REPORTABLE
CASE NO: 4/2004

IN THE ELECTORAL COURT OF SOUTH AFRICA
HELD AT BLOEMFONTEIN

In the matter between:

AFRICAN CHRISTIAN DEMOCRATIC PARTY — APPLICANT

and

THE CHAIRPERSON, INDEPENDENT
ELECTORAL COMMISSION — FIRST RESPONDENT

AZAPO — SECOND RESPONDENT

CORAM: MTHIYANE JA, PILLAY and MASIPA JJ; Ms S MOODLEY and Ms S ABRO (Members)

DATE OF HEARING: 11 May 2004

DELIVERY DATE:

Summary: Review – Whether Electoral Court has power to review and correct errors or mistakes, beyond the window period contemplated in Section 55 of the Electoral Act No 73 of 1998. r Condonation – whether good cause shown for delay in lodging objection.

JUDGMENT

PILLAY J

INTRODUCTION

This case is concerned with whether this court has the power to correct errors or mistakes on the part of the Independent Electoral Commission(the first respondent), resulting from an alleged incorrect allocation or posting of votes, causing prejudice to another party (the applicant in the present matter). The application is not opposed by the first respondent, which concedes that the votes cast for the African National congress were erroneously allocated to the second respondent, to the prejudice of the applicant.

THE BACKGROUND

[1] On the 14th of April 2004, national and provincial elections were held for the whole of the Republic of South Africa. The Applicant and the Second Respondent, as parties registered in terms of section 15 of the Electoral Commissions Act No 51 of 1996 participated in the said elections. The First Respondent is charged with the management of elections for the national, provincial and local legislative bodies under the Electoral Commissions Act No 51 of 1996 read together with section 190 of the Constitution of the Republic of South Africa Act No 108 of 1996.

[2] To appreciate the nature of this application, it is useful to understand the electoral system under which the election is held for the National Assembly. In its simplest form, the system is one of proportional representation, which in practice translates to the counting of votes at each of the 16 986 voting stations throughout the Republic of South Africa polled for each party spread through the nine provinces. The total of these votes are added together to determine the

total number of votes received by each party in the elections as a whole. The 400 seats in the National Assembly are allocated proportionally to each party according to the votes gained in the election by way of a formula set out in section 57A of the Electoral Act No 73 of 1998 as amended (the Electoral Act) read together with Schedule 1A therein referred to.

[3] It stands to reason, and it usually happens as a matter of course, that the division will invariably result in fractions left over in terms of votes cast for each party and seats remaining to be allocated on the basis of the highest remainder of such leftover votes. The formula extracted from Section 57A of the Electoral Act read together with Schedule 1A, is best summed up in the submissions of the First Respondent as follows:

> '(a) The total number of votes cast in the election is divided by 400 plus 1. The result, plus one (disregarding fractions), is the quota of votes per seat, i.e. the minimum number of votes a party must have to be assured of one seat.
>
> (b) As a first round in the allocation of the seats, the quota is divided into the total number of votes obtained by each party. The result (disregarding fractions) for each party, is the number of seats allocated to that party in the first round.
>
> (c) As all the seats will not be allocated in the first round, the next five seats are allocated to parties with the largest number of surplus votes after the first round, whether a party had gained seats in the first round or not.
>
> (d) If seats remain unallocated after the second round, only parties that have by then already gained one or more seats, compete for the remaining seats in a third and last round. These remaining seats are allocated in sequence from the highest average number of votes a party had gained per seat already allocated to it.'

Nothing in regard to the application of the formula applied is in dispute.

THE DISPUTE

[4] This dispute concerns the allocation of seats by the First Respondent (The Commission) as will appear from the NATIONAL RESULTS seat allocation document, annexure "C" to the Applicant's founding affidavit, applying the prescribed formula to the third round (the last round). The last 3 seats according to this formula were allocated on the basis of the highest average votes remaining to the MINORITY FRONT (55 267), the FREEDOM FRONT PLUS (46 488) and AZAPO (41 776). The latter is the Second Respondent opposing this application.

