



REPORTABLE
Case number: 2/2001

IN THE ELECTORAL COURT OF SOUTH AFRICA

In the matter between:

THE INDEPENDENT PARTY

APPELLANT

and

THE ELECTORAL COMMISSION

FIRST RESPONDENT

THE AFRICAN NATIONAL CONGRESS

SECOND RESPONDENT

THE DEMOCRATIC ALLIANCE

THIRD RESPONDENT

**THE AFRICAN CHRISTIAN
DEMOCRATIC PARTY**

FOURTH RESPONDENT

MAGRIETA PAULSEN

FIFTH RESPONDENT

CORAM:

**SMALBERGER ADCJ, TSHABALALA JP, VAN DER
WALT, PILLAY and MASIPA JJ**

DATE OF HEARING:

26 MARCH 2001

DELIVERY DATE:

6 APRIL 2001

JUDGMENT

SMALBERGER ADCJ

SMALBERGER ADCJ:

[1] In the municipal elections held on 5 December 2000 throughout South Africa the Independent Party ("the appellant") contested ward 10203001 in the Drakenstein (Paarl) Municipality against the African National Congress ("the ANC"), the Democratic Alliance ("the DA") (the second and third respondents respectively) and the African Christian Democratic Party ("the ACDP") (cited as the fourth respondent). The successful candidate was Ms Paulsen of the ANC (the fifth respondent).

[2] According to the declared result of the election the ANC received 994 votes, the appellant 813, the DA 732 and the ACDP 16. There were 13 spoilt ballots. The ANC and the appellant were therefore the main contestants receiving 38.8% and 31.73% respectively of the votes cast. By contrast the ACDP received a mere 0.62% of the votes.

[3] There were three voting stations in the ward. They are referred to in the papers as Saron, Seventh Day Adventist and Gouda. At Saron the appellant polled 276 votes to the ANC's 136; at Seventh Day Adventist it polled 465 to the ANC's 237. At each of those two stations the appellant therefore received approximately twice as many votes as the ANC. A very different picture emerged at Gouda where the ANC polled 621 votes to the appellant's 72.

[4] The appellant lodged an objection with the first respondent, the Electoral Commission ("the Commission"), concerning the result of the election, in terms of s 65(1) of the Local Government: Municipal Electoral Act 27 of 2000 ("the Act"). The objection was based on certain alleged irregularities which were said to have occurred at the Saron and Gouda voting stations.

[5] Section 65(1) to (4) of the Act provides as follows:

"65. (1) An interested party may lodge an objection concerning any aspect of an election that is material to the declared result of the election

with the Commission by serving, by not later than 17:00 on the second day after voting day, at its office in Pretoria a written notice containing-

- (a) a reference to the election concerned;
- (b) the full name and address of the objector;
- (c) the postal address and telephone number where the objector can be contacted;
- (d) the interest of the objector in the matter;
- (e) details of the objection and the aspect of the election concerned;
- (f) detailed reasons for the objection;
- (g) the relief sought;
- (h) a list of any supporting documents accompanying the notice of objection; and
- (i) proof of service of copies of the notice and annexures on other parties involved in the objection.

(2) The Commission, on good cause shown, may condone a late objection.

(3) In considering and deciding the objection, the Commission may-

- (a) investigate the factual basis of the objection;
- (b) afford interested parties an opportunity to make written or verbal submissions;
- (c) call for written or verbal submissions from other persons or parties;
- (d) call upon the objecting party to submit further information or arguments in writing or verbally; and
- (e) conduct a hearing on the objection.

(4) The Commission must-

- (a) consider the objection and decide it within three days after it was served on the Commission, and either-

- (i) reject the objection;
 - (ii) amend the declared result of the election; or
 - (iii) rescind the declared result of the election; and
- (b) immediately notify the objector and any other parties involved in the objection, of the decision."

[6] Although the appellant attempted to lodge its objection with the Commission by 17:00 on 7 December 2000, as required by s 65(1), it only succeeded in doing so on 11 December 2000. At the same time it sought condonation for the objection being late. Copies of the papers were served by facsimile on the ANC and the DP but not on the ACDP. According to the appellant it had no information regarding the ACDP's candidate due to the ACDP's lack of infrastructure and support in the ward.

[7] No response was received from the Commission. When the appellant on 17 January 2001 enquired as to the outcome of its objection it received the following facsimile from the Chief Director of the Commission, Mr A F Tredoux.

"Please be advised that this office has no record of any documentation in the above regard that was served on the Commission within the time

limits and in the manner as required by section 65 of the Municipal Electoral Act, 2000 (Act No. 27 of 2000). I consequently regret to inform you that the objection can therefore not be entertained."

