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**IN THE ELECTORAL COURT OF SOUTH AFRICA
HELD AT BLOEMFONTEIN**

**Not Reportable
Case number: 001/2023 EC**

In the matter between:

AFRICAN NATIONAL CONGRESS

Applicant

and

ELECTORAL COMMISSION OF SOUTH AFRICA

Respondent

INKATHA FREEDOM PARTY

(party applying to intervene)

Neutral Citation: *African National Congress v Electoral Commission of South Africa and Others* (001/2023 EC) [2023] ZAEC 1 (17 February 2023)

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

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 12H00 am on 17 February 2023.

Summary: Municipal By-Elections – Failure by a political party to pay a prescribed deposit in terms of section 14(1)(b) of the Local Government: Municipal Electoral Act 27 of

2000 to enable its candidate to contest By-election – candidate disqualified – application dismissed.

REASONS

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

Introduction

[1] This is a review application that was brought by the African National Congress (the Applicant) to review and set aside the decision of the Electoral Commission (the Commission) to disqualify its candidate from contesting by-elections that were to be held on 18 January 2023 in Mtubatuba Local Municipality, in the Province of KwaZulu Natal. The application was opposed by the Commission. The Inkatha Freedom Party sought to be joined in these proceedings and also opposed the relief sought by the Applicant. The Applicant sought the following relief:

- ‘(a) That any late filing of this application be and is hereby condoned,
- (b) That the decision of the Respondent’s KZN Provincial Election Officials to disqualify the Applicant’s Candidate from contesting in Ward 09 Mtubatuba Local Municipality by-election be declared invalid, alternatively is reviewed, and set aside.
- (c) That the Respondent is ordered and directed to take all necessary steps to ensure that the name of the Applicant’s candidate is included in the ballot paper for the by-election for Ward 09 Mtubatuba Local Municipality scheduled for the 18 January 2023.

ALTERNATIVELY:

- (d) That the Applicant’s candidate is declared to be compliant in terms of section 17(1) of the Municipal Electoral Act, 2000.
- (e) The Respondent is ordered and directed to take all the necessary steps to ensure that the name of the Applicant’s candidate is included in the ballot paper for the

by-election for Ward 09 Mtubatuba Local Municipality schedule for the 18 January 2023.

(f) No order as to costs, save in the event the Respondent opposes this application, then that it be ordered to pay costs.'

[2] After all the parties had filed their pleadings, the Court considered and decided the application in chambers without any oral submissions as follows:

- '1. The application for condonation is dismissed.
2. The application is dismissed.
3. Inkatha Freedom Party is granted leave to intervene as a Respondent in these proceedings.
4. There is no order as to costs.'

In view of the urgency of the matter, we made an order without reasons and indicated that reasons would follow later. These are the reasons for the order we made.

Factual Background

[3] On 02 December 2022, one of the Applicant's representatives, Mr. Mbhekiseni Vivian Mfeka, went to the Commission's offices in Mtubatuba branch where he was issued with an invoice for payment of a deposit into the Commission's Standard Bank account no (0[....]8) as he intended to register and participate in Ward 09 by-elections that were to be held on 18 January 2023. In terms of the election timetable compiled by the Commission the cut-off date for complying with the stipulated requirements by all candidates including the payment of the required deposit of R1000.00 was 17h00 on 5 December 2022.

[4] After receiving the invoice, Mr. Mfeka went to effect payment at Standard Bank. There, he was assisted by one of the bank's officials. Upon inserting the bank account number, the system reflected Bayport Financial Services, as the recipient, with an account number (4[....]8) that is different from the one that he was given by the Commission. However, they proceeded to make payment even though Mr. Mfeka had queried the said account number from the bank official as it showed an unfamiliar name.

[5] On 12 December 2022, the Commission wrote to the Applicant informing them that the

deposit of Mr. Mfeka does not reflect in their system and therefore their candidate was disqualified to contest the by-elections. According to the Applicant, while Mr. Mfeka tried to resolve the issue with the bank, their representatives engaged with the Commission's officials who indicated that everything was in order. The Commission's representatives have disputed this and stated that at no stage did they inform the Applicant that its candidate was eligible to contest the by-elections.

