REPUBLIC OF SOUTH AFRICA

ELECTORAL COURT, BLOEMFONTEIN

CASE NO:003/11 IEC

In the matter between:

AFRICAN CHRISTIAN DEMOCRATIC PARTY Applicant

and

THE ELECTORAL COMMISSION Respondent

Neutral Citation: *African Christian Democratic Party v The Electoral Commission* (Case no 003/11 IEC) [2011] ZAEC 2 (20 April 2011)

J U D G M E N T

MASIPA, J:

INTRODUCTION

[1] The applicant, by way of review, sought to set aside a decision of the respondent (Commission) not to place the applicant's name on the list of registered parties entitled to contest the election in the Umhlabuyalingana Municipality on 18 May 2011. The applicant also sought ancillary relief and costs.

[2] The relief sought as set out in the notice of motion is the following:

> "*5. The Respondent's decision … is reviewed and set aside.*
>
> *6. The Respondent is ordered to take all such consequent steps as are necessary, in order to enable the Applicant to contest the elections, including:*
>
> *a. allocating surplus funds in its possession from the Applicant, as a deposit in terms of sections 14(1)(b) and 17(2)(d) of the Electoral Act to contest the elections;*
>
> *b. forthwith placing Applicant's name on the list of registered parties entitled to contest the election;*
>
> *c. forthwith placing the name of Applicant's candidates for the various wards on the final list of candidates of the Umhlabuyalingana local government election;*
>
> *d. ensuring that all ballot papers reflect the result of the orders set out above, alternatively to the extent that the ballot papers have already been printed, to print forthwith ballot papers reflecting the result of the orders set out above.*"

[3] Because of the urgency of the matter an order was granted setting the decision of the Commission aside and granting the ancillary relief sought and reasons were to follow later. These are the reasons.

BACKGROUND

[4] National Government Local Elections are to take place on 18 May 2011. 25 March 2011 is the deadline for political parties and ward candidates to convey their intention to contest the elections and they have to do this in terms of ss 14 and 17 of the Local Government: Municipal Electoral Act No. 27 of 2000 ("*the Act*").

[5] In terms of s 14 a party may contest an election by way of party lists submitted to the Commission's local representative. A notice of intention to contest the election together with a party list and the prescribed deposit have to be submitted no later than the date stated in the election timetable.

[6] In terms of s 17 a person may contest an election as a ward candidate if he or she is nominated on a prescribed form submitted to the Commission's local office by no later than a date stipulated in the election timetable accompanied *inter alia* by the prescribed deposit.

[7] It is common cause that relevant documents and the requisite deposit were submitted to the Commission by the applicant before the cut-off time of 17h00 on 25 March 2011. Also common cause is that when submitting party lists the applicant mistakenly filled the designated number of a wrong municipality.

THE ISSUE

[8] The issue, therefore, is whether there was proper compliance with the provisions of ss 14 and 17 of the Act notwithstanding the error above.

THE FACTS

[9] To get a proper perspective of the issues it is necessary to briefly set out facts gleaned from the supporting affidavit of the applicant. Jo-Ann Downs deposed to the affidavit on behalf of the applicant. There is no opposing affidavit from the Commission.

[10] On 23 March 2011 Marlene Briel, the applicant's National Election Manager, took a bank guaranteed cheque in the amount of R309 500,00 to the Commission. Briel had lists from each province which indicated all the municipalities that the applicant was contesting, and which payment related to. The list from KwaZulu-Natal had been sent via sms to Briel and only included municipal designation numbers, not the full names of the municipalities. At the Commission's offices Briel had to fill in a form that indicated which municipalities were being competed in. This was done by simply inserting the relevant municipal designation number (e.g. KZN 271) for each of the municipalities.

[11] Briel had to complete the form by filling in all the metropolitan, local and district municipalities that the applicant was competing in. She took the details from the list that had been prepared by the applicant and then filled in the

relevant form by hand. This form was duly submitted and then electronically captured by S Whiten, a Commission official.

[12] Unbeknown to Briel she had unwittingly written the number for Umhlabuyalingana Municipality as KZN 274 which is Hlabisa (which the applicant had never intended contesting) instead of KZN 271, the designated number for Umhlabuyalingana.

[13] As a result of the above error the Commission allocated payment for Hlabisa and not Umhlabuyalingana.

[14] On 31 March 2011 the Commission informed the applicant that it appeared that no deposit had been received for the Umhlabuyalingana Municipality. When the matter was investigated the applicant realised its mistake.

[15] On 1 April 2011 the applicant addressed a letter to the Commission explaining what had occurred and requesting that the error be corrected and that the deposit allocated to Hlabisa be re-allocated to Umhlabuyalingana. A copy of the letter is marked Annexure “JD3”.

[16] The same afternoon a fax addressed to the applicant came through indicating that “*the framework does not allow for flexibility, we are therefore unable to assist in rectifying the situation*”. A copy of the letter is marked Annexure “JD4”.

[17] Subsequent efforts to negotiate and to find a solution proved fruitless. On Sunday afternoon, 3 April 2011, an email from the Commission was addressed to the applicant. It read:

> "*I write to confirm that the IEC is regrettably not in a position to change the allocations of payments after the cut-off date.*"

A copy of the email is marked Annexure "JD6".

THE LAW AND ITS APPLICATION

[18] It is difficult to understand the response "*the framework does not allow for flexibility* …" when the Commission's conduct in the past has shown just the opposite.

[19] The Commission has interpreted the Electoral Act to allow it to create a central deposit system, by which all payments to compete in municipalities can be paid centrally to the Commission. The Constitutional Court in *ACDP v Electoral Commission* 2006 (3) SA 305 (CC) (the *ACDP* case) lauded this step as being in accordance with a broad, purposive interpretation of ss 14(1)(b) and 17(2)(a) of the Electoral Act.

