



**THE ELECTORAL COURT OF SOUTH AFRICA  
BLOEMFONTEIN**

**Not Reportable**  
**Case No: 0018/24EC**

In the matter between:

**THE GIVING FOUNDATION NPC**

Applicant

and

**ELECTORAL COMMISSION OF SOUTH AFRICA**

First Respondent

**PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

Second Respondent

**Neutral Citation:** *The Giving Foundation v Electoral Commission of South Africa and Another* (0018/24EC) [2024] ZAEC 13 (13 May 2024)

**Coram:** Modiba J, Steyn and Yacoob AJJ

**Heard:** 07 May 2024 – virtually by videoconference

**Delivered:** 13 May 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 13 May 2024.

**Summary:** Application to set aside proclamation of National and Provincial Election for 2024 and related relief – jurisdiction – alleged failure of President to comply with constitutional obligation within exclusive jurisdiction of the Constitutional Court– application dismissed.

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## ORDER

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1 The application is dismissed.

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## JUDGMENT

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**Yacoob AJ (Modiba J and Steyn AJ concurring):**

### Introduction

[1] The applicant (“the Foundation”) is a non-profit juristic person which brings this application in the interests of citizens eligible to vote in the upcoming 2024 election. The first respondent (“the Commission”) is the entity tasked with ensuring that elections are properly held in accordance with the law and the Constitution of the Republic of South Africa, 1996 (“the Constitution”). The second respondent (“the President”) is the head of State and head of the national executive of the Republic of South Africa, and has the obligation to proclaim elections. The President does not participate in these proceedings.

[2] The Foundation is represented personally in these proceedings by the deponent to the founding affidavit, Mr Yoshihito Mavunga Yame (“Mr Yame”). It seeks:

a declaration that the Commission and the President have contravened s 87(4) of the Electoral Act, 73 of 1998 (“the Electoral Act”);

- (a) an order “warning” the Commission and the President that the proclamation of the election in terms of Proclamation 158 of 2024 (“the proclamation”) does not comply with s 49(2) of the Constitution, and
- (b) an order setting aside the proclamation by the President.

[3] The Foundation elected not to file a replying affidavit, relying only on its founding affidavit and heads of argument.

### **Preliminary procedural issues**

[4] The notice of set down was sent to both the Foundation, at the email address it provided for service and the Commission's attorneys. The Foundation was also requested to file a paginated bundle and an index. In addition, a link for the virtual hearing was sent. Since neither the court's administration nor the Commission's attorneys could get hold of Mr Yame, the Commission attended to compiling an index and a paginated bundle. Mr Yame did not appear at the hearing, which was scheduled to begin at 09h45.

[5] At 11h40, after the hearing had ended, Mr Yame sent an email to the court's secretary, saying that he was unaware of the set down, and he only knew of the hearing when his phone's calendar notified him of the hearing on the morning of the hearing. He also stated in the email that he did not intend to say anything more than what was contained in his founding affidavit and heads of argument.

[6] It must be noted that the failure of a party to attend a hearing is less than ideal, even if they have nothing more to say, because it means they are not able to respond to the court's queries or to arguments submitted by the other side. That being said, it appears that Mr Yame is satisfied that the hearing continued in his absence, and the court was not unable to deal with the matter.

### **Analysis of the relief sought by the foundation**

[7] The notice of motion filed by the Foundation contains three prayers. The alleged contravention of the Electoral Act by the Commission and the President, a "warning" to the Commission and the President, and the setting aside of the proclamation of the election are all based on the Foundation's contention that the proclamation does not comply with s 49(2) of the Constitution. Bound up with this, although not included in the relief sought, is an allegation in the founding affidavit that s 17 of the Electoral Act is unconstitutional.

[8] Section 87(4) of the Electoral Act provides that:

'No person, knowing that another person is not entitled to vote, may-

- (a) assist, compel or persuade that other person to vote; or
- (b) represent to anyone else that that other person is entitled to vote.'

[9] The Foundation contends that, since the proclamation did not comply with the Constitution, it is unlawful. The election itself is therefore unlawful, and the Commission and the President, who must know that the election is unlawful, have contravened s 87(4). This relief therefore depends on a finding that the proclamation is unlawful and invalid.

[10] It is not clear what legal force the “warning” sought in the second prayer of the notice of motion would have, or what form it would take, but in its own terms, it too depends on the finding that the proclamation is unlawful and invalid.

[11] The final prayer is the setting aside of the proclamation, which is also, obviously, premised on the finding that the proclamation is unlawful and invalid.

[12] The basis on which the Foundation contends that the proclamation is unlawful and invalid is that s 49(2) of the Constitution provides that when the term of the National Assembly expires, “...the President, by proclamation, must call and set dates for an election”. The Foundation contends that this means that the proclamation must include one day for the electorate to vote, and one day for the members of the National Assembly to elect the President and other office bearers of the national assembly. The fact that the proclamation only provides for the one day means it does not comply with s 49(2) and is therefore unlawful and invalid.

### **The Commission’s case**

[13] The Commission raises a number of points in opposition of the application, both procedurally and with regards to the merits. I set them out in brief summary below.

[14] First, it is submitted that this court has no jurisdiction to determine whether the President fulfilled his Constitutional obligation to proclaim the election. This is because s 49(2) of the Constitution imposes an obligation on the President of the kind that brings it within the bounds of s 167(4)(e) of the Constitution, which reserves the decision whether the President has failed to fulfil a constitutional obligation to the exclusive jurisdiction of the Constitutional Court.

[15] Second, if this court did have jurisdiction, the application was not brought at the earliest possible opportunity, or at the proper time. The application was instituted over a month after the election was proclaimed and two months before the election date. The complaint is tied up with a complaint that s 17(1) of the Electoral Act only provides for one date to be proclaimed. This has been in effect since 1998 and has applied to every election since then. The argument continues that the proper time for a challenge of this sort is not when the election has been proclaimed and preparations are underway in accordance with a tight election timetable, but at any time between elections when the courts can consider and determine the matter properly and without disrupting elections.

[16] The third point relied on by the Commission is that the proclamation is, in any event constitutional and lawful. The proclamation was issued in terms of both s 49(2) of the Constitution and s 17(1) of the Electoral Act. The principle of constitutional subsidiarity requires that, if the Foundation wished to challenge the validity of something done in terms of the Electoral Act, which gives effect to the provisions of the Constitution with regard to elections, it should challenge the provision of the Electoral Act. Failure to do so means the thing done in terms of the legislation remains lawful. Secondly, the Foundation conflates two separate processes, the election in which votes are cast by citizens registered and appearing on the national common voters' roll, and the election of the President by the National Assembly. The second process is completely separate and is not the responsibility of either the Commission or the President. The Constitution itself makes provision for how that happens.

[17] The final point relied on by the Commission is that the relief sought by the Foundation will imperil the election and would not be just and equitable. This sets out the difficulties which would ensue if ordinary voting by the electorate were to happen over more than one day, and raises the spectre of an election the integrity of which cannot be guaranteed.

### **Jurisdiction**

[18] The most pressing issue, taking into account the facts of this case, is that of

jurisdiction. The Commission points out that s 167(4)(e) of the Constitution reserves to the Constitutional Court's exclusive jurisdiction the question whether "Parliament or the President has failed to fulfil a constitutional obligation". The President has an obligation in terms of s 49(2) to proclaim the election, and only the Constitutional Court has the power to determine that he has failed to fulfil it.

[19] This issue was pleaded in detail in the Commission's answering affidavit. Although the Foundation did not file a replying affidavit, it did have the benefit of considering the Commission's affidavit before submitting its heads of argument. The Foundation chose not to deal directly with the s 167(4)(e) question. As far as the jurisdiction of this court is concerned, the Foundation simply asserts that these are electoral matters and that this court has the power to determine electoral matters in terms of s 20 of the Electoral Commission Act, 51 of 1996. Since this court is a court of high court status, it also has the power to determine the validity of law and conduct, in terms of s 172 of the Constitution.

[20] The Foundation seems to submit in its heads of argument that the consideration of whether the President has failed to fulfil a constitutional obligation is an "alternative" gateway to jurisdiction, and that this, too, is something over which this court has jurisdiction in terms of s 172. The Foundation's heads are unfortunately not a model of clarity, and it is unclear whether the submission is that these are "alternative gateways" means it was open to the Foundation to choose whether to go to the Constitutional Court for a declaration in terms of s 167(4)(e), or whether it means that the Foundation submits that this court has jurisdiction over this issue too. This is one of the issues that would have been debated and clarified with Mr Yame had he appeared at the hearing.

[21] Be that as it may, if the Constitutional Court has exclusive jurisdiction to determine an issue, this court may not venture to examine it. Having identified the underlying basis of the relief sought by the Foundation as the alleged non-compliance of the proclamation with s 49(2) of the Constitution, I must now consider whether this court has jurisdiction to make a finding that the proclamation does not comply. If this court does not have jurisdiction to do that, it can make none of the orders sought by the Foundation, as all those flow from this finding.

[22] The idea that this court is still able to deal with only the electoral issues raised, if that is what Mr Yame's submissions mean, has no legal merit, if this court finds that those electoral issues rest on a premise that is not within this court's jurisdiction to determine.

[23] Section 167(4)(e) is clear. It provides:

'Only the constitutional Court may –

...

(e) decide that Parliament or the President has failed to fulfil a constitutional obligation.'

[24] This does not mean that only the Constitutional Court has jurisdiction over conduct of the President, or over proclamations made by the President. As pointed out by the Foundation, s 172(2)(a) allows courts of high court status and higher, including this court, to enquire into the constitutional validity of conduct of the President, including proclamations, subject to any order of constitutional invalidity being confirmed by the Constitutional Court. Section 167(4)(e) must therefore be given a narrow meaning.<sup>1</sup>

[25] It follows that, in order to fall within the exclusive jurisdiction of the Constitutional Court in terms of s 167(4)(e) the question to be determined must not be simply whether the President's conduct is consistent with the Constitution, but whether there is an obligation imposed on the President by the Constitution, and if so, whether the finding this court is being asked to make is that the conduct is invalid because it does not fulfil that obligation.

[26] The Foundation itself contends that the President has an obligation to proclaim dates for an election in terms of s 49(2). Section 49(2), itself, on an examination of its plain meaning, imposes a positive obligation on the President to call and set dates for an election by proclamation within 90 days of the term of the National Assembly expiring. Whether the proclamation, as conduct of the President

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<sup>1</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (2) SA 14 (CC) at [25]

in terms of s 49(2) fulfils the obligation imposed on him, is a question that only the Constitutional Court can determine.

[27] This court therefore has no jurisdiction to determine the Foundation's application. It is not appropriate to deal any further with the Foundations contentions.

### **Conclusion**

[28] It remains only to make one comment regarding the contention that the Commission and the President are willfully misleading the electorate and falsely holding out to voters that they are entitled to vote. In South African law, executive conduct such as a proclamation remains valid unless and until it is set aside by a competent court.<sup>2</sup> Everything done in furtherance of the election is done in accordance with a factually valid proclamation until that happens. Voters and litigants would do well to take this principle into account.

[29] It is not the practice in this court to grant costs orders and the Commission does not seek costs against the Foundation. No costs order is therefore made.

[30] For these reasons I grant the order below:  
The application is dismissed.

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S YACOOB

Acting Judge of the Electoral Court  
Bloemfontein

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<sup>2</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at 26.

## APPEARANCES

For the applicant: No appearance

For the first respondent: M de Beer

Instructed by: Harris Nupen Molebatsi Inc, Johannesburg