THE ELECTORAL COURT OF SOUTH AFRICA,
BLOEMFONTEIN

Not Reportable

(1) CASE NO: 014-2024EC

In the matter between:

ARISE SOUTH AFRICA (ASA) Applicant

and

THE ELECTORAL COMMISSION OF SOUTH AFRICA Respondent

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(2) CASE NO: 020-2024EC

In the matter between:

INDEPENDENT SOUTH AFRICAN NATIONAL CIVIC ORGANISATION (ISANCO) Applicant

and

THE ELECTORAL COMMISSION OF SOUTH AFRICA Respondent

Neutral Citation: *Arise South Africa v Electoral Commission of South Africa*; *Independent South African National Civic Organisation v Electoral Commission of South Africa* (014/2024EC; 020/2023EC) [2024] ZAEC 08 (06 May 2024)

Coram: ZONDI JA, SHONGWE and ADAMS AJJ, PROFESSORS PHOOKO and NTLAMA-MAKHANYA (Additional Members)

Heard: 15 April 2024 – as a videoconference on *Microsoft Teams*

Delivered: 06 May 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by publication on the

website of the Supreme Court of Appeal and by release to SAFLII. The date and time for hand-down is deemed to be 11:30 on 3 May 2024.

Summary: The Electoral Act – section 27(1), s 27(2)(*c*B) and item 3(2) of Schedule 1A – unrepresented registered political parties required to submit lists of candidates – when contesting election for compensatory seats in National Assembly, then a candidates' list for one region required – also required to submit supporters' lists and to meet quotas imposed by the Act and the regulations – non-compliance and failure to submit these lists disqualify a party *ex lege* to contest elections – factual disputes as to whether the applicants complied – to be decided in terms of *Plascon Evans* principle – Section 28 – gives the Chief Electoral Officer circumscribed powers to rectify limited failures of compliance with s 27(2) – namely in respect s 27(2)*(a)*, *(b),* (*c*A), (d) or s 27 (4) – the section 28 only applies to those parties which had submitted lists in compliance with s 27(1) and s 27(2)(*c*B), read with item 3(2) of the Schedule 1A – Applications dismissed with no order as to costs.

ORDER

For reasons which were to follow shortly, the following identical order was issued on Wednesday, 17 April 2024, in each of the above two opposed applications under the separate case numbers:

The application is dismissed with no order as to costs.

JUDGMENT

Adams AJ (Zondi JA, Shongwe AJ, Professors Ntlama-Makhanya and Phooko (Additional Members) concurring):

[1] On Wednesday, 17 April 2024, this Court, for reasons which were to follow shortly, issued the following identical order in the above two opposed applications under the above separate case numbers:
'The application is dismissed with no order as to costs'.

[2] This judgment contains the reasons for the said orders which this Court issued on 17 April 2024.

[3] The applicants in the above two applications, both unrepresented registered political parties, intended to participate in, and contest, the upcoming national and provincial elections scheduled for 29 May 2024. The respondent in both of these applications is the Electoral Commission of South Africa (the Commission).

[4] According to the Commission, the applicants were disqualified – by operation of law – from contesting some and/or all of the elections in that they had not complied timeously with the peremptory requirements of s 27(1) and/or s 27(2)(*c*B) of the Electoral Act[1]. The applicants failed, so it is alleged by the Commission, to 'nominate candidates and submit a list or lists of those candidates for [those elections they

[1] Electoral Act 73 of 1998.

intended to contest] to the chief electoral officer in the prescribed manner' by 8 March 2024, being the relevant date stated in the *Election Timetable for the Election of the National Assembly and the Election of Provincial Legislatures* (timetable) promulgated in terms of s 20 of the Electoral Act by the Commission.

[5] The applicant in the first application, Arise South Africa (ASA), was disqualified, according to the Commission, from contesting the national elections for compensatory seats and regional seats in the National Assembly as they did not comply with item 3(2) of Schedule 1A to the Electoral Act. In the relevant part, item 3 provides, also in peremptory terms, as follows: -

'3 (1) Registered parties contesting an election of the National Assembly must nominate candidates on a list of candidates prepared in accordance with this Act.

(2) A party's list of candidates must consist of –

(a) a regional list for each region that the party wishes to contest; and

(b) a national list,

with such number of names on each list as the party may determine subject to sub-item (3).

(3) ... '. (Emphasis added).

