



**THE ELECTORAL COURT OF SOUTH AFRICA
BLOEMFONTEIN**

**Not Reportable
Case No: 0022/24EC**

In the matter between:

AFRICAN ECONOMIC FREEDOM

APPLICANT

and

ELECTORAL COMMISSION OF SOUTH AFRICA

RESPONDENT

Neutral Citation: *African Economic Freedom v Electoral Commission of South Africa*
(0022/24EC) [2024] ZAEC 17 (10 May 2024)

Coram: Zondi JA, Adams and Steyn AJJ, Professor Ntlama-Makhanya (Additional Member)

Heard: 10 May 2024—virtually by videoconference on Microsoft Teams

Delivered: 21 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 11h00 on 21 May 2024.

Summary: Application to condone the non-compliance and failure to meet the deadline in the Election Timetable for the Election of the National Assembly and the

Election of Provincial Legislatures. Non-compliance with s 27 of the Electoral Act, 73 of 1998. Nothing unlawful about the IEC's insistence on compliance with the deadline in the Timetable. Non-compliance by applicant to meet the deadline of paying the deposit on time to the IEC attributed to the party's own fault and not that of the IEC.

ORDER

The application is dismissed with no order as to costs.

JUDGMENT

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

Introduction

[1] On Friday, 10 May 2024, the applicant sought relief from this court. After hearing argument and considering the matter, the court issued the following order:

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

[2] What follows are the reasons for the dismissal of the application.

Parties

[3] The applicant is the *African Economic Freedom* (‘AEF’), a registered political party who intended participating in the general elections to be held on 29 May 2024. The respondent is the *Electoral Commission of South Africa*, colloquially referred to as the Independent Electoral Commission (‘IEC’). The IEC is a body established in terms of s 181 of the Constitution of the Republic of South Africa, 1996 (‘Constitution’).¹ The objects of the Commission, which are to strengthen constitutional democracy and promote democratic electoral processes, are confirmed in s 4 of the Electoral Commission Act, 51 of 1996 (‘the ECA’). The Constitution also obliges the IEC to manage elections in accordance with national legislation.²

¹ Also see s 191 of the Constitution of the Republic of South Africa, 1996.

² See s 190 of the Constitution.

Relief

[4] When the matter was heard the AEF abandoned some of the relief it sought in its notice of motion but persisted with the review of a decision taken by the IEC, which it said, was a decision to disqualify the AEF to participate in the elections to be held on 29 May 2024 since it failed to pay its deposit by 17h00 on 8 March 2024, in terms of the Election Timetable for the Election of the National Assembly and the Election of Provincial Legislatures.³ We were asked to set that decision aside. The AEF also sought declaratory orders from this Court to declare that it had complied with s 27(2) of the Electoral Act, 73 of 1998 ('the Act')⁴ and to direct the IEC to take all the necessary steps to ensure that the AEF's list of candidates is amongst the list of party candidates entitled to contest the election.

Issues

[5] The issue in this application is whether the AEF had complied with s 27(2) of the

³ Government Gazette No 50185, dated 24 February 2024, 'Election timetable for the election of the National Assembly and the election of Provincial Legislatures.'

⁴ Section 27(2) of the Act reads:

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

- (a) undertaking, signed by the duly authorised representative of the party, binding the party, persons holding political office in the party, and its representatives and members, to the Code;
- (b) declaration, signed by the duly authorised representative of the party, that each candidate on the list is qualified to stand for election in terms of the Constitution or national or provincial legislation under Chapter 7 of the Constitution and has signed the prescribed acceptance of nomination;
- (c) ...
- (cA) declaration, signed by the duly authorised representative of the party confirming that each candidate appearing on the party's provincial list of candidates referred to in Schedule 1A is registered to vote within the province in which the election will take place;
- (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) in the case of an election of the National Assembly in respect of regional seats, on the national segment of the voters' roll and who support the party-
- (aa) totalling 15 percent of the quota for that region in the preceding election, when nominating candidates for the region; or
- (bb) totalling 15 percent of the highest of the regional quotas in the preceding election, when nominating candidates for more than one region provided that where 15 percent of the highest quotas is not achieved, that the party may only nominate candidates for the region of regions as determined by the next highest quota; or
- (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 percent of the quota of that province in the preceding election, for which the party intends to nominate candidates;
- (d) undertaking signed by each candidate, that that candidate will be bound by the Code; and
- (e) deposit.'

Act or whether substantial compliance with the requirements was sufficient to condone non-compliance with the requirement to pay the deposit before the deadline stipulated in the published timetable. Section 27(2) of the Act required payment before 17h00 on 8 March 2024. Simply put, is there any conduct of the IEC to be reviewed and set aside. When the matter was argued it was conceded by the AEF that the IEC has no power to condone the non-compliance of the requirements as prescribed in s 27 of the Act.

