regions. DoP also failed to submit the necessary number of supporter signatures totalling 15% of the quota for a seat in the previous election for the Limpopo provincial legislature.

[7] As regards DoP's objection, the Commission alleges that on 27 March 2024, DoP lodged an objection concerning its exclusion from the list of parties contesting the National Assembly. The Commission considered the objection and rejected it in the letter dated 28 March 2024. In this regard the Commission has this to say:

'I note that the Commission erroneously stated in the letter that DOP had not submitted candidate lists timeously. This is incorrect, but immaterial to the outcome of the rejection. Furthermore, having further considered the matter and taken urgent legal advice in the preparation of this answering affidavit, the Commission did respond to the section 30 objection by the [DoP] and did reject same on the basis, amongst others, that in terms of the Electoral Act, there is no lawful remedy available for the failure to submit candidate lists after the deadline. The Electoral Act does not entitle a party to object its non-inclusion on the list of parties contesting elections'.

[8] With reference to s 30(1) of the Electoral Act which deals with objection to nomination of candidates, the Commission argues that DOP's objection was not a "nomination of candidate" and therefore its objection did not fall within the purview of s 30 of the Electoral Act. It was adamant that its decision to reject the objection was correct and is thus not susceptible to being set aside on review by this Court (or on appeal in terms of s 30 of the Electoral Act).

[9] The issue to be determined is whether the Commission's decision to disqualify DoP from contesting the national election was unlawful and irrational.

[10] Section 27(1) of the Electoral Act provides:

'A registered party intending to contest an election must nominate candidates and submit a list or lists of those candidates for that election to the chief electoral officer in the prescribed manner by not later than the relevant date stated in the election timetable.

(2) The list or lists must be accompanied by a prescribed—

...

(cB) form, in the case of a registered party not represented in the National Assembly or any provincial legislature, confirming that the party has submitted, in the prescribed manner, the names, identity numbers and signatures of voters whose names appear—

(i) in the case of an election of the National Assembly in respect of regional seats, on the national segment of the voters' roll and who support the party—

(aa) totalling 15 percent of the quota for that region in the preceding election, when nominating candidates for one region; or

(bb) totalling 15 percent of the highest of the regional quotas in the preceding election, when nominating candidates for more than one region provided that where 15 percent of the highest of the quotas is not achieved, that the party may only nominate candidates for the region or regions as determined by the next highest quota;

(ii) or in the case of an election of a provincial legislature, on the segment of the voters' roll for the province and who support the party, totalling at least 15 percent of the quota of that province in the preceding election, for which the party intends to nominate candidates;¹

[11] The deadline for the submission of lists of candidates together with the number of voters' signatures in terms of the *Election Timetable for the Election of National Assembly and Election of Provincial Legislatures* (timetable) promulgated in terms of s 20 of the Electoral Act² was at 17:00 on 08 March 2024. The timetable does not provide an exception.

[12] This Court held in *Labour Party of South Africa v Electoral Commission of South Africa*³ that:

"... an election timetable and the deadlines set therein are essential for the facilitation of free and fair elections. Electoral authorities, like the Commission, would not be able to run a free and fair election without clear rules regulating the submission and verification of party and candidate information. For an election to be free and fair, and to be perceived as free and fair, all parties must be held to these rules. As submitted on behalf of the Commission, there can be no ad hoc condonations or indulgences – otherwise some of the parties will be perceived as being favoured by electoral authorities, who must remain neutral".

¹ See section 3 of the Electoral Amendment Act 1 of 2023.

² Electoral Act, Act 73 of 1998.

³ 008-2024EC at para 8.

[13] The DoP's contention that it successfully completed the required quota of supporter signatures cannot be correct. The evidence before this Court shows otherwise. The Commission produced its records showing that the supporter signature status information submitted by DoP was less than 100% of the quota required. In particular, the evidence before this Court shows that the DoP's supporter signatures for Gauteng is 80.86%), KwaZulu-Natal is 86.09%, and 94.18% for Mpumalanga regions. For the province, the Commission's records show that the supporter signatures for Limpopo is 3.10%. This evidence was unchallenged. It is clear that the DoP fell short of the quota required by s 27(2)(cB) of the Electoral Act. The DoP failed to submit the required number of the supporter signatures by 8 March 2024. In my view, these factors lead to one conclusion and that is DoP failed to meet the requirements of s 27. This is the end of the DoP's case.

[14] On 27 March 2024, the DoP objected to its exclusion from the list of parties contesting the National Assembly on the ground that the Commission had erred to exclude it on the basis that it had failed to submit the candidates list timeously. The Commission has since conceded that it made a mistake by stating that it had excluded DoP because it had not submitted its candidates list on time. The Commission explains that the DoP's exclusion was based on its failure to satisfy the quota requirement and therefore DoP's complaint should not have been treated as an objection under s 30 of the Electoral Act. What has become clear is that DoP seeks to exercise their right to political participation which includes the right to contest the elections.⁴ However, they are unable to do so. In my view, their non-compliance with the time limits imposed by the timetable, and their failure to submit the required supporter signatures cannot be blamed on the Commission. This is squarely their fault or oversight. The Commission informed DoP that the exclusion "followed by operation of law".⁵ It is not a decision coming from the exercise of its discretion.

[15] All in all, the Commission's decision of 28 March 2024 cannot be said to be unlawful or irrational. The irrationality review ground holds no water. In the premises, the application falls to be dismissed.

⁴ Section 19 of the Constitution, 1996.

⁵ *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at para 15.

Costs

[16] As a general rule, cost orders are not imposed upon a losing party in electoral matters unless such party's conduct has been vexatious, frivolous or abusive of the court processes.⁶ I can think of no reason why the foregoing general rule should be departed from. Each party should pay its own costs.

Order

[17] In the result, I make the following order:

The application is dismissed, and each party is ordered to pay its own costs.

PROF R PHOOKO
Additional Member of the Electoral Court

I concur,

D H ZONDI
Chairperson of the Electoral Court

Z J SHONGWE
Acting Judge of the Electoral Court

I concur,

L R ADAMS
Acting Judge of the Electoral Court

I concur,

⁶ *Arise Afrika Arise (AAAR) v Electoral Commission of South Africa* (008/2023 EC) [2024] ZAEC 1 at para 31.

Prof N NTLAMA-MAKHANYA
Additional Member of the Electoral Court

APPEARANCES

For the applicant:

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Instructed by:

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For the respondents:

M Bishop and M De Beer

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