[5] It will be seen and is important to bear in mind that the NATIONAL RESULT sheet shows that the Applicant failed to obtain an additional seat in this third and last round by a mere 65 votes. In other words, if the Applicant had recorded a further 65 votes to the existing total shown in its name (41 712), it would have been allocated this seat instead of AZAPO.

[6] It is the Applicant's case that in voting district 97090139 (Western Cape) the election results for the province (annexure "B" to the founding affidavit) records *inter alia*, the following votes cast:

I	AFRICAN MUSLIM PARTY	0
II	ACDP	2
III	ANC	2666
IV	AZAPO	6

in that order.

For the NATIONAL ELECTION (annexure "A" to the founding affidavit) for the same electoral district, the following votes are reflected in the same consecutive order to the ACDP, the ANC and AZAPO as follows:

I	ACDP	0
II	ANC	2
III	AZAPO	2666

The AFRICAN MUSLIM PARTY is omitted and its no vote result has apparently been allocated to the ACDP; the ACDP vote to the ANC, and the ANC vote to AZAPO.

THE APPLICANT'S SUBMISSIONS

[7] The Applicant's case is encapsulated on the basis of the results announced by the Commission at paragraphs 9 and 11 of the founding affidavit as follows:

> '9. - - - In recording the results the counting officer switched the results for the ANC and the second respondent reflecting the aforesaid unlikely support for the second respondent. When compared to the National and Provincial results it is highly improbable that the ANC would have received such little support in the aforesaid voting district on the National List. The aforesaid error resulted in 2666 votes in the National Election being allocated to the second respondent. This had resulted in a serious irregularity as envisaged in s56 of the Electoral Act, No 73 of 1998.
>
> 10. - - -
>
> 11. The applicant is an interested party in the correction of the aforesaid result in that it is material to the determination of the final result of the election. The aforesaid electoral issue is material to the applicant in that, if the relief in the notice of motion is granted, the applicant will obtain an additional seat in Parliament at the expense of the second respondent, who will lose a seat. In support of this the following is submitted:
>
> 11.1 The current National results and allocation of seats in Parliament as published are annexed hereto marked "C". The Honourable Court is referred to the third allocation of seats. A further parliamentary seat was allocated to the second respondent due to an aggregate of 41 776 votes in run two. The applicant had an

average of 41 712 votes in the aforesaid run two. The difference is a mere 64 votes. If the results in the aforesaid voting district are set aside and corrected, the disallowing of votes to the second respondent of 2666 on the National Election, will result in the applicant being awarded the final seat in Parliament. In fact, a reduction of the votes awarded to the second respondent by 65 votes would have the same result.

11.2 The applicant therefore contends that, with the third allocation of seats the second respondent was awarded a second seat by virtue of the fact that, based on the aforesaid erroneous result, they had 64 more votes than the applicant. Should the Honourable Court grant the order as prayed for supra, sufficient votes will be deducted from the second respondent to leave the applicant with more votes than the second respondent for purposes of the third allocation of seats. The applicant will then be awarded the final seat in Parliament.'

THE RELIEF CLAIMED

[8] The Applicant seeks the following relief:

"1. Correcting, reviewing and setting aside the determination of the result of the National Election by the Independent Electoral Commission in respect of voting district 97090139 [Municipality of Cape Town];

2. Directing that the 2666 votes recorded in the result of the aforesaid voting district as having been cast in favour of the second respondent, be deducted in whole from the votes cast in favour of the second in the National Election of 14 April 2004;

3. Costs of the application in the event of opposition;

4. Further and/or alternative relief."

COMMON CAUSE FACTS

[9] The Commission declared and announced the results of the elections for the National Assembly on the 17th of April 2004 at about 19h30. On the 20th of April 2004, the applicant filed an objection with the First Respondent in accordance with section 55(1) of the Electoral Act accompanied by an application for condonation in accordance with section 55(3) of the Electoral Act because the

objection was lodged outside of the framework prescribed by section 55(2) i.e. after 21h00 on the second day after the voting day. The First Respondent, acknowledging that an error had occurred, (not conceded by the Second Respondent), convened a meeting at which representatives of the Applicant and the Second Respondent were present, in an effort to amicably resolve the matter. The First Respondent took the view, it would appear, that it could not deal with the objection under section 55 of the Act because the window of opportunity to deal with such objections had passed and it had become *functus officio* after the results of the election had been declared. For the sake of completeness and in order to understand the First Respondent's standpoint in supporting this application, it is best that the letter dated the 23rd of April 2004 addressed by the Commission to the Applicant in response to the objection of the 20th of April 2004, be reproduced in full. It reads as follows:

