THE ELECTORAL COURT OF SOUTH AFRICA

BLOEMFONTEIN

Not Reportable

Case No: 0026/2024EC and
0026A/2024EC

In the matter between:

THE GIVING FOUNDATION NPC	Applicant
and	
ELECTORAL COMMISSION OF SOUTH AFRICA	Respondent

And in the matter between:

THE GIVING FOUNDATION NPC	Applicant
and	
ELECTORAL COMMISSION OF SOUTH AFRICA	First Respondent
JUDICIAL SERVICES COMMISSION	Second Respondent
POLITICAL LIAISON COMMITTEE	Third Respondent

Neutral Citation: *The Giving Foundation NPC v Electoral Commission of South Africa and Others* (0026/24EC and 0026A/24EC) [2024] ZAEC 21 (03 July 2024)

Coram: Zondi JA, Adams and Yacoob AJJ, and Professors Ntlama-Makhanya and Phooko (additional members)

Heard: Decided in chambers on the papers

Delivered: 03 July 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 03 July 2024.

Summary: Application for review in terms of Rule 6 of Electoral Court Rules – out of time – based on issues raised in previous application - already determined court does not have jurisdiction to determine - incompetent.

Urgent application - brought three months after election timetable published – no basis for urgency.

Procedure - application based on issues in previous applications – attempt to describe relief sought differently does not change nature of relief.

Constitutional Law - Elections – elections for which Electoral Commission responsible in terms of section 190 of the Constitution constitutionally, conceptually and factually distinct from election of office bearers within legislatures in terms of Schedule 3 of Constitution.

Costs – multiplicity of applications with no regard paid to comments of court or responses by Commission in previous application – justifying departure from practice not to order costs.

ORDER

1. The applications are dismissed with costs.

JUDGMENT

Yacoob AJ (Zondi JA and Adams AJ and Professors Ntlama-Makhanya and Phooko concurring):

INTRODUCTION

[1] The Giving Foundation NPC ("the Foundation") has already unsuccessfully brought an application to set aside the Proclamation of the National and Provincial Elections on 23 February 2024 ("the Proclamation"),[1] on the basis that the Proclamation is inconsistent with the Constitution because it proclaims one day where section 49(2) requires "days" for an election to be proclaimed. I refer to that application as "the first application". This judgment deals with second and third applications the Foundation has instituted within a very short space of time, for very similar relief premised on what is essentially the same cause of action.

[2] The first application, under case number 0018/2024EC, was dismissed on the basis that the Constitutional Court has exclusive jurisdiction to determine whether the President has failed to fulfil a constitutional obligation. Rather than approach the Constitutional Court to pursue that relief, the Foundation sought leave to appeal from this court, which was refused on 17 May 2024.

[3] The Foundation then, on 21 May 2024, filed what it terms an application for review in terms of Rule 6, seeking a declaration that the conduct of the respondent ("the Commission") is inconsistent with its obligation to uphold the Constitution of the Republic of South Africa, 1996 ("the Constitution"); that the conducting of voting on days that were not proclaimed for voting, that is, international voting on 17 and 18

[1] Proclamation Notice 158 of 2024, Government Gazette No 50166 of 23 February 2024.

May, is invalid, and that the Commission erred in not ensuring that the Proclamation included all the required dates, including dates for special votes and the voting for office bearers in the national assembly. This application has been given case number 0026/2024EC. I refer to it as the second application.

[4] On 28 May 2024, seemingly prompted by the holding of special voting days on 27 and 28 May, the Foundation filed what it terms an urgent application in terms of Rule 12(3), in which the Commission is the first respondent, the Judicial Services Commission ("the JSC") the second respondent, and the Commission's Political Liaison Committee ("the PLC") the third respondent. Although it seeks related relief to the second application, there does not seem to have been a notice withdrawing the second application.

[5] This third application seeks relief broadly based on the Foundation's thesis that the Proclamation is invalid because it only proclaims one day for elections and does not contain dates for the election of office-bearers in the national and provincial legislatures. The specific relief it seeks is set out below. This application has been given case number 0026A/2024EC, and I shall refer to it as the third application. This court has directed that the applications be heard together.