[6] Before I deal with the facts of this application it is necessary to state that this Court has received a flurry of applications, albeit by different parties, over the last three months, applying for relief relating to their non-compliance with s 27(2) of the Act.⁵

Facts

[7] I intend dealing with the facts in detail in light of the AEF's claim that it complied substantially with the requirements. The AEF attempted to pay a deposit of R750 000 to contest the election into the account of the IEC. Payment was not made from its account but on its behalf by a donor on 8 March 2024. In terms of the Election timetable the cut-off time for any act that needs to be performed in terms of the Act, was 17h00 and had to be performed on that date.⁶ Regarding payments of deposits paid by parties and the submission of the candidate lists of the parties, s 27(2) of the Act finds application. It is averred by the AEF in its founding affidavit that a donor made payment of R750 000 and proof of the electronic transfer from the donor's account was forwarded to the IEC. According to the AEF, the IEC then opened the online system which allowed AEF to electronically submit its candidates list. This issue, of allowing capturing of candidates after proof of payment was contested by the IEC. I will return to it when I summarise the version of the IEC. Later on, on 8 March 2024 it was discovered by AEF that the bank with which the legal entity banks, reversed the payment of the money. Knowing that the amount had to be paid the AEF made payment later on two separate days, that is 11 and

⁵ See *Labour Party of South Africa and Others v Electoral Commission of South Africa and Others* [2024] ZAEC 4; *Arise South Africa v Electoral Commission of South Africa*; *Independent South African National Civic Organisation v Electoral Commission of South Africa* [2024] ZAEC 8; *Operation Dudula v Electoral Commission of South Africa and Another* [2024] ZAEC 9; *Defenders of the People and Another v Electoral Commission of South Africa and Another* [2024] ZAEC 10.

⁶ See s 1 of the proclamation.

12 March of R500 000 and R250 000, respectively. Proof of payment of the two amounts submitted by the AEF shows that payment did not come from the same legal entity. An amount of R500 000 was paid by one legal entity and the rest of the money by another legal entity. The AEF claimed that it took all necessary steps to make payment of the deposit timeously and accordingly, so it was argued, it had substantially complied with the s 27(2) of the Act.

[8] Ms Mthethwa of the AEF filed an explanatory affidavit regarding the electronic payment purportedly made from First National Bank to the bank account of the IEC. Her affidavit however contradicts the founding affidavit. In paragraph 6 of her affidavit she states that the bank was already closed when it was discovered that there was a reversal of the payment. According to the founding affidavit Ms Mthethwa became aware on 8 March that payment had been reversed and informed Ms Zulu, also a member of the party. The latter then inquired from the bank about the reversal.⁷ She was then informed that the transaction was for a large amount and was withheld by the fraud department until the funds could be cleared. No confirmatory affidavit was filed of Ms Zulu.

[9] The AEF further avers that no communication was received from the IEC. It was only on 26 March 2024 when the lists of party candidates were published by the IEC, that the AEF noticed that it was not amongst those published. The IEC advised the AEF that it had been disqualified since the deposit amount was not reflected in the account of the IEC. The AEF was advised to file an objection and to do so timeously.

[10] On 28 March, the AEF received correspondence from the IEC stating that the failure to pay the deposit in accordance with the deadline in the timetable could not be remedied. The objection filed by the AEF was not upheld by the IEC. The AEF was advised to refer the matter to the Electoral Court within the prescribed time.

[11] The version of the IEC is straight forward. It states that inasmuch as payment was attempted by the AEF on 8 March 2024, the date of the deadline, the payment was

⁷ See para 28 of the founding affidavit.

reversed by the bank and handed over to the bank's fraud department for further investigation. The IEC explains that while the bank statement records of the third party records a 'reversal' – the money was never paid into the IEC's bank account. At 17h00 on 8 March 2024, there was no deposit paid into the IEC's account. Most importantly, the IEC states that it has no power to condone any non-compliance with the deadlines set out in the timetable. In its replying affidavit the AEF did not take issue with the fact that the money was not in the IEC's bank account at 17h00 on 8 March 2024, the cut-off time. Instead, it elected to elaborate on the remedies sought and that the relief sought would not compromise a free and fair election as averred to by the IEC.

[12] There is evidently a dispute of fact on whether the AEF's payment was received by the IEC in its account. The trite test in dealing with factual disputes as stated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁸ finds application. It is:

"... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order ...Where it is clear that the facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

The AEF did not deny that the payment never reached the IEC's account on the deadline determined by the Election timetable. The AEF failed to make payment of the deposit on time and the version of the IEC has to be accepted on this score as correct and true.

