THE ELECTORAL COURT OF SOUTH AFRICA
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 03/2009

THE AFRICAN NATINAL CONGRESS **Applicant**

and

THE ELECTORAL COMMISSION **First Respondent**

BLOEM, DENNIS VICTOR **Second Respondent**

NGALEKA, ELIZABETH **Third Respondent**

Neutral citation: *The African National Congress v The Electoral Commission* (03/2009) (9 April 2009)

Coram: Mthiyane JA (Chairperson: Electoral Court)

Heard: 01 April 2009
Delivered: 04 April 2009

Summary: Application for condonation of late lodging of application for leave to appeal against decision of the Electoral Commission dismissing objection to nomination of certain candidates– application for leave to appeal – Condonation application refused

ORDER

1 In the result the following order is made:

(1) The applicant's application for condonation is dismissed.

JUDGMENT

[1] The applicant, the African National Congress has lodged an application for leave to appeal against the decision of the first respondent, the Electoral Commission, dismissing an objection by the applicant to the nomination of the second and third respondents as candidates for election on 22 April 2009. The application for leave to appeal is accompanied by an application for condonation of the late filing of the application for leave to appeal.

[2] It is not the practice of this court to give a full judgment in an application for leave to appeal. Such applications are dealt with on the same basis as Petitions for leave to appeal to the Supreme Court of Appeal, where decisions are made and reasons not given. However in terms of s 20 (3) of the Electoral Commission's Act 51 of 1996 this court is empowered 'to determine its own practice and procedures'. Given the background and what transpired during the communications between the applicant's attorneys and the registrar I consider it appropriate to give a

judgment and to advance full motivation for the conclusion to which I have come.

[3] In terms of rule 5 (1) of the rules of this court an application for leave to appeal must be lodged 'within three days after the decision [sought to be impugned] has been made by the Commission [the first respondent].' The application for leave to appeal was filed with the Registrar of this court on 27 March 2009, some four days after the decision made by the first respondent (on 23 March). The applicant contends that its application for leave to appeal was 'lodged' timeously. For this contention it relies on the fact that an electronic copy of the application was e-mailed to the Registrar, Mr Coetzee on 26 March 2009 at 16h27. The difficulty with this contention is that none of the respondents were served on that day and the second and the third respondents were not even cited as parties to the application. It was only after this deficiency was pointed out to applicant that the second and third respondents were cited. Whether or not they have now been served is not altogether clear from the papers. In terms of rule 1 of the rules of this court 'lodge' means 'to serve copies on all parties and file the original with the clerk'. Clearly therefore in the absence of the requisite service the application was not 'lodged' as required by the rule.

[4] To counter this hurdle the applicant has filed an application for

condonation. In support thereof the deponent for the applicant, Attorney Deon Lambert concedes that the non-service on the respondents rendered Notice of Application for Leave to Appeal defective for non-compliance with rule 5 (1). Lambert has however tendered no explanation for the applicant's failure to serve the application of leave to appeal on the respondents within the time stipulated in the rule. In fairness to Lambert he does state that they were instructed late, which put the ball firmly on the applicant's court. The applicant in its turn offers no explanation as to why its attorneys were given instructions 'in close proximity to the date set in the election timetable to lodge notices of appeal being 26 March 2009' to use Lambert's words. The applicant does not address himself to the possible prejudice or absence thereof likely to be suffered or not suffered by the respondents if the application were granted after the deadline set by the timetable (agreed to by the parties including the applicant.)

[5] In my view the applicant has failed dismally in its quest to establish good cause for its failure to comply with rule 5 (1), which as I have pointed out above requires the application of leave to appeal to be lodged within three days after the decision has been taken by the Commission in respect of its objection. This is however not the end of the matter. It is trite that even if applicant is a bit thin on this aspect of its

case, indulgence may still be granted if the applicant succeeds in showing that there are good prospects of success on appeal. It is against the backdrop of this principle that I turn to consider the merits of the application. The applicant contends that the Commission erred in its finding that s 30 (1) (b) and (c) had been complied with by the second and third respondents and that they were therefore not disqualified as candidates for election on 22 April 2009. Section 30 (1) provides as follows:

'(1) any person, including the chief electoral officer, may object to the nomination of a candidate on the following grounds –

(a) ...

(b) There is no prescribed acceptance of nomination signed by the candidate; or

(c) There is no prescribed undertaking signed by the candidate, that the candidate is bound by the code.'

[6] The applicant submits further that the second and third respondents were expelled by the applicant in terms of rule 25 (8) (c) of its rules and that the applicant could no longer able give any undertaking in relation to the two candidates as contemplated in s 27 (2) (a) and (b) of the Electoral Act – an aspect which, says the applicant, was disregarded by the first respondent. Section 27 deals with submission of lists of candidates by political parties relating to candidates they wish to stand for election on

their behalf. The relevant portion of the section reads as follows:

'(1) 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 –

(a) Undertaking, signed by the duly authorised representative of the of the party, binding the party, persons holding political office in the party, and its representative and members, to the Code;

(b) Declaration, signed by the duly authorised representatives of the party, that each candidate on the list is qualified to stand for election in terms of the Constitution or national or provincial legislation under Chapter 7 of the Constitution.'

[7] The applicant also submitted that the Commission erred in ignoring the negative impact likely to occur if the first and second respondent appeared on two lists. Implicit in the submission is that the second and third respondents, to the knowledge of the Commission, now appear in the list of a political party other than the applicant. So also, it must be assumed, the Commission is aware that the second and third respondents were expelled and are no longer members of the applicant.

[8] If I am correct in the above assumptions I do not see what then

would prevent the second and third respondents' new party from furnishing them with the requisite undertaking as contemplated in s 27 (2) (a) and (b) of the Electoral Act. (As appears to have happened – otherwise the chief electoral officer would not have accepted their nomination as candidates for election). I also do not see why it would not be competent for the Commission armed with this information that the second and third respondents have joined a new party, to disregard the names of the second and third respondents on the applicants list and to allow the applicant to substitute the two respondents with the other candidate's period.

[9] It seems to me that the applicant has misconceived its remedy which would simply be to ask the Commission to substitute the second and third respondents. In my view the applicant has failed to show that there are any prospects of success on appeal and its application for condonation must fail. So, too, its application for leave to appeal fails. It is however not necessary to make an order dismissing the application for leave to appeal because the applicant has failed on the condonation application. I accordingly make that order.

K K MTHIYANE
JUDGE OF APPEAL