

REPUBLIC OF SOUTH AFRICA



ELECTORAL COURT OF SOUTH AFRICA HELD AT BLOEMFONTEIN

Case No.002/15EC

In the matter between:

AFRICAN INDEPENDENT CONGRESS

APPELLANT

And

THE ELECTORAL COMMISSION

FIRST RESPONDENT

MATATIEL LOCAL MUNICIPALITY

SECOND RESPONDENT

AFRICAN NATIONAL CONGRESS

THIRD RESPONDENT

JIMMY THABO TSHABALALA

FOURTH RESPONDENT

Neutral Citation: *African Independent Congress v The Electoral Commission and Others* (Case no 002/15EC) [2016] ZAEC 1 (8 February 2016)

JUDGMENT

MTHEMBU [MEMBER] [SHONGWE J.A. AND WEPENER J. concurring]

INTRODUCTION

[1] On 25th November 2015, this court heard both parties and reserved judgment. It later, after deliberations, issued an order dismissing the appeal with no order as to costs with reasons to follow. What follows are the reasons for the order.

[2] This matter comes before the Electoral Court by way of an application for leave to appeal, lodged by the Appellant in terms of Section 20 (2) (b) of the Electoral Commission Act, 51 of 1956 which leave was granted by the Chairperson of the Electoral Court, against the decision taken by the first Respondent (The Commission) rejecting the appellant's objection.

[3] The principal issue for determination in this appeal is the validity of the first Respondent's decision, rejecting the objection lodged by the appellant against the declared results of the by-elections, held at the voting district No. 11781042, in

the voting station located at Lerato Junior Secondary School on 30 September 2015.

The subsidiary issue is whether the objection lodged by the appellant against the alleged irregularities, that such irregularities are material to the declared overall results of the by-election as contemplated in Section 55 of the Local Government Municipal Electoral Act, 27 of 2000 (The Act).

[4] **BACKGROUND**

As this case concerns a challenge to the validity of the Commission's decision to reject the Appellant's objection and whether the alleged irregularities materially affect the overall outcome of the declared results of the by – elections. It is necessary, at the outset, to mention by way of background, a brief narrative of certain facts and circumstances which bear on the questions to be decided in this appeal and which precipitated the launching of this appeal.

[5] By means of a Provincial Notice No.98 of 2015; the Member of the Executive Council responsible for Local Government, Eastern Cape (The MEC), acting in terms of Section 25(4) of Local Government Municipal Structures Act, 117 of 1998; On 28 August 2015 called and set a date of 30 September 2015 for holding the by-elections in Ward 12 at Matatiel Local Municipality.

- [6] The by-election was held on 30 September 2015 and contested by 2 candidates, one nominated by and representing the appellant and another nominated by and representing the third respondent.
- [7] One of the 6 voting districts in this ward is voting district No. 11781042, comprising of 960 registered voters, whose voting station was located at Lerato Junior Secondary School.
- [8] Primarily relevant and challenged in this appeal are the election processes followed, the alleged irregularities committed in the conduct and management of the by elections and the final results of the by elections declared. The voting processes and the alleged irregularities at this voting station form the main subject matter of complaint in this by election. The declared results of the by election was that the candidate nominated by and representing the third respondent (the ANC) obtained 400 votes and the appellant obtained 70 votes.
- [9] The appellant contended and motivated the objection on the basis that the by election was irregular and stands vitiated by the following irregularities;

- (i) The ballot box used at the voting station was placed in an obscure location where it was not visible to all in the voting station / hall for a period of about 30minutes;
- (ii) The Presiding Officer had insisted that party agents and the SAPS officials go for a lunch break outside the voting station between 12H55 and 13H10. This, the appellant contended, was unusual and suspects that the Presiding Officer and his staff members had used this opportunity to tamper with the ballot box and ballot papers;
- (iii) Before the lunch break adjournment, 166 votes had been cast, but, no later than an hour after returning from the lunch break adjournment 320 votes had been cast, despite that, according to the observation of the appellant's , party agent, only about 50 people had cast their votes during the period after the lunch break adjournment.

[10] Upon receipt of these objections and incompliance with the provisions of Section 65 (4) (a) of the Act, the first respondent caused an investigation to be conducted into these complaints.

