THE ELECTORAL COURT OF SOUTH AFRICA

BLOEMFONTEIN

Not Reportable

Case No: 0024/24EC

In the matter between:

THE ELECTORAL COMMISSION	**APPLICANT**

and

VISVIN GOPAL REDDY	**FIRST RESPONDENT**
BONGINKOSI GIFT KHANYILE	**SECOND RESPONDENT**
UMKHONTO WESIZWE POLITICAL PARTY	**THIRD RESPONDENT**
AFRICAN NATIONAL CONGRESS	**FOURTH RESPONDENT**

Neutral Citation: *The Electoral Commission v Reddy & Others* (0024/24EC) [2024] ZAEC 23 (03 July 2024)

Coram: Zondi JA, Adams and Steyn AJJ, Professor Phooko (Additional Member)

Heard: 28 May 2024 – virtually by videoconference on Microsoft Teams

Delivered: 03 July 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 03 July 2024.

Summary: Electoral Act 73 of 1998 – Whether the respondents statements are violative of sections 87(1)*(a)-(c)*; 87(2) and 93(2) of the Electoral Act 73 of 1998 – Whether contempt of court has been established on the part of the respondents – Jurisdiction of the Electoral Court to consider complaints about violation of Electoral Act and the Electoral Code of Conduct - Consideration of appropriate penalty.

ORDER

The following order is granted:

1. It is found that the first and second respondents contravened sections 87(1)*(a)*, *(b)* and *(c)*, and 87(2) of the Electoral Act 73 of 1998.
2. The first and second respondents are ordered to pay a fine of R150 000 each, this fine is suspended for a period of five (5) years from the date of this order on the following conditions:

   (i) That the two respondents do not contravene section 87(1) or 87(2) of the Electoral Act 73 of 1998 during the period of suspension; and

   (ii) That the two respondents do not make any statements that are intended to undermine the integrity of any electoral process during the period of suspension.
3. The counter-application is dismissed.
4. Each party to pay its own costs.

JUDGMENT

Steyn AJ (Zondi JA, Adams AJ, Professor Phooko (Additional Member) concurring):

Introduction

[1] This application has been instituted by the Electoral Commission ('the Commission') on an urgent basis to enforce compliance with certain provisions of Part 1 of Chapter 7 of the Electoral Act 73 of 1998 ('the Act') which prohibit various types of

conduct.[1]

Parties

[2] The applicant is the Commission established under s 181 read with ss 190 and 191 of the Constitution of the Republic of South Africa, 1996 ('the Constitution'). The objectives of the Commission are to strengthen constitutional democracy and promote democratic electoral processes.[2] The duties of the Commission and its obligations are

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[1] In terms of the notice of motion, the following relief is sought:

'2. It is declared that Mr Visvin Gopal Reddy **("Mr Reddy")** contravenes sections:

2.1 87(1)*(a)* of the Electoral Act by compelling or unlawfully persuading any persons not to vote;

2.2 87(1)*(b)* of the Electoral Act by interfering with the independence or impartiality of the Commission, members, employees and/or officers of the Commission and the Chief Electoral Officer;

2.3 87(1)*(c)* of the Electoral Act by prejudicing any persons because of any past, present or anticipated performance of a function in terms of the Act;

2.4 87(2) of the Electoral Act by preventing any persons from exercising a right conferred by the Act; and

2.5 93(2) of the Electoral Act by obstructing and hindering the Commission and its members, employees and officers, as well as the Chief Electoral Officer, in the exercise of their power and performance of their duties.

3. The candidature of Mr Reddy is disqualified for the national election scheduled for 29 May 2024.

4. Mr Reddy is ordered to pay a fine of R200 000.

5. It is declared that Bonginkosi Gift Khanyile **("Mr Khanyile")** contravened sections:

5.1 87(1)*(a)* of the Electoral Act by compelling or unlawfully persuading any persons not to vote;

5.2 87(1)*(b)* of the Electoral Act by interfering with the independence or impartiality of the Commission, members, employees and/or officers of the Commission and the Chief Electoral Officer;

5.3 87(1)*(c)* of the Electoral Act by prejudicing any persons because of any past, present or anticipated performance of a function in terms of the Act;

5.4 87(2) of the Electoral Act by preventing any persons from exercising a right conferred by the Act; and

5.5 93(2) of the Electoral Act by Obstructing and hindering the Commission and its members, employees and officers, as well as the Chief Electoral Officer, in the exercise of their power and performance of their duties.

