



**THE ELECTORAL COURT OF SOUTH AFRICA
BLOEMFONTEIN**

Case no: 005/2024EC

In the matter between:

NATIONAL FREEDOM PARTY

APPLICANT

and

ELECTORAL COMMISSION OF SOUTH AFRICA

FIRST RESPONDENT

MCELELENI SIMON MLANGENI

SECOND RESPONDENT

SIPHOKAZI ZULU

THIRD RESPONDENT

Neutral Citation: *National Freedom Party v Electoral Commission of South Africa and Others* (005/24EC) [2024] ZAEC 07(08 March 2024)

Coram: Zondi JA, Adams and Yacoob AJJ, and Professors Ntlama-Makhanya and Phooko

Heard: 08 March 2024 Decided in chambers on the papers.

Delivered: 26 April 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by publication on the website of the Supreme Court of Appeal and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 26 April 2024.

Summary: Application to compel Electoral Commission to recognize one faction of party over another – effect of application for leave to appeal – requirement to join and serve application on all interested parties – application dismissed.

ORDER

1. The second and third respondents are granted leave to intervene in these proceedings with no order as to costs.
 2. The applicants' application is dismissed, with no order as to costs.
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JUDGMENT

Yacoob AJ (Zondi JA and Adams AJ and Professors Ntlama-Makhanya and Phooko (Additional members) concurring):

[1] This court granted an order as set out above on 08 March 2024, with reasons to follow. These are the reasons for the order.

[2] The application had to be determined on the morning of 08 March 2024, because the application would have become moot had it been determined later. This is because the election timetable gazetted on 24 February 2024 requires registered parties contesting the national elections on 29 May 2024 to submit their list of nominated candidates by the close of business on 08 March 2024. Had the application been successful, it would have permitted a different group of people to submit a list on behalf of the National Freedom Party ("the NFP").

[3] The NFP, ostensibly the applicant in this matter, approaches this court for an order compelling the Independent Electoral Commission of South Africa ("the Commission") to recognise the National Executive Committee ("NEC") elected at a National Elective Conference in Ulundi in December 2019 as "the only lawful structure that is bestowed with authority and responsible for the day to day duties and functions of the NFP both administratively and politically". This application was brought so as to allow the persons elected to the NEC in 2019 to be the authority that submits a list to the Commission on the NFP's behalf, in order to contest the National and Provincial Elections to be held on 29 May 2024.

[4] As will be seen below, there is reason to doubt that the NFP is properly the applicant before us. I therefore refer to the deponent, Mr Zulu, as the true applicant, or to his faction. Mr Zulu acknowledges in his replying affidavit in this application that the real applicant is his faction within the NFP. Until an order is made, either by this court or another, that Mr Zulu's faction or the 2019 NEC is the valid authority of the NFP, it would, in my view, be premature to refer to them as the NFP.

[5] The NFP has been subject to leadership disputes since before the 2019 national elections. At that stage, apparently in order to permit it to contest those elections, an agreement was entered into that the leadership of the party would consist of members of both factions, and that the election lists would consist of members of both factions. This Interim National Executive Committee would, among other things, hold proper elections to elect new leaders. An elective conference was held in Ulundi in December 2019, but the validity of the elective conference was challenged in the Kwazulu-Natal High Court. In November 2021, the court set aside the December 2019 conference and everything resulting from it. An application for leave to appeal was brought in December 2022 and granted in May 2023. This order was rescinded. Leave to appeal was then granted again on 17 November 2023. The appeal is pending, together with an application for condonation, before the SCA. The appellant in that matter is Mr Zulu, the deponent to the founding affidavit in this matter, and not the NFP.

[6] In the meantime, in December 2023, a new elective conference was held at which a new NEC was elected. Mr Zulu alleges that this conference is also now the subject of an application to set it aside. He contends that, since the court order setting aside the 2019 elections is under appeal, the *status quo ante* continues and the NFP is entitled to participate in the upcoming national elections, with the recognized leaders being those elected at the Elective Conference in 2019. However, the Commission has, on 26 February 2024, recognized leadership elected on 15 and 16 December 2023. The question then arises what the *status quo ante* is, and which of two sets of NECs, both of which are challenged before a court, is the correct one. However, that question is not before us, nor can it be, for a number of reasons, including that Mr Zulu has inexplicably failed to join or serve

the application on the 2023 NEC, despite their obvious interest in his application.

[7] While the disputes were ongoing, and until 26 February 2024, the Commission declined to recognize any leadership of the NFP, and had not allowed it to participate in any elections. The applicant contends that, since the court order setting aside the elections is under appeal, the *status quo ante* continues and the NFP is entitled to participate in the upcoming national elections, with the recognized leaders being those elected at the Elective Conference in 2019. However, the Commission has, on 26 February 2024, recognized leadership elected on 15 and 16 December 2023. The deponent claims that the election has been challenged in court but those documents do not appear to have been annexed, or else have been omitted from the documents available to the court.

[8] Mr Zulu, or his faction, were directed to serve the application on the 2023 NEC, but because the decision had to be made before close of business on 8 March 2023, due to the constraints of the electoral timetable, the order was made without reference to any input by the 2023 NEC faction of the NFP.

[9] An application for intervention, dated 7 March 2023, was received from the 2023 NEC faction after the order was issued, but taking into account that the order dismisses the application, there is no prejudice to that party, and there is no need to join them after the fact. However, it will be ensured that this judgment is served on them so that they are aware of the outcome and the reasons therefore.

[10] Applications for intervention were made by two members of the NFC, as interested parties who claimed not to be aligned with either faction, but did not support the relief sought, as, in their view, it did not further the interests of the NFC. Their applications were granted and they are the second and third respondents in the matter.

[11] Although the versions set out by the respondents in this matter add weight to the decision taken, it is possible to reach the conclusion we do even without reference to those versions. In our view the application was fatally flawed from the outset.

[12] Firstly, shorn of any other complications, the relief sought by Mr Zulu is based on a belief that his application for leave to appeal the decision setting aside the 2019 Conference changes the *status quo ante* to one in which the 2019 NEC is functional and recognised. However, this was not in fact the *status quo ante* which existed. The *status quo ante*, on Mr Zulu's own version, was that nobody was recognised by the Commission as the authority of the NFC. His application for leave to appeal, at best for him, restores that position.

[13] Secondly, Mr Zulu takes the view that, because the validity of the 2023 NEC has been challenged, this means the 2019 NEC should be recognised. The logical flaw in this is obvious, as the validity of the 2019 is also challenged, and if one cannot be recognised for being challenged, the same must apply to the other.

[14] Thirdly, Mr Zulu does not seek to review and set aside the decision of the Commission recognising the 2023 NEC. If that is not done, that decision stands. If the court grants Mr Zulu's application, then the Commission will have to recognise a second NEC as the NFC's authority, which is obviously impossible.

[15] Fourthly, Mr Zulu takes the view that the relief he seeks may be considered and granted without any notice to the 2023 NEC. This is clearly not possible, as they are, at the very least, interested parties. In addition, the relief sought clearly prejudices them and cannot be considered in their absence. In his replying affidavit, Mr Zulu makes the concerning allegation that the Commission is biased because they brought to the attention of Annandale AJ, in proceedings seeking the identical relief as in these but in the KwaZulu-Natal High Court, that there had been a non-joinder of directly interested parties, that is, the people who had challenged the 2019 Conference. He blames the Commission for the fact that his application was not successfully determined when it served before Annandale AJ, because he was directed instead to serve on interested parties. This is clearly no indication of bias, as no court would granting relief which clearly has a direct and prejudicial impact on persons who have not been joined, and who have a real legal interest. Had the Commission not pointed out the non-joinder, it is likely that it would have been pointed out by Annandale AJ herself. The allegations of bias against the

Commission by Mr Zulu have absolutely no foundation in this matter.

[16] Fifthly, as referred to in the paragraph above, Mr Zulu brought an application for identical relief in the KwaZulu-Natal High Court. Those proceedings are still pending. This court cannot entertain this matter unless those proceedings have been withdrawn, for obvious reasons. In addition, Mr Zulu's approach smacks of forum shopping, which cannot be condoned.

[17] The second and third respondents' application to intervene is dated 6 March 2024. The second respondent, Mr Mlangeni, is a branch secretary who was an observer of the 2023 Elective Conference, and the third respondent, Ms Zukulu, is a member in good standing of the NFP. They are the people who have instituted an application to set aside the elective conference held in 2023. They contend that, not only should Mr Zulu's application not be successful, but that the Commission ought never to have recognized the 2023 NEC. We note that the validity of that recognition is not before us at this point.

[18] Mr Mlangeni states that there are two factions and two NECs, both purporting to operate as the NFP. He alleges that Mr Zulu's faction has been dormant for some years and in fact had previously acknowledged that its election was flawed.

[19] As far as Mr Zulu's founding affidavit is concerned, Mr Mlangeni alleges that Mr Zulu has not renewed his membership and is not in good standing. He also disputes the validity of the resolution empowering Mr Zulu to bring the application, in light of the factional disputes with which the NFP is beset. Mr Mlangeni and Ms Zukulu appear to take the position that no NEC can at present be recognized by the Commission, because each only has factional support and both are, according to them invalid, but that, of course, is not an issue before us at this point.

[20] The explanatory affidavit filed by the Commission confirms the "long history of factionalism" in the NFP and explains in clearer detail the various litigation that it was aware of, which has assisted in the summary above. It also raises procedural objections which had been apparent to this court from reading the founding affidavit of Mr Zulu. It is obliged to point these obstacles out as an independent body which

is before the court and which has to implement not only the orders of this court but also its constitutional mandate.

[21] Mr Zulu's replying affidavit does not add much to be considered. He confirms that he brings this application only on behalf of one faction, and not of any united version of the NFP. He concedes that the urgency is self-created, but, as indicated above, unjustifiably blames the Commission for not allowing him to obtain the order in the High Court. Taking into account that, in any event, the application was fatally flawed when the founding affidavit alone is considered, the replying affidavit does not add to weight to the application.

[22] It is for these reasons that the order below was granted:

1. The second and third respondents are granted leave to intervene in these proceedings with no order as to costs.
2. The applicants' application is dismissed, with no order as to costs.

S YACOOB
Acting Judge of the Electoral Court
Bloemfontein

APPEARANCES

For the applicant:	S Bharath
Instructed by:	Bharath and Associates, Pietermaritzburg
For the first respondent:	M Kanyane
Instructed by:	Moeti Kanyane Attorneys, Pretoria
For the second respondent:	N Moodley
Instructed by:	Kanhai Moodley and Associates, Durban
For the third respondent:	In Person
Instructed by:	In Person