

REPUBLIC OF SOUTH AFRICA



ELECTORAL COURT, BLOEMFONTEIN

CASE NO: 005/11 IEC

In the matter between:

INKATHA FREEDOM PARTY

Applicant

and

THE ELECTORAL COMMISSION

Respondent

Neutral Citation: *Inkatha Freedom Party v The Electoral Commission* (Case no 005/11 IEC) [2011] ZAEC 04 (12 May 2011)

J U D G M E N T

MTHIYANE, JA:

INTRODUCTION

[1] On 20 April 2011, the applicant, Inkatha Freedom Party, launched an application to this Court on notice of motion seeking two forms of relief. In the first, it sought leave to appeal against the decision of the respondent, the Electoral Commission, 'refusing to allow [Mr] Mzwandile Beatus Mbhele to contest the municipal election in Ward 4 Indaka Hotel Municipality and refusing to accept the Applicant's documentation in terms of sections 14(1) and 17(1) and (2) of the Local Government: Municipal Electoral Act 2000, at the Respondent's offices in Indaka Municipality'. The second and alternative form of relief sought is the review and setting aside of that decision. In its written submissions, the Applicant appears to have abandoned the application for leave to appeal and limited itself to the application for review. Accordingly, this matter will be dealt with as a review, which is, in any event, more appropriate.

FACTUAL BACKGROUND

[2] On 25 March 2011, two representatives of the applicant visited the office of the respondent's local representative in Indaka Municipality, in order to submit party lists, nomination forms and supporting documentation in respect of its candidates for the local government elections in Indaka Municipality. The applicant wished to nominate Mr Mbhele as its candidate for Indaka Municipality Ward 4 and tendered documentation for submission in support of that nomination. The officials of the Respondent informed the

applicant's representatives that Mr Mbhele's name did appear on Indaka Municipality's segment of the voters' roll, but rather on the segment for Msinga Municipality, and that they could therefore not accept his nomination. Confronted with this predicament, the applicant's representatives then nominated Sboniso Vincent Ndlovu as the applicant's candidate for Indaka Municipality Ward 4. This nomination was duly accepted by the respondent's officials.

[3] Mr Mbhele, who deposed to the applicant's founding affidavit, affirms that he did not register as a voter in Msinga Municipality. During the last registration weekend on 5 and 6 March 2011, Mr Mbhele visited his voting station in Indaka Municipality, to confirm that he was registered there, and indeed this was confirmed. This visit is corroborated by the respondent's records. However, the respondent's records also reflect that on the morning of 6 March 2011, Mr Mbhele registered as a voter in Msinga Municipality.

[4] Having heard that his nomination was not accepted by the respondent, due to his registration in Msinga, Mr Mbhele visited the respondent's offices in Msinga Municipality on 28 March 2011, and demanded that the respondent's officials produce the relevant registration documentation. He was informed that the relevant documentation, namely an "REC 1" application for re-registration form, could not be located. The respondent, in its first written submissions in this matter, confirmed that the documentation had still not been located. It stated, however, that the scanner that was used to scan Mr Mbhele's identity document had been operated jointly by the presiding officer and deputy presiding

officer of the station, who had both deposed to sworn statements to this effect, although neither could explain the missing documentation.

[5] This Court requested copies of these sworn statements, in its directives dated 6 May 2011, but the respondent has neither provided the statements nor explained its failure to do so. Such non-compliance is unhelpful indeed. However, the respondent did provide the requested copies of relevant parts of the voters' roll, namely (a) the page of the Msinga Municipality's segment of the voters' roll on which Mr Mbhele's name is indeed printed, and (b) the page of the Indaka Municipality's segment of the voters' roll on which Mr Mbhele's name is printed but struck out. His name is however not the only name that has been struck out. It appears that that is the way in which a removal from the voters' roll is reflected, when a voter is removed for some or other reason, including, presumably, death. There is no annotation to indicate the reason for the striking out of a person's name, which is apparently effected simply by ruling a line through the name.

[6] Mr Mbhele suspects that his re-registration in Msinga was a fraudulent attempt by 'individuals' to disqualify him from standing as a candidate for Indaka Municipality Ward 4, although he did not identify who the culprits could be. When he was asked by the respondent's officials to produce his identity document for purposes of making further investigations, he informed them that it was either stolen or lost. The respondent found itself unable to take the matter further and reported it to the South African Police Service for investigation. The respondent informed the applicant of this by letter dated 18 April 2011, which the applicant apparently identifies as the 'decision' which it seeks to have

set aside on review, presumably in the sense that, in this letter, the respondent's refusal to accept the applicant's nomination of Mr Mbhele as final.