6. Mr Khanyile is ordered to pay a fine of R200 000.

7. In the alternative to paragraphs 3, 4 and/or 6 above, Mr Reddy and/or Mr Khanyile are formally warned in respect of their contraventions of the Electoral Act.

8. It is declared that Mr Reddy and Mr Khanyile are guilty of contempt of court for:

8.1 making scurrilous, unfounded attacks on the Judiciary and its members;

8.2 making statements which display and encourage wilful disrespect and disobedience to judicial authority; and

8.3 interfering with the administration of justice by making statements intended to prevent this court, appeal courts and the High Court, KwaZulu-Natal Local Division, Durban, for granting effective relief with the intention of defeating the course of justice.

9. Mr Reddy and Mr Khanyile are each ordered to retract their contemptuous statements and apologise for making them.

10. The costs of this application, including the costs of two counsel, are to be paid jointly and severally by any respondents opposing it.

11. Further and/or alternative relief.'

[2] See s 4 of the Electoral Commission Act 51 of 1996.

defined in s 190(1) and (2) of the Constitution.

[3] The first respondent is Mr Visvin Reddy ('Mr Reddy'), a member and candidate of the third respondent, the Umkhonto Wesizwe Party ('MK'), a political party registered under s 15(1) of the Electoral Commission Act 51 of 1996 ('ECA'). He is a candidate for the national election which is scheduled for 29 May 2024, and has been nominated as a candidate for the MK in terms of s 27 of the Act.

[4] The second respondent is Mr Bonginkosi Gift Khanyile ('Mr Khanyile') a member of the MK and, at the relevant time, the national co-ordinator of the MK Youth League ('MK Youth League').

[5] The fourth respondent is the African National Congress ('the ANC'), a political party registered under s 15(1) of the ECA and cited merely as an interested party, and no relief was sought against the ANC.

[6] The application is opposed by the first to third respondents ('the respondents'). In addition to opposing the application on the merits, the respondents raised the following in *limine* defences:

(a) This Court lacks the necessary jurisdiction to hear the application;

(b) The Commission failed to make out a case for urgency and failed to seek condonation for the lateness of the application;

(c) The Commission lacked *locus standi* to institute the proceedings and/or that there is non-joinder of the Chief Electoral Officer of the Commission; and

(d) The mandate of the applicant's attorney was also challenged; however, it is not necessary to deal with this since it was effectively abandoned when the matter was heard.

[7] In relation to the merits, the respondents disputed that the statements constituted prohibited conduct and contended that the alleged contraventions lacked particularity. In relation to the contempt of court charges, it was contended that the first and second respondents were not in breach of any court orders or judgments.

[8] The respondents also brought a counter-application in terms of s 20(1)*(a)* of the ECA, claiming that the Commission's decision to pursue the present application be reviewed and set aside as invalid.

Statutory framework

[9] The powers and duties of this Court are prescribed by s 20 of the ECA, which provides as follows:

'20 Powers, duties and functions of Electoral Court

(1)*(a)* The Electoral Court may review any decision of the Commission relating to an electoral matter.

(b) Any such review shall be conducted on an urgent basis and be disposed of as expeditiously as possible.

(2)*(a)* The Electoral Court may hear and determine an appeal against any decision of the Commission only in so far as such decision relates to the interpretation of any law or any other matter for which an appeal is provided by law.

(b) No such appeal may be heard save with the prior leave of the chairperson of the Electoral Court granted on application within the period and in the manner determined by that Court.

(c) Such an appeal shall be heard, considered and summarily determined upon written submissions submitted within three days after leave to appeal was granted in terms of paragraph *(b)*.

(2A) The Electoral Court may hear and determine any dispute relating to membership, leadership, constitution or founding instruments of a registered party.

(3) The Electoral Court may determine its own practice and procedures and make its own rules.

(4) The Electoral Court shall-

(a) make rules in terms of which electoral disputes and complaints about infringements of the Electoral Code of Conduct as defined in section 1 of the Electoral Act, 1993 (Act 202 of 1993), and appeals against decisions thereon may be brought before courts of law; and

(b) determine which courts of law shall have jurisdiction to hear particular disputes and complaints about infringements, and appeals against decisions arising from such hearings.

(5) The hearings and appeals referred to in subsection (4) shall enjoy precedence in the courts of law determined in accordance with that subsection.

(6) The Electoral Court may hear and determine any matter that relates to the interpretation of any law referred to it by the Commission.

