

**IN THE ELECTORAL COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**



CASE NUMBER: 011/2016 EC

In the matter between:

NATIONAL FREEDOM PARTY (NFP)

Applicant

And

THE ELECTORAL COMMISSION

First Respondent

INKATHA FREEDOM PARTY

Second Respondent

THE AFRICAN NATIONAL CONGRESS

Third Respondent

ECONOMIC FREEDOM FIGHTERS

Fourth Respondent

DEMOCRATIC ALLIANCE

Fifth Respondent

UNITED DEMOCRATIC MOVEMENT

Sixth Respondent

AFRICAN CHRISTIAN DEMOCRATIC PARTY

Seventh Respondent

CONGRESS OF THE PEOPLE

Eighth Respondent

Coram: SHONGWE JA ET MOSHIDI ET WEPENER JJ (WITH ADV. MTHEMBU ET
Ms PATHER ET – MEMBERS)

Heard: 29 July 2016

Delivered: 5 August 2016

Summary: Electoral Law – party seeking relief on same grounds as before – principle of res judicata applicable – the electoral timetable requires strict compliance with its provisions – there is no provision for condonation or the extension of time periods, save as set out in s 11(2)(b) but his provision should not be applied to achieve the interests of one entity only but to serve the interests of all participants in an election equally.

JUDGMENT

WEPENER J (WITH SHONGWE JA, MOSHIDI J, ADV. MTHEMBU, Ms PATHER – MEMBERS CONCURRING):

[1] On Friday 29 July 2016 the applicant sought relief from this court. After hearing argument and considering the matter, the court issued the following order:

The application is dismissed with no order as to costs.

[2] What follows are the reasons for the dismissal of the application.

[3] The applicant is the National Freedom Party (NFP), a registered political party that intended participating in the national municipal elections called for 3 August 2016.

[4] The First respondent is the Electoral Commission, commonly known as the Independent Electoral Commission or IEC ('the Commission'), a body established pursuant to the Constitution with its objects set out in s 4 of the Electoral Commission Act ('the Electoral Commission Act'), as being to 'strengthen constitutional democracy and promote democratic electoral processes'. The Constitution obliges the Commission to manage elections in accordance with national legislation, in this case, inter alia, the Local Government: Municipal Electoral Act¹ (the Municipal Electoral Act).

¹ Act 27 of 2000.

[5] The Second to Seventh Respondents are all registered political parties who, save for the Inkatha Freedom Party (IFP), did not participate in these proceedings although some of them stated in letters attached to the founding affidavit that they supported the cause of the NFP to be included in the upcoming elections.

The Relief

[6] The relief sought by the NFP is a review, alternatively an appeal against a decision of the Commission who, it is said, declined to exercise its discretion in terms of s 11(2)(a)² of the Municipal Electoral Act by refusing to extend the time period in which the NFP could pay the required deposit.

[7] Counsel for the Applicant did not pursue the question of an appeal during his submissions before us. In the circumstances, the matter is to be approached on the basis of a review³ of the decision of the Commission in terms of s 20(1)(a) of the Electoral Commission Act⁴.

Res Judicata

[8] The first issue dealt with by the NFP was as a result of the submission of the Commission and the IFP that the matter is res judicata and not open for renewed adjudication by this court. The reliance on the defence of res judicata arose as a result of the matter heard and adjudicated upon by this court on 1 July 2016 under case number 006/2016⁵ (the previous application) in which case the NFP sought relief in order to enable it to participate in the upcoming municipal elections. That matter was instituted by the NFP against the Commission (the IFP seeking leave to intervene).

² '11 Election timetable –

(1) . . .

(2) The Commission may, by notice as required in subsection (1) (b), amend the election timetable if-

(a) it considers it necessary for a free and fair election; . . . '

³ *Kham and Others v Electoral Commission and Another* 2016 (2) SA 388 (CC) para 39.

⁴ Act 51 of 1996.

