

***Case No 315/2001
Reportable***

In the matter between

ZOLEKA MKETSU & OTHERS

APPELLANTS

and

***AFRICAN NATIONAL CONGRESS
& OTHERS***

RESPONDENTS

***Coram : VIVIER ADP, OLIVIER, SCOTT, CAMERON et
BRAND JJA***

Heard : 20 AUGUST 2002

Delivered : 13 SEPTEMBER 2002

***Election – jurisdiction of High Court – interpretation of s 65 of Act 27 of
2000***

J U D G M E N T

SCOTT JA/...

SCOTT JA:

[1] The proceedings culminating in this appeal have their origin in the local government elections held on 5 December 2000 in the Eastern Cape.

The elections took two forms; the election by proportional representation of councillors to municipal councils of different kinds and the election of individual councillors to particular wards. The five applications which are the subject of the present appeal were launched on 19 December 2000, i.e. some 14 days after the election. Three related to the election by proportional representation of councillors to three different councils, one being a district council and the other two being local councils. (Nothing turns on the distinction.) The remaining two applications related to the election of individual councillors to particular wards.

[2] The applicants, now the appellants, in all five cases were members of the African National Congress ('ANC'), a registered party in

terms of the Electoral Commission Act 51 of 1996 ('the Commission Act').

They allege that the selection process by which candidates were chosen for inclusion on the party's list for election by proportional representation and as candidates for the ward elections was flawed for want of compliance with the procedures laid down in a party document entitled 'ANC Campaign Manual'.

They contend that had the proper procedures been followed they would have been included in the respective party lists or nominated for the wards in question and in due course elected as councillors. The first respondent in each of the three proportional representational matters was the ANC. The second respondent was the chairperson of the Electoral Commission while the remaining respondents were the municipal council in question and the successful ANC candidates whose names had appeared on the party's list. In each of the ward election matters the first respondent was the successful ANC candidate, the second was the ANC, the third was the chairperson of the

Electoral Commission and the fourth respondent was the municipal council concerned.

[3] As shall become apparent, the relief claimed in the Court *a quo* is significant. In the proportional representation matters the applicants sought an order (a) declaring that the party list of the ANC for the council in question and certified by the chairperson of the electoral commission 'is not and never was the party list of the [ANC]' for that council and (b) that the determination by the chief electoral officer of the successful ANC candidates as councillors of the council in question be set aside. In the ward election matters an order was sought declaring (a) that the successful candidate in the election was not properly nominated by the ANC to contest the ward in question and (b) that his candidature and subsequent election was null and void.

[4] The applications were opposed on various grounds. One of them was that the appellants had failed to follow the procedure laid down in s 65 of the Local Government : Municipal Electoral Act 27 of 2000 ('The Municipal Electoral Act') and that the High Court lacked jurisdiction to entertain any of the matters. As this and other issues were common to all the matters, they were argued together. Kroon J in the Eastern Cape High Court upheld the defence of lack of jurisdiction and found it unnecessary to decide the remaining grounds of opposition. The appeal is with the leave of the Court *a quo*.

[5] In order to better understand the issues relating to the question of jurisdiction it is convenient to refer briefly at this stage to certain of the more relevant statutory provisions governing the elections in question and the steps taken in pursuance of those provisions. In terms of s 11 of the Municipal Electoral Act the Electoral Commission ('the Commission') is obliged when

an election is called to compile a timetable for that election and publish it in the Government Gazette. The Commission is a statutory body established in terms of s 3 of the Commission Act with wide powers in relation to elections, including their management. It consists of five members, one of whom must be a judge. (Section 6 of the Commission Act.) Returning to the Municipal Electoral Act, in terms of sections 13, 14, 16 and 17 a registered party may contest an election of a municipal council by submitting to the Commission in the prescribed manner and by the date set out in the timetable a notice of intention to contest the election and a party list of candidates for election by proportional representation. It may similarly submit in the prescribed manner and by the date so set its nomination of a candidate for election in a ward. In terms of s 15 the Commission is obliged by not later than the date stated in the timetable to compile a list of the parties contesting the election and to certify the party lists which it is to keep available at the office of its local

representative. Similarly, in terms of s 18, the Commission is required by a date not later than the date so set to compile for each ward a list of candidates contesting that ward and to certify those lists which are to be kept available at the office of the Commission's local representative.