(7) The Electoral Court may investigate any allegation of misconduct, incapacity or incompetence of a member of the Commission and make any recommendation to a committee of the National Assembly referred to in section 7 (3) *(a)* (ii).

(8) The Director-General: Justice shall provide the necessary accommodation, administration and financial support for the Electoral Court.'

[10] It is important for purposes of the challenge to this Court's jurisdiction to hear the matter as a court of first instance to consider s 96 of the Act. It provides as follows:

'96 Jurisdiction and powers of Electoral Court

(1) The Electoral Court has final jurisdiction in respect of all electoral disputes and complaints about infringements of the Code, and no decision or order of the Electoral Court is subject to appeal or review.

(2) If a court having jurisdiction by virtue of section 20(4)*(b)* of the Electoral Commission Act finds that a person or registered party has contravened a provision of Part 1 of this Chapter it may in the interest of a free and fair election impose any appropriate penalty or sanction on that person or party, including-

(a) a formal warning;

(b) a fine not exceeding R200 000;

(c) the forfeiture of any deposit paid by that person or party in terms of section 27 (2) *(e)* or paid by an independent candidate in terms of section 31B (3) *(b)*;

(d) an order prohibiting that person or party from-

(i) using any public media;

(ii) holding any public meeting, demonstration, march or other political event;

(iii) entering any voting district for the purpose of canvassing voters or for any other election purpose;

(iv) erecting or publishing billboards, placards or posters at or in any place;

(v) publishing or distributing any campaign literature;

(vi) electoral advertising; or

(vii) receiving any funds from the State or from any foreign sources;

(e) an order imposing limits on the right of that person or party to perform any of the activities mentioned in paragraph *(d)*;

(f) an order excluding that person or any agents of that person or any candidates or agents of that party from entering a voting station;

(g) an order reducing the number of votes cast in favour of that person or party;

(h) an order disqualifying the candidature of that person or of any candidate of that party; or

(i) an order cancelling the registration of that party.

(3) Any penalty or sanction provided for in this section will be in addition to any penalty provided for in Part 3 of this Chapter.' (Own emphasis.)

[11] The Act sets out how the provisions have to be interpreted. Section 2 provides that:

'(2) Every person interpreting or applying the Act must:

(a) do so in a manner that gives effect to the constitutional declarations, guarantees and responsibilities contained in the Constitution; and

(b) take into account any appropriate Code.'

[12] Section 19(3)*(a)* of the Constitution provides that:

'(3) Every adult citizen has the right-

(a) to vote in elections for any legislative body established in terms of the Constitution…'[3]

Factual background

[13] The application has its genesis in statements that were made by Messrs Reddy and Khanyile on 5 March 2024 and 13 March 2024, respectively. On 18 March 2024, the Commission received a complaint which had been lodged on behalf of the ANC KwaZulu-Natal. In broad terms, the complaint was that the statements concerned pose a threat to a successful election. It was contended that the statements amount to the incitement of violence and unlawful conduct and are in contravention of the Code of Conduct.[4]

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[3] See *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC) para 14, where the Constitutional Court held that the right to vote '. . . is therefore a right to vote in free and fair elections in terms of an electoral system prescribed by national legislation which complies with the aforementioned requirements laid down by the Constitution.'

[4] The Electoral Code of Conduct ('Code of Conduct') is contained in Schedule 2 of the Act. See also s 94 of the Act which provides that no person or registered party may contravene the provisions of the Code of Conduct.

[14] The Commission, after receiving the complaint, decided to have the matter investigated by Harris Nupen Molebatsi Attorneys ('HNM'), the attorneys of record. The investigation was completed on 26 March 2024 and the outcome thereof was submitted to the Commission. The Commission alleges that the investigation report was produced on a confidential and privileged basis and for that it has elected to retain its legal privilege.

[15] The present application was instituted on 25 April 2024 by the Commission, a month after the completion of the investigation undertaken by HNM. It seeks a declarator in respect of the alleged contraventions of ss 87(1)*(a)–(c),* 87*(2)* and 93 of the Act, the disqualification of the candidature of Mr Reddy, and penalising the first and second respondents with a fine of R200 000 each, alternatively that they each be given a formal warning. It is significant to note that the relief sought by the Commission in its notice of motion is not predicated on the violation of the Code in terms of s 94 of the Act. In addition, the Commission seeks further that they both be found guilty of contempt of court and that they retract the allegations and tender apologies.

