



THE ELECTORAL COURT OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE ELECTORAL COURT OF SOUTH AFRICA

From: The Registrar, Electoral Court

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Electoral Commission of South Africa v African Independent Congress and others (0011/23EC) [2024] ZAEC 11 (10 May 2024)

On 21 January 2018, the Parliament of South Africa enacted the Political Party Funding Act 6 of 2018, (“Funding Act”) with 1 April 2021 as its date of commencement. Section 12 of the Funding Act read with Regulation 10 of the Regulations issued in terms of the Funding Act imposes an obligation on all political parties who are registered with the Electoral Commission of South Africa (“the Commission”) to account for their income by filing audited financial statements (AFSs) and an audit opinion by 30 September annually. They are also required to disclose all donations received and account for donations above the prescribed threshold of R100 000 per annum cumulative. Since funders of political parties may influence party policies and decisions, these requirements empower voters to make an informed decision when voting by ensuring access to information regarding persons and entities who fund the party, they intend voting for. These requirements are also aimed at preventing corruption as funders of political parties may exert pressure on political parties to act in their private interests once elected to public office.

496 Registered political parties have not accounted for their income as required by the Funding Act. 6 of these are categorised as big political parties. They are the African Independent Congress, African National Congress (ANC), African Transformation Movement (ATM), Congress of the People (COPE), National Freedom Party (NFP), and Pan Africanist Congress of Azania (PAC).

The Commission approached the Electoral Court for an order declaring that the respondents have failed to account for their income as required by the Funding Act and imposing administrative penalties on them. Prior to doing so, it embarked on a nation-wide information campaign to raise the awareness of political parties about their obligations in terms of the Funding Act and to engage them on the difficulties that impede them from complying. It subsequently issued a directive urging non-compliant political parties to comply. Very few registered political parties responded to the Commission’s efforts. The Commission resorted to instituting this application. The Commission also seeks this Court’s advice on the circumstances under which it may approach it for an order imposing administrative penalties on non-compliant parties.

Only three respondents filed answering affidavits. Several other respondents responded to the application by letter or email. None of the respondents seriously dispute the Commission’s version that

they have failed to comply with their obligations as alleged. The remaining respondents have not responded to the application at all.

The respondents who filed papers in any of the formats referred to above cited lack of funds, ignorance of the provisions of the Funding Act, the fact that smaller political parties who are not represented in the legislature do not receive funding under the Funding Act, unfairness of the Funding Act in that it does not recognise that small political parties would not afford to comply with their statutory obligations, and the fact that some of these political parties are dormant and not functioning. The Court found that the statutory obligations imposed by the Funding Act are peremptory. The respondents' grounds of opposition are unsustainable.

Two respondents, Conservatives in Action and Democratic People's Movement sought to resist the relief the Commission seeks by contending that they had complied with their statutory obligations. Their cases were dismissed because this Court found that notwithstanding that they did not file their AFSs and audited opinions in the prescribed format, they had not fully accounted for the income they received during the period under review.

On the advice the Commission seeks from this Court, it held that the Funding Act gives the Commission a discretion to institute proceedings to request this Court to impose an administrative fine against any party who contravenes its provisions. Since the legislature did not set out the circumstances under which the Commission may exercise this discretion, it conferred a discretion in the wide sense. The Commission ought to exercise it having regard to the circumstances of each case. It is not for this Court to pre-empt circumstances that may be appropriate for the exercise of the Commission's discretion to excuse non-compliance with the Funding Act. Doing so may impede the Commission from exercising its wide discretion by considering the circumstances of each case. It may even have an unintended effect in that the circumstances enumerated by this Court may be regarded as exhaustive. The Court invited the Commission to draw guidance from judgments of this Court to determine whether it should approach the Court to enforce non-compliance with the Funding Act.

In respect of the relief the Commission seeks, the Court held that s 18(2) affords it a discretion not to impose an administrative fine, despite the Commission's request. As with any discretion, this Court's discretion must be exercised judiciously considering all the relevant factors. When exercising its discretion to impose administrative penalties, this Court should be guided by the need to give effect to the purpose and objective of the Funding Act and to prevent future incidents of non-compliance. It should promote the interest of justice when exercising its discretion.

The Funding Act was enacted to safeguard political rights. The staggering number of political parties who have not complied with their statutory reporting obligations is of concern to this Court. So is the number of respondents who have not responded to this application. Those who did have not cited meritorious grounds of opposition. It is important that non-compliant political parties are dealt with firmly, to buttress the importance of meeting their statutory obligations. Otherwise, political parties may continue ignoring their s 12 obligations with impunity, thus undermining the very important objectives of the Funding Act, to the peril of South Africa's constitutional democracy.

The Court further held that elevating substance over form, particularly where there has been substantial compliance and the purpose and objectives of the Funding Act are not imperilled, as in the case of Our City Masters (OCM), dealt with below, would not serve the interests of justice.

OCM admits that it has not strictly complied with its reporting obligations due to lack of funding as well as being non-functional. It is an unrepresented political party. OCM's chairman pleaded with this Court not to impose the administrative penalty prayed for by the Commission in the amount of R10 000. The Court found that OCM advanced factors that justify that an administrative penalty should not be imposed

on this party. It substantially complied with its reporting obligations, albeit not in the prescribed format. It has since been registered as a political party. Therefore, there are not prospects that it would re-offend. Imposing the proposed administrative penalty on OCM would serve the objectives of the Funding Act. It would elevate substance over form. There is no prospect of OCM reoffending as it has been dissolved.

The Commission prayed for different amounts to be imposed in respect of administrative penalties. None of the respondents have taken issue with the proposed amounts. This Court finds that status of a party as well as the nature of non-compliance justify the imposition of administrative penalties in different amounts. Non-compliance by registered political parties who ought to be in a position to carry the disbursements that are necessary to comply with the Funding Act, even if their only funding is that received under the Funding Act as well as membership fees, failure to respond to the Commission's directive and/ or place a version before this Court and claiming ignorance notwithstanding the Commission's efforts to educate political parties of their obligations and issue them with a notice urging them to comply with Act were found to constitute aggravating factors that justify the imposition of a penalty in the amount of R40 000 on each of the relevant respondents. These include the six represented political parties referred to above. Administrative penalties in the amount of R10 000 were imposed on the remaining respondents except for OCM.

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