

REPUBLIC OF SOUTH AFRICA



ELECTORAL COURT, BLOEMFONTEIN

CASE NO: 007/22EC
Reportable

In the matter between:

SANDILE JEROME LUTHULI First Applicant

THAMSANQA MKHIZE Second Applicant

NICOLAS NXUMALO Third Applicant

and

**THE ELECTORAL COMMISSION
OF SOUTH AFRICA** Respondent

and

In the matter between:

THANDEKA P NDLOVU First Applicant

SANDILE MEYIWA Second Applicant

THABANI C MADIBE Third Applicant

KHAYELIHLE ZUNGU Fourth Applicant

NOTHANDO J NGIDI Fifth Applicant

FIKILE MKHIZE Sixth Applicant

LUNGELO W ZULU Seventh Applicant

THAMSANQA MKHIZE Eighth Applicant

and

**THE ELECTORAL COMMISSION
OF SOUTH AFRICA** Respondent

Neutral Citation: *Luthuli and Others v The Electoral Commission of South Africa and Ndlovu and Others v The Electoral Commission of South Africa* (Case 007/22EC) [2022] ZAEC 8 (17 June 2022)

Coram: MBHA JA, MODIBA J and SHONGWE AJ and PROFESSOR NTLAMA-MAKHANYA and PROFESSOR PHOOKO (Members)

JUDGMENT

MBHA JA (MODIBA J and SHONGWE AJ and PROFESSOR NTLAMA-MAKHANYA and PROFESSOR PHOOKO (Members) CONCURRING):

[1] On 3 November 2021, after the holding of the 2021 Local Government Elections (LGE 2021), four individuals who contested in eThekwin Municipality (Ward 7), namely, Sandile Jerome Luthuli, Thamsanqa Mkhize, Nicolas Nxumalo and Mr Ndlovu of the New Freedom Party lodged an objection with the Independent Electoral Commission (the Commission) in terms of s 65(1) of the Local Government: Municipal Electoral Act 27 of 2000 as amended (the Electoral Act).

[2] The relevant part of the objection read as follows:

'At Ntshongweni Primary there was missing of ballot box number or serial number.

Due to the missing of ballot box as the ward 07 candidates . . . dispute and declare that the election processes were not Free and Fair in this VD.

At Damini VD the ANC was campaigning on the VD openly. They told the people to vote for ANC candidate Luthando Jali (Sjongo). And play the Radio closely to VD which is not accepted according to the IEC policies.'

The objection specifically called for the holding of a by-election in Ward 7 as a result of the allegation of the missing box.

[3] On 6 November 2021, the Commission sent correspondence to the complainants stating that it had investigated and considered the s 65 objection

but had resolved to dismiss it. The basis of the dismissal was that the objection lacked merit and that there was no evidence provided to show that the objection would have been material to the outcome of the final result.

[4] Subsequent to the dismissal of the objection, three of the complainants, namely, Messrs. Luthuli, Mkhize and Nxumalo, launched an application in this Court seeking to appeal the decision of the Commission dismissing the objection on the basis that they were not afforded an opportunity to produce evidence in support of the objection. The complainants, who I will for convenience refer to as the 'first applicants', sought an order setting aside the decision of the Commission to dismiss the objection and that a by-election be held in Ward 7 as the elections, especially in Ntshongweni and Damini VD's, were not free and fair. The first applicants' Notice of Motion is marked 'AA2'.

[5] Another Notice of Motion has been filed in this matter under the same case number. It bears the names of eight individuals cited as the first to the eighth applicants. None of these individuals is part of the first applicants. Nonetheless, they similarly appeal the decision of the IEC, dismissing their objection as contained in the IEC's correspondence dated 6 November 2021 under the same reference number 3080007. The relief they seek is similar to that sought by the first applicants. I will refer to these individuals as the 'second applicants'.

[6] The second applicants have filed a host of founding affidavits and purported supporting affidavits in which various complaints were raised, which can be summarised as follows:

- 6.1 There were electricity outages at the voting districts concerned, which affected voting;
- 6.2 The Voter Management Devices (VMD) were not utilised;
- 6.3 People were turned away and prevented from voting as their names did not appear of the Voters' Roll;
- 6.4 A certain Presiding Officer (PO) acted impartially when addressing their complaints;
- 6.5 A lack of MEC 7 forms;

- 6.6 The elections not being organised properly and procedures not being followed; and
- 6.7 There were long queues at voting stations which were then closed early and re-opened.

[7] The filing of separate and different Notices of Motion is an irregularity. Whilst I understand that the applicants are laymen and that there could possibly be an explanation, there is a more serious irregularity in that the bases upon which the second applicants rely is not at all contained in the objection filed on 3 November 2021. Not only that, the second applicants were not even party to that objection. As shown above, the objection confined itself to two issues: an alleged missing ballot box number or serial number; and allegations that the African National Congress (ANC) were unlawfully campaigning openly at a voting district.

[8] What one can term as 'new allegations' made by the second applicants cannot legally be raised in this application as the '*internal process/remedies*' have not yet been exhausted before the Commission. In other words, as these new allegations did not form part of the objection dated 3 November 2021, they may not be raised in these proceedings and be considered as they were not part of the objection process. Neither were they ever submitted to the Commission to date of this application for consideration.

[9] To sum up, the applicants seek to appeal a decision of the Commission in circumstances where:

- 9.1 The alleged conduct now complained of was never included in the objection or placed before the Commission and decided upon; and
- 9.2 No supporting documents or evidence alluding to the alleged conduct now complained of was included in the objection or placed before the Commission.

[10] The Commission cannot investigate and determine an objection that was never placed before it. Similarly, the applicants cannot appeal a decision before this Court of the Commission that was never made in relation to an objection that

was never lodged. This entire application falls to be dismissed on this irregularity alone.

[11] I now consider the application vis-a-vis the objection lodged by the first applicants on 3 November 2022. Before doing so, I need to deal with the Commission's application for condonation for the late filing of its opposing affidavit.

[12] In terms of the directives issued by this Court on 23 May 2022, the Commission had until Friday, 27 May 2022, to file its answering affidavit. However, this was done on Monday, 30 May 2022. Thus the Commission, as respondent, was effectively one court day late filing its opposing papers.

[13] The explanation given for the lateness by the deponent to the founding affidavit, Mr Ryan Anthony Daly, is that there was a bona fide administrative error in that the signed opposing affidavit was not returned timeously to him for filing. Upon investigating, he discovered that the opposing affidavit was sent to him via an incorrect email address by one Ms Mosia, an employee of the Commission. Ms Mosia has filed a supporting affidavit in this respect.

[14] The explanation proffered for the lateness is, in my view, reasonable. More so, it was filed a mere one day out of time. It has not been demonstrated that the applicants have or will suffer any prejudice by the late filing of the opposing affidavit. The application ought, in the circumstances, to be granted.

[15] The application brought by the first applicants is fatally defective. I say so because no founding affidavit is deposed to by any of the first applicants, notwithstanding the fact that they were the complainants or objectors who lodged the objection on 3 November 2021.

[16] The first applicants opted instead to rely on accompanying affidavits by community members and party agents in support of their application to set aside the decision of the Commission dismissing their objection. However, as I have

demonstrated earlier, these affidavits have no bearing or relation whatsoever to the objection dated 3 November 2021 that the first applicants filed.

[17] It is trite law that a petition is to be made on notice of motion together with a founding affidavit that provides the material facts relied upon for the relief sought. Furthermore, the onus rests on an applicant to fully and properly make out his or her case in the founding papers.¹ The first applicants' failure in this regard is so material such as to render their application dismissable on this ground.

[18] The application is also rendered defective by the non-joinder² of interested and necessary parties. Bearing in mind that the relief sought is *inter alia* a by-election in Ward 7, it follows that all parties and individuals who contested in Ward 7 on 1 November 2021 ought to have been joined and cited in these proceedings. More so, as the second ground of the objection, contains the allegation of unlawful conduct on the part of the ANC by allegedly openly and wrongly campaigning within the voting station, it follows that the ANC ought to have been served with the papers and afforded the opportunity to deal with these accusations.

[19] In terms of s 65(1), the objector must demonstrate that the objection is material to the outcome of the results of the election in relation to:

- (a) any aspect of the voting or counting proceedings provided for in Chapter 5 or Chapter 6 respectively; or
- (b) alleged and unlawful–
 - (i) interference with or obstruction of election activities or processes in the vicinity of, at or in a voting station; or
 - (ii) interference with or influencing, intimidation or obstruction of voters or prospective voters in the vicinity of, at or in a voting station.'

[20] In my view, the objection lodged does not satisfy the materiality test prescribed in s 65(1). It contained no particularity or detail and only consisted of

¹ *Transnet Ltd v Rubenstein* [2005] 3 All SA 425 (SCA); 2006 (1) SA 591 (SCA) para 28.

² *Bowring NO v Vrededorp Properties CC* [2007] ZASCA 80; [2007] SCA 80 (RSA); 2007 (5) SA 391 (SCA) para 21.

vague allegations. Reference is made to a missing 'ballot box number or serial number', but no further information is provided.

[21] There is also reference to allegations in respect of the ANC campaigning in the voting district openly. However, no evidence is provided, and insofar as this allegation may be true (which has been vehemently denied by the Commission), it has not been demonstrated how this would or did affect the outcome of the results in Ward 7.

[22] Importantly, no supporting documentation was provided to comply with the peremptory requirements of s 65(2)(h). This section requires a list of supporting documents to accompany the notice of objection.

[23] The applicants aver that it was agreed that they would submit whatever necessary evidence later but that they were never afforded the opportunity to do so. But this complaint cannot hold. The provisions of s 65(2) of the Electoral Act are clear. An objector must comply with the provisions thereof and must lodge an objection in the matter as prescribed. The Commission can only explore evidence presented to it or found by it during its investigation of information and documents provided. In this case, only scant and vague information was provided, and no evidence to substantiate the objection was provided or found.

[24] In light of what I have found, as stated above, I am satisfied that the Commission was correct when it dismissed the objection on the basis that it lacked merit.

[25] In the circumstances, the following order is made:

- 1 The respondent's application for condonation of the late filing of the opposing or answering affidavit is granted.
 - 2 The entire application is dismissed.
 - 3 There is no order as to costs.
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B H MBHA
CHAIRPERSON
OF THE ELECTORAL COURT

17 June 2022