[16] There are no material disputes of fact. The outcome of this matter turns, in my view, on the interpretation of s 96(1) of the Act read with the Rules of this Court relating to electoral disputes and complaints relating to the infringement of the Code of Conduct,[5] and whether the conduct of the first and second respondents constitutes conduct that should be sanctioned by this Court.

[17] Rule 2 is relevant to this dispute and was also relied upon by counsel for the applicant during argument. It reads:

'2. Determination of courts and jurisdiction. —(1) The Magistrate's Court and the High Court in whose area of jurisdiction—

(*a*) any electoral dispute; or

(*b*) any complaint about an infringement of the Code,

has arisen, have, subject to subrules (2) and (3), jurisdiction to hear such dispute or complaint.

[5] Rules regulating electoral disputes and complaints about infringements of the electoral code of conduct in schedule 2 of the Electoral Act, 1998 (Act No. 73 of 1998) and determination of courts having jurisdiction, GN 2915, *GG* 19572, 4 December 1998.

(2) The following courts have jurisdiction to impose the following sanctions referred to in section 96 of the Act—

(*a*) The Court, all the sanctions in subsection (2);

(*b*) The High Court, all the sanctions in subsection (2) except (2) (*h*) and (i);

(*c*) The Magistrate's Court, all the sanctions in subsection (2) except (2) (*d*) (vii), (*h*) and (*i*) and with regard to the sanctions in subsection (2) (*b*) and (*c*), the Magistrate's Court must have regard to its civil jurisdiction.

(3) A party may approach the Court directly in respect of any electoral dispute or complaint about an infringement of the Code—

(*a*) where a sanction referred to in section 96 (2) (*h*) or (*i*) of the Act is sought; and

(*b*) notwithstanding the provisions of subrule (1), in any matter where special circumstances are present, with prior leave of the Chairperson and at least two members of the Court.

(4) The offences referred to in Part 1 of the General Provisions of Chapter 7 and in sections 107, 108 and 109 of the Act, are dealt with in accordance with the legislation applicable to criminal matters.' (My emphasis.)

Jurisdiction

[18] I shall deal with the issue of jurisdiction first, since it could be dispositive of the matter, should it be successful.

[19] The Constitutional Court held in *Gcaba v Minister for Safety and Security*,[6] that questions of jurisdiction are to be determined on the issues identified in the pleadings and in application proceedings, the affidavits represent both the pleadings and the evidence.[7]

[20] In *Lewarne v Fochem International (Pty) Ltd*,[8] the Supreme Court of Appeal held that a decision regarding jurisdiction should be based on an applicant's pleadings since it determines the legal basis for the claim, and *in casu,* that would be the founding affidavit filed by the Commission.[9]

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[6] *Gcaba v Minister for Safety and Security and others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).
[7] Ibid para 75.
[8] *Lewarne v Fochem International (Pty) Ltd* [2019] ZASCA 114.
[9] Ibid para 7.

[21] The authors of *Lawsa*[10] define this Court's jurisdiction as follows:

'The High Court in whose jurisdiction the electoral dispute or complaint about the infringement of the code has arisen, may impose all penalties except those penalties that result in the disqualification of a person's candidature, or that result in an order cancelling the registration of a political party.'

And further:

'A party may approach the Electoral Court directly in respect of an electoral dispute or complaint about the infringement of the code only in circumstances in which an order that results in the disqualification of a person's candidature or of any candidate of that party, or an order cancelling the registration of a political party is sought.' (My emphasis.)

[22] The Commission in it its founding affidavit relied on s 96(1) of the Act, s 20(4)*(b)* of the ECA, and sections 38, 172(1)*(b)* and 173 of the Constitution in invoking this Court's jurisdiction.

[23] In my view, even though s 96(1) of the Act endows this Court with final jurisdiction, it does not oust the jurisdiction of the Supreme Court of Appeal or the Constitutional Court. In *African Christian Democratic Party v Electoral Commission and others*,[11] the Constitutional Court held that s 96(1) of the Act has not ousted the jurisdiction of the Constitutional Court. I am mindful that the Constitutional Court considered a matter relating to municipal elections, the principle however remains the same. O'Regan J, writing for the majority, held:

'[14] The first question to be considered is whether this Court has jurisdiction to consider an application for leave to appeal against the Electoral Court. The respondent argued that this Court did not have jurisdiction on two grounds. In the first place, it relied upon the provisions of s 96(1) of the Electoral Act 73 of 1998 which states:

> "The Electoral Court has final jurisdiction in respect of all electoral disputes and complaints about infringements of the Code, and no decision or order of the Electoral Court is subject to appeal or review."

