



THE ELECTORAL COURT OF SOUTH AFRICA

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

From: The Registrar, Electoral Court

Date: 26 April 2024

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Electoral Court of South Africa

Umkhonto Wesizwe Political Party and Another v Electoral Commission of South Africa and Others
(0015/2024EC) [2024] ZAEC 05 (26 April 2024)

On 9 April 2024 the Electoral Court (EC) issued an order granting leave to appeal, and upholding the appeal, against a decision of the Electoral Commission of South Africa (the Commission) upholding an objection to the candidacy of the second applicant, Mr Zuma, a candidate on the first applicant's party list. The decision was set aside and substituted with a decision that "the objection is hereby dismissed". The EC made no order as to costs.

The order was issued without reasons in order to comply with the timelines of the election timetable published by the Commission on 24 February 2024, and the EC indicated that reasons therefor would be given in due course. The reasons had to be expedited because the Commission has in the interim already brought an application for leave to appeal in the Constitutional Court.

The objection that was upheld relied on section 47(1)(e) of the Constitution, which disqualifies a person who has been convicted of a crime and sentenced to more than twelve months' imprisonment without the option of a fine from being a member of the National Assembly.

Leave to appeal was granted on the basis that the matter raises issues which are of public interest, deals with the interplay between s 30 of the Electoral Act, 73 of 1998 and s 47(1)(e) read with s 19(3) of the Constitution, and that there are prospects of success. It is therefore in the interests of justice to grant leave to appeal.

The issues were narrowed at the hearing to preliminary issues of whether the Commission had the power to determine whether a candidate was eligible to be a member of the National Assembly at candidacy stage, and whether the Commission was biased, and the "merits" issue of whether Mr Zuma, having been convicted of contempt of court by the Constitutional Court and sentenced to fifteen months' direct imprisonment without the option of a fine, was disqualified from membership of the National Assembly, and whether a Presidential remission of sentence had the effect that he was no longer disqualified from membership.

The findings of the court are unanimous with regard to all issues save the effect of the Presidential remission.

The applicants submitted that membership of the National Assembly was not for the Commission to determine, and that the Commission exceeded its powers by excluding Mr Zuma by applying section

47(1)(e). The Court found, *per* the judgment of Zondi JA, all members concurring, that the Commission was correct that sections 27 and 30 of the Electoral Act, read with the form for submitting a candidate list prescribed in the Regulations concerning the Submission of a List of Candidates, entitled and required it to exclude candidates who did not qualify for membership of the National Assembly from standing for election.

The applicants submitted that certain statements made by one of the Commissioners at a press conference in January that if a person had been given a sentence that had not been deferred the law would be an impediment to their candidacy meant that the Commissioner was biased and had prejudged the issue of Mr Zuma's candidacy, and the fact that the Commissioner had not recused herself meant that the whole Commission was biased. The Court found unanimously, *per* Zondi JA, that there was no merit in this complaint.

The applicants then submitted that Mr Zuma had not been convicted of an offence as contemplated in s 47(1)(e) because he had not had the benefit of the fair trial rights in s 35 of the Constitution, and that a conviction of an offence contemplated in the section must, necessarily, be a conviction that was consistent with the Bill of Rights. The argument was both that the conviction was not of an offence and that there was not a conviction as contemplated in the section. The Court found, unanimously, *per* Zondi JA, that there is sufficient authority that contempt is a crime, and therefore an offence, and that it is a proceeding of particular nature which is part of the Rule of Law. It is therefore consistent with the Constitution, even if not procedurally one that is contemplated by section 35.

It was submitted by the applicants that Mr Zuma had not been sentenced to imprisonment longer than twelve months for two reasons, one, that the proviso to s 47(1)(e) provides that no one is regarded as having been sentenced until an appeal has been determined or the time for an appeal has lapsed, and, two, that the Presidential remission of sentence proclaimed on 11 August 2023 which resulted in Mr Zuma's release having served just less than three months of his sentence meant that his sentence had been reduced to under twelve months.

The court found, *per* Zondi JA, all members concurring, that section s 47(1)(e) and section 19(3) had to be interpreted in a manner that gave both their proper weight and content. The fact that Mr Zuma was sentenced by the highest court in the land as the court of first and final instance meant that there was no appeal available to him. In terms of a section, a person is not regarded as having been sentenced until an appeal has been determined. The unavailability of appeal meant that he had not been sentenced as contemplated in terms of s 47(1)(e).

Zondi JA found that the President may not, through the exercise of executive power under s 84(2)(j) of the Constitution to remit sentences, change the fact of the sentence. Remission which Mr Zuma obtained had no effect on the fact of a sentence imposed on Mr Zuma. It affected only the period which Mr Zuma had to serve. The President cannot change the sentence through the exercise of remission powers under s 84(2)(j) of the Constitution, To do that will constitute an impermissible executive interference in the judicial sphere.

Modiba J found (Professors Phooko and Ntlama-Makhanya concurring) that the remission of sentence was not an impermissible interference by the President in the judicial sphere because the Constitution empowers him to remit sentences. The remission effectively reduced Mr Zuma's sentence, absolving him from its legal consequences. As a result, Mr Zuma does not fall within the ambit of s 47(1)(e). This means that he is not disqualified from being a member of the National Assembly.

Yacoob AJ agreed with Modiba J that there was no impermissible executive interference, but that the legal effect of the Presidential remission did not reduce the sentence imposed on Mr Zuma as contemplated by the section, since the section required the reduction to be done by someone who considered the conduct of the person and the penalty imposed on the person in order for that person to escape the consequence thereof for purposes of membership of the National Assembly.