

THE
SOUTH



ELECTORAL COURT OF
AFRICA
BLOEMFONTEIN

Not Reportable

CASE NO: 0017/24EC

In the matter between:

OPERATION DUDULA

Applicant

And

THE ELECTORAL COMMISSION OF SOUTH AFRICA

First Respondent

THE CHIEF ELECTORAL OFFICER OF

Second Respondent

THE ELECTORAL COMMISSION OF SOUTH AFRICA

Neutral citation: *Operation Dudula v Electoral Commission of South Africa and Another* (0017/24EC) [2024] ZAEC 09 (08 May 2024)

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

Heard: 15 April 2024

Delivered: 08 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 12:00 on 08 May 2024.

Summary: Section 27(2) of the Electoral Act – *Election Timetable for the Election* – non-compliance by applicants with requirements to contest the National Assembly election 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 IEC – therefore, nothing irrational about the IEC’s insistence on compliance with the deadlines in the timetable – Application dismissed with no order as to costs.

ORDER

- 1 OD’s application for condonation of the late filing of the replying affidavit is granted.
 - 2 The Commission’s application for condonation of the late filing of the answering affidavit is granted.
 - 3 The application is dismissed with no order as to costs.
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JUDGMENT

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

Introduction

[1] This case concerns the applicant’s disqualification to contest elections for the National Assembly on the basis that it failed to comply with the requirement to upload its candidates list through the Electoral Commission’s *Online Candidate Nomination System* (“the portal”) or physically deliver the said candidate list to the Electoral Commission’s national office in Centurion by Friday 17:00 on 8 March 2024.

[2] The applicant seeks to review the decision of the Electoral Commission (Commission) purportedly taken on 26 March 2024 to disqualify it from contesting for elections in the National Assembly. The applicant attributes its failure to submit the list of candidates to the technical challenges it encountered whilst using the Commission’s portal.

[3] The Commission denies that the applicant's failure to timeously submit its list of candidates was due to the technical fault of its portal which prevented the applicant from uploading the requisite information.

The parties

[4] The applicant is Operation Dudula ("OP"), an unrepresented political party registered in terms of the Electoral Commission Act 51 of 1996 (the Electoral Commission Act). It intends to participate in, and contest, the upcoming national and provincial elections scheduled for 29 May 2024.

[5] The first respondent is the Commission established in terms of s 181 of the Constitution read with s3 of the Electoral Commission Act whose duties include managing the elections.

[6] The second respondent is the Chief Electoral Officer of the Commission and is appointed in terms of s12(1) of the Electoral Commission Act. The second respondent is an Accounting Officer of the Commission, and his duties include ensuring that the parties seeking to contest elections are compliant with the provisions of the Electoral Act 73 of 1998 (the Electoral Act) and its Regulations.

Facts

[7] On 8 March 2024, OD paid an amount of R300 000 for contesting national elections and R150 000 to contest in three provinces namely, Limpopo, Gauteng, and the Western Cape.

[8] Following the payment of the requisite deposits, OD's authorised agent went onto the portal to upload the list of candidates. There, the authorised agent obtained a reference number (C118536) that was used when uploading the candidates list on the portal. The authorised agent successfully uploaded its list of candidates for contesting provincial legislatures.

[9] According to OD, when its authorised agent tried to upload the list of candidates for contesting seats in the National Assembly, the online portal did not

allow the authorised agent to do so. As a result of the online portal failure, OD's authorised agent could not finalise the uploading the information before the cut off time.

Issues

[10] The issues are whether the online portal malfunctioned on 8 March 2024 and such malfunction was the only reason for OD's failure to submit a list of candidates for the upcoming election before the cut off time set out in the election timetable.

Legal framework

[11] Section 27(1) of the Electoral Act is headed '**Submission of lists of candidates**'. It provides as follows:

'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

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

[12] The deadline for the submission of lists of candidates together with the number of voters' signatures in terms of s27 and 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. The Commission has no power to change the election date of 29 May 2024 because the date it set by the President.³

[13] Against this legal framework, I now proceed to consider both the oral and written submissions of the parties.