ISSUE FOR DETERMINATION BY THIS COURT

[7] The fundamental issue raised in this application is whether the respondent was obliged to accept the applicant's nomination of Mr Mbhele as its candidate for Indaka Municipality Ward 4. Answering this question requires us to examine sections 16 and 17 of the Local Government: Municipal Electoral Act 27 of 2000, respectively relating to the nomination of ward candidates and the requirements for ward candidates to contest election. It is necessary briefly to discuss the parties' submissions in this respect.

[8] It appears from the applicant's written submissions that, although it continues to challenge the respondent's refusal to allow Mr Mbhele to contest the election in Ward 4, it no longer challenges the respondent's refusal to accept the applicant's documentation in terms of sections 14(1) and 17(1) and (2) of the Act, as it has confined its substantive submissions to the former challenge only. This abandonment is well-advised, since the respondent, on the facts before us, did not refuse to accept the documentation tendered by the applicant in respect of its proportional representation candidates (section 14(1)), or in respect of its ward candidates (section 17(1) and (2)), since it apparently accepted the documentation in respect of Mr Ndlovu and all of the other nominated candidates, apart from Mr Mbhele.

[9] The applicant contends that the impugned decision, (i.e. the respondent's refusal to accept the applicants' nomination of Mr Mbhele) is reviewable on the grounds that it: (a) was materially influenced by an error in law, as it was not justifiable under section 16 of the Act; (b) was taken because irrelevant considerations were taken into account, the irrelevant consideration being the fact that Mr Mbhele was registered in Msinga and not Indaka; (c) was not rationally connected to the purpose of the empowering provision, as the respondent is obliged to register candidates where sections 16 and 17 of the Act are complied with. In short, the applicant contends that there is no provision precluding the nomination by a registered political party of a ward candidate who is not registered as a voter on the segment of the voters' roll pertaining to the municipality in which that ward falls. The applicant submits that the respondent has wrongly applied section 16(1)(b)(ii) to Mr Mbhele's nomination, which requires the person nominating an independent ward candidate to be registered as a voter on segment of the voters' roll of the municipality in which that ward falls, and which does not apply to candidates representing a registered political party.

[10] The respondent disputes that its letter dated 18 April 2011 constitutes a 'decision' capable of review. The respondent denies that it refused to accept any nomination or documentation tendered by the applicant, but contends, on the contrary, that it accepted all of the documentation that was in fact submitted by the applicant, including those in respect of its candidate for Indaka Municipality Ward 4, namely Mr Ndlovu. In respect of Mr Mbhele, the respondent submits that it did not refuse to allow Mr Mbhele to contest the election, but merely informed the applicant's representatives that Mr Mbhele was not

registered in Indaka Municipality, whereupon they nominated Mr Ndlovu instead. Thus, the respondent relies on factual submissions and does not present legal argument.

WAS THE RESPONDENT OBLIGED TO ACCEPT MR MBHELE'S NOMINATION?

[11] While section 16 of the Act¹ prescribes the requirements for *nomination* of ward candidates, it is section 17 of the Act² that prescribes the requirements for nominated

¹ Section 16 of the Act reads as follows:

“16. Nomination of ward candidates.

- (1) A person may be nominated to contest an election in a ward by—
 - (a) a registered party; or
 - (b) a person who is—
 - (i) ordinarily resident in the municipality in which that ward falls; and
 - (ii) registered as a voter on that municipality's segment of the voters' roll.
- (2) Provided the other provisions of this Act are complied with, a person nominated in terms of—
 - (a) subsection (1)(a) stands in the ward as a ward candidate representing the nominating party; and
 - (b) subsection (1)(b) stands in the ward as an independent ward candidate.”

² Section 17 of the Act reads as follows:

“17. Requirements for ward candidates to contest election.

- (1) 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 office of the Commission's local representative by not later than a date stated in the timetable for the election.
- (2) The following must be attached to a nomination when it is submitted:
 - (a) 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;
 - (b) a prescribed acceptance of nomination signed by the candidate;
 - (c) a copy of the page of the candidate's identity document on which the candidate's photo, name and identity number appear;
 - (d) a deposit equal to a prescribed amount, if any, payable by means of a bank guaranteed cheque in favour of the Commission;
 - (e) a prescribed undertaking, signed by the candidate, to be bound by the Code; and
 - (f) a prescribed declaration, signed by the candidate, that he or she is not disqualified from standing for election in terms of the Constitution or any applicable legislation.

ward candidates to contest election, and therefore prescribes the requirements for the *acceptance* of nominations by the Electoral Commission. It is accordingly to section 17 that we must look in order to determine whether the respondent was obliged to accept the applicant's nomination of Mr Mbhele.