[20] It was submitted, correctly in my view, that the Commission was compelled, when interpreting the Electoral Act and carrying out its duties in

terms thereof, to adopt an interpretation which favours enfranchisement rather than disenfranchisement.

[21] This approach was discussed in *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC) (1994 (4) BCLR 363) in para [17] where the following was stated:

> "*Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.*"

[22] It is, therefore, clear that in interpreting any provisions of the Act the purpose thereof must be borne in mind.

[23] In the *ACDP* case where the interpretation of the very same provisions was in issue in the Constitutional Court the court said the following:

> "*[31] Of crucial relevance also is the underlying statutory purpose of ss 14 and 17 which appears to be to ensure that candidates and political parties contesting elections declare their intentions to do so by a certain date and provide the Electoral Commission with the necessary information to enable them to organise the elections. The payment of an electoral deposit ensures that the participation of political parties and candidates in the elections is not frivolous. The payment of the deposit is complementary to the key notification required for organising the elections, namely, the notification of the intention to participate and the furnishing of details of candidates.*" (See para [31]) at 319.)

[24] In the present case the applicant lodged the notice of intention to contest the election timeously. It also lodged the party list with the local office

of the Commission. In addition it lodged a deposit in a bank guaranteed cheque in the amount of R309 500,00 to the Commission on 23 March 2011, two days before the stipulated deadline of 17h00 on 25 March 2011.

[25] It is clear from the papers that when Ms Briel inserted municipal designated numbers instead of the full names of the municipalities she inserted KZN 274 instead of KZN 271 and this was a genuine mistake. It is common cause that KZN 274 is the Hlabisa Municipality which the applicant never intended contesting.

[26] The applicant argues that it fully complied with ss 14 and 17 and states that it was unaware that there was any problem relating to its documents or deposit until 31 March 2011. It learnt for the first time that late afternoon that as far as the Commission was concerned no deposit had been received for the Umhlabuyalingana Municipality elections. It was only then that the applicant realised that there had been a clerical error when on the form KZN 274 was inserted instead of KZN 271.

[27] No opposing papers have been filed by the Commission so there is no explanation for the stance that it took that the "*framework does not allow for flexibility*" when the Constitutional Court has already ruled on the issue. It is also not clear what prejudice would be suffered by either the Commission or other interested parties if there was a re-allocation of the surplus funds already deposited with the Commission.

[28] The applicant states that both Umhlabuyalingana and Hlabisa are municipalities. Since the prescribed amount for local municipalities is R2 500,00, an amount which is already in possession of the Commission, there would be no disruption in the Commission's administration if a relocation of the funds concerned was made.

[29] The purpose of ss 14 and 17 has been clearly set out in the *ACDP* case *supra* as to ensure that a deposit is paid by a political party (or ward candidate) to establish that it has a serious intention to contest the election.

[30] The facts of the present case as set out above show without doubt that there was a serious intention on the part of the applicant to contest the elections in the Umhlabuyalingana Municipality.

[31] The applicant contends that it has spent much time and effort creating an electoral presence in the above municipality. It states that although in the past it has not competed in this municipality it is optimistic that through its efforts, together with a strong set of candidates, it will be able to win seats in the Municipal Council. There is no reason to doubt this contention.

[32] From the facts it is clear that the applicant indicated its intention to contest the elections prior to the cut-off deadline of 17h00. In fact it submitted all the required documents to compete in those elections including the notification of its intention to participate by 11h35 on 25 March 2011. In

addition it had deposited the necessary funds with the Commission on 23 March 2011.

[33] In view of the above it seems to me that the Commission's refusal to allocate the duly deposited funds to Umhlabuyalingana especially when it is clear that the applicant had not intended at all to contest elections in Hlabisa was a decision that did an injustice to the right to vote and the applicant's right to participate in the local elections in terms of section 9 of the Constitution.

[34] A proper interpretation of ss 14 and 17 is the one consistent with our constitutional values. It is evident that the Commission overlooked the central purpose of these provisions when it interpreted them narrowly.

[35] In the circumstances the interpretation of ss 14 and 17 of the Municipal Electoral Court by the Commission is not correct. Its decision, therefore, ought to be set aside.

[36] The Electoral Court, having considered the application lodged by the applicant, the supporting documents and the urgent nature of the matter, has come to the conclusion that, in the exercise of its power under Rule 11, it would be appropriate in the circumstances, to issue the following order:

1. The decision of the respondent on 3 April 2011 refusing to allocate an already paid deposit by the applicant to cover contesting elections in the Umhlabuyalingana Municipality is hereby reviewed and set aside.

2. The respondent is directed to allocate the said deposit of the applicant to the election of Umhlabuyalingana Municipality.

3. It s declared that the applicant has complied with the provisions of ss 14 and 17 of the Local Government Municipal Electoral Act 27 of 2000, and is therefore entitled to contest the legal government elections to be held in the Umhlabuyalingana Municipality on 18 May 2011.

4. The Electoral Commission is ordered to take all reasonable steps forthwith to give effect to this order so as to enable applicant to properly contest the election for the Umhlabuyalingana Municipality, including:

   (a) Placing applicant's name on the list of registered parties entitled to contest the election;

   (b) placing the names of candidates of the applicant for the various wards on the final list of candidates for the Umhlabuyalingana local government elections;

(c) ensuring that all ballot papers printed reflect the applicant's and its candidates respectively.

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MASIPA J

JUDGE OF THE ELECTORAL COURT

CONCURRED:
MTHIYANE JA
PILLAY J

Date: 20 April 2011