[6] In accordance with the timetable compiled by the Commission, the ANC gave notice of its intention to contest the election and submitted its party lists and its nomination of ward candidates to the Commission by not later than 19 October 2000. The Commission, in turn, by 30 October 2000 compiled a list of the parties contesting the election and of the candidates contesting the ward elections, certified the party lists and lists for ward elections, and had the lists available at its local office. As previously mentioned the election was held a little more than a month later on 5 December 2000. The results were determined by the chief electoral officer in accordance with the *formulae* contained in Schedule 1 (in the case of

proportional representation elections for local councils) and in schedule 2 (in the case of proportional representation elections for district councils) of the Local Government : Municipal Structures Act 117 of 1998 (‘the Structures Act’). In the case of the ward elections the candidate who received the most votes was elected. Once declared elected the successful candidates, whether in a ward election or on the basis of a party list, became councillors. The right of a successful candidate to become and hold office as a councillor is guaranteed both by s 21 (1) (b) of the Structures Act and s 19 (3) (b) of the Constitution.

[7] Section 65 of the Municipal Electoral Act, being the section on which the respondents rely for their contention that the High Court had no jurisdiction to entertain the applications, reads as follows –

‘65(1)An interested party may lodge an objection concerning any aspect of an election that is material to the declared result of the election with the Commission by serving, by not later than 17:00 on the second day after voting day, at its office in Pretoria a

written notice containing – [I omit the nine paragraphs setting forth details of what must be contained in the written notice.]

- (2) The Commission, on good cause shown, may condone a late objection.
- (3) In considering and deciding the objection, the Commission may-
 - (a) investigate the factual basis of the objection;
 - (b) afford interested parties an opportunity to make written or verbal submissions;
 - (c) call for written or verbal submissions from other persons or parties;
 - (d) call upon the objecting party to submit further information or arguments in writing or verbally; and
 - (e) conduct a hearing on the objection.
- (4) The Commission must –
 - (a) consider the objection and decide it within three days after it was served on the Commission, and either –
 - (i) reject the objection;
 - (ii) amend the declared result of the election; or
 - (iii) rescind the declared result of the election; and
 - (b) immediately notify the objector and any other parties involved in the objection, of the decision.
- (5) An objector or other party involved in the objection who feels aggrieved by the decision of the Commission may, within three days of the Commission's decision, appeal to the Electoral Court in terms of section 20 of the Electoral Commission Act and the Rules of the Electoral Court.
- (6) The Electoral Court must –

- (a) consider the appeal and either –
 - (i) reject the appeal;
 - (ii) amend the decision of the Commission; or
 - (iii) make another appropriate order; and
 - (b) notify the parties to the appeal of its decision.
- (7) The declared result of an election is not suspended by an appeal to the Electoral Court.’

[8] Before considering the arguments advanced in this Court it is necessary to say something about the Electoral Court to which reference is made in the section just quoted. It was established in terms of s 18 of the Commission Act. It enjoys the status of a High Court and comprises a judge of the Supreme Court of Appeal, two High Court judges, plus two other members appointed by the President. Its powers, duties and functions are set out in s 20. They include the power to hear reviews and appeals and to determine its own practice and procedures. I shall revert to this section later in this judgment.

[9] In the Court below it was contended on behalf of the appellants that their objection to the selection process adopted by the ANC in the five instances in question was not an objection ‘concerning any aspect that is material to the declared result’ and therefore s 65 did not apply. In this Court, however, counsel abandoned the point. I think he was wise to do so. One merely has to look at the relief claimed to see that the objection is material to the declared result. Indeed, the effect of the relief claimed would be to unseat the successful candidates who now hold office as councillors. The expression ‘any aspect of an election’ is clearly wide enough to encompass the objection in question, particularly when considered in the light of the effect which the objection would have on the election result.

[10] The principal argument advanced on behalf of the appellants was that the procedure set forth in s 65 was not mandatory and that the High Court retained its ordinary inherent jurisdiction to entertain the applications. In

support of this counsel relied heavily on the word ‘may’ in ss 1. Quite clearly the legislature could not have substituted ‘must’ for ‘may’ as the intention could hardly have been to compel an interested party to proceed with an objection against his or her will. Admittedly, as counsel pointed out, the subsection could have been worded along the lines of the following ‘an interested party wishing to object shall lodge etc’, but the fact that the legislature could have expressed itself with greater clarity is hardly decisive and the word ‘may’ in the context in which it is used does little to advance counsel’s argument.

[11] Section 65 must not, of course, be viewed in isolation but in its context in the Act. It becomes necessary therefore to refer to certain other provisions of the Municipal Electoral Act. Section 78(1) provides:

‘(1) The Electoral Court has jurisdiction in respect of all electoral disputes and complaints about infringements of the Code, subject to section 20(4) of the Electoral Commission Act.’

Section 20(4) of the Commission Act reads:

- ‘(4) The Electoral Court shall –
- (a) make rules in terms of which electoral disputes and complaints about infringements of the Electoral Code of Conduct as defined in section 1 of the Electoral Act, 1993 (Act No 202 of 1993), and appeals against decisions thereon may be brought before courts of law; and
 - (b) determine which courts of law shall have jurisdiction to hear particular disputes and complaints about infringements, and appeals against decisions arising from such hearings.’

