

IN THE ELECTORAL COURT OF SOUTH AFRICA

HELD AT BLOEMFONTEIN



Reportable
CASE NO: 007/21 EC

In the matter between:

SELLO DAVID NYAKU

APPLICANT

and

ELECTORAL COMMISSION OF SOUTH AFRICA -

CHIEF ELECTORAL OFFICER

FIRST RESPONDENT

NTHABI TSIPANE

SECOND RESPONDENT

KGOSIETSILE TSHOKA

THIRD RESPONDENT

KARINA HUMAN

FOURTH RESPONDENT

Neutral Citation: *Nyaku v The Electoral Commission of South Africa-Chief Electoral Officer and Others* (Case no 007/21 EC) [2021] ZAEC 2 (22 October 2021)

Summary: Electoral law – Section 17 of the Local Government: Municipal Electoral Act 27 of 2000 – strict adherence to the prescripts of an election timetable required – failure to submit nomination with supporting documents timeously in terms of the election timetable renders the nomination of a candidate invalid – application dismissed with no order as to costs.

REASONS

Mbha JA (Shongwe and Moshidi AJJ and Ms Pather (member) concurring):

[1] The applicant approached this Court on an urgent basis, initially on 8 October 2021, seeking an order reviewing and setting aside the decision of the first respondent, the Independent Electoral Commission of South Africa (the Commission), to unlawfully exclude him from contesting the local government elections on 1 November 2021 as an independent candidate in Ward 11 in the Midvaal Local Municipality. In addition, the applicant sought an order for the condonation of his application, and that his registration to contest the election be reinstated. On 12 October 2021, the applicant filed a supplementary affidavit in which he sought another relief postponing the election in Ward 11, in order to allow him time to contest on an equal footing with other candidates.

[2] On 22 October 2021, having read the papers and considered the matter, this Court unanimously granted an order, first, condoning the applicant's late filing of his replying affidavit; second, dismissing the applicant's application with no order as to costs; and lastly, that reasons would be furnished in due course. These are the reasons.

[3] The applicant's case, as can be gleaned from his papers filed on record, can be summarised as follows:

(a) On 21 September 2021 he attended the Commission's local office in Meyerton where he completed and signed a nomination acceptance form which he duly handed in together with a copy of his identification document, and proof of payment of the required deposit. Thereafter, he was furnished with a form for 50 voter names and signatures which he had to submit to the Commission the next day ie 22 September 2021, before close of business.

(b) On 22 September 2021, upon returning the aforesaid forms of voter names and signatures to the Commission, it was discovered that the ink on one of the forms was faint thus making the names and identification numbers therein illegible. He was then asked to submit additional names to replace the ones that were illegible. Later that same afternoon, at around 17h53, he was able to email to the Commission's local office a list containing the required replacement names and signatures. At some point that same day on 22 September 2021, he went to the Commission's offices to collect special voting forms for the elderly whereupon he was advised that his registration as an independent candidate had been cancelled.

(c) The applicant contended that the Commission's decision to disqualify his registration was irrational, wrong and without a valid reason since he had timeously submitted all the required documents. Moreover, according to the Commission's timetable, the 23rd September 2021 was the cut-off date for the submission of 'outstanding ward documents' by party and independent individuals.

[4] The Commission filed an extensive affidavit in which it denied that the applicant had been treated unfairly and rejected his allegations that it had acted with an ulterior motive, in bad faith, irregularly or irrationally or in a manner that undermined the freeness and fairness of the elections. It asserted, in brief, that the applicant's exclusion was of his own accord and that he failed to ensure that his nomination as a candidate, together with the requisite supporting documents, was submitted timeously before 17h00 on 21 September 2021 in terms of the Amended Election Timetable published in terms of the Local Government: Municipal Electoral Act 27 of 2000 (the Act)

[5] The Commission further contended that the applicant failed to submit the prescribed form with at least 50 signatures of voters on the municipality's segment of the voters' roll for the contested ward by 17h00 on 21 September 2021, and only did so on 22 September 2021. Accordingly, the applicant's nomination did not, so the Commission contended, comply with s 17 of the Act and was thus invalid. In the result, the applicant did not lawfully qualify to contest the election as an independent candidate.

[6] Section 11 of the Act requires the Commission to compile an election timetable after an election has been called. Such timetable must be published in the Government Gazette. Importantly, s 11(3) provides that '[a]ny act required to be performed in terms of this Act must be performed by no later than a date and time stated in the election timetable'.

[7] Section 17(1) provides that '[a] person may contest an election as a ward candidate only if that person is nominated on a prescribed form and that form is submitted to the Commission by *not later than a date stated in the timetable for the election*'. (My emphasis.) Section 17(2) specifies that certain documents must be attached to the nomination when it is submitted. Crucially, s 17(2)(a) provides that 'In the case of an independent ward candidate, a prescribed form with the signatures of at least 50 voters whose names appear on the municipality's segment of the voters' roll for any voting district in the contested ward' must be submitted. I pause to mention that there is no provision in s 17 of the Act, that permits the rectification of a failure to lodge the form with at least 50 signatures as required by s 17(2)(a) timeously, after the deadline for the candidate nominations.