Submissions of the parties

Applicant's submissions

[14] OD alleged that it experienced difficulties with the portal and was unable to upload its list of candidates for the National Assembly. According to OD, their attempts to get help from the Commission's officials were unsuccessful. Its official phoned Tato and Akani of the Commission's office and requested them to assist but they were unable to provide assistance.

[15] Concerned about the cut-off time of 17:00 on 8 March 2024 to submit their list of candidates for the National Assembly, OD opted to email their list of candidates to the Commission's officials namely Akani and Thato at 16:56.

[16] After not receiving feedback from the Commission, OD made a follow-up and only learnt on 26 March 2024 that the Commission was unable to upload their list of national candidates and therefore they were disqualified.

[17] OD blames its failure to meet the deadline of submitting through the portal squarely on the technical challenges that they encountered when using the Commission's portal. OD further contended that they would not have made it to submit physically at the Commission's national office because of the distance as it was on the day of the deadline.

Respondent's submissions

² Electoral Act, Act 73 of 1998.

³ *Liberal Party v The Electoral Commission* 2004 (8) BCLR 810 (CC) 30 para 27.

[18] The Commission refutes the allegations made by OD to the effect that its portal had challenges. The Commission's version is that the portal was properly functioning. According to the Commission, OD only started submitting its documents late and was therefore the co-author of its misfortune.

[19] To buttress their point about the functionality of the portal, the Commission submitted that OD failed to "*select the boxes indicating its intention to contest the National Assembly election*". In addition, the Commission contended that its records indicated that OD "*de-selected the National Assembly boxes at 14h02 on 8 March 2024*". The Commission contended averred that OD's action had nothing to do with the portal's failure.

[20] The Commission argued that in its replying affidavit OD admitted that it generated an "*invoice only for three provincial legislature elections, which it used to upload its provincial candidates*" and none for the elections for the National Assembly. Therefore, the Commission submitted that OD could not upload a list for the candidates for the National Assembly.

[21] The Commission further argued that the fact that OD was *inter alia* able to submit the list of candidates and made payment of deposits for provincial elections is testimony that the portal was functional, and that OD failed to provide evidence to support its contention that the portal was dysfunctional. In any event, argued the Commission, OD did not raise any issues about the portal prior to 8 March 2024 but only did so closer to the cut-off time, 17:h00, 8 March 2024. The Commission maintained that OD could have delivered the list of candidates by hand to the Commission's office from any point after 23 February 2024 but did not do so.

[22] The Commission further submitted that OD's application was late and there was no explanation for the delay. It contended that OD ought to have brought the review application on 12 March 2024 but only instituted its application on 2 April 2024. The Commission accordingly argued that the application should be dismissed.

[23] Finally, the Commission contended that the relief sought by OD is incompetent because the applicant wants a review of "*a non-existent decision*" and the

Commission “to exercise a power - an *ad hoc* decision to condone non-compliance-which the Commission does not have”.

Evaluation of the submissions and evidence

[24] The election timetable is a benchmark for the preparation of elections. Without it, there arises a risk of many logistical challenges as the Commission may from time to time be required to accommodate those who have failed to comply with a certain aspect of it.⁴ These are the parameters within which the submission of the parties should be assessed.

[25] There is no evidence that on the relevant date the portal was dysfunctional and contributed to the OD’s failure to submit its list timeously. The Commission’s evidence shows that OD only started complaining about the portal on 8 March 2024 closer to the cut-off time of 17:00. Moreover, it is clear from the Commission’s undisputed evidence that OD failed to “*select the boxes indicating its intention to contest the National Assembly election*”. OD initially selected on the portal a box indicating that it intended to contest the National Assembly election but it immediately “*de-selected the National Assembly boxes at 14:h02 on 8 March 2024*”. This evidence was not disputed by OD in reply.

[26] To the extent that there are factual disputes between the parties on the relevant issues those disputes should, on the basis of the principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,⁵ be resolved in favour of the Commission. In my view, it cannot possibly be said that the version of the Commission is so far-fetched and untenable that this Court can reject it out of hand. The Commission’s evidence demonstrates that its portal functioned without issues at the relevant times. In any event, OD did not adduce any evidence whatsoever to support its case about the alleged dysfunctionality of the portal.