What is clear is that the jurisdiction conferred on the Electoral Court in terms of s 78(1) was intended to be exclusive, subject to the power of the Electoral Court to determine which courts of law would exercise concurrent or exclusive jurisdiction to hear particular electoral disputes and complaints about infringements of the Code. Furthermore, the use of similar language in s 78(1) of the Municipal Electoral Act and s 20(4) of the Commission Act, *viz* ‘electoral disputes and complaints about infringements of the Electoral Code’

and the fact that the former section is subject to the latter indicates that the power of the Electoral Court to determine which courts of law have jurisdiction in terms of s 20(4) of the Commission Act relates to the matters referred to in s 78 and not s 65. The latter section, it will be recalled, is concerned with ‘objections concerning any aspect of an election that is material to the declared result.’ Such objections, therefore, cannot be the subject of a determination in terms of s 20(4) of the Commission Act.

[12] The expression ‘material to the *declared* result’ makes it clear that what is contemplated is the adjudication of a dispute after the election which could have the effect of upsetting the declared result. The wide meaning of ‘any aspect of the election’ is further indicative of an intention that little, if anything, which is material to the declared result is to be excluded from the ambit of the section. By contrast, s 78 is concerned with ‘all electoral disputes’ and ‘infringements of the Code’. What would seem to

be contemplated are disputes and infringements in the course of what Kroon J called 'the run-up to the election' and which would ordinarily be determined prior to the election. As far as the code is concerned, it is apparent that its provisions relate to the regulation of the conduct of parties and candidates in respect of such matters as their relationship with other candidates and parties, the press and the electorate. Any breach would typically be required to be dealt with as soon as possible in order to put a stop to the conduct complained of. (I mention in passing that the Electoral Act 1993 to which reference is made in s 20(4)(a) of the Commission Act was repealed in 1998 by the Electoral Act 73 of 1998. The code of conduct now applicable is contained in Schedule 2 of the latter Act. That code is for all intents and purposes identical to the code contained in Schedule 1 of the Municipal Electoral Act. I shall revert later to the Electoral Act 1998 and the circumstances in which it came to be inapplicable to municipal council elections.)

[13] Although not decisive, another indication that s 78 is concerned with disputes and infringements which are not material to the declared result is to be found in subsection 2. It reads:

‘(2) If a court having jurisdiction by virtue of section 20(4)(b) of the Electoral Commission Act finds that a person or party has contravened a provision of Part 1 of this Chapter, it may in the interest of a free and fair election impose any appropriate penalty or sanction on that person or party, including – ’ [What follows are nine paragraphs in which are listed various penalties and sanctions ranging from a formal warning to an order cancelling the registration of a party.]

Part 1 of the Chapter referred to contains a number of prohibitions relating to the conduct of the election, including a prohibition against failing to comply with the provisions of the code. What is significant, however, is that the penalties and sanctions listed are all consistent with a result not yet having been declared and, as the subsection suggests, have as their object ‘a free and fair election’.

[14] The scheme that emerges from these various provisions is that all electoral disputes, infringements of the code and contraventions in relation to municipal elections which are not material to the declared result are to be dealt with by the Electoral Court or some other court having jurisdiction in terms of s 78 of the Municipal Electoral Act. Ordinarily, but not necessarily, such matters would be heard and resolved prior to the result of an election being declared. Where, on the other hand, an objection is lodged concerning any aspect of an election that is material to the declared result, the procedure prescribed in s 65 is to be followed.

[15] It is necessary at this stage to refer to the determination made by the Electoral Court on 4 December 1998 in terms of s 20(4)(b) of the Commission Act. (See General Notice 2915 of 1998 contained in Government Gazette No 19572 of 4 December 1998.) This, of course, was prior to the enactment of the Municipal Electoral Act in 2000. How this came

about is as follows. The Electoral Act 73 of 1998 was in terms of s 3(c) to be applicable (in addition to national and provincial elections) also to municipal council elections, but from a date to be proclaimed. In the event no date was proclaimed and instead the Municipal Electoral Act was enacted in 2000. Section 78 of the latter Act is virtually identical to s 96 of the Electoral Act 1998. Nonetheless, the point remains that the determination was made in relation to s 96 of the latter Act and not s 78 of the former. I shall assume however, without deciding, that the determination is applicable to municipal council elections.