⁵ *National Freedom Party v Electoral Commission and Another* (006/2016 EC) [2016] ZAEC 2 (5 July 2016).

Despite the contents of the notice of motion in the previous matter, the NFP decided to seek the following relief from this court:

'20. The Applicant accordingly seeks an order in the following terms:

(a) That the Applicant be granted leave to appeal;

(b) That the appeal be upheld and an order made:

(i) That the failure by the Applicant to pay the deposit payable in terms of sections 14 and 17 of the Local Government: Municipal Electoral Act, 2000 on or before 2 June 2016 and the payment of such deposit on 22 June 2016 is condoned and the Electoral Commission is directed to publish notice in the Government Gazette in terms of s 11(2) of the said Act amending the time for the payment of the deposit on the election timetable from 2 June 2016 to 22 June 2016;

alternatively

(ii) That the Electoral Commission is directed to give consideration to s 11(2)(b) of the Local Government: Municipal Electoral Act, 2000 and, if it is of the opinion that it is necessary for free and fair elections to allow the Applicant to participate in the election, it is directed to amend the electoral timetable to extend the date for payment of the deposit payable in terms of sections 14 and 17 of the said Act to 22 June 2016.

(iii) No order as to costs.'

The relief in (i) above was not persisted with. In effect, the NFP sought a retrospective amendment of the election timetable. This court held that the Commission had no such power⁶.

[9] In the matter now before us, the NFP seeks to review

'... the decision of the ... Commission taken on 15 July 2016. ... declining the application in terms of s 11(2)(b) of the Local Government: Municipal Electoral Act, 2000 to amend the Municipal Electoral timetable, retrospectively, so that the deposit paid by the Applicant on 22 June 2016 shall be deemed as payment for purposes of entitling the Applicant to participate in the 2016 Municipal Local Elections'.

⁶ *National Freedom Party v Electoral Commission and Another* (006/2016 EC) [2016] ZAC 2 (5 July 2016) para 40.

[10] In this matter the same parties are before this court, save for the citation of the additional political parties as respondents, and the NFP seeks that the payment of the deposit on 22 June 2016 is to be accepted by retrospectively amending the election timetable. That is also the essence of what was sought in the previous application. The reason for the application is that the NFP was not registered as a party to contest the national municipal elections by the Commission because the NFP failed to pay the deposit that parties seeking to contest the elections were required to pay in terms of ss 14(1)(b) and 17(2)(d) of the Municipal Electoral Act. The election timetable promulgated on 24 May 2016 stipulated that the parties must pay the relevant deposit by 17h00 on 2 June 2016⁷. It is common cause that the NFP only paid the deposit on 22 June 2016.

[11] The Constitutional Court set out the law regarding the doctrine of res judicata as follows in *S v Molaudzi*⁸

[14] Res judicata is the legal doctrine that bars continued litigation of the same case, on the same issues, between the same parties. Claassen defines res judicata as —

“(a) case or matter is decided. Because of the authority with which in the public interest, judicial decisions are invested, effect must be given to a final judgment, even if it is erroneous. In regard to res judicata the enquiry is not whether the judgment is right or wrong, but simply whether there is a judgment.”

[15] In *Bertram* the Supreme Court of the Cape of Good Hope traced the doctrine back to the Digest (50.17.207), which provided that — as a rule of law — once a matter is adjudged it is accepted as the truth:

“The meaning of the rule is that the authority of res judicata includes a presumption that the judgment upon any claim submitted to a competent court is correct and this presumption being juris et de jure, excludes every proof to the contrary. The presumption is founded upon public policy which requires that litigation should not be endless and upon the requirements of good faith which, as said by Gaius, does not permit of the same thing being demanded more than once. On the other hand, a presumption of this nature, unless carefully circumscribed, is capable of producing great hardship and even positive injustice to individuals. It is in order to

⁷ Government Notice no 564, Government Gazette 40011 of 24 May 2016.