[11] As part of such an investigation, the Commission obtained statements from the Presiding Officer and a member of the SAPS, who had been deployed at the voting station for the sole purpose of safeguarding the elections.

According to the Commission, its investigation into the matter of complaints of irregularities lodged by the appellant revealed the following;

- (i) As regards the complaint about placement of a ballot box in a position where it was obscured and not visible to the party agents and all present at the voting station;

The obscurity of the ballot box lasted for only about 30minutes and a remedial measure was undertaken immediately after a complaint was lodged. The ballot box was repositioned to a place visible to the satisfaction of the appellant and all concerned;

- (ii) As regards closing the voting station for a lunch break, the Commission found such conduct to be highly irregular, but contended that when a decision was taken to close the voting station for a lunch break, there was, at that stage, no voting activity taking place at the voting station and such decision to close the voting station was unanimously taken by all officials conducting and managing the election process at the voting station.

The only two frontal door entrances to the voting station building structure were locked. All the commission officials, party agents and SAPS members were requested to and did leave the voting station during the entire lunch break period. The photographs of the building structure submitted to the first respondent depict that the building structure used as a voting station does not have a back door. The only two entrance doors to the voting

station were in the front of the building structure, one used by voters as an entrance and another as an exit point. According to the investigation, no evidence showed that some or any of the votes were cast fraudulently during the lunch break adjournment.

[12] As regards the dispute that 166 votes were cast just before closure for the lunch break adjournment, and an hour later after opening the voting station for voting, that 320 votes were found to have been cast, notwithstanding the appellant's observation that not more than about 50 people cast their votes after the lunch break adjournment. The Commission, found, inter alia, that contrary to the appellant's allegations that the number of votes cast before closure of the voting station for the lunch break was 166, the zip zap scanner data examined tell a different story, it showed that a figure of 358 votes were cast. Identity documents scanned with the zip zap scanner indicates 367 persons had voted, 9 of which were found either not to be on the voter's roll or not registered at all in the voting district in question.

[13] According to the appellant's objection, the total number of 154 votes were fraudulently cast, calculating from the alleged figure of 166 votes cast before the lunch break and 320 shortly thereafter. By subtracting 166 votes cast before the

lunch break from the total number of 320 votes cast shortly thereafter, a figure of 154 stands disputed.

This, the commission contended, was contradicted by the data extracted from the zip zap scanner, which provides the only best, reliable and the only objective evidence in deciding the matter.

In addition, the Commission, in its investigation found that having regard to the fact that the overall margin of victory to this ward was 256 votes in favour of the third respondent, 154 votes that remain disputed or allegedly fraudulently cast do not materially affect the outcome of the declared by election results.

Logically, this means that even if the 154 allegedly fraudulently cast votes could either be disregarded or added to the total votes obtained by the appellant, it would not change or alter the results of the by election.

Based on this reasoning and /or submission, the Legal Services Department of the first respondent recommended to the Commission investigation Committee that the objection lodged by the appellant be rejected and the appellant was advised of the First Respondent's rejection decision on 16 October 2015.

[14] It is perhaps prudent at this juncture to touch on the scheme of the Act relevant to some of the irregularities and issues placed in dispute in this appeal.

Section 45 of the Act provides;

*"(i) Unless the Commission determines other voting hours for an election in general or for a particular voting station, a voting station **MUST**;*

(a) Open for voting at 07:00; and

(b) Remain open for voting until 21:00

(ii) If the Commission determines other voting hours for an election in general or for a particular voting station, it must make the voting hours known in a way that ensures sufficient publicity of those hours." (My Emphasis)

[15] The cardinal rule of construction of statutes as **STRATFORD JA held in BHYAT vs COMMISSIONER OF IMMIGRATIONS 1932AD 125 at 129**, is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment...in construing a provision of an Act of Parliament, the plain meaning of its language must be adopted, unless it leads to absurdity, inconsistency, hardship or anomaly which, from a consideration of the enactment as whole, a court of law is satisfied that the legislature could not have intended.