[12] Section 17(1) requires that the candidate is nominated on a prescribed form and that form is submitted to the respondent's local representative by the deadline set in the election timetable. The applicant's compliance with this requirement is not in dispute. Section 17(2) requires that the nomination is accompanied by certain documentation. The applicant's compliance with this requirement is similarly not in dispute. However, section 17(3) stipulates that the respondent "must accept a nomination submitted to it and allow the nominated person to stand as a candidate in the ward", if two cumulative conditions have been met, namely: (a) the provisions of sections 16 and 17(1) and 17(2) have been complied with; and (b) 'the candidate is registered as a voter on that municipality's segment of the voters' roll.'

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- (2A) If any document mentioned in paragraphs (b) and (c) of subsection (2) were not attached to the nomination, the Commission must—
- (a) notify the nominating party or person in writing by no later than the date stated in the election timetable; and
 - (b) allow the nominating party or person to submit the outstanding document by no later than a date stated in the election timetable.
- (3) The Commission must accept a nomination submitted to it and allow the nominated person to stand as a candidate in the ward if—
- (a) the provisions of section 16 and this section have been complied with; and
 - (b) the candidate is registered as a voter on that municipality's segment of the voters' roll."

[13] It is clear that section 17(3)(b) applies to all nominated ward candidates, whether they are independent or representing a registered political party, and that this provision presents an absolute bar to the acceptance of the nomination of a ward candidate who is not registered as a voter on the segment of the voters' roll for the municipality within which that ward falls. The respondent is a creature of statute, and it bears no discretion to condone non-compliance with the conditions clearly set out in section 17 of the Act.

[14] The respondent's officials, when presented with the nomination of Mr Mbhele by the applicant, duly consulted the voters' roll as section 17(3)(b) required them to do, and upon discovery that Mr Mbhele's name had been deleted from the Indaka Municipality's segment of the voters' roll, section 17(3)(b) precluded them from accepting Mr Mbhele's nomination and from allowing Mr Mbhele to stand as a candidate in Indaka Municipality Ward 4. Section 17(3)(b) does not require that, if the name of the candidate concerned does not appear on the relevant segment of the voters' roll, the official concerned must then conduct an enquiry as to the reasons for the absence of that name. Were that to be a requirement, it would render it very difficult for the respondent to conduct a proper election involving millions of South African citizens. It is sufficient for the respondent's officials to consult the voters' roll to see if a person's name appears thereon and make a decision on that basis. That is, after all, the proper and only way to ascertain if a person is a registered voter, since section 1 of the Act defines a voter as 'a person whose name appears on the voters' roll'.

[15] It cannot credibly be argued that the striking out of Mr Mbhele's name from the Indaka Municipality's segment of the voters' roll should have aroused any suspicion of fraud in the minds of the respondent's officials who were presented with the applicant's nomination of Mr Mbhele. Firstly, as mentioned, striking out appears to be the standard method of reflecting the removal of a person's name from the voters' roll, whatever the reason might be. Secondly, the presence of Mr Mbhele's name on the segment of the voters' roll for the Msinga Municipality could only have indicated to the officials on duty that Mr Mbhele had indeed re-registered in Msinga, and there was nothing to indicate to them that his re-registration was the result of fraud. Finally, and fatally for this point, it is well-established that, in motion proceedings, such as the present, the courts are bound to decide matters of fact only on the papers before them.³ We are not permitted to draw inferences of fact from affidavits, purely on a weighing up of the probabilities. Thus, in the present case, an inference of fraud, even if it was probable on the papers, would not be permissible in order to found a decision as to the duty of the respondent's officials in the circumstances. Furthermore, it would be inappropriate for this Court to base its binding decision on speculation or suspicion.

[16] On the available evidence, I am unable to find that the respondent and its officials were obliged to accept the applicant's nomination of Mr Mbhele. The decision in issue, namely the refusal to allow Mr Mbhele to stand as a candidate in Indaka Municipality Ward 4, cannot be questioned. The surrounding circumstances, however suspicious or

³ See, for example, *Langa CJ and Others v Hlophe* 2009 (4) SA 382 (SCA) at para 38; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 26; *Administrator, Transvaal and Others v Theletsane and Others* 1991 (2) SA 192 (A) at 196I-197D.

unfavourable for Mr Mbhele, cannot compel the respondent's officials to contravene the clear requirements of the Act, and cannot confer on them a power that they do not bear. It is unfortunate that Mr Mbhele finds himself in this position. I do not however see how one could come to his assistance. His only remedy lies in the police investigation, from which might emerge the truth behind his re-registration in Msinga. That truth, however, whatever it may be, could not have had any impact on the decision of the respondent's officials, nor, consequently, on the decision of this Court.

[17] In the circumstances I am unable to find that the respondent has acted irregularly. Accordingly, the review application is dismissed with costs.

MTHIYANE JA

CHAIRPERSON: ELECTORAL COURT

CONCURRED:

MASIPA J

PILLAY J

Date: 12 May 2011