



**THE ELECTORAL COURT OF SOUTH AFRICA,
BLOEMFONTEIN**

Not Reportable

Case No: 0013/24EC

In the matter between:

CAPE INDEPENDENT PARTY (CIP)

APPLICANT

and

THE ELECTORAL COMMISSION OF SOUTH AFRICA

RESPONDENT

Neutral Citation: *Cape Independent Party v Electoral Commission of South Africa*
(0013/24EC) [2024] ZAEC 14 (13 May 2024)

Coram: ZONDI JA, SHONGWE and ADAMS AJJ, PROFESSORS NTLAMA-
MAKHANYA and PHOOKO (Additional Members)

Heard: 15 April 2024 – as a videoconference on *Microsoft Teams*

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 16:00 on 13 May 2024.

Summary: The Electoral Act – section 27(1) and s 27(2)(cB) – unrepresented registered political party required to submit supporters' lists 'in the prescribed manner' and to meet quotas imposed by the Act and the regulations – when contesting election for seats in Provincial Legislatures – non-compliance and failure to submit

these lists disqualify a party *ex lege* to contest elections – factual disputes as to whether the applicant complied – to be decided in terms of *Plascon Evans* principle.

ORDER

The application is dismissed with no order as to costs.

JUDGMENT

Prof Ntlama-Makhanya and Adams AJ (Zondi JA, Shongwe AJ, Professor Phooko (Additional Member) concurring):

[1] On Wednesday, 17 April 2024, this Court, for reasons which were to follow shortly, issued the following order in this application:

‘The application is dismissed with no order as to costs’.

This judgment contains the reasons for the said order.

[2] The applicant, Cape Independent Party (CIP), is an unrepresented registered political party and intended to participate in, and contest, the upcoming Western Cape provincial elections scheduled for 29 May 2024. The respondent is the Electoral Commission of South Africa (the Commission).

[3] According to the Commission, the applicant was disqualified – by operation of law – from contesting the said elections in that they had not complied timeously with the peremptory requirements of s 27(2)(cB) of the Electoral Act¹. CIP failed, so it is alleged by the Commission, to submit its list of supporters to the chief electoral officer ‘in the prescribed manner’ by 8 March 2024, being the relevant date stated in the *Election Timetable for the Election of the National Assembly and the Election of Provincial Legislatures* (timetable) promulgated in terms of s 20 of the Electoral Act by the Commission. CIP was therefore disqualified, according to the Commission, from contesting the said provincial elections as they did not comply with the

¹ Electoral Act 73 of 1998.

mandatory provisions of s 27(2)(cB) of the Electoral Act, relating to the requisite supporters' lists.

[4] Section 27(2) reads in the relevant part, which includes s 27(2)(cB), as follows:-

'27 Submission of lists of candidates

(1) A registered party intending to contest an election must nominate candidates and submit a list or lists of those candidates for that election to the chief electoral officer in the prescribed manner by not later than the relevant date stated in the election timetable.

(2) The list or lists must be accompanied by a prescribed-

(a) ...

(cB) form, in the case of a registered party not represented in the National Assembly or any provincial legislature, confirming that the party has submitted, in the prescribed manner, the names, identity numbers and signatures of voters whose names appear -

(i) ...

(ii) in the case of an election of a provincial legislature, on the segment of the voters' roll for the province and who support the party, totalling at least 15 per cent of the quota of that province in the preceding election, for which the party intends to nominate candidates.

...'. (Emphasis added).

[5] CIP accepts that they did not timeously submit the required lists of supporters 'in the prescribed manner', which entailed compliance with the *Regulations concerning the Submission of List of Candidates, 2004*, which required that the details and the signatures of the required number of registered voter supporters be uploaded on the *Online Candidate Nomination System* (OCNS or portal) of the Commission. By the deadline at 17:00 on 8 March 2024, CIP, by their own admission, had submitted and uploaded onto the OCNS the details and signatures of only 5400 'verified' or 'valid' supporters, when they were legally required to submit the details and signatures of at least 7176 voter supporters. CIP blames their failure to complete the submission and uploading of the supporters' details and signatures on the fact that at 17:00 the portal 'became defunct'. This happened, so the case on behalf of CIP goes, whilst they were logged on to the portal uploading the various electronic files as required, in line and fully intending to comply with the timetable. CIP thereafter

emailed to an email address provided to them by certain employees of the Commission, the complete list of supporters.

[6] The CIP contends that it was prevented from submitting the balance of the supporter requirements because of the technical difficulties and constraints experienced with the online portal and its inherent failings and limitations in respect of its design, exacerbated by internet failures, and because the means of submission is obstructive and prohibitive, and through no fault of its own.