> ' Mr Bruce Harbour
> ACDP
> - - - - -
> **RE: OBJECTION FROM ACDP : VD 97090139**
>
> On 20 April 2004, the ACDP lodged an objection with the Commission purportedly in accordance with section 55(1) of the Electoral Act, 73 of 1998 ("the Act"). This objection was accompanied by an application for condonation in terms of section 55(3) as the objection was lodged outside of the timeframe prescribed in section 55(2).
>
> The window of opportunity to deal with election disputes in terms of section 55 of the Act having passed, this issue could not be dealt with under section 55. In an attempt to resolve the matter, the Commission invited all parties affected by the matter to a meeting on 22 April 2004 at the Commission's offices in Pretoria. The meeting was duly held with a view to reaching an agreement between the parties. Only the ACDP and AZAPO attended the meeting. During the meeting, the Commission agreed that there appears to have been a mistake made in the recording of the results at the voting station in the abovementioned voting district even though the results slip had been countersigned by five party agents. There was however no agreement however reached between the parties.

> As a way forward, the Commission undertook to launch an urgent application to the Electoral Court to have the recorded results reviewed and if appropriate, the record corrected.
>
> The Commission then consulted with legal counsel on the launching of the urgent application. During the consultation, the legal representatives were of the view that a party involved in the dispute was clothed with the necessary *locus standi* to launch appeal or review proceedings rather than the Commission. The issue was considered at length and it was finally decided that the view adopted by counsel was correct and that instead of the Commission launching the application itself, it is up to any of the affected parties to approach the Electoral Court if it so wishes.
>
> In the result, the Commission has decided not to launch an application as initially communicated to the parties, but to leave the matter in the hands of the affected parties. In the event that the Electoral Court is approached in this matter, the Commission will assist the Court in providing all factual information required.'

The Second Respondent placed in issue that at that meeting the First Respondent admitted the alleged error, contending that '- - - at most (the First Respondent) agreed that there was a possibility that an error had been committed when the results were recorded at the voting station in question. There was no evidence of that during the meeting.'

THE SECOND RESPONDENT'S SUBMISSION

[10] The Second Respondent, AZAPO, which prays for the dismissal of the application together with an order for costs, raised two *in limine* points. Counsel for AZAPO, Mr MOKODITOA accepted and commenced argument on the points *in limine.*

THE FIRST AND SECONDS POINTS *IN LIMINE*

[11] Mr MOKODITOA submitted that once the results are announced and once the window period for objections has passed i.e. not lodged by 21h00 on the 16th

of April 2004 the Commission had become *functus officio*. The objection and application for condonation had been brought by invoking the provisions of section 55 of the Electoral Act. It is evident that the Commission took the view that it could not deal with the matter and therefore attempted to settle the dispute before the "successful" candidate was sworn in as a member of the National Assembly. There was some merit in the *functus officio* argument. No finding in this regard is called for, for the very reason that the Commission left it to the parties to approach this Court, if they so desired.

[12] AZAPO's standpoint as I understand it, is that this Court is not a Court of first instance. It can only deal with matters referred to it on appeal or review. This Court therefore has no jurisdiction to deal with a matter which the Commission refused to deal with. If the matter were left open-ended, and that is precisely what section 52(3) seeks to avoid, an absurd situation could arise. The Electoral Court cannot deal with matters not dealt with by the Commission. The Electoral Court is a creature of statute. It derives its jurisdiction from the statute creating it and unlike the Supreme Court has no inherent jurisdiction. Mr MOKODITOA placed much reliance for his submission on the case of *National Party v Jamie NO and Another* 1994 (3) SA 483 (EL AT: WCD), a case dealt with by the Electoral Appeal Tribunal under now repealed legislation. Although the case deals with the question of the competence of the Elections Tribunal to deal with a matter which the Chief Director (the present equivalent of the Chief Electoral Officer) did not entertain (and therefore of some relevance to this application), it must however be borne in mind that the Electoral Act No 202 of