[13] Counsel on behalf of the AEF, submitted to us that *African Christian Democratic Party v Electoral Commission and Others*⁹ ('ACDP') clearly states that this court should follow a purposive approach in interpreting s 27 of the Act. I consider it necessary to refer to paragraph 25 of ACDP:

'The question thus formulated is whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose. A narrowly textual and legalistic approach is to be avoided as Olivier JA urged in *Weenen Transitional Local Council v Van Dyk*:

"It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the ordinance is to follow a common-sense

⁸ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-F.

⁹ *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC).

approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the Legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular. Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should be read as 'may'; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc. may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have *a posteriori*, not *a priori* significance. The approach described above, identified as '... a trend in interpretation away from the strict legalistic to the substantive' by Van Dijkhorst J in *Ex parte Mothuloe (Law Society, Transvaal, Intervening)* seems to be the correct one and does away with debates of secondary importance only." (Original references omitted.)

[14] The Constitutional Court also considered the issue of non-compliance with the Election timetable in *Liberal Party v The Electoral Commission and Others*:¹⁰

'The applicant's inability to contest the forthcoming elections, *therefore, arises solely from its failure to comply with the mandatory provisions of the Electoral Act and regulations and cannot be laid at the door of the Commission*. The application must therefore fail. In the circumstances, we do not consider it necessary to consider the peripheral issues raised by the applicant in this case. Should the applicant wish to pursue these issues, it may do so in a proper forum in the proper manner'. (My emphasis.)

[15] At the heart of the dispute is the timetable that was issued by the IEC. The AEF did not challenge the timetable as unreasonable or unlawful, it decided to challenge the

¹⁰ *Liberal Party v The Electoral Commission and Others* 2004 (8) BCLR 810 (CC) para 30. For the sake of completeness, I also like to emphasise what was stated by the Constitutional Court at paragraph 22 when it dealt with the powers of the Commission to rectify in terms of s 27 of the Act. It held:

'Section 28(1) provides for condonation and rectification "[i]f a registered party that has submitted a list of candidates has not fully complied with section 27". As such, contrary to the applicant's submission, 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. The applicant had not submitted a list by the deadline and is therefore not entitled to rectify its non-performance in terms of section 28.'

adherence to the timeframes, as set out in the timetable by the IEC, as reviewable. In my view the IEC is created by statute and is required to act within the confines of the ECA and other applicable legislation. Section 5 of the ECA provides for the powers, duties and functions of the IEC, and s 5(b) of the ECA specifically provides for the duty to ensure that the election is free and fair. The timetable is binding on the AEF as a matter of law.

[16] The importance of the timetable has been explained by the IEC in that it sets out the various stages of the process and when it must occur. Any delay or amendment to the steps in the timetable will have a cascading effect on the election preparations, hence strict compliance is required to ensure a fair and free election to all. The IEC made it abundantly clear in its answering affidavit that the relief sought by the AEF is not just a simple administrative remedy but constitutes radical remedial relief that has the potential to derail the entire election process.

Interpretation

[17] I consider it necessary to briefly deal with the interpretation of s 27 of the Act since the AEF submits that a purposive interpretation of the provision results in allowing the AEF to participate in the election since it has substantially complied with the provision. Whilst I agree that a purposive approach should be followed in interpreting the statutory requirements as per s 27(2) of the Act, I disagree with the contention that substantial compliance with some of the requirements suffice. The proper approach to statutory interpretation has been encapsulated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,¹¹ (*'Endumeni'*). The Supreme Court of Appeal in *Endumeni* stated as follows:¹²

'...Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, 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. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar

¹¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

¹² *Ibid* para 18.

and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. *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.*’ (Footnotes omitted.) (My emphasis.)

[18] In *Electoral Commission v Inkatha Freedom Party*,¹³ the Constitutional Court emphasised the legislative purpose of the Act, it held:¹⁴

‘As we have held previously, and as section 2 of the Act requires, the provisions of the Act must be construed in a manner that gives effect to the right “to vote in elections” and the right “to stand for public office.” In addition, the Act must be construed in the light of the foundational values of our constitutional democracy, which include:

“...a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”

These foundational values require courts and the Commission to construe the electoral statutes in a manner that promotes enfranchisement rather than disenfranchisement and participation rather than exclusion...’ (Footnotes omitted.)

The Constitutional Court went however further and held in paragraph 52 that these foundation values are best advanced through the IEC’s rigorous adherence to deadlines which is crucial to the integrity of the electoral process.