[6] The specific relief sought in the third application is set out here for completeness:

a. a declaration that all votes cast on days that have not been proclaimed as election days are invalid;
b. a declaration that the Commission "must be in possession of" a proclamation consistent with ss 49(2) and 108(2) of the Constitution to "prepare" the National Assembly and the Provincial Legislature;
c. a declaration that the Proclamation is unconstitutional and invalid;
d. a declaration that the Commission has failed to uphold the Constitution with respect to votes cast on 17, 18, 27 and 28 May 2024;
e. an order "cordially instructing" the JSC to engage with the government of the Republic (which is not joined), with regard to the role of the Judiciary in the electoral processes in the national and provincial legislatures;

f. an order setting aside elections that have taken place or may take place in terms of the Proclamation, and

g. an order instructing the PLC to instruct members of the PLC to not participate in the election on 29 May 2024.

[7] Unfortunately for the Foundation, many of the impediments to the application brought in the first exist in these latest applications. Even though those impediments were not dealt with by this court in the first application because of this court's lack of jurisdiction, those impediments were raised and brought to the Foundation's notice, and ought to have been considered.

[8] The Foundation failed to file any replying affidavit or written legal argument in these applications. The applications are therefore decided on the founding papers, the Commission's answering papers, and the Commission's written argument.

URGENCY

[9] The first and most obvious issue is that the Foundation purports to bring these applications on an urgent basis. It seems that each time special voting took place, and only after it had taken place, the Foundation instituted an application aimed at invalidating the special voting. Thus, on 21 May, an application is filed seeking to deal with what the Foundation contends is irregular voting on 17 and 18 May, and on 28 May, an application is filed seeking to deal with the same on 27 and 28 May. However, special voting did not simply take place on those days with no notice to anybody.

[10] The proclamation of National and Provincial Elections ("the Proclamation") was gazetted on 23 February 2024.[2] The electoral timetable was gazetted on 24 February 2024.[3] The electoral timetable included provision for voting at foreign mission on 17 and 18 May 2024, and special votes on 27 and 28 May 2024. Assuming the Foundation was entitled to challenge the provision in the timetable for these votes, the time for him to do so started running on 24 February 2024.

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[2] Proclamation Notice 158 of 2024, Government Gazette No 50166 of 23 February 2024.
[3] Notice 2340 of 2024, Government Gazette No 50185 of 24 February 2024.

[11] The second application styles itself a review in terms of Rule 6. Rule 6 requires the review to be lodged within 3 days of the decision sought to be reviewed. The application ought to have been lodged on or before 1 March 2024. It is woefully out of time and no attempt is made to seek condonation.

[12] The third application is cast as an urgent application in terms of Rule 12(3), which simply permits the court to determine its own practice and procedures. The primary relief it seeks is aimed at preventing the elections that have now taken place, and which were due to take place the day after the application was filed. However, despite the fact that it is based on the alleged invalidity of the proclamation of the elections on 23 February, and of voting taking place in accordance with the election timetable gazetted on 24 February, there is not one word in the affidavit of why, on 28 May 2024, the application is suddenly urgent and must be considered by this court.

[13] Both applications therefore stand to fail on urgency.

PRELIMINARY ISSUES COMMON TO BOTH APPLICATIONS

[14] Both applications take issue with the fact that voting was permitted to take place on dates that were not proclaimed by the President. Although the relief in each is slightly different, this is the basis for much of that relief. In addition, the third application seeks to set aside the provincial elections on the (factually incorrect) basis that dates for provincial elections were not proclaimed by the Premiers of each province, as contemplated by s108(2) of the Constitution.

[15] As pointed out by the Commission in its answering affidavits, the Foundation simply ignores the fact that both the Proclamation and the election timetable are issued in terms of the Electoral Act, 73 of 1998 ("the Act"). The Proclamation is provided for in ss 17 (for National elections) and 18 (for Provincial elections) of the Act, while section 20 requires the Commission to compile and publish the election timetable. Section 33 allows for special votes on days different than the proclaimed election day, and Regulation 10 of the Election Regulations[4] ("the Regulations") is premised on the designation of a date for special votes in the election timetable.

[4] Election Regulations in terms of s 100 of the Electoral Act, 73 of 1998, as amended.

