

IN THE SUPREME COURT OF SOUTH AFRICA  
APPELLATE DIVISION

In the matter between:

THOMAS MAMITSA

Appellant

and

JULIUS MOSES KHUMALO

Respondent

CORAM: VAN HEERDEN, SMALBERGER JJA et PREISS AJA

HEARD: 13 NOVEMBER 1990

DELIVERED: 23 NOVEMBER 1990

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JUDGMENT

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VAN HEERDEN JA:

The issues in this appeal stem from provisions of the Black Local Authorities Act 102 of 1982 and the Election Regulations (Transvaal) promulgated in terms of s 56(1) of that Act. (Board Notice 22 of 1988 published in Government Gazette 11240 of 8 April 1988, as amended by Board Notice 47 of 1988 published in Government Gazette 11381 of 1 July 1988).

The city council of Diepmeadow ("the council") is a local authority established in terms of s 2 of the Act. In compliance with regulation 10(1) and (2) the electoral officer of the council caused a notice to be published in a newspaper on 24 August 1988. The notice called for nominations "for the election of members of the City Council of Diepmeadow in respect of wards 1-20", and stated that nominations would be received by the electoral officer on 9 September 1988 in respect of an election which was to take place on 26 October 1988. On the former date the electoral officer received a nomination of the

appellant as a candidate for ward 14. This nomination - the only one for ward 14 - was rejected by the electoral officer because the appellant's name did not appear on a voters' list for the council. Thereafter, and in compliance with regulation 10(5), the electoral officer caused a notice to be affixed to the notice board at the offices of the council. The notice contained the names of the candidates nominated for the election of members of the council as well as the names of the candidates unopposed and declared to have been duly elected as members. Because of the rejection of his nomination the name of the appellant did not appear in the notice.

On 3 October 1988 the Director of Local Government, Transvaal (appointed in terms of s 3 of the Act and hereinafter referred to as "the Director") issued the following instruction:

"Na aanleiding van 'n beëdigde verklaring deur bogenoemde persoon [the appellant] en op grond van die bevestiging wat van die

verkiesingsbeampte van Diepmeadow ontvang is dat die weglating van die betrokke persoon se naam op die kieserslys h oorsig is en nie vanweë h spesifieke diskwalifikasie nie, word u hierby opgedra om die tekortkoming reg te stel deur die persoon se naam op die kieserslys aan te bring en sy nominasie geldig te verklaar."

Pursuant to this instuction a further notice of the electoral officer was affixed to the said notice board, stating that the appellant had been elected unopposed as member of the council for ward 14. It does not appear when this was done, but it is clear that it occurred before the election date.

On 26 October 1988 the respondent was duly elected- as a member of the council. Thereafter he brought an urgent application in the Witwatersrand Local Division for an order declaring invalid the nomination and election of the appellant. The electoral officer, the Director and the appellant were cited as respondents. The order sought by the respondent was eventually granted by Levy AJ.

Subsequently the appellant obtained leave to appeal to this court.

Only the appellant opposed the application. At the hearing it was common cause that his name did not appear on a voters' list on nomination day and that this had been due to an administrative oversight. The appellant contended, however, that because of the subsequent rectification of the relevant list he was duly declared elected as a member of the council.

In terms of s 8(1)(e) of the Act no person is competent to vote at any election of a member of a local authority unless his name appears on a voters' list prepared and approved in the prescribed manner. In so far as the provisions of subsection (2) are material to this appeal, they read:

- "(2) ... no person shall be competent to be elected as a member of a local authority ... if -
- (h) he is in terms of paragraph ... (e) of subsection (1) disqualified from voting at any election of a member of the local authority concerned;

(i) he is in arrear for a period of three months or longer with the payment of any rental and service charges, rates or any other levies ... which he owes that local authority."

It will be observed that the above provisions relate to the competence to exercise a vote and to be elected as a member of a local authority. Neither s 8 nor any other section of the Act in terms prescribes qualifications (or disqualifications) in regard to the competence to be nominated as a candidate.

Regulation 5(1)(a) makes provision for the preparation of voters' lists for a local authority after its area has been delimited into wards. The electoral officer is enjoined to prepare, or cause to be prepared, a list for each ward of all persons resident there or who are in another way competent to vote in an election. Subregulations (3), (4), (5)(a) and (6) of regulation 5 read as follows:

" (3) At any time prior to its being certified under subregulation (4)(b), the

electoral officer concerned may amend a voters' list by -

(a) adding to such list the names of voters competent to be enrolled thereon;

(b) deleting from such list the names of voters no longer competent to be enrolled thereon;

(c) correcting any error in the particulars of persons so enrolled, supplying any particulars omitted from such list, deleting therefrom any superfluous entry or record any other change thereon.