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[10] 16 *Lawsa* 3 ed (2017) para 470.

[11] *African Christian Democratic Party v Electoral Commission and others* [2006] ZACC 1; 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC).

[15] The question of this Court's jurisdiction to hear matters, in the light of s 96 of the Electoral Act, was expressly left open by this Court in Liberal Party v The Electoral Commission and Others. The legislation that, in the first place, governs municipal elections is the Municipal Electoral Act. Section 3(2) of the Electoral Act provides that:

> "This Act applies to an election of a municipal council or a by-election for such council only to the extent stated in the Local Government: Municipal Electoral Act 27 of 2000."

There is no provision in the Municipal Electoral Act that renders s 96 of the Electoral Act applicable to disputes arising from municipal elections. Accordingly, on a proper interpretation of the Municipal Electoral Act, read with the Electoral Act, s 96 of the Electoral Act is not applicable to disputes arising from municipal elections. It is true that the Municipal Electoral Act does not contain an express provision for an appeal against the decision of the Electoral Court. However, there is also no express provision in the Municipal Electoral Act stating that the decision of the Electoral Court is final. In my view, in these circumstances, it cannot be said that s 96 applies to disputes arising from municipal elections and, accordingly, cannot on any terms be held to oust the jurisdiction of this Court to entertain an appeal. I cannot accept therefore the respondent's argument that it could not have been the intention of Parliament to provide differently for provincial and national elections, on the one hand, and local government elections on the other. Legislation should not be presumed to have intended to oust this Court's jurisdiction when it does not expressly state as such. The question of whether this Court's jurisdiction in constitutional matters can, in fact, be ousted without offending the Constitution is an important matter upon which we had little argument and on which it is not necessary to say more in this judgment. I should add only that I expressly refrain from considering the effect of s 96 in relation to disputes arising from national or provincial elections and the matter should be left open, as it was in the *Liberal Party* case.[12] (My emphasis, and footnotes omitted.)

[24] The Constitutional Court in *African National Congress v Chief Electoral Officer, Independent Electoral Commission* definitively stated that its jurisdiction is not ousted:[13]

> [8] The question we must consider now is whether s 96(1) ousts the jurisdiction of this court in this matter. Section 96(1) must be interpreted in a manner that is consistent with the Constitution. Indeed, s 2 of the Electoral Act provides that any person interpreting or applying the Act must do so in a manner that "gives effect to the constitutional . . . guarantees". It is clear that were s 96(1)

[12] Ibid paras 14-15.
[13] *African National Congress v Chief Electoral Officer, Independent Electoral Commission* [2009] ZACC 13; 2010 (5) SA 487 (CC); 2009 (10) BCLR 971 (CC) paras 8-9.

to be interpreted to oust this court's jurisdiction to consider constitutional matters, it would be inconsistent with s 167(3)*(a)* of the Constitution, which provides that this court is the highest court in all constitutional matters. Accordingly, s 96(1) should in the light of s 2 of the Electoral Act be read in a manner consistent with s 167(3)*(a)*. This can be achieved by reading s 96(1) to mean that no appeal or review lies against a decision of the Electoral Court concerning an electoral dispute or a complaint about an infringement of the Code, save where the dispute itself concerns a constitutional matter within the jurisdiction of this court.

[9] In this case the applicant argued that Mr Maluleka had a constitutional right in terms of s 19(3)*(b)* of the Constitution to stand for election to the National Assembly and that the effect of the decision of the Electoral Court constituted an unjustifiable infringement of that right. Clearly this case raises a constitutional matter within the jurisdiction of this court, a jurisdiction which s 96(1) of the Electoral Act does not oust.' (My emphasis, and footnotes omitted.)

[25] The Commission avers in para 20 of its founding affidavit that this Court has the necessary jurisdiction to adjudicate this application in terms of s 96(1) of the Act, as it concerns electoral disputes and complaints about infringements of the Code of Conduct. It is further endowed by s 20(4)*(b)* of the ECA with the necessary jurisdiction to 'determine which courts of law shall have jurisdiction to hear particular disputes and complaints about infringements'.