[16] The Foundation does not challenge any of these provisions of the Act or the Regulations. It was brought to the Foundation's attention in its previous application that the alleged illegality of which it complained was explicitly provided for in the Act and that it had not challenged the Act, and, once again, the Foundation does not challenge the Act.

[17] Nor does the Foundation contend that the Proclamation or the election timetable were in any way inconsistent with the Act. Instead, the complaint is that the manner in which elections have been held, which was consistent with the Proclamation, the election timetable and the Act, was unconstitutional. This falls foul of the principle of constitutional subsidiarity, as was pointed out to the Foundation in the first application. It is not open to the Foundation to challenge the constitutionality of the Commission's conduct when it is consistent with the Act, without challenging the constitutionality of the Act. The Foundation appears to proceed on the basis that the Constitution must be applied directly and without mediation, which is directly antithetical to the established principles of our law.

[18] The complaints regarding the validity of the Proclamation in both applications, and regarding the validity of voting on days that were not proclaimed, all must fail on this basis: that the conduct complained of is consistent with the Act and the constitutionality of the Act has not been challenged. The Commission points out, correctly, that the Foundation must challenge the validity of the Act in order to achieve the result it seeks.[5] It bears mentioning that this court does not have the power to set aside a statute for inconsistency with the Constitution, and that the Foundation would have to approach a different court for that relief.

[19] As the Commission aptly points out, to the extent that the Foundation relies on a contention that the electoral system given substance by the Act is inconsistent with the Constitution, this would have to be done in the correct forum, against the correct parties (the Commission is not responsible for national legislation but is obliged to act in accordance with it),[6] and with sufficient time for any confirmation by

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[5] *MEC Development Planning and Local Government, Gauteng v Democratic Party* 1998 (4) SA 1157 (CC) paras 61-63.

[6] *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) para 7.

the Constitutional Court and for Parliament to enact any necessary changes.[7] There is absolutely no reason why the Foundation could not have done that.

[20] Finally, the relief sought by the Foundation is based on its contentions that the Proclamation is invalid because it does not do what it is required to do in terms of the Constitution, which is the declaration the Foundation sought in the first application, and which this court has already found it does not have jurisdiction to determine.

[21] Nothing has occurred to change this position, and there is no basis on which this court can enter into the merits of the validity of the Proclamation. The attempt by the Foundation to cast the burden on the Commission to “obtain” what the Foundation contends is the correct Proclamation does not assist, because the Proclamation is still the obligation and prerogative of the President, in terms of the Constitution, and there is no legal basis for the Foundation’s attempted gloss.

[22] The Commission points out that the relief sought by the Foundation is based on substantially the same issue, that is, the alleged invalidity of the Proclamation, and, this court having already found that it does not have jurisdiction to determine that issue, the matter is *res judicata* between the parties. Alternatively, the Commission submits, the Foundation is precluded by operation of estoppel from raising the issue again.

[23] For these submissions, the Commission relies on *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund*.[8] In my view, the situation in this case is distinguishable. The issue between the parties in the *Ekurhuleni* case had been substantively determined and was therefore *res judicata*. Here, at least notionally, there is still a live issue, from the applicant’s point of view. It simply is not justiciable in this court.

[24] The Commission submits that in the context that this court has already found that it has no jurisdiction to determine the Foundation’s cause of action, these

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[7] *AParty v Minister of Home Affairs* 2009 (3) SA 649 (CC); *New Nation Movement NPC v President of the Republic of South Africa* 2019 (9) BCLR 1104 (CC).
[8] 2017 (6) BCLR 750 (CC) at paras 29-30.

applications are vexatious and frivolous, and asks for a departure from the usual practice in this court regarding costs.

THE ELECTION OF OFFICE BEARERS IN LEGISLATURES AND THE ROLE OF THE JUDICIARY

[25] The notice of motion in the second application includes within its prayers that the Proclamation of the election by the President must include dates for the election of office-bearers within the national and provincial legislatures. The election of these office bearers is beyond the purview of the Commission and the Foundation, having not annexed an affidavit to its notice of application, does not explain why the election of office bearers must be included in the Proclamation.