[7] In this application, CIP in essence is applying for a review and a setting aside of such disqualification. The relief sought in its notice of motion is couched in terms for an order as follows: (a) That the Commission's decision to refuse the email submission of the balance of the supporter requirements be reviewed and set aside; (b) It be declared that the CIP has complied with the requirements of s 27 of the Electoral Act; and (c) That the Commission be ordered and directed to take all reasonable steps to ensure that the CIP is included in the ballot paper for the election of the provincial legislature scheduled for 29 May 2024.

[8] The application is therefore directed at setting aside CIP's disqualification from contesting the Western Cape Provincial elections. The Commission opposes the application on the basis that CIP did not comply with the peremptory requirements of s 27(2)(cB) of the Electoral Act. It did not disqualify CIP from contesting the elections, so it is contended by the Commission – they were disqualified by operation of law. Therefore, so the Commission's contention continues, there is no decision, which it took that can and should be reviewed and set aside, not the least of which is the alleged decision to refuse the email submission of the balance of the supporter requirements.

[9] The issue to be considered in this application is therefore whether CIP's non-compliance with the peremptory provisions of s27(2)(cB) disqualifies it from contesting the elections. Put another way, the question to be considered is whether such non-compliance can be condoned.

[10] As was held by the Constitutional Court in *Liberal Party v The Electoral Commission and Others*,² 'section 28 does not vest the Commission with a discretion to condone late submission of candidates' lists, but only to allow the rectification of other failures to comply with section 27'. Because the applicant in that matter 'had not submitted a list by the deadline', the Court held that it was 'not entitled to rectify its non-performance in terms of section 28'. What is more is that the Commission cannot condone failures to meet deadlines in the electoral timetable – this is consonant with an elementary principle of public law. In *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd*,³ the Supreme Court of Appeal articulated the principle as follows:

'As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so.'

[11] As contended on behalf of the Commission, the absence of a discretion to condone non-compliance with deadlines is by design. The deadlines serve the important function of ensuring the fairness of the elections and of ensuring that the Commission can manage the elections properly. A power to relax deadlines for certain parties would undermine the very purpose of the deadlines. It would place the Commission in the impossible position of having to decide on a case-by-case basis whether to condone or not. Howsoever the Commission acted, it would risk being accused of favouring one party over another. That would undermine its role as a neutral facilitator of the elections.

[12] CIP's contention that the Commission should at the very least have advised and warned it that it had not complied with s 27(2)(cB) falls to be rejected – the Commission and CEO were under no obligation to notify CIP of its failure to comply with the requirements of the said provision. A party that fails to submit voter supporters' lists before the deadline in the electoral timetable never becomes eligible to contest the election.

² *Liberal Party v The Electoral Commission and Others* [2004] ZACC 1; 2004 (8) BCLR 810 (CC)

³ *Minister of Environmental Affairs and Tourism & Others v Pepper Bay Fishing* 2003 6 SA 407 (SCA); *Minister of Environmental Affairs and Tourism & Others v Smith* 2004 (1) SA 308 (SCA).

[13] According to s 27(2)(cB) of the Electoral Act, an unrepresented political party's candidate lists must be accompanied by a prescribed form bearing the details and signatures of voter supporters amounting to at least 15% of the quota for a seat in the preceding election. These quotas have been published and are incorporated into the *Regulations concerning the Submission of List of Candidates*, 2004, as Table 2 (to contest seats for the Provincial Legislatures). We have *supra* alluded to the quotas applicable to the seats which CIP intended contesting, that being the provincial elections for the Western Cape. The quota as determined in s 27(2)(cB)(i)(bb) in respect of the Western Cape is in fact set out in Table 2 of Schedule A to these Regulations as 7176 voter supporters.

[14] It is the case of the Commission that CIP failed to submit the required number of voter signatures to contest the Provincial elections for the Western Cape Province by the deadline in the electoral timetable. This is not disputed by CIP.

[15] At a factual level, we do not accept the CIP's explanation that the reason for their failure to timeously submit the required list of voter supporters was due to the inefficacy of the OCNS. As was found by this Court in *Labour Party*⁴ – in which the same claims of inefficiencies on the part of the OCNS were made – on the probabilities, the OCNS was not as ineffective and cumbersome to use as CIP would make it out to be. In my view, the CIP's unpreparedness and their tardiness are what resulted in their inability to comply with the provisions of s 27. In the context of this opposed application, which implies that the principle in *principle in Plascon Evans*⁵ finds application, it cannot possibly be said that the version of the Commission is so far-fetched and untenable that this Court can reject it out of hand. Put another way,

⁴ *Labour Party of South Africa and Others v Electoral Commission of South Africa and Others* (008/2024EC; 012/2024EC; 011/2024EC; 009/2023EC; 010/2024EC) [2024] ZAEC 4 (9 March 2024).

⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) Sa 623 (A) at pp 634 and 635 held as follows: -

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers ...'.

the Commission's version on the facts cannot and should not be rejected by this Court out of hand, as one being patently implausible and far-fetched.

[16] Therefore, factually it cannot be said that there was anything untoward or unlawful with the Commission's insistence on strict compliance with the prescribed manner and limits imposed by s 27 and the timetable. The CIP did not challenge the unsuitability of the development of OCNS as a transformative technological measure in electoral law. Instead, from the general tone, it indicated its own lack of technological skills which cannot be attributed to the Commission. We also find it difficult to comprehend how 84 parties were able to upload their lists and the CIP found the OCNS to be a 'total disaster' in the promotion of electoral law rights through the 'lens' of technology. It was incumbent upon the CIP to showcase before this Court the irrationality of adopting and designing the online system which was incompatible with section 27 requirements. Instead, the CIP adopted a generalized approach on the dysfunctionality of the portal without conclusive proof that gives substance to its failures whilst more than 80 parties were able to use it without hindrance. The CIP "disqualified itself from participating in the public affairs of the Republic".⁶

[17] Whilst it is so that laws and regulations should be interpreted to promote political participation, that principle serves both the right to stand for political office and to vote. This then requires an interpretation of s 27 that promotes the political rights enshrined in s 19 of the Bill of Rights in the Constitution. This entails the prescriptive nature of the s 27 requirements in that an aspirant public representative, such as the CIP or any individual who has registered as such with the Commission, is required to submit the list with the intended purpose of filling any seats that the party may be eligible to fill following the outcome of the Provincial elections. This equally meant that the responsibility of the aspirant representative is to keep itself abreast of the constant developments and build its own capacity towards adhering to upholding such developed measures. The consequent result of non-adherence to the rules as evidenced by this case, was a disqualification of the CIP from the list of eligible contenders to the provincial legislatures. The issue is whether CIP ought to

⁶ *Tanganyika Law Society v Tanzania* 2011 1 AfCLR 3 para 78.

be allowed to contest the elections notwithstanding their non-compliance with the peremptory prerequisites of s 27(2)(cB). In our view, not, and for the reasons expanded upon in the paragraphs which follow.

[18] It is so, as submitted on behalf of the Commission, that parties and candidates want to participate in free and fair elections. Voters must vote in free and fair elections. If the elections are not free and fair, political participation is not promoted, but stifled. This, however, requires the Commission, political parties and independent candidates to all adhere to the deadlines set in the electoral timetable precisely to give effect to all the section 19 rights. It is also necessary to promote the founding values of democracy and universal suffrage.

[19] This is of particular importance for the interrelationship that exists between the right to political participation which is not entrenched as pure justiciable rights but linked to the foundational values, particularly in s 1(d) of the Constitution. These values seek to serve as the cornerstone that is designed to be reflective of an institutionalised system for the promotion of the electoral rights protected in s 19. The Namibian High Court in *Chairperson of the Electoral Commission of Namibia v Swapo Party of Namibia*⁷ concretised the significance of elections in the context of the right to vote and held as follows:

[2] [E]lection is one of the most important modes of building a functioning and effective state and of developing a more open, inclusive and representative political order; and revitalising the link between the state and the society. In our view, elections are an essential step in building legitimacy and enabling citizens to take part in shaping a common future. Yet elections can also be used to destabilise and act as detonators of violence and conflict and if conditions are not right, elections can be a tightrope walk between war and peace, stability and instability’.

[20] It is our considered view that the entitlement to the right *vis-à-vis* the responsibility attached to the said right become of fundamental importance.

⁷ *Chairperson of the Electoral Commission of Namibia v Swapo Party of Namibia* (EC 8/2020) [2020] NAHCMD 600.

[21] Similarly, in *Inkatha Freedom Party*⁸, Ngcobo CJ held that ‘the foundational values of universal suffrage and multi-party democracy ... [as foundational values] are best advanced through the Commission’s rigorous adherence to the provisions of the Act’. Rigorous adherence to deadlines ‘is crucial to the integrity of the electoral process’. It may be apposite to cite in full the para 55 of the judgment, which reads as follows: -

‘[55] It is necessary that the integrity of the electoral process be maintained. Indeed, the acceptance of the election as being free and fair depends upon that integrity. Elections must not only be free and fair, but they must be perceived as being free and fair. Even-handedness in dealing with all political parties and candidates is crucial to that integrity and its perception by voters. The Commission must not be placed in a situation where it has to make *ad hoc* decisions about political parties and candidates who have not complied with the Act. The requirement that documents must be submitted to the local offices of the Commission does not undermine the right to vote and to stand for election. It simply gives effect to that right and underscores the decentralised and local nature of municipal elections.’ (Emphasis added).