(4) (a) A voters' list prepared and amended by the electoral officer shall be available for public inspection, at a conspicuous place at the office of the local authority concerned and at the other places which the electoral officer may direct, for a period of 14 days ending not less than 60 days before polling day and prescribed by the electoral officer in a notice and affixed to the notice board of the local authority, during which period any person desiring to be enrolled on such list or objecting to the enrolment of any other person on such list may lodge with the said electoral officer, for consideration, his application or objections.

(b) On the expiry of the period referred to in paragraph (a), the voters' list prepared and updated or amended by the said electoral officer in the light of any applications or objections referred to in that paragraph, shall be certified by him as the final and conclusive list for the ward concerned.

(c) A voters' list for a ward

certified as provided in paragraph (b) shall be the only valid voters' list for any ensuing election held in respect of such ward and shall remain valid and current until such time as such ward is [delimited] or redelimited or until a new list is prepared therefor in the manner laid down in these Regulations.

(5) (a) It shall be the exclusive duty and obligation of a voter to ensure that he is enrolled on a voters' list.

.....

(6) If anything required by law to be done in the preparation or revision of a voters' list is by accident or through an inadvertence done erroneously or is omitted to be done, the director may -

(a) if he is of the opinion that the irregularity obviously is [trifling] or purely of a technical nature and that nobody will be substantially prejudiced thereby, he may condone such irregularity; or

(b) if he is of the opinion that the irregularity is of a serious nature he may give instructions that steps be taken which he deems necessary to rectify the irregularity."

In terms of regulation 10(1) the electoral officer has to call in a prescribed manner for candidates to be nominated for the election of members of a local authority. The notices to be published and displayed by him must specify the place at which, and



the date and hour on which, nominations will be received, as well as the places at, and the date on, which polling will take place (regulation 10(2)). The formalities with which a nomination form must comply are prescribed by regulation 10(3). In so far as it is material, regulation 10(4) provides that if not more than one candidate has been nominated for election in respect of any particular ward, the electoral officer shall declare such candidate to have been duly elected in respect of that ward. Finally, regulation 10(5) enjoins the electoral officer to cause a notice to be affixed to the notice board at the office of the local authority. The notice must state the names of the candidates nominated as well as the names of the candidates unopposed and declared under sub-regulation (4) to have been duly elected, and must be affixed as soon as practicable, but not later than 14 days, after nomination day.

Levy AJ found for the respondent for two

reasons, viz, i) that a candidate's nomination is invalid if on nomination day he is not competent to be elected as a member of the council, and ii) that in any event a voters' list may not be amended once it has been certified under regulation 5(4)(b). Before us counsel for the appellant challenged both findings. In regard to (i) he submitted that s 8(2) of the Act does not require that the competence to be elected must obtain on nomination day. He argued that even if on that day a candidate is disqualified from being elected, he may still be duly elected, or, in the case of an unopposed candidate, be declared to have been so elected, if the disqualification falls away before the election day or the date of the declaration. As regards (ii) it was contended that in terms of regulation 5(6) the Director could instruct the electoral officer to rectify a voters' list and that, once the relevant list was amended by the inclusion of the appellant's name therein, the electoral officer was

entitled, and indeed obliged, to declare the appellant the duly elected member in respect of ward 14.

The question whether a candidate on nomination day must not be disqualified, in terms of s 8(2) of the Act, from being elected as a member of a local authority, has arisen in three reported cases. In De Wet en h Ander NNO v Rajuili en Andere 1989 (4) SA 146 (O) 152, the question was left open, but in Sigwepu and Others v Mpondo and Others 1989 (2) SA 907 (E), a full bench of the Eastern Cape Division held that a nomination of a candidate may be valid even if on nomination day he is disqualified from being elected by virtue of the provisions of s 8(2)(i) of the Act. It will be recalled that in terms of this paragraph a person is not competent to be elected as a member of a local authority if he is in arrear for a period of three months or longer with the payment of certain amounts ("charges"). One of the issues which fell for decision in Sigwepu was whether the nominations of 10

candidates were invalid on the assumption that on nomination day they were in arrear for more than three months with the payment of charges. The court's conclusion appears from the following extract from the judgment (at p 917H-J):

"In the result my conclusion is that for the purposes of s 8(2) of Act 102 of 1982 the nomination of a candidate for an election to a local authority is not invalid by reason of the circumstance that as at the date of the nomination the candidate does not have all the qualifications set out in the section provided that the qualification or qualifications which he lacks on that date are such that it is possible for him to obtain such qualification(s) prior to polling day."

However, in Maris en Andere v Verkiesingsbeampste, Galeshewe Munisipaliteit en Andere 1990 (2) SA 531 (NC), a full bench of the Northern Cape Division disapproved of the above finding. It held that the nominations of candidates who, on nomination day, were in terms of s 8(2)(i) of the Act disqualified from being elected as members of a local authority, were invalid.