[26] This relief appears to be related to the relief sought in the third application, that the JSC be requested to engage with the government regarding the role of the judiciary in the election of these office-bearers.

[27] The Commission points out that the Foundation appears to have been confused by the fact that the Constitution provides for two entirely separate species of elections, with different provisions of the Constitution specifying different processes and imposing obligations on different bodies for those processes.

[28] Section 190(1)(a) of the Constitution provides that the Commission must "manage elections of national, provincial and municipal legislative bodies in accordance with national legislation." This is the reason for which the Commission is established, in terms of s 181(1)(f) of the Constitution, to manage the processes by which the rights articulated in ss 1(d) and 19 of the Constitution are given shape.

[29] The election of office bearers in the legislatures, once the members of those legislatures have been elected, is conceptually distinct and is provided for separately and specifically in the Constitution. The election of office bearers in the national and provincial legislatures is provided for comprehensively in Schedule 3 of the Constitution, read with ss 53(1), 86(3), 111(2) and 128(3) thereof. The role of the judiciary is specifically spelt out. There is nothing in the Constitution that indicates that this comes within the power or obligation of the President when proclaiming

elections in which the electorate votes, and, as the Commission has pointed out in the first application, these processes are beyond the purview of the Commission and the jurisdiction of this Court.

[30] Section 178(5) of the Constitution, on which the Foundation purports to rely for this relief, has the function of facilitating the oversight of the executive and legislative arms of government over the judiciary through the mechanism of the JSC, which is intended to help preserve the independence of the judiciary.[9] Where there is no intimation that the judiciary is acting in any manner other than in accordance with the Constitution, it is not clear what the Foundation wishes the JSC to "engage" with government about, or what the desired outcome of that "engagement" would be. Even if there was a proper legal foundation for this leg of the relief sought, the vagueness of the terms of the relief mean that no such order could be made.

THE ORDER TO THE PLC THAT PARTIES NOT PARTICIPATE IN ELECTIONS

[31] The last prayer sought in the third application is a prayer that the PLC instruct political parties not to participate in the election the Foundation considers unlawful. The Commission points out that the PLC has no independent legal personality and cannot be sued. The PLC is described in the Commission's answering affidavit as a forum operated by the Commission for the purpose of liaising with political parties and independent candidates. The Commission points out also that the order would be moot, as the elections have already taken place.

[32] In any event, the relief sought is not an order this court can make. The Commission, of which the PLC is part, cannot instruct registered political parties and candidates properly appearing on the ballot sheet and participating in the election, to stop participating in the election. And there is nothing in any of the legislation from which this court gets its power which gives this court the power to make any order of that nature.

[9] This interpretation is consistent with the analysis of the role of the JSC in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at paras 120-124.

NON-JOINDER

[33] The Commission raises a further preliminary point in the third application, that is, that the President (for the second and third applications) and the Premiers of the Provinces (for the third application) have not been joined to the applications, and that since it is their conduct which is maligned, the applications are incompetent. This point is unanswerable.

CONCLUSION

[34] The relief sought by the Foundation is fatally flawed and stems from a fundamental failure to understand how the Constitutional and legal process in this country work. The Commission contends that the applications are vexatious and frivolous and that costs orders should be made. I see no reason why this should not be the case.

[35] Much of what the Foundation has sought to deal with in these two applications was traversed in its first application and it has simply ignored the legal and Constitutional framework that was explained for its benefit, not only by this court but also in the Commission's answering papers and written legal submissions. In addition, it failed to take steps to determine whether, in fact, the Premiers of the nine provinces had in fact proclaimed the provincial elections, which the Commission has demonstrated the Premiers have done.

[36] In bringing these applications, in this ill-considered and under-informed way, the Foundation has stretched the thin resources of both this court and the Commission at a time when they ought properly to be seized with more substantive issues. It is an aggravating circumstance that the Foundation failed to file either replying papers or written argument. A departure from this court's practice with regard to costs orders is in these circumstances entirely justified.

[37] For these reasons, the applications are dismissed with costs.

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S YACOOB

Acting Judge of the Electoral Court

Bloemfontein

APPEARANCES

For the applicant:	Y Yame (In person)
For the first respondent:	M de Beer
Instructed by:	Harris Nupen Molebatsi Inc