1993 and the Electoral Commissions Act No 150 of 1993 have both now been repealed. The review application in the *Jamie* case was brought before a Tribunal and not a Court. The issue before the Appeal Tribunal, though in part relevant to this matter, was one really related to the leading of oral evidence on a matter not dealt with by the Chief Director. Whilst the judgment is persuasive, it is not binding on this Court as Mr MOKODITOA would have the Court accept. Mr MOKODITOA did not, it appears, give sufficient consideration to the provisions of section 20 of the Commissions Act and other related provisions.

[13] Section 20 of the Commissions Act reads as follows:

> '20(1)(a) The Electoral Court may review any decision of the Commission relating to an electoral matter.
>
> 20(3) The Electoral Court may determine its own practice and procedures and make its own rules.'

In short the powers of this Court in electoral matters are wide-ranging. Section 18 of the Commissions Act explicitly accords to it the status of the Supreme Court (now the High Court). Whilst there may be merit in the argument that it does not enjoy those inherent powers that the High Court has, it certainly, in my view, enjoys extensive powers in relation to electoral matters. It is the final Court of Appeal or Review in all such matters (see section 96 of the Electoral Act). Mr MOKODITOA rightly, and very correctly, conceded that his jurisdiction point had no merit and accordingly withdrew it.

[14] Part of the problem in this matter is that neither party appears to have considered the effect of section 20 of the Commissions Act. The Applicant

pleaded its case based solely on section 55 of the Electoral Act, claiming relief, it would appear, under section 56 of the Electoral Act, contending for a serious irregularity having occurred relating to any aspect of the election. This approach also accounts for the relief claimed in part two of the order which is analogous to that which is set out in section 56(b) of the Electoral Act. It is however clear from what I have said above that this Court's powers extend beyond the powers provided for in section 56 of the Electoral Court Act, if regard is had to the powers, functions and duties referred to in the Commissions Act.

[15] I am unable to agree with the view that the Court, in the light of the very wide powers it has in electoral matters, cannot, on application, (as is the case here) correct declared results arising from some underlying administrative error, in appropriate circumstances. It would seem to me that, by failing to do so the Court would not only be acting irresponsibly but would be abdicating its constitutional imperative to ensure free and fair elections (see section 19(2) of the Constitution of the Republic of South Africa, Act 108 of 1996). It must follow therefore that even if there is merit in the Second Respondent's argument that the Commission was *functus officio* in dealing with the objection, this Court is nevertheless at large, in appropriate circumstances, to deal with the matter in terms of its review powers contained in section 20 of the Commissions Act.

[16] The Court will of course in any application for review, more especially in electoral matters, where speedy resolution of matters

is of paramount importance, look closely at any application for condonation. Condonation plays an important role in reaching finality. Good cause must be shown. This ensures that any election will not be left open-ended or open to the absurdities contended for by AZAPO in its submissions. The submission by Mr MOKODITOA that the Applicant is not entitled to any relief because it had failed to lodge its objection timeously is without merit. The results were announced on Saturday the 17th of April 2004. The following day was a Sunday. The error was discovered on Monday the 19th of April 2004 and the objection was prepared and lodged on the 20th of April 2004, albeit after the window period had passed. There is accordingly no merit, as Mr HELLBERG for the Applicant, rightly pointed out, that, because the Applicant was late, it should accept the declared result. The Electoral Court, as I see it, is a public functionary and is duty bound to correct any mistake or error which is material to the declared results. Considering therefore the diligence with which the Applicant lodged its objection and prudently pursued it, I am of the view that that is good grounds for condonation. I also agree with Mr HELLBERG's submission that by passing the matter on to this Court, the Commission appears to have *de facto* granted condonation.