[8] The appellant immediately sent copies of its documents in support of its objection by facsimile to the Commission. It would seem that the earlier documents had been misplaced by the Commission, because on 18 January Mr Tredoux responded as follows:

- "1. Your facsimile dated 17 January 2001 has reference.
2. No documentation in the above regard was served on the Commission by 17:00 on 7 December 2000 at its office in Pretoria.
3. Documentation which purports to be an objection, dated 10 December 2000, was received by facsimile on 11 December 2000 in Pretoria.
4. A written objection material to declared results of an election in terms of section 65 of the Municipal Electoral Act, 2000, must be served by not later than 17:00 on the second day after voting day (7 December 2000) at the Commission's office in Pretoria.
5. The objection must contain the matters referred to in paragraphs (a) to (i) of the said section. The information rendered does not constitute an 'objection material to the declared result of an election', nor does it comply with the requirements of the said paragraphs."

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[9] The appellant, in my view correctly, regarded the latter communication as a rejection by the Commission of its objection in terms of s 65(4)(a)(i) of the Act. It accordingly applied for leave to appeal to this Court in terms of s 65(5) of the Act read with s 20 of the Electoral Commission Act 51 of 1996. Leave to appeal was duly granted and the parties were directed to file submissions as required by Rule 5(4) of the Rules of this Court (as published in Notice 794 of 1998 in Government Gazette 18908 of 15 May 1998).

[10] In its submissions the Commission, represented by its Acting Chief Electoral Officer, said, *inter alia*, the following:

“6. Although section 65(2) empowers the Commission to condone a late objection, the objector also did not comply with section 65(1)(i), in that the objector failed to provide proof that the objection was served on the party/candidate cited as fourth respondent in the Notice of Appeal. Failure to comply with this requirement cannot be condoned.

7. In view of the aforesaid considerations the objection was not submitted to the Electoral Commission for consideration but dealt with

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administratively by informing the objector by fax on 17 January 2001 that the objection cannot be entertained."

This was the first intimation that the appellant's objection had been considered and dealt with, not by the Commission, but administratively.

[11] The appeal was set down for hearing on 26 March 2001, being the earliest available opportunity for the Court to assemble, given the situation of its members and their respective duties. The parties were advised that argument would "be confined to the question whether the Electoral Commission was not legally obliged to consider the Independent Party's objection in terms of section 65 of the Municipal Electoral Act 27 of 2000, as opposed to dealing with the matter administratively."

[12] At the hearing of the appeal it was common cause that the appellant's objection had never been referred to the Commission for its consideration. An administrative decision, presumably by Mr Tredoux, had been taken not to entertain the objection. This had been done, as appears from the Commission's submissions referred to

above, on the basis (1) that the objection was late and (2) because of non-compliance with s 65(1)(i) in respect of the ADCP. It was also common cause, for the purposes of the appeal, that Mr Tredoux, in acting as he did, was not clothed with any delegated powers in terms of s 90 of the Act, which permits the Commission to delegate certain of its powers and assign certain of its duties. Nor did he have any statutory power to deal with the objection.

[13] Section 3(1) of the Electoral Commission Act provides for the establishment of the Commission "which is independent and subject only to the Constitution and the law". One of its functions, in terms of s 5(1)(o) of that Act, is to "adjudicate disputes which may arise from the organisation, administration or conducting of elections and which are of an administrative nature".

[14] Section 1(d) of the Constitution provides that one of the values on which the Republic of South Africa is founded is:

"Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

Section 19 provides that every citizen is free to make political choices, and has the right to free, fair and regular elections including the right to vote in elections and stand for public office.

[15] In terms of s 181(1)(f) of the Constitution the Commission is one of the State institutions established to "strengthen constitutional democracy in the Republic". As such it must, in terms of s 181(2) *inter alia*, "be impartial and must exercise [its] powers and perform [its] functions without fear, favour or prejudice". One of its functions, as provided for in s 190(1)(a) of the Constitution is to "manage elections of national, provincial and municipal legislative bodies in accordance with national legislation".

[16] The above provisions emphasise the important constitutional role the

Commission fulfils in relation to overseeing and regulating elections, and upholding the rights of those who are entitled to participate in elections, in keeping with the Constitution and applicable national legislation such as the Act. In this respect s 2(a) of the Act requires that it must be interpreted "in a manner that gives effect to the constitutional declarations, guarantees and responsibilities contained in the Constitution".

[17] I revert to a consideration of the provisions of s 65(1) of the Act quoted in para [5] above. It provides that an interested party (which the appellant undoubtedly is) "may" lodge an objection with the Commission. In the context "may" means "is entitled to" (cf *Goldberg and Others v Minister of Prisons and Others* 1979(1) SA 14 (A) at 43 A - B). From this it follows that an interested party has a right to lodge an objection with the Commission, and the Commission has a corresponding obligation to consider and determine such objection. To hold otherwise would be to

negate the right. The nature of the objection is prescribed - it must be one "concerning any aspect of an election that is material to the declared result of the election". This goes to the very heart of the objection. It is a jurisdictional requirement which is a pre-condition for the exercise of the Commission's powers in terms of s 65(4)(a). If the objection does not fall into that category the Commission is free to reject it on that ground. But implicit in s 65(1), seen against the constitutional and legislative framework relating to the Commission's role in elections, is that the Commission is the functionary which is required to determine whether the objection is one within the contemplation of s 65(1). It could never have been intended by the Legislature that an administrative official, without any delegated power, should be entitled to decide, without reference to the Commission, what is in effect the vital ingredient of the objection. The Commission may well be entitled to act in appropriate circumstances on the advice or recommendation of its officials, but

ultimately it must apply its mind to the matter and decide it in accordance with the provisions of s 65(4)(a).