[16] The relevant part of the determination reads as follows:

- ‘(1) The Magistrate’s Court and the High Court in whose area of jurisdiction –
 - (a) any electoral dispute; or
 - (b) any complaint about an infringement of the Code,
 - has arisen, have, subject to subrules (2) and (3),
 - jurisdiction to hear such dispute or complaint.
- (2) The following courts have jurisdiction to impose the following sanctions referred to in section 96 of the Act:

- (a) The [Electoral] Court, all the sanctions in subsection (2);
- (b) The High Court, all the sanctions in subsection (2) except (2)(h) and (i);
- (c) The Magistrate's Court, all the sanctions in subsection (2) except (2)(d)(vii), (h) and (i) and with regard to the sanctions in subsection (2)(b) and (c), the Magistrate's Court must have regard to its civil jurisdiction.'

It appears from paragraph 2 of the determination that the High Court was not afforded jurisdiction to impose all the sanctions listed in s 96 (2) of the Electoral Act 1993 (the equivalent of s 78(2) of the Municipal Electoral Act quoted in paragraph 13 above). The sanctions in respect of which it was granted jurisdiction were quite clearly inappropriate in cases where the relief sought was material to the declared result of an election. This much was not in dispute. On behalf of the appellant it was pointed out, however, that s 78(2), which lists the sanctions, was concerned only with contraventions of Part 1 of Chapter 7 of the Act and that those sanctions did not apply to 'any electoral dispute' referred to in s 78(1) and in respect of which jurisdiction

was conferred in paragraph 1(a) of the determination. (Section 78(1) is quoted in para 11 above.) Accordingly, so it was contended, the jurisdiction conferred on the High Court in terms of para 1 of the determination was not limited by reference to the sanctions it could impose and that therefore the High Court had jurisdiction to entertain the applications which were the subject of the appeal.

[17] There are several answers to this argument. For one thing, the wording of the determination would seem to make it clear that the limitation on the sanctions that may be imposed applies to the jurisdiction referred to in 78(1) of the Municipal Electoral Act which is the jurisdiction conferred in terms of para 1 of the determination. But quite apart from the determination, and for the reasons already advanced, I am of the view that on a proper construction of the Municipal Electoral Act the phrase, ‘any electoral dispute’

in s 78(1) is to be understood as being limited to disputes which are not material to the declared result of an election.

[18] Against this background I revert to s 65. The time limits imposed on the lodging of objections in ss (1), the consideration of such objections by the Commission in ss (4) and the noting of an appeal to the Electoral Court in ss (5) make it clear that what was contemplated by the legislature was an expeditious procedure to ensure that any dispute affecting the result of an election was to be resolved with a minimum of delay. Subsection 5 provides that the appeal to the Electoral Court is ‘in terms’ of s 20 of the Commission Act. The latter section similarly contains time constraints. If, as was submitted by counsel, the High Court retained its inherent jurisdiction to entertain such an objection the time limits contained in the section would serve no purpose. An objecting party would simply bring his or her case to the High Court.

[19] It is true that the ousting of the jurisdiction of the High Court will not lightly be inferred. But it should not be overlooked that the Electoral Court enjoys the status of the High Court and three of its five members are required to be judges, one a judge of this Court.

[20] It is also significant that the legislature found it necessary to make express provision for other courts, i e other than the Electoral Court, to have jurisdiction in specific instances. One such example is s 78. As previously mentioned, the fact that in terms of s 78 (read with s 20(4) of the Commission Act) the Electoral Court is afforded the power to determine which courts of law, other than itself, are to exercise the jurisdiction referred to in the section is the clearest indication that, subject to that power, the Electoral Court's jurisdiction was to be exclusive. Admittedly s 65 is not subject to the same power. However, the obvious inference to be drawn from this is not that the jurisdiction of the Commission and the Electoral Court

under s 65 was intended to be concurrent with the High Court's inherent jurisdiction but that the procedure set out in s 65 was to be followed in all cases where the result of the election was in issue and that in such matters other courts of law were not to have jurisdiction. Another example is s 77. In terms of this section the chief electoral officer is empowered to 'institute civil proceedings before a court, including the Electoral Court, to enforce a provision of this Act or the Code'. It is also interesting to note that s 55 of the Electoral Act 1998, which is the equivalent of s 65 of the Municipal Electoral Act, provides for a similar procedure culminating in an appeal to the Electoral Court. The wording is however different and permits of no doubt that the procedure described therein is mandatory in cases where the objection concerns 'any aspect of an election that is material to the final result of the election.'

[21] In the result I am satisfied that the procedure set out in s 65 of the Municipal Electoral Act is intended to be mandatory and that the High Court accordingly has no jurisdiction to entertain objections of the kind referred to therein.

[22] The appeal is dismissed with costs including the costs occasioned by the employment of two counsel.

D G SCOTT
JUDGE OF APPEAL

CONCUR:

VIVIER	ADP
OLIVIER	JA
CAMERON	JA
BRAND	JA