[6] The payment was eventually transferred from Bayport Financial Services account (4[....]8) to the Commission's account (0[....]8) on 12 December 2022. Aggrieved by the decision of the Commission, the Applicant launched this review application seeking the relief referred to in para 1.

Condonation

[7] An application for condonation will only be granted once the court is satisfied, among other factors, that it is in the interest of justice to do so.¹ In *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*², the Constitutional Court, said the following:

'...It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect' (footnotes omitted).

In light of the above, I now turn to consider the explanation proffered by the Applicant. Any person who wants to take a decision of the Commission on review is required by law to do so within three days after the decision has been made.³ The Commission made its decision on 12 December 2022. According to the Applicant, he became aware of the decision of the Commission on 14 December 2022.

¹ *Grootboom v National Prosecuting Authority and Another* (2014) 35 ILJ 121 (CC) at para 22.

² 2000 (2) SA 837 (CC) at para 3.

³ Section 6(1) of the Rules Regulating the Conduct of the Proceedings of the Electoral Court, 1998.

[8] The Applicant alleges that the reason for the delay was because of its national elective conference which took place on 16 December 2022 during which it could not discuss the matter and obtain authority from its secretary general to institute these proceedings. Further, the Applicant submitted that its Secretary-General only occupied office after the December 2022 holidays. Consequently, the engagement with the Secretary-General, consultation with attorneys, and the preparation of this application was only possible during January 2023. The Applicant further submitted that they have good prospects of success.

[9] In my view, the Applicant has not satisfactorily demonstrated why it took them a prolonged period to approach this Court to protect a fundamental right such as to stand for a public office. The preparation for the then National Elective Conference by the Applicant does not justify their failure to act within the time frames in their attempt to protect what the Applicant regards as a fundamental right in a constitutional democracy. In addition, the reliance on the wait for the new Secretary-General does not in any way assist the Applicant's cause. This somehow suggests that there was no one else to attend to this issue within the administrative affairs of the Applicant. The Inkatha Freedom Party has in my view correctly submitted that the internal administrative affairs of the Applicant should not be invoked to affect the by-elections. Furthermore, the Applicant's explanation is not that clear. On one hand, the Applicant contends that they only became aware of the issue of non-payment of the deposit on 14 December 2022. On the other hand, a communique from the Applicant's attorneys to the Commission states that 'on 9 December 2022, our client was informed by IEC that the payment made on behalf of our client on 2 December 2022 did not reflect'.⁴ This contradiction is unfortunate. This Court is therefore not persuaded by the Applicant's explanation for the delay. The review application was filed in this Court on 12 January 2023. This is almost a month later post the decision of the Commission, and five days before the by-elections took place. I am therefore of the view that the reasons advanced by the applicant are unreasonable and unacceptable.

[10] The prospects of success for the Applicant are also extremely poor in that they do not in any way complement the explanation presented by the Applicant. To the contrary, the

⁴ Annexure A para 2.7 of the Applicant's Reply to the Respondent's Answer and Answer to the Intervening Party's Founding Affidavit.

Applicant admits a mistake of payment of the deposit into an incorrect account while at the same time, the Applicant, unfortunately, insists that the deposit was paid timeously. In my view, there are no other factors from the papers before this Court that could be said to assist the case of the Applicant in so far as the late filing of the review application is concerned.

[11] In the circumstances, I find that the Applicant has not made out a case for the condonation of the late filing of its review application. The interest of justice also does not permit this Court to condone the late filing. For these reasons, the application for condonation had to fail.

Non-joinder

[12] The law requires that any party who has a direct and substantial interest in the subject matter must be joined in the proceedings to safeguard their interests.⁵ The Supreme Court of Appeal in *Absa Bank Ltd v Naude NO*⁶, formulated the test for non-joinder as follows:

‘The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined’.

[13] If the answer is in the affirmative, the party that has a direct and substantial interest in the subject matter must be joined in the proceedings as failure to do so may result in this Court giving adverse findings that may prejudice a party who had no opportunity to state the side of their story.

[14] The Inkatha Freedom Party submitted that it had a candidate in the by-elections and that the Applicant was seeking to impose a new candidate at the last minute. In my view, this is valid ground. I say this because the Applicant’s candidate sought to participate in the by-elections against Inkatha Freedom Party’s candidate even though he had not complied with one of the requirements to contest the by-elections. There is no doubt that

⁵ *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) para at 21

⁶ [2015] ZASCA 97 at para 12.

Inkatha Freedom Party had a direct and substantial interest in the subject matter. In any event, the Applicant did not object to the application to intervene as sought by Inkatha Freedom Party.⁷ Therefore, I conclude that the joinder of Inkatha Freedom Party was a necessity in these proceedings.

[15] I now turn to dealing with the merits of the review.

Legislative Framework

[16] It is trite that the Commission must operate within the confines of the Constitution and the law. Section 14 of the Local Government: Municipal Electoral Act 27 of 2000 lists requirements for parties contesting the by-elections by way of party lists. In particular, section 14 (1) provides that:

‘A party may contest an election in terms of section 13(l)(a) or (c) only if the party by not later than a date stated in the timetable for the election has submitted to the office of the Commission’s local representative—

(a) in the prescribed format-

(i) a notice of its intention to contest the election: and

(ii) a party list; and

(b) a deposit equal to a prescribed amount, if any, payable by means of a bank guaranteed cheque in favour of the Commission.’

The above provisions are clear and peremptory as far as the deposit is concerned. The question that follows is whether the Applicant complied with the above mandatory requirement. The answer is no. I say so for the following reasons.

Discussion

⁷ Applicant’s Reply to the Respondent’s Answer and Answer to the Intervening Party’s Founding Affidavit at para 30.

[17] It is common cause that the cut-off date for the payment of the deposit was 5 December 2022 and that the prescribed amount had not been paid into the Commission's bank account on the said date. The error of payment into an incorrect bank account was only realized by the Applicant on 09 December 2022 when a representative of the Commission informed one of the Applicant's agents. All the measures taken to rectify the same were taken post the due date, 5 December 2022. Consequently, there was no compliance with one of the mandatory legislative requirements to pay a deposit. In dealing with mandatory payment of a deposit *albeit* in the context of section 27(2)(e) of the Electoral Act 73 of 1998, the court in *Economic Freedom Fighters v President of the Republic of South Africa and Others*⁸

'A party which does not comply with either of the above requirements faces the risk of disqualification because the Electoral Commission is responsible for compiling the list of political parties and candidates contesting the elections. The regulations do not provide the IEC with discretion to waive the deposit requirement on good cause shown. Therefore, the deposit requirement is inflexible and non-compliance therewith will result in disqualification' (own emphasis added).

I find the above paragraph relevant and applicable in this case. In my view, this settles the matter. I, therefore, do not deem it necessary for this Court to venture into details about other issues save to indicate that the Commission gave the Applicant's representative an invoice reflecting a correct STD Bank account (0[....]82) including a reminder that "all payments should be received by IEC before cut-off date and time...late payment will result in candidate being disqualified".⁹

[18] In the circumstance, the Commission acted lawfully, reasonably, rationally, and within the ambit of the law and Regulations to disqualify the Applicant's candidate for failure to adhere to one of the conditions as stipulated in section 14(1)(b) of the Local Government: Municipal Electoral Act 27 of 2000. There is no basis to fault the Commission's decision. The application, therefore, stands to be dismissed.

[19] The Applicant failed to comply with a legislative requirement to pay the required

⁸ (16247/14) [2014] ZAGPPHC 109 (11 March 2014) at para 15.

⁹ Annexure C of the Applicant's founding affidavit.

deposit timeously. Consequently, it excluded itself from contesting in the by-elections. Therefore, it is not entitled to the relief sought. These are the reasons for the order we made.

PROFESSOR MR PHOOKO
MEMBER
ELECTORAL COURT