[17] Mr BRUCE COLIN HARBOUR in his supporting affidavit to the application and in reply effectively counters the Second Respondent's submission that the Applicant was late or tardy in lodging the objection and on that account, its opposition should be rejected because it had not discharged the onus upon it to show good cause. I do not wish to burden this judgment with the technical

details encountered by the Applicant (as set out by Mr HARBOUR) in capturing the detailed information for purposes of comparing the provincial and national election results in a single voting district. The reasons advanced are extremely persuasive. For its part the Second Respondent has not placed anything before the Court to show the contrary save for some vague allegation that the Applicant's tardiness was of its own making, as for example that it ought to have its own party-agents present and that it ought to have been aware that more updated computer software was necessary.

[18] In my view there was no undue delay on the part of the applicant in lodging the objections in terms of section 55 of the Electoral Act and this court has the power to condone such delay. It also has jurisdiction to review any errors committed during the elections. Accordingly both points *in limine* must fail.

THE MERITS

[19] To illustrate the error/mistake contended for, the Applicant makes reference to a map from the DEMARCATION BOARD, (annexure "E" to the affidavit of Harbour) and draws attention to the voting districts 97090139 (results of which it specifically singles out for challenge) and neighbouring voting districts 97090128, 97090140, 97091129, 97091141 and voting district 97090117. An analysis of those adjoining voting districts shows the following voting pattern: (annexures "H", "I", "J", "K", "L", "M", "N", "O", "P" and "Q" of Harbour's supporting affidavit to the application).

VOTING DISTRICT	PARTY	NATIONAL	PROVINCIAL
9709128	ANC	2293	2254
	AZAPO	10	14
9709140	ANC	1945	2013
	AZAPO	11	10
97091129	ANC	1968	1916
	AZAPO	10	12
970901141	ANC	1399	1367
	AZAPO	4	5
97090117	ANC	1725	1702
	AZAPO	7	6

In these voting districts which adjoin voting district 97090139, the total votes cast for AZAPO on the national list amounts to a mere 42 and on the provincial list to a mere 46. If the result in voting district 97090139 is compared with the figures for that district where AZAPO is shown to have recorded 2666 national votes and the ANC only 2 votes, the startling disparity can only be explained by the affidavit put up by the presiding officer and counting officer LUCAS KRWAQA, confessing to the mistake. From an objective analysis and the surrounding circumstances, the error is obvious and most likely caused by a casual error in transferring the results from the Provincial Result from "NDH 2" (the source document) to the National Result form "NDH 1" (the source document) where the ACDP, the ANC and AZAPO appear consecutively in the horizontal columns as appears from annexure "A" to the Second Respondent's opposing affidavit. The error/mistake is repeated in the Election Results Sheet – annexures "A" and "B" to the Applicant's (MESHOE's) founding affidavit.

[20] The Second Respondent does not acknowledge the error/mistake and persists in its claim that the results are correctly recorded. There is no suggestion of fraudulent behaviour. However, it draws attention to the following weaknesses in the Applicant's case:

1. That the five party agents as will appear from "NDH 1" and "NDH 2" purportedly from the UDM, the ANC, the IFP, the NNP and the PAC have all signed the source documents as correctly reflecting the results. Now, only one of them has come forward with an affidavit confirming its incorrectness.

2. The signature of the party agent for the ANC – NTOBENDE LANDIGWE whose sworn affidavit appears as annexure "S" to the founding papers is markedly different from that which appears on "NDH 1" and "NDH 2". I might mention at this stage that no hard or convincing evidence has been placed before us in this regard. It amounts to no more than conjecture.

3. Further, the contents of the affidavit of NTOMBENDE LANDIGWE simply do not make sense. She says that when the final count was taken the ANC received a total of 1341 on the National Ballot and 1325 on the Provincial Ballot. This is not consistent with the Applicant's claim that the ANC received 2666 on both ballots. The total of provincial and national votes in her affidavit coincidentally, it will be noted, totals 2666.

[21] In addition to the anomalies or inconsistencies listed above, the Second Respondent believes that the support for it, contrary to the general voting pattern in the voting district concerned could well be attributable to the funeral of one

MAODA NTILASHE, its former branch secretary which drew thousands of mourners to his funeral, originally and then to the first anniversary of his death in January 2004. The suggestion by the Second Respondent that attendance at the funeral and memorial service of its branch secretary should be seen as an indication of support for it in an area where the voter preference clearly shows the contrary, is, with respect, tenuous, because experience tells us that even non-supporters are known to sympathise with fallen heroes. It serves as no indication of support for the party concerned.