[6] The Commission's case in opposition to ASA's application is that, whilst ASA submitted its national list of candidates, it omitted to submit a regional list for at least one region, which means that it (ASA) cannot contest the national election for either compensatory seats or regional seats.

[7] The applicant in the second application, Independent South African Civic Organisation (ISANCO), intended contesting the elections for compensatory seats in the National Assembly and for the Mpumalanga regional seats. It also intended contesting the elections for the legislatures for the following provinces: Free State, Mpumalanga and Eastern Cape. As regards the requisite supporters' lists, as prescribed by s 27(2)(*c*B) of the Electoral Act, ISANCO alleges that they more than complied in that they submitted and uploaded onto the Commission's *Online Candidate Nomination System* (OCNS or portal) the details and signatures of 37 745 party supporters. This total, according to ISANCO, is made up as follows: 11 750 supporters from the Free State, in which the required quota in terms of Table 2 of the regulations is 4285; 12 370 supporters from the Eastern Cape, with the required quota

being 4627; and 13 625 supporters from Mpumalanga, which has a quota of 5886 supporters to contest a provincial legislature seat. According to Table 1 of the regulations, the quota to be met in Mpumalanga to contest regional seats for the National Assembly is 11 924.

[8] ISANCO was disqualified from contesting the national elections, as well as the Free State and Mpumalanga provincial elections, as, according to the Commission, they did not meet the quota requirements in relation to the supporters' lists as required by s 27(2)(*c*B). They are, however, able to contest the Eastern Cape provincial election. In a nutshell, ISANCO was disqualified from contesting the other elections because their verified lists of supporters fell short of the required quota prescribed by the regulations. In this application, we shall assume to the benefit of ISANCO, that they are applying for a review and a setting aside of such disqualification.

[9] Both applications – in the form of a review application or as an application for a mandatory interdict – are directed at setting aside the applicants' disqualification from contesting the elections. The Commission opposes both these applications on the basis that the applicants did not comply with the peremptory requirements of s 27(1), read with s 27(2)(*c*B) and item 3(2) of Schedule 1A, of the Electoral Act. It did not disqualify the applicants from contesting the elections, so it is contended by the Commission – they (the applicants) were disqualified by operation of the law. Therefore, so the Commission's contention continues, there is no decision, which it took that can and should be reviewed and set aside.

[10] The issues to be considered in both these applications are therefore of a factual nature. In the first application, the question to be considered by this Court is whether or not factually ASA had submitted – by 17h00 on 8 March 2024 – their list of candidates with the s 27(2)(*c*B) and other supporting documentation, to contest the national elections for the regional seats in the National Assembly or for at least one region. In the second application, the issue is simply whether factually ISANCO had submitted lists with sufficient numbers of supporters in compliance with s 27(2)(*c*B).

[11] It is accordingly convenient to deal with both these matters in one judgment.

[12] I now proceed to deal with these issues with reference to the two applications.

The Arise South Africa matter

[13] As I have already indicated, in order for a political party to contest the elections for the National Assembly, s 27(1), read with item 3(2) of Schedule 1A to the Electoral Act, requires it to submit by the deadline in the electoral timetable a national list of candidates and a regional list or lists of candidates for each region that the party wishes to contest (in at least one region). And the central issue in this application is whether ASA submitted regional lists of candidates or at least a regional list of candidates.

[14] ASA alleges that it did. It does not, however, provide any evidence, whether in the form of documents confirming submission of the regional lists or, for that matter, the lists themselves and/or supporting documentations (such as the forms signed by the nominated candidates), in support of such averment. The allegation by ASA that they did in fact submit the lists – no matter how many times they repeat that averment in their papers – is, as contended by the Commission, bald and unsubstantiated. It bears emphasising that ASA has not produced – neither in its founding affidavit nor in its reply – the lists of regional candidates, which, in my view, would have corroborated and given a lot more credence to their claim that the lists were submitted. As the saying goes, their failure to produce the lists speaks volumes.

[15] ASA submits that the Court should have regard to the fact that the Commission had accepted their list of candidates for compensatory seats in the National Assembly, as evidenced by the provisional lists of parties' candidates published by the Commission on 26 March 2024. The Commission's explanation that this was as a result of an 'administrative error', so ASA contends, should be rejected. If anything, so ASA argues, this so called 'administrative error', coupled with the *ipse dixit* of the deponent of ASA's founding affidavit that they submitted the lists, prove conclusively that the lists were in fact submitted.