[26] The Constitutional Court in *Kham and others v Electoral Commission and another*,[14] considered this Court's jurisdiction, albeit in the context of reviews, and held:

'Its powers, duties and functions are spelled out in s 20. As regards the ambit of its jurisdiction this is defined in s 20(1) which reads that "(t)he Electoral Court may review any decision of the Commission relating to an electoral matter". If the Electoral Court had jurisdiction in this case, it is in this provision that one would expect to find it.'[15]

And held further:

'Is there anything in the context that would warrant a more restrictive interpretation of the section and hence of the Electoral Court's jurisdiction? I think not. The clear purpose was to establish a court that would be able to deal with all electoral matters. It was constituted with the same status as the High Court and with a judge of the Supreme Court of Appeal as its chairperson. It is to

[14] *Kham and others v Electoral Commission and another* [2015] ZACC 37, 2016 (2) SA 338 (CC) para 38.
[15] Ibid para 38.

resolve electoral disputes as a matter of urgency. There is not the slightest indication that the intention was to limit the range of disputes that would fall within the ambit of the Electoral Court's jurisdiction, so that some electoral issues would fall within its jurisdiction and others not. Instead, the breadth of language used suggests that the statutory purpose was to create a specialist court that would deal with all electoral matters. And our jurisprudence holds that when a specialist court is created the apparent purpose of creating a single forum for resolving disputes of a particular type is not to be stultified by a resort to undue literalism and too careful a parsing of statutory language.'[16] (My emphasis, and footnotes omitted.)

[27] In dealing with the jurisdiction of specialists courts, the Supreme Court of Appeal held in *Makhanya v University of Zululand*[17] as follows:

'But the state might also create special courts to resolve disputes of a particular kind. Generally, those will be disputes concerning the infringement of rights that are created by the particular statute that creates the special court (though that will not always be so). When a statute confers judicial power upon a special court it will do so in one of two ways. It will do so either by *(a)* conferring power on the special court and simultaneously *(b)* excluding the ordinary power of the High Court in such cases (it does that when 'exclusive jurisdiction' is conferred on the special court). Or it will do so by conferring power on the special court without excluding the ordinary power of the High Court (by conferring on the special court jurisdiction to be exercised concurrently with the original power of the High Courts). In the latter case the claim might be brought before either court.' (My emphasis.)

[28] It was submitted by counsel for the respondents that since this Court is a specialist court created by statute, it derives its jurisdiction from the primary statute, i.e. the Act, more specifically s 96, and s 20 of the ECA. Accordingly, so it was argued, the final jurisdiction refers to appellate jurisdiction to entertain a matter and not to this Court sitting as a court of first instance.

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[16] Ibid para 40.
[17] *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA) para 25.

[29] The Supreme Court of Appeal has referred to the Rules and has taken no issue with the Electoral Court sitting as the court of first instance in certain circumstances. In *Electoral Commission v Democratic Alliance and others*[18] the following was stated:

'Then there are the administrative penalties provided under s 96 of the Electoral Act. These can be imposed by various courts, designated for that purpose by the Electoral Court under the mechanism for determining complaints of contraventions in terms of s 20(4) of the ECA, read with the rules made by the court.'

And further:[19]

'The Electoral Court, in terms of s 20(4) of the ECA, has determined that a magistrates' court or High Court in whose area of jurisdiction any electoral dispute or complaint about an infringement of the Code has arisen, has jurisdiction to hear such complaint. That determination was made in the Rules.'

And lastly:[20]

'As stated, in terms of the Rules, magistrates' courts, High Courts and the Electoral Court have jurisdiction to hear electoral disputes and complaints about infringements of the Code. A party may approach a court directly in respect of any electoral dispute or complaint about the infringement of the Code. Proceedings are instituted by way of application.' (My emphasis, and footnotes omitted.)

[30] In *Brown v Economic Freedom Fighters and others*[21] the following was stated with regard to the Electoral Court sitting as the court of first instance in certain matters:

'[28] The jurisdiction issue was expressly addressed in *African National Congress v Democratic Alliance*, where it was found that in terms of the Rules, the Electoral Court may only be approached as a court of first instance when a violation of the Electoral Act might justify a sanction in terms of ss 96(2)*(h)* and *(i)* of the Act. In all other instances, justifying a lesser sanction under s 96(2), the relevant High Court or magistrates' court has jurisdiction. The jurisdiction of the High Court is thus extended, but the High Court does not become an Electoral Court for these purposes. I respectfully agree with these conclusions.

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[18] *Electoral Commission v Democratic Alliance and others* [2021] ZASCA 103; 2021 (5) SA 476 (SCA) para 26.
[19] Ibid para 40.