[19] The AEF submits that the purpose of the provision is to establish that parties have a serious intention to contest the election. This is in my view, not the only purpose of the provision. Section 27(1) of the Act is mandatory and requires of a registered party to

¹³ *Electoral Commission v Inkatha Freedom Party* 2011 (9) BCLR 943 (CC).

¹⁴ *Ibid* para 37.

comply in the prescribed manner. The manner in which it should comply is meeting the requirements as listed in s 27(2)(a) to (e), which should be read with the timetable issued by the IEC in terms of s 20 of the Act. The requirements cannot be separated they are all equally important and are aimed at ensuring a fair and free election.

[20] The AEF relied on proof that was issued by the bank to show that a transfer was made to the IEC. In my view given the obligation on it to make the deadline of payment, such proof was insufficient. In *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Others v Smith*¹⁵ the SCA dealt with the status of a document that purports to constitute proof of payment and held as follows:¹⁶

'Since the deposit slip duly stamped by the bank and annexed to its application constituted such proof, so the argument concluded, the application had been lodged properly. *This argument, in my view, amounts to an elevation of the façade of proof over the substance of payment. What the General Notice requires is actual payment of the application fee before the application is lodged, together with proper proof by way of a deposit slip that such payment had been made. The notion that incorrect or false proof of such payment would suffice is quite untenable.*' (My emphasis.)

Substantial compliance

[21] Since the AEF claims that it has substantially complied with s 27(2) of the Act it is necessary to analyse its actions aimed at ensuring compliance with the provisions of the section. The AEF failed to meet the deadline for payment. It elected to rely on a third party, another legal entity, to make payment on its behalf on the very last day that the payment should be effected. The AEF fails to explain why it was necessary to make payment, not from its own bank account but from this third party. No confirmatory affidavit was filed by the Bank, explaining the reasons for not transferring the monies into the account of the IEC.

¹⁵ *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Others v Smith* 2004 (1) SA 308 (SCA).

¹⁶ *Ibid* para 24.

[22] The proof of payment relied on by the AEF does not show compliance with s 27(2)(e) of the Act. The money had to be received in the IEC's account by the time of the deadline and it was not. The AEF has failed to comply with the prescribed requirements of the Act. It is not for this Court to speculate as to why payment was attempted at the last minute. The AEF should have addressed the reasons for making a payment at the last minute and through a third party in its founding affidavit. There is no explanation in the affidavit as to what arrangements were made with the third party and why the AEF could not make payment from its own bank account. If the AEF wanted to rely on a third party to act on its behalf it ought to have ensured that the payment was cleared and reflected in the bank account of the IEC. It had failed to do so. In fact, the payments that were subsequently made by two different legal entities raises many unanswered questions. I do not intend to venture into the duties that apply to all registered parties regarding their obligations to account and declaring donations above the prescribed threshold, since the attempted payment in the present matter never reached the IEC's account on time.¹⁷

[23] Moreover it cannot be stated, given the facts of this case that payment of the deposit as required by s 27(2)(e) should be regarded as being complementary to the other prescribed requirements as was held in *ACDP*. In *ACDP*, the Constitutional Court considered whether the establishment of a bulk payment instead of individual deposits constituted substantial compliance with the Act. The distinction between the conduct of the AEF and the party in *ACDP* is that there was payment made in *ACDP* and it was made on time. The reliance by the AEF on *ACDP* is in my view misplaced. I find that the AEF failed to comply with s 27(2) of the Act and that there is no room for substantial compliance with the provision.

Conclusion

[24] Given the said circumstances, the IEC acted lawfully, reasonably, rationally and within the ambit of the law. There is no basis to find fault with the IEC's conduct. The

¹⁷ Regarding the obligations that rest on parties to account for income see *Electoral Commission of South Africa v African Independent Congress and Others* [2024] ZAEC 11.

application stands to be dismissed due to the AEF's failure to comply with the legislative requirements of s 27(2) of the Act to pay the required deposit by 17h00 on 8 March 2024. The AEF, by not complying with the legal prescripts excluded itself from contesting the election. The AEF failed to make out a case entitling it to any of the relief sought.

Costs

[25] The practice in this Court is that in general an unsuccessful party is not ordered to pay the costs of the successful party, unless the application is frivolous and vexatious. There is no basis to deviate from the established practice in this case.

Order

[26] In the result and for these reasons, on 10 May 2024, the following order was issued:

'The application is dismissed with no order as to costs.'

EJS STEYN

Acting Judge of the Electoral Court

Appearances

Counsel for the applicant : K Nhlapo-Merabe

Instructed by : Mpanza Attorneys, Durban

Counsel for the respondent: M De Beer

Instructed by : Gildenhuis Malatji Inc, Pretoria