[22] The simple point of this matter is that CIP did not comply with s 27(2)(cB). That was not a result of the OCNS or the Commission’s conduct, but the fact that it left compliance to the last minute and then ran out of time.

[23] We have also not lost sight for the transformative imperatives that are required of the Commission in ensuring the promotion of technological advancement in electoral law. It is obligated by the prescripts of section 190(2) of the Constitution which empowers the IEC with additional powers that are prescribed by national legislation. These powers are envisaged in section 5(1)(i) of the Commission Act which requires the ‘developing and promotion of the development of electoral expertise and technology in all spheres of government’ which is of direct relevance to capacitate all the parties in South Africa’s democratisation. The OCNS was not a back-door development but a constitutionalised development for the advancement of a healthy democratic process that will in turn contribute to the fairness of the elections. This means that electoral law is not stagnant as it seeks to align itself with

⁸ *Electoral Commission v Inkatha Freedom Party* 2011 JDR 0421 (CC).

the needed transformative improvements in ensuring the quality of the delivery of the section 19 rights. This development carries a 'double-edged sword' by not focusing on the law itself but the empowerment of the general citizenry on the use of technology. However, this Court is not blind to the challenges faced by many South African citizens that were in the past denied opportunities such as the advancement of their technological skills. We do not intend to focus on this history, as the Commission developed an instrument that is forward looking in ensuring the transformation of electoral law which must be undertaken on a progressive basis. We must also, on the other hand, note that the applicant scheduled only two days (07-08 March 2024) to upload the candidates' list, considering the introduction of the new instrument (OCNS) on submission requirements which could have entailed a timeous preparation for any eventualities that might be experienced on candidate's submission.

[24] In the circumstances of this matter, the CIP's grounds of review – insofar as it may be entitled to take a supposed decision of the Commission on review – are without merit. Importantly, it cannot be said with any conviction that the Commission took an irrational decision not to accept the submission by email, the balance of the voter supporters list. The vast majority of parties successfully used the OCNS to compete in the upcoming elections. The CIP's failure was of its own doing. It was not 'necessary' for free and fair elections for the Commission to accept such non-compliance.

[25] The irrationality review ground holds no water. The Commission's refusal not to accept the list of supporters is patently rational. Moreover, as contended by the Commission, a decision was not taken to not accept the email submission of the voter supporters' list. Nor was a decision taken to disqualify CIP from contesting the elections. The simple point is that CIP did not comply with the peremptory requirements of s 27(2)(cB) of the Electoral Act. CIP was disqualified by operation of the law. Therefore, there is no decision taken by the Commission that can and should be reviewed and set aside.

[26] For all of these reasons the CIP's application stands to be dismissed.

Costs

[27] The award of costs is a matter which is within the discretion of the Court considering the issue of costs. This discretion must be exercised judicially having regard to all the relevant considerations. One such consideration is the principle, in line with *Biowatch Trust v Registrar, Genetic Resources, and Others*⁹, that in general in this Court an unsuccessful party ought not to be ordered to pay costs. But this is not an inflexible rule, and it can be departed from where there are strong reasons justifying such departure such as in instances where the litigation is frivolous or vexatious.

[28] We can think of no reason why the foregoing general rule should be departed from. Each party should therefore bear its own costs.

Order

[29] In the result and for these reasons, on Wednesday, 17 April 2024, the following order was issued in this application:

The application is dismissed with no order as to costs.

PROFESSOR NTLAMA-MAKHANYA
ADDITIONAL MEMBER OF THE ELECTORAL COURT
Bloemfontein

⁹ As per the *ratio* in *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC), in which it was held that private parties that lost in constitutional litigation against the State should not as a rule be mulcted in costs. This means that when a private party sought to assert a constitutional right against the government and failed, each party should bear its own costs.

L R ADAMS
ACTING JUDGE OF THE ELECTORAL COURT
Bloemfontein

APPEARANCES

For the applicant:

S Van der Merwe

Instructed by:

Tracy Babb Attorneys, Muizenberg,
Western Cape

For the respondent:

M Bishop and E Cohen

Instructed by:

Motsoeneng Bill Attorneys Incorporated,
Wendywood, Sandton