[16] I disagree. I do so for the simple reason that the Commission's affidavit conclusively demonstrates that as a matter-of-fact ASA did not submit the regional

candidates lists. That being the case, ASA is disentitled to contest elections for the National Assembly.

[17] As already indicated, in order to contest the elections for the National Assembly, the Electoral Act requires a political party to submit both a national list of candidates and at least one regional list of candidates. This is clear from s 27 read with item 3(2) of Schedule 1A to the Electoral Act, which refer to both lists. Moreover, s 27(2)(*c*B)(i) requires an unrepresented party wishing to contest elections for the National Assembly to submit voter signatures demonstrating its support in the electorate totalling 15 percent of the quota for the region concerned in the preceding election. As submitted on behalf of the Commission, if a party were able to choose only to contest the compensatory seats (and thus submit only the compensatory list of candidates), this important requirement – aimed at the legitimate purpose of preventing frivolous participation in elections and logistical problems that can arise from that – would be rendered meaningless.

[18] It has to be accepted, therefore, that a party would only qualify to be on the National Assembly ballot if it has submitted at least one regional list of candidates. In any event, ASA does not dispute, rightly so, that it was required to submit at least one regional list of candidates in order to compete in the election for the National Assembly.

[19] That brings me back to the factual dispute relating to whether or not the ASA submitted its regional list of candidates for the National Assembly.

[20] The Commission, in contrast to ASA's unsubstantiated and uncorroborated averment that it submitted its regional list of candidates, does not merely deny that ASA submitted those candidate lists, but produces positive evidence. This includes an audit trail extract from its OCNS system, coupled with the fact that no emails were sent to ASA, confirming that submissions had been received from ASA, as would have been the case had it submitted regional lists.

[21] The simple point is that, on the probabilities, having regard to all of the evidence before the Court, the ASA failed to submit a regional list of candidates as alleged by

it. If it did, it would no doubt at the very least have produced the list and the supporting documentation. The ineluctable conclusion to be drawn from ASA's failure to produce the said documentation is that they do not have it. It follows that it is, as averred by the Commission, that ASA did not submit its regional list of candidates, which, in turn, means that it is disqualified from contesting the elections for seats in the National Assembly.

[22] In the context of this opposed application, which implies that the principle in *Plascon Evans*[2] finds application, it cannot possibly be said that the version of the Commission is so far-fetched and untenable that this Court can reject it out of hand. Put another way, the Commission's version on the facts cannot and should not be rejected by this Court out of hand, as one being patently implausible and far-fetched. If anything, the version of the Commission should be accepted as being more probable than that of ASA.

[23] ASA makes much of the fact that the Commission failed to notify it of the fact that it (ASA) failed to comply with the requirements of s 27. In that regards, ASA's reliance on s 28 of the Electoral Act is misplaced. That section gives the Chief Electoral Officer highly circumscribed powers to rectify limited failures of compliance with s 27(2) – namely in respect s 27(2)*(a)*, *(b)*, (*c*A), (d) or s 27(4). The section does not require of the Commission to afford a political party an opportunity to rectify its failure or omission to submit a list of candidates. Section 28 only applies to those parties which had submitted lists in the prescribed form and in compliance with the provisions of s 27(1) and s 27(2)(*c*B), read with item 3(2) of the Schedule 1A to the Electoral Act.

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[2] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 at pp 634 and 635 held as follows: -

> 'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact … … Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers ...'.

[24] As was held by the Constitutional Court in *Liberal Party v The Electoral Commission and Others*,[3] 'section 28 does not vest the Commission with a discretion to condone late submission of candidates' lists, but only to allow the rectification of other failures to comply with section 27'. Because the applicant in that matter 'had not submitted a list by the deadline', the Court held that it was 'not entitled to rectify its non-performance in terms of section 28'. What is more is that the Commission cannot condone failures to meet deadlines in the electoral timetable – this is consonant with an elementary principle of public law. In *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd*,[4] the Supreme Court of Appeal articulated the principle as follows:

'As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so.'

[25] As contended on behalf of the Commission, the absence of a discretion to condone non-compliance with deadlines is by design. The deadlines serve the important function of ensuring the fairness of the elections and of ensuring that the Commission can manage the elections properly. A power to relax deadlines for certain parties would undermine the very purpose of the deadlines. It would place the Commission in the impossible position of having to decide on a case-by-case basis whether to condone or not. Howsoever the Commission acted, it would risk being accused of favouring one party over another. That would undermine its role as a neutral facilitator of the elections.

[26] ASA's contention that the Commission contravened s 28 or failed to comply with it falls to be rejected – the Commission and CEO were under no obligation to notify ASA of its failure to meet the deadline. A party that fails to submit candidate lists before the deadline in the electoral timetable never becomes eligible to contest the election.

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[3] *Liberal Party v The Electoral Commission and Others* [2004] ZACC 1; 2004 (8) BCLR 810 (CC)

[4] *Minister of Environmental Affairs and Tourism & Others v Pepper Bay Fishing* 2003 6 SA 407 (SCA)*; Minister of Environmental Affairs and Tourism & Others v Smith* 2004 (1) SA 308 (SCA).

[27] ASA also sought to latch onto the fact that the Commission made an error and on 26 March 2024 included it (ASA) on the provisional compensatory ballot list for the National Assembly. It contends that the Commission was not entitled to rectify this error by removing it from the list on 27 March 2024 and calls in aid the *Oudekraal* principle. However, the Commission contends that *Oudekraal* does not find application in this case because there is no decision taken by the Commission to exclude ASA. As alluded to above, ASA's ineligibility results from the operation of law (*ex lege*). The mere administrative error of its inclusion cannot be elevated into a binding decision to that effect on the Commission's part.

[28] I agree with these submissions. In any event, there was no final list of candidates to self-review. The Commission had in any event yet to publish a final list, which was to occur only on 10 April 2024 in accordance with Item 18 of the electoral timetable.

[29] For all of these reasons, ASA's application falls to be dismissed.

[30] As regards the Commission's application for condonation for the late filing of its answering affidavit, I am of the view that same should be granted. I am satisfied with the explanation proffered for the late filing of the said affidavit and that such explanation is reasonable. Moreover, the delay in the delivery of the said affidavit was minimal. In any event, it would not be in the interest of justice that the said affidavit be excluded in a matter of such importance as the one before this Court.

[31] Condonation should be and is therefore granted.

Independent South African National Civic Association (ISANCO) matter

[32] According to s 27(2)(*c*B) of the Electoral Act, an unrepresented political party's candidate lists must be accompanied by a prescribed form bearing the details and signatures of voter supporters amounting to at least 15% of the quota for a seat in the preceding election. These quotas have been published and are incorporated into the *Regulations concerning the Submission of List of Candidates*, 2004, as Table 1 (to contest seats for the National Assembly) and Table 2 (to contest seats for the Provincial Legislatures). I have *supra* alluded to the quotas applicable to the seats

which ISANCO intended contesting, that being the Mpumalanga regional election for the National Assembly and the provincial elections for the Eastern Cape, the Free State and the Mpumalanga provincial legislatures.

[33] It is the case of the Commission that, save for the Eastern Cape provincial election, ISANCO failed to submit the required number of voter signatures to contest the elections for the Mpumalanga region and the provinces by the deadline in the electoral timetable. This is set out extensively – as a table reflecting the percentage of signatures submitted for the elections that the party intended contesting – in the Commission's answering affidavit. On the version of the Commission, ISANCO merely failed to upload sufficient signatures to meet the requirement. Therefore, ISANCO is ineligible to contest the elections for the National Assembly and the Free State and Mpumalanga provincial legislatures due to is failure to submit the requisite voter supporter signatures.

[34] As is the case in the ASA matter, the factual dispute between ISANCO and the Commission is required to be adjudicated on the basis of the principle in *Plascon Evans*. ISANCO avers that it submitted the lists of supporters and that the number of the supporters was in excess of the applicable quotas. As indicated above, ISANCO avers that the details and signatures of a total number of about 38 000 voter supporters were submitted to the Commission. The Commission alleges that the grand total was 18 387. There is therefore a big discrepancy between the figures quoted by ISANCO, on the one hand, and those alleged by the Commission.

[35] The Commission explains that its figures are generated by the OCNS. Moreover, so it is contended by the Commission, the quotas are to be met not by numbers submitted, but by the number of 'verified' voter supporters, which means that the lists of names and signatures must be those of registered voters in a particular region, for example. The OCNS processes the lists of supporters and will, in real time, verify the identity number of a supporter and whether he or she is a registered voter and whether he or she is eligible to be a voter supporter. If so, such a voter supporter would be counted towards the requisite quota. If not, the details of such a person would be disregarded. This process resulted in the figures contained in the tables in the

Commission's answering affidavit, which demonstrated conclusively that ISANCO did not meet the quotas prescribed in terms of s 27(2)(*c*B).

[36] In a further affidavit filed by the Commission following a direction from the Court during the hearing of the application on Monday, 15 April 2024, the Commission elaborates on the figures in these tables. It also explains the variance between its numbers and those of ISANCO as follows: -

'27. Therefore, for the purposes of this case, how many signatures ISANCO may have obtained or provided is irrelevant in this case – what matters is how many ID numbers it uploaded on the OCNS in the prescribed manner. As set out above ISANCO failed to upload the required number of ID numbers for the Mpumalanga regional election, or the Free State and Mpumalanga provincial elections.

28. Thus, the discrepancies between the numbers contained in paragraph 9 of the founding affidavit and the numbers that the Commission has reflected herein is not due to any other reason than ISANCO's OPA not capturing the number of supporters' ID numbers as recorded in paragraph 9 of the founding affidavit. This is not the fault of the Commission nor the OCNS.'

[37] In my view, having regard to the evidence before Court, the version of the Commission is more probable than the bald and unsubstantiated averment by ISANCO that the right number of voter supporters were submitted to the Commission. The Commission's version, in addition to being supported by the details and particulars relating to exact figures, has a ring of truth to it. It cannot possibly be said that the version of the Commission is so far-fetched and untenable that this Court can reject it out of hand. Put another way, the Commission's version on the facts cannot and should not be rejected by this Court out of hand, as one being patently implausible and far-fetched. Therefore, factually it has to be accepted that ISANCO failed to submit the voter supporters lists with the requisite number of supporters. It has therefore not complied with the peremptory requirements of s 27(1), read with s 27(2)(*c*B), of the Electoral Act. It accordingly is disqualified from contesting those elections in respect of which there has been non-compliance.

[38] There are other reasons why ISANCO's application should fail. In that regard, I agree with the submission on behalf of the Commission that ISANCO's application does not even make it out of the starting blocks procedurally. The legal basis of the

application, insofar as it is based in terms of s 30(4) of the Electoral Act, is fundamentally incorrect and incompetent. There is also an issue relating to the fact that its founding affidavit is not properly commissioned, which means that, for all intents and purposes, the evidence contained in the said affidavit is not properly before the Court. However, in light of my factual finding that ISANCO failed to comply with the provisions of s 27 and was therefore disqualified from contesting the elections in question, it is not necessary for me to deal in detail with those issues.

[39] For all of these reasons, ISANCO's application falls to be dismissed.

Costs

[40] The award of costs is a matter which is within the discretion of the Court considering the issue of costs. This discretion must be exercised judicially having regard to all the relevant considerations. One such consideration is the principle, in line with *Biowatch Trust v Registrar, Genetic Resources, and Others*[5], that in general in this Court an unsuccessful party ought not to be ordered to pay costs. But this is not an inflexible rule, and it can be departed from where there are strong reasons justifying such departure such as in instances where the litigation is frivolous or vexatious.

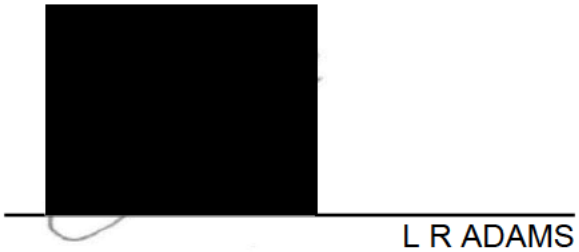
[41] I can think of no reason why the aforegoing general rule should be departed from. In both matters, each party should therefore bear its own costs.

Order

[42] In the result and for these reasons, on Wednesday, 17 April 2024, the following identical order was issued in each of the above two opposed applications under the separate case numbers:

> The application is dismissed with no order as to costs.

[5] As per the *ratio* in *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC), in which it was held that private parties that lost in constitutional litigation against the State should not as a rule be mulcted in costs. This means that when a private party sought to assert a constitutional right against the government and failed, each party should bear its own costs.



L R ADAMS
ACTING JUDGE OF THE ELECTORAL COURT

APPEARANCES

For the applicant in the First matter (Arise SA):	D C Mpofu SC (with M Khumalo and Ms P May)
Instructed by:	Gqwede Attorneys, Allen's Nek, Roodepoort
For the applicant in the Second matter (ISANCO):	Mr B Ramosie
Instructed by:	ISANCO, Doorn, Welkom
For the respondent in both matters (the Commission):	M Bishop (with M Tsele, M De Beer and E Cohen)
(In first application), instructed by:	Mota Africa, Menlyn Maine, Pretoria
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