[16] The effect of that formulation, according to **SCHULTZ JA in POSWA vs MEMBER OF THE EXECUTIVE COUNCIL FOR ECONOMIC AFFAIRS, ENVIRONMENT AND TOURISM, EASTERN CAPE 2001 (3) SA58 SCA [2001] (6) BCLR545**, is that the court does not impose its notion of what is absurd on the legislature's judgment, as to what is fitting, but uses absurdity as a means of deciding what

the legislature could not have intended and therefore did not intend, thus arriving at what it did actually intend.

[17] **TROLLIP JA in S vs WYNEBURG 1979 (3) SA 89A at 98D – G**, remarked as follows;

'I think the starting point... is to emphasise the general well known principle that, if possible, a statutory provision must be construed in such a way that effect is given to every word or phrase in it: or putting the same principle negatively, which is more appropriate here; a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant...'

[18] Recently, in **Natal Joint Municipal Pension Fund vs Endumeni Municipality 2012 (4) SA 593 SCA Para 18**, the SCA, after an in depth analysis of the authorities relating to the interpretation of documents stated;

'...Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument...having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence....consideration must be given to the language used in the light of the rules of grammar and syntax, the context in which the provision appears, the

apparent purpose to which it is diverted and the material known to those responsible for its production.... A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

The inevitable point of departure is the language of the provision itself read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[19] The voting hours prescribed by Section 45(1) (a) (b) of the Act, are PEREMPTORY, hence the use of the word **MUST** in the language of the statute.

To say the provisions of this statute were not followed or violated in the conduct and management of the by election is to state the obvious.

[20] The plain language of the statute is simply couched as follows;

'unless the commission determines other voting hours for an election in general or for a particular voting station, a voting station **MUST**;

(a) Open for voting at 7:00; and

(b) Remain open for voting until 21:00.'

[21] A breach of such a peremptory provision, clearly indicating the intention of the legislature constitutes gross irregularity.

[22] 'Accessing the materiality of compliance with legal requirements in our administrative law is an exercise unencumbered by excessive formality. Formal distinctions were drawn between **"mandatory" or "peremptory"** provision and **"directory"** ones on the other, the former needing strict compliance on pain of non validity and the latter only substantial compliance or even non compliance. *The strict mechanical approach has been discarded'* [own emphasis].

[23] This, in my respectful view, is not an inconsequential irregularity merely because its impact does not materially change, alter or affect the declared results of the by election. A proper determination of the voting hours in an election is an important component in the conduct and management of the whole election process because voters, the public and parties have their own daily livelihood commitments and have to be well informed of the date, place and most importantly time for voting.

In **ALLPAY CONSOLIDATED INVESTMENT HOLDINGS [PTY] LTD and OTHERS vs CHIEF EXECUTIVE OFFICER, SOUTH AFRICAN SOCIAL SECURITY AGENCY, AND OTHERS 2014 (1) SA 604 (CC) F**, the Court held; 'A fair process does not demand perfection and not every flaw is fatal. Public interest dictates that a [procurement] process should not be invalidated for minor inconsequential flaws.'

[24] In **ALLPAY** the SCA dealt with procurement irregularities and the dispute turned on whether the award of a tender by **SASSA** to **Catch Master Services [PTY] LTD** for the countrywide payment of social grants to beneficiaries was constitutionally valid.

[25] As is the position **in casu**, **ALLPAY** relied on a number of alleged irregularities in the tender process. The SCA, in the end found that there were no unlawful irregularities, but also commented in general terms on the proper approach to be followed in the determination of matters of this kind.

[26] The SCA suggested that initially, it is necessary to examine the following;

- (i) The alleged irregularities in the procurement process;
- (ii) The proper legal approach to the existence and legal effect of proven irregularities; and
- (iii) Application of this approach to the facts

Although the SCA eventually decided the matter on the grounds that there were no unlawful irregularities in the procurement process, but, **ALLPAY AND CORRUPTION IN WATCH** contended that, 'certain passages in its judgment

lend themselves to an interpretation that impermissibly endorses a relaxed approach to procedural requirements of public requirement tenders.'

[27] Dealing with irregularities, the Constitutional Court emphasized that, 'public interest dictates that a procurement process should not be invalidated for minor inconsequential flaws.'

[28] 'There will be few cases of any moment in which flaws in the process of public procurement cannot be found; particularly where it is scrutinized intensely with the objective of doing so. But, a fair process does not demand perfection and not every flaw is fatal.

It was submitted that a process of procurement has a value in itself which must lead to invalidity if the process is flawed irrespective of whether the flaw has consequences. It would be gravely prejudicial to the public interest, if the law was to invalidate public contracts for inconsequential irregularities.'

[29] The introduction in the procurement process and similarly also in the election process of what the SCA describes as, "inconsequential irregularities", suggest that some irregularities are of less impact than others in the overall results or outcome

of the process and that some irregularities are of no impact at all to the overall outcome or results of the elections/procurement.

[30] The Court held that in spite of the alleged inconsequential irregularities that fact point to the inescapable conclusion that SASSA considered the technical solution offered by CASH MASTER to be materially superior to that of ALLPAY according to key criterion for proposals.

[31] **ALLPAY** argued that the SCA's analysis was flawed. On the approach of the SCA an inconsequential irregularity is an irregularity which, despite its existence, would not affect the final outcome of the award. On this approach an irregularity is inconsequential when, on a hindsight assessment of the process, the successful bidder or [candidate] in an election process; would likely still have been successful despite the presence of the irregularity.

[32] This focus on an "inconsequential irregularity presents a different enquiry from the one commonly used, where the Courts only look at immaterial irregularity". The SCA rejected some irregularity on the basis that the requirements did not have the force of law and that, consequently, legal invalidity did not flow from non-compliance.

[33] The irregularities submitted by the appellant and on which he relies for his objections need to be subjected to this materiality test, pronounced in the ALLPAY, to determine or establish whether despite their existence, these irregularities would affect or not affect the outcome of the award or the by election results.

[34] The 3 irregularities submitted by the appellant and on which the appellant relies for its objection, measured on this test, clearly become inconsequential irregularities which, despite their existence, would not affect the final outcome of the declared by election results.

[35] On the approach suggested by the SCA in determining matters of this kind it is necessary to determine the materiality of the irregularity submitted, to establish whether it would likely change or alter the outcome of the declared by election results.

[36] It appears disturbing that the voting station closed for a lunch break between 12H55 and 13H10, without any determination by the Commission on that aspect. In the Electoral Commission's Appeal Record it appears that the application letter addressed to the Commission, seeking authority to close the voting station at 7pm

was delivered to it so late that the Commission could not convene a meeting to authorize closure of the voting station at 7pm, yet, the voting station closed at 7pm without an authorization from the Commission so to close. To say that the provisions of Section 45 of the Act, were violated by the first respondent is to state the obvious.

[37] A party agent of the appellant demanded from the presiding officer an objection form to record an objection during the voting process. The presiding officer responded by denying that he had one, and later filed an affidavit denying, not only this occurrence, but also that he ever said he did not have the objection form. But at page 67 of the Commission's Appeal Record, the presiding officer is requested to enlist all the election material supplied to him for this voting station. The presiding officer enlisted that he was not supplied with an objection form in the election material supplied to him by the Commission. It is either the presiding officer did not have the objection forms in the election material supplied by the Commission to him for the voting station, or was not telling the truth in his affidavit when he said he did have the objection form.

[38] The commission considered that these are gross irregularities and indicated its intention to institute disciplinary proceedings against members of its staff found to have committed any of these irregularities.

COSTS

[39] The appellant prayed for an Order for costs against the respondents. The first respondents also prayed for dismissal of the application.

The question of costs has already been settled in this Court. As a general rule, this court does not make costs orders.

There appears to be no compelling grounds submitted, to compel a deviation from this general rule regarding costs in this matter.

I therefore do not propose to make an order in this regard.

CONCLUSION

[40] On a consideration of the factors relevant to this appeal, the evidence submitted on affidavit, parties' representations and submissions made on behalf of all the parties, I am inclined to the view that the appellant has failed to show on a balance of probability that all the irregularities allegedly committed in the conduct and management of the by – election materially affected the overall outcome / results of the by election.

This, therefore, means that the application falls to be dismissed.

In the result the following order shall issue;

(i) The appeal is dismissed;

(ii) No order as to costs.

M.M. MTHEMBU

**MEMBER OF THE ELECTORAL
COURT**

CONCURRED:

SHONGWE JA

WEPENER J

08 February 2016