[8] It is common cause that the Commission duly published an Amended Election Timetable on 20 September 2021.¹ The following paragraphs in the timetable are particularly relevant:

(a) Paragraph 1 provides:

'Cut-off time for act to be performed

1. An act required in terms of the Act and the Municipal Electoral Regulations 2000, to be performed by no later than a date stated in the election timetable must be performed before 17:00 on that date.'

(b) Paragraph 8(2) provides:

¹ 'The local government elections were initially called by the Minister of Cooperative Governance and Traditional Affairs on 3 August 2021 and set for 27 October 2021. The Commission published an election timetable on 4 August 2021. In terms of the initial timetable the cut-off date to submit nominations, pay the prescribed deposits with supporting documentation for the said ward election was 23 August 2021 at 21h00.'

'Registered parties and nominators of independent candidates that intend to contest a ward in this election in terms of s 17, must submit their nominations and the prescribed deposits with the supporting documentation for the said ward election in a manner provided for in s 14(1A)(a) or (b) in the prescribed form by 21 September 2021.' (My emphasis.)

(c) Paragraph 9(2) provides:

'(a) The Commission may request the nominating party or person of a candidate to provide the information contemplated in s 17(2A) by 22 September 2021. Failure to comply with such a request would result in disqualification of the candidate concerned.²

(b) If the nominating party or person takes the opportunity to comply with section 17(2A), that party or person must do so by 23 September 2021.'

As the Commission never made any request to the applicant to provide the information contemplated in s 17(2A), the provisions of paragraph 9(2) of the timetable, find no application in this case.

[9] The applicant's case was pivoted, in the main, on the contention that according to the Commission's timetable, the 23rd September 2021 was the cut-off date for the submission of outstanding documents.

[10] In my view, the applicant's contention is misconceived. The amended election timetable which the Commission avers was personally given to the applicant, expressly provided the date of 21 September 2021 to be the cut-off date. Thus, even on his own version, the applicant failed to ensure that his nomination as a candidate, with supporting documents, was submitted timeously in terms of the Amended Election Timetable. The forms which had to contain voters' names, their signatures and identification numbers were only submitted, according to him, on 22 September 2021. This was in clear breach of s 17(2)(a) of the Act which required various documents, including a prescribed form with the signatures of at least 50 voters whose names appear on the municipality's segment of the voters' roll for any voting district in the contested ward, to be submitted by not later than the cut-off date of 21 September 2021. The effect hereof is that the

applicant's nomination was invalid for failure to comply with the provisions of s 17 of the Act.

[11] Based on what is set out above, it is clear that the applicant failed to comply with the deadline in the amended election timetable to ensure that his nomination as a candidate was submitted together with all necessary documents and information as required by sections 17(1) and 17(2) of the Act. This Court and the Constitutional Court have both emphasised that it would be unfair to permit a candidate who fails to comply with a deadline in an election timetable and the prescripts of the Act, to contest an election.³ It is especially unfair to those who comply. In *National Peoples Party v The Electoral Commission*,⁴ this Court stressed the important role of the election timetable, saying:

'The purpose of the time-table is to facilitate the smooth running of the election process. It is intended to allow the administration of elections to proceed without disruption and for officials to properly prepare for the election by, *inter alia*, the announcement of the contesting parties and candidates and preparation and distribution of ballot papers to mention a few aspects. It also serves to avoid unfair advantage, occasioned by late entry, to a particular party (or candidate).

...

Adherence to the timetable is peremptory since certain requirements have to be complied with within the time limits stipulated in the timetable in order to properly prepare for the elections.'

[12] My aforesaid conclusions have led ineluctably to the finding that the relief sought by the applicant for his 'reinstatement' as a candidate, could not be sustained. Furthermore, no submission was made in support of the relief sought for condonation of the application.

[13] In a supplementary affidavit to the founding affidavit, the applicant sought a different relief namely, for the postponement of the election in Ward 11. However, the applicant failed to cite all political parties and other candidates who would be directly impacted by the postponement he sought. Neither did he give such interested parties any

³ *National Freedom Party v Electoral Commission* [2016] ZAEC 2 para 29; *Electoral Commission of the Republic of South Africa v Inkatha Freedom Party* [2011] ZACC 16; 2011 (9) BCLR 943 (CC) para 55.

⁴ *National Peoples Party v The Electoral Commission* [2011] ZAEC 3 paras 23-24.

notice that he would be seeking such a relief.⁵ For this reason, the relief sought to postpone the election could not be granted.

[14] In light of what I have stated above, the Court granted the order as set out in paragraph [2] of this judgment.

Mbha JA
Chairperson of the Electoral Court

22 October 2021

⁵ *Bowring N O v Vrededorp Properties CC* [2007] ZASCA 80; 2007 (5) SA 391 (SCA) para 21.