[27] This Court emphasised in *Labour Party of South Africa v Electoral Commission of South Africa*⁶ that:

⁴ *Labour Party of South Africa and Others v Electoral Commission of South Africa and Others* (008/2024EC; 012/2024EC; 011/2024EC; 009/2023EC; 010/2024EC) at para 23.

⁵ 1984 (3) Sa 623 (A) at pp 634 and 635.

⁶ 008-2024EC at para 8.

'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'.

[28] In my view, the Commission's insistence on compliance with the rules cannot be viewed as irrational. The portal has been opened since 23 of February 2024 to enable political parties to upload all the required information. I am of the view that OD has itself to blame, it left everything to the eleventh hour and opted to submit outside the permissible platforms, the portal and the Commission's national offices in Centurion.

[29] I am mindful about OD's asserted political rights enshrined in s 19 of the Bill of Rights in the Constitution. However, rights go hand in hand with responsibilities. OD has a responsibility to ensure that it complied with the set rules to enable it to contest the National Assembly elections.

[30] About OD's unreasonable delay in bringing the review application immediately after being aware of the decision of the Commission, I am prepared to give OD the benefit of the doubt in that they only became aware of the Commission's decision on 26 March 2024. I say so because the portal does not provide any form of feedback to political parties whether they have qualified or not. OD only learnt of same when they enquired from the Commission. Therefore, the Commission's submission to the effect that OD knew or should have known about being disqualified after 17:00 on 8 March 2024 because they were aware that they failed to upload their list of national candidates, cannot be sustained.

[31] In the premises, the application falls to be dismissed.

Condonation

[32] This Court issued directives on 4 April 2024 which *inter alia* required the Commission to file its answering affidavit at 17:00 on 4 April 2024. However, the

Commission only filed its answering affidavit around 21:11 on 4 April 2024. The reasons advanced for the late filing include that the Commission's personnel required more time to locate and confirm various annexures to the affidavit and that the Commission was simultaneously attending to other court cases. The Commission submitted that its delay was short (four hours) and that OD was not going to be prejudiced by the delay.

[33] OD also applied for condonation as it filed its replying affidavit beyond the time stipulated time in the court directives, 14:h00 on 5 April 2024. The reasons advanced for the delay include that the Commission filed its answering affidavit at 22h00 on 4 April 2024. According to OD, its attorney was only able to send the said answering affidavit to counsel on 5 April 2024 at around 8h00. Consequently, consultation and preparation of the replying affidavit took longer than expected. OD also submitted that its late filing was not going to prejudice the Commission.

[34] The explanation proffered for the lateness by both parties is, in my view, reasonable.⁷ Furthermore, the Commission's answering affidavit was filed a mere four hours late. The same applies to OD's replying affidavit which was filed about three days out of time. It has not been demonstrated that the Commission or OD have or will suffer any prejudice by the late filing of the replying or answering affidavit. The application ought, in the circumstances, to be granted.

Costs

[35] 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.⁸ There is no reason to depart from the general rule in this case. Accordingly, each party is ordered to bear its own costs.

Order

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

1. OD's application for condonation of the late filing of the replying affidavit is granted.

⁷ *Grootboom v National Prosecuting Authority and Another* 2014 (1) BCLR 65 (CC) at para 36.

⁸ *Arise Afrika Arise (AAAR) v Electoral Commission of South Africa* (008/2023 EC) [2024] ZAEC 1 at para 31.

2. The Commission's application for condonation of the late filing of the answering affidavit is granted.
3. The application is dismissed with no order as to costs.

PROF R PHOOKO
Additional Member of the Electoral Court
Bloemfontein

I concur,

D H ZONDI
Chairperson of the Electoral Court

I concur,

Z J SHONGWE
Acting Judge of the Electoral Court

I concur,

L R ADAMS
Acting Judge of the Electoral Court

I concur,

Prof N NTLAMA-MAKHANYA
Additional Member of the Electoral Court

APPEARANCES

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