Because of the conclusion I have reached as to the second ground on which Levy AJ held for the respondent, I find it unnecessary to determine which of the conflicting views expressed, on one the hand, in Maris and by Levy AJ in regard to the first of the above grounds, and, on the other, in Sigwepu are correct. I should point out, however, that even if the reasoning in Sigwepu is to be preferred, it does not follow that the appellant was validly nominated. As already mentioned, the appellant was the only candidate nominated for ward 14, and the passage from Sigwepu quoted above must be read subject to the following qualification appearing earlier in the judgment (at p 913F):

"It is, of course, so that a candidate who is not opposed would, on nomination day, have to qualify to be elected before he can, by reason of the lack of opposition, be declared to be elected, but that is by reason of the fact that the election day has, as it were, been anticipated and no candidate can be elected if he does not qualify."

I now turn to the second of the above grounds. Counsel for the appellant rightly conceded that the appeal must fail if the appellant was not competent to be elected on the day on which he was declared to have been duly elected, but submitted that before that date the disqualification in question had been removed. Fundamental to this submission is the supposition that under regulation 5(6) the Director could subsequent to the certification of a voters' list in terms of regulation 5(4)(b) give instructions that the list be rectified by the inclusion of the name of the appellant.

Regulation 5(1) and (2) deals with the preparation of voters' lists. As has been seen, regulation 5(3) provides that at any time prior to its being certified under subregulation 4(b), the electoral officer may amend a voters' list by inter alia adding to such list the names of all voters competent to be enrolled thereon. In terms of regulation 5(4)(a) a

list prepared and amended by the electoral officer must be available for public inspection for a period of 14 days. During that period any person desiring to be enrolled on a list or objecting to the enrolment of any other person thereon may lodge his application or objection, as the case may be. On the expiry of the period a list amended by the electoral officer in the light of any applications or objections shall be certified by him as the final and conclusive list for the ward concerned (regulation 5(4)(b)). And a list so certified shall be the only valid list for an ensuing election held in respect of that ward (regulation 5(4)(c)).

As regards the effect of certification, regulation 5(4)(b) appears to be perfectly clear. After certification the list becomes final and conclusive, and this can only mean that it may not be subsequently altered for the purposes of an ensuing election. This much is indeed borne out by the

explicit provisions of regulation 5(4)(c).

Counsel for the appellant contended that notwithstanding the clear meaning of regulation 5(4)(b), read with regulation 5(4)(c), regulation 5(6) must be construed as conferring upon the Director the power to cause an amendment to a voters' list at any time after certification thereof. As has appeared, regulation 5(6) authorises the Director to take certain steps "if anything required by law to be done in the preparation or revision of a voters' list is by accident or through an inadvertence done erroneously or is omitted to be done". If counsel's construction of the subregulation were to be accepted, it would certainly lead to startling results. In theory a voters' list could on the eve of an election, and without the knowledge of the candidates, be amended by the addition of hundreds of names thereto. Conversely, a list could be rectified by the deletion therefrom of the names of a substantial number of persons, including



those of candidates. That could hardly have been the intention of the draughtsman of the Regulations. Indeed, the above construction would render inconclusive that which in terms of regulation 5(4)(b) is specifically declared to be conclusive.

It is not necessary to determine the precise ambit of regulation 5(6). It seems clear, however, that it can be applied if the electoral officer fails to comply with the procedure prescribed in regard to the preparation and amendment of a voters' list. So, for instance, if in conflict with regulation 5(4)(a) a list is made available for public inspection for a period of less than 14 days, it may be said that something "required by law to be done in the preparation or revision of a voters' list" was done erroneously. In a suitable case the Director may then act under regulation 5(6); e g, by instructing the electoral officer to take fresh steps to make the list available for inspection for the full prescribed

period. But whatever the ambit of regulation 5(6) may be, it does not confer upon the Director the power to bring about an amendment of a voters' list which - and this bears repetition - has become final and conclusive by virtue of the provisions of regulation 5(4)(b) and which, in terms of regulation 5(4)(b) "shall be the only valid voters' list for any ensuing election".

It does not appear when the list in question was certified by the electoral officer. It was common cause, however, that this occurred prior to nomination day, i e 9 September 1988. It follows that the amendment of the list on or after 3 October 1988 was a nullity and that the appellant remained disqualified from being elected as a member of the council. Hence the electoral officer was precluded from declaring him "to have been duly elected" (regulation 10(4)).

The appeal is dismissed with costs.

H.J.O. VAN HEERDEN JA

SMALBERGER JA

CONCUR

PREISS AJA