[18] Section 65(1) further requires an objection to be lodged "by not later than 17:00 on the second day after voting day". Section 65(2) makes specific provision for condonation of a late objection by the *Commission*, on good cause shown. The decision is clearly that of the Commission; it is not for an administrative official to take it upon himself or herself to reject an objection because it is late, particularly not when condonation has been sought. It is for the Commission to determine whether good cause for condonation exists.

[19] The objection is furthermore to be by written notice complying with requirements (a) to (i) of s 65(1). There is nothing in the wording of s 65(1) to suggest that these requirements are peremptory and that non-compliance with any one would invalidate an objection. No such words as "shall" or "must" are used in regard

to what the written notice is required to contain. The omission of an insignificant detail, such as the objector's telephone number (see s 65(1)(c)), could not invalidate the objection. It would be absurd to hold otherwise. In my view no more ~~than~~ substantial compliance with the listed requirements is called for. Whether there has been substantial compliance is, once again, for the Commission to decide, not an administrative official. If there has not been substantial compliance it would be open to the Commission to reject the objection on that ground alone. But in so acting, the Commission would be required to act reasonably, not arbitrarily. (*Pharmaceutical Manufacturers Association of SA and Another: In Re ex parte President of the Republic of South Africa and Others* 2000(2) SA 674 (CC) at paras [85] and [90].)

It may, in an appropriate case, be arbitrary for the Commission simply to reject an objection because the written notice does not substantially comply with all the prescribed requirements when it could reasonably have been expected of it to call for

.. further information (see s 65(3)(d)) to cure any deficiencies in the notice. On the other hand a written notice may be so manifestly defective as to justify it being rejected out of hand, but even then the objector would be entitled to know why it is being rejected. Ultimately it is a question of degree and each case would have to be dealt with having regard to its own facts and circumstances.

[20] In any event, in the present matter, s 65(1)(i) was substantially complied with. That sub-section requires proof of service "on other parties involved in the objection". It does not speak of "interested parties" or parties "involved in the election". The parties "involved in the objection" may only be such parties in regard to whose conduct the objection relates - in this case only the ANC. I express no firm view on the matter. However, by no stretch of the imagination can it be said that the ACDP, which only polled 0.62% of the votes, was an interested party or one involved in the objection within the context of s 65(1)(i). It had no substantial or protectable

Commission in terms of s 65(3) when considering and deciding an objection, it will in any event be virtually impossible to comply with s 65(4)(a) in all instances. This could lead to a situation where the objections are not given the attention and consideration they deserve. An amendment to s 65 should be considered to allow the Commission more latitude in appropriate cases while remaining mindful of the need to deal with objections expeditiously.

[22] It follows that the appeal must succeed and the Commission must be required to consider the appellant's objection. It was suggested tentatively that this Court could consider the objection. To do that would be to usurp the function of the Commission. In the interests of fair and reasonable administrative action the Commission should provide reasons, however brief, for whatever decision it reaches in regard to the objection - see s 33(1) of the Constitution

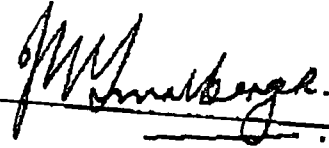
[23] While one would normally hesitate in electoral matters to make adverse costs'

orders it seems to me appropriate to do so in the present matter and to apply the normal rule that costs should follow the result. This is a matter where the Commission's officials misconceived the legal position, acted unreasonably and when challenged persisted, with the Commission's apparent support, in defending the indefensible. In the circumstances it is appropriate to order the Commission to pay the costs of those parties who made submissions to this Court and appeared at the hearing of the appeal. There appears, however, to be no justification for awarding any party the costs of two counsel.

[24] The following order is made:

1. The appeal is allowed.
2. The Electoral Commission is directed to consider and decide, in terms of s 65 of the Municipal Electoral Act 27 of 2000, the objection lodged by the Independent Party on 11 December 2000 in respect of the result in ward 10203001 in the Drakenstein (Paarl) Municipality, and to furnish reasons for its decision.

3. The Electoral Commission is to pay the costs of the appellant and the second and fifth respondents in relation to the appeal.



J W SMALBERGER
ACTING DEPUTY CHIEF JUSTICE

TSHABALALA JP)Concur
VAN DER WALT J)
PILLAY J)
MASIPA J)

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