[22] Support for the Applicant's contention that an error occurred by a switching of results when transferring from one form to the other is to be found in the submission of the First Respondent, who is an impartial and uninterested party and constitutionally bound to be objective. Its standpoint has been consistent from the very first time the objection was brought to its attention. Its attitude is summed up in the submissions made by it as follows:

> "Taking into consideration all the surrounding circumstances, the Commission accepts that the figure 2666 was mistakenly recorded for AZAPO and that it should have been recorded for the ANC. Having accepted that, the Commission also accepts that but for that mistake, the last seat in the third round would have been allocated to the ACDP and not to AZAPO. Furthermore the Commission accepts that as the deduction of only 65 votes from AZAPO's national total would have resulted in the seat being allocated to the ACDP, it is not necessary to determine whether the correct number of votes that had to be recorded for AZAPO on the result slip was 2 or 6. It is further confirmed that the Commission has reviewed the situation of all the other parties and found that such a correction of the result slip will not affect the allocation of seats to any of the other parties that contested the election."

[23] Notwithstanding the anomalies and concerns enumerated by the Second Respondent to which I have already made reference in the preceding paragraphs, which could well be a question of innocent errors being repeated along the line, or even based on negligence, there is no basis in fact to disbelieve the presiding officer's admission that he made an error in recording the result. The objective facts substantiate what he says. AZAPO insists that the results are correct, but in my view they fall short of placing any acceptable explanation why they are to be regarded as correct. The facts speak for themselves. To the extent that the probabilities may be considered, the results in neighbouring adjoining districts simply add strength to the submission that human error and probably negligence, alone, accounts for the mistake in incorrectly reflecting the results. Accordingly the applicant is entitled to the relief claimed.

[24] Section 20 of the Commissions Act elevates the enquiry to another level, beyond that contemplated by section 55 of the Electoral Act. It gives the Court wide powers in electoral matters including the power to determine its own practice and procedures and make its own rules. It is the final arbiter in all electoral matters. I hasten to add however, that it is not beyond the law. The Order prayed is one couched along the lines set out in section 56 of the Electoral Act because it would appear that that is the section invoked by the Applicant to obtain relief. However, I am of the view that the Order should be along the lines proposed by the First Respondent, which has the effect of settling all of the issues related to this particular matter.

COSTS:

[25] The First Respondent accepts, as it very correctly did, ultimate responsibility for the mistake and has tendered the costs of both the Applicant and the Second Respondent on the unopposed scale. During argument of this case the question of this court's power to make an order for costs was under consideration, and in *Inkatha Freedom Party v The Independent Electoral Commission*, Case no. EC 3 & 4 (not yet reported) this court came to the conclusion that it had no power to order costs. That being the position, the re will be no order as to costs.

THE ORDER

[26] The order that I make is the following:

1. - The result slip "EC2" be corrected with 2666 votes recorded for the ANC.
   - The result slip "EC2" be corrected with 6 votes recorded for AZAPO.
   - Two thousand six hundred and sixty six votes (2666) be deducted from the total votes recorded for AZAPO on document "EC1".
   - The average votes per seat recorded for AZAPO on document "EC1" be changed to 39116.
   - In the column "Rank" of document "EC1" the numeral 3 opposite AZAPO be deleted and the numeral 3 be entered opposite ACDP.
   - In the column "Final Allocation" of document "EC1" the numeral 6 opposite ACDP be replaced by the numeral 7 and the numeral 2 opposite AZAPO be replaced by the numeral 1.
   - The Electoral Commission is ordered to convey the corrected seat allocations to the Speaker of the National Assembly; to

effect the necessary changes in the designation of candidates to the seats allocated to the ACDP and AZAPO; to inform the Speaker of these changes; and to correct the published designation of candidates where necessary.

PILLAY J
JUDGE OF THE ELECTORAL COURT

MTHIYANE JA	**CONCURRED**
MASIPA J	"
Ms S MOODLEY	"
Ms S ABRO	"