⁸ 2015 (2) SACR 341 (CC) at 348h-349f.

prevent such injustice that the Roman law laid down the exact conditions giving rise to the *exceptio rei judicatae*.”[Citation omitted.]

[16] The underlying rationale of the doctrine of *res judicata* is to give effect to the finality of judgments. Where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt by one party to proceed against the other party on the same cause of action should not be permitted. It is an attempt to limit needless litigation and ensure certainty on matters that have been decided by the courts.’

[12] After considering the application of the doctrine which it held should not be rigidly applied, the Constitutional Court concluded⁹

‘[30] The general thrust is that *res judicata* is usually recognised in one way or another as necessary for legal certainty and the proper administration of justice. However, many jurisdictions recognise that this cannot be absolute. This is because ‘(t)o perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience’.

[13] In the matter before this court, there is no allegation of an injustice having occurred or an error which is perpetuated and which requires correction. In my view, an application for an extension of time after the cut-off date ie the retrospective relief claimed, is nothing other than an application for condonation of the NFP’s failure to pay on time.

[14] In these circumstances the matter is indeed *res judicata* and the application falls to be dismissed on this basis alone.

[15] However, should I be wrong in this conclusion, I am of the view that the application cannot succeed for the additional reasons which follow.

[16] This court held in the previous matter that there is no room for condonation for the late payment of a deposit. At para 25 of the judgment it was held that:

‘If this view is too narrow an approach and I am to assume that the Commission took a decision, that decision was no more than a recital of its belief that it had no power to condone the late

⁹ Para 30.

payment of the deposits which the NFP did not pay in accordance with the election timetable that has been officially published in the Government Gazette’.

[17] Thereafter it was said¹⁰:

‘There is no provision which enables this court to grant condonation for the non-compliance with the provisions of the relevant legislation nor is there any provision for the Commission to grant condonation for anyone regarding that person’s non-compliance with the law. . . there is no sanction for non-compliance other than placing oneself outside the contest due to non-compliance.’

[18] This finding of was followed by these remarks¹¹:

‘The election timetable which was issued by the Commission is a timetable that regulates the process of the forthcoming elections which commenced with the promulgation of the date for the elections by the relevant minister. The timetable is required in terms of s 11 of the Municipal Electoral Act. Once it is published it, in my view, becomes subordinate legislation with full force and effect and becomes binding on the parties. This law is of general application to all and does not provide for condonation for non-compliance therewith.’

[19] In addition, and by virtue of the provisions of s 11(3) of the Municipal Electoral Act¹² the provisions of the election timetable are, in my view, mandatory and the NFP’s failure to comply therewith cannot be remedied.

[20] I am of the view that the reasoning in the judgment of the previous application contained in paras 27-33 thereof is applicable¹³ and that the relief sought cannot be granted to an individual party.

¹⁰ Para 28.

¹¹ Ibid.

¹² ‘Any act required to be formed in terms of this Act must be performed by no later than the date and time stated in the election timetable.’

¹³[27] It is common cause that the only relevant facts are that the deposits for the candidates had to be paid by 2 June 2016 in accordance with the election timetable and that the NFP did not do so.

[28] There is no provision which enables this Court to grant condonation for the non-compliance with the provisions of the relevant legislation nor is there any provision for the Commission to grant condonation for anyone regarding that person’s non-compliance with the law. The election timetable which was issued by the Commission is a timetable that regulates the process of the forthcoming elections which commenced with the promulgation of the date for the elections by the relevant minister. The timetable is required in terms of s 11 of the Municipal Electoral Act. Once it is published it, in my view, becomes subordinate legislation with full force and

Sabotage / Fraud

[21] Nevertheless, courts will usually scrutinise the evidence before it when there is an allegation of fraud perpetrated on a party. In the previous application the NFP contended that the late payment of the deposit was due to a bona fide mistake. It now contends that a deliberate act of sabotage was committed by its national treasurer. Although the legal principles which apply to a requirement of compliance with the election timetable does not allow for a different conclusion in the event of a mistake or an alleged sabotage, I am of the view that the allegations of sabotage, if it could assist the NFP, are such that they do not pass muster.

[22] Firstly, the content of the minute relied upon by the NFP which shows that the treasurer asserted that all the payments had been made shows that this statement, if made, was made on 31 May 2016 some three weeks prior to the launching of the previous application. With that knowledge the NFP alleged:

effect and becomes binding on all parties. This law is of general application to all and does not provide for condonation for non-compliance therewith. There is no sanction for non-compliance other than placing oneself outside of the contest due to non-compliance.

[29] The NFP finally advised that the relief as set out in the heads of argument would be competent due to the provisions of s 11(2)(b) of the Municipal Electoral Act in that by the inclusion of the NFP in the elections it would lead to a free and fair election but that its exclusion would not. I do not agree. The freeness and fairness of elections commence when it is first called. From that date the prospective participants are required to observe the prescripts. Individuals or parties who fail to act fairly and correctly may pay the price by exclusion. Those who did act according to the prescripts acted fairly. They are entitled to complain of an unfair election should non-compliant candidates and parties be allowed to join in the process despite their failure to comply with the prescripts. If those who disregarded the prescripts are allowed to join in on the basis contended for by the NFP I am of the view that the inclusion would be unfair vis-à-vis those participants who acted lawfully. The election timetable being law, the NFP is not pursuing the application for condonation as there is no provision for such condonation, it is asking for the law to be bent in its favour so that it need not have complied with the relevant prescripts.

[30] The election timetable is a regulatory mechanism to ensure free and fair elections. It cannot and should not be changed at the whim of an individual or party – if it is changed to suit individuals, the timetable becomes an inefficient electoral tool.

[31] The electoral process as a whole must be free and fair. It must be free and fair for all parties and not advance the interests of one party only.

[32] The ad hoc amendment of the election timetable will unfairly prejudice those parties who complied with its provisions.

[33] The provisions of s 11(2)(a) allowing the Commission to extend the timetable must be seen against this background. The power should be exercised in circumstances where it applies to all participants in the election equally otherwise it will open the flood gates for ad hoc extensions of time which way lead to unfairness and is not sanctioned by the legal prescripts.'

'In hindsight it is apparent that the task assigned to Mr Ndlovu was simply too great to be properly done by him and his small team and errors occurred.'

And further:

'Mr Ndlovu and his assistants were working flat out under enormous pressure to generate and produce the relevant submissions via the electronic system.'

And further:

'As indicated earlier Mr Ndlovu is the National Treasurer of the Applicant. In that capacity he is the person responsible for ensuring that the deposit of R480 000,00 was paid in accordance with the timetable. Because of the enormous pressure he was under in acting as the administrator for the submission of the electronic nominations he failed to properly focus on this aspect. His bona fide but mistaken belief, due to a misreading of the elections timetable, was that the deposit only had to be paid on 27 June 2016.'

And further:

'When the National Chairperson sought confirmation on 22 June 2016 in a discussion he had with Mr Ndlovu that the deposit had been duly paid he was told by Mr Ndlovu that it was not due until 27 June 2016.'

There was accordingly no hint of any sabotage or fraud committed by the treasurer of the NFP despite the known facts.

[23] Secondly, the affidavits on which the applicant relies in support of the alleged sabotage are not cogent. An affidavit by a Mr Mabika states:

'I asked him if he had paid or not. Xolani Ndlovu did not hesitate to respond by saying all was well with payment. . . .'

[24] On the date when the question was posed i.e. 30 May 2016 payment of the deposit was not yet due as it was only due on 2 June 2016 with the result that the words 'all was well with payment' do not, in my view, show a deliberate intention not to pay it.

[25] An affidavit by a Mr Ngcobo refers to an incident on 5 May 2016 when he was asked not to attend a council meeting so that the IFP could have a majority vote. In

general, the witness's view was that the treasurer attempted to assist the IFP to the detriment of the NFP/ANC coalition. This may well be so but this evidence falls short of allowing any inference of sabotage or fraud by the treasurer as far as the election deposit is concerned.

[26] A third affidavit asserts that the treasurer attempted to persuade the deponent to join the IFP. Again, this occurred on 8 March 2016, well before the question of the payment of the deposit occurred and does not link a payment or non-payment of the deposit to the discussion between the two persons during March.

[27] The final affidavit avers that the treasurer requested the deponent to take an envelope to an IFP chairperson on 2 May 2016. The deponent speculates that this was in order for him to 'meet' the IFP official.

[28] None of the affidavits convinces that the treasurer intended and did commit a fraud by failing to pay the deposit on time on 2 June 2016. Indeed the allegations were not served on the treasurer in order for him to respond thereto. The only version by the treasurer is a press statement issued by him on 17 July 2016 (after the previous application had been launched) wherein he reiterated that there was an oversight. The contents of the press statement coincide with the case made by the NFP in the previous application.

[29] The allegations now raised in support of sabotage or fraud are such that this court cannot rely on them to make a finding that a fraud had been perpetrated. In those circumstances the case before this court remains based on an oversight to pay the deposit.

[30] In addition s 11(3) of the Municipal Electoral Act requires mandatory compliance with the election timetable and I again conclude that the Commission's discretion to extend the timetable can only be exercised in a situation where all parties and independent candidates can benefit from such an extension¹⁴.

¹⁴ National Freedom Party v Electoral Commission and Another (006/2016 EC) [2016] ZAEC 2 (5 July 2016) para 33.

[31] The Constitutional Court said in *Electoral Commission v Inkatha Freedom Party*¹⁵:

'It is necessary that the integrity of the electoral process be maintained. Indeed, the acceptance of the election as being free and fair depends upon that integrity. Elections must not only be free and fair but they must be perceived as being free and fair. Even-handedness in dealing with all political parties and candidates is crucial to that integrity and its perception by voters. The Commission must not be placed in a situation where it has to make ad hoc decisions about political parties and candidates who have not complied with the Act. The requirement that documents must be submitted to the local offices of the Commission does not undermine the right to vote and to stand for election. It simply gives effect to that right and underscores the decentralised and local nature of municipal elections.'¹⁶

[32] The NFP further submitted that by virtue of the statements in *Electoral Commission v Mhlope*¹⁷ the Constitutional Court held that a court has a free hand to grant a just and equitable remedy. The Constitutional Court said:¹⁸

'Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy even for exceptional, complex or apparently irresolvable situations. And the operative words in this section are "an order that is just and equitable". This means that whatever considerations of justice and equity point to as the appropriate solution for a particular problem, may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in section 172(1)(b). In this case a just and equitable order is one that would pave the way for the August elections to be held although our voters' roll is the product of unlawful conduct. Failure to do so, could indeed lead to constitutional crisis with far-reaching implications.'

The reliance on the *Mhlope* case is in my view misplaced. The Constitutional Court's conclusion regarding the remedial powers contained in s 172(1)(b) of the Constitution was premised on a finding in terms of s 172(1)(a) of the Constitution that the conduct of the Commission in that case was inconsistent with the Constitution and invalid.

¹⁵ 2011 (9) BCLR 943 (CC) para 55.

¹⁶ Para [55].

¹⁷ (CCT55/16) [2016] ZACC 15 (14 June 2016).

¹⁸ Para 132.

[33] There is no such conduct in this matter which can be declared inconsistent with the Constitution and invalid in order to invoke the provisions of s 172(1)(b) of the Constitution.

[34] Having regard to the foregoing, this Court issued the order set out in the first paragraph of this judgment.

Wepener J

Shongwe JA

Moshidi J

Adv Mthembu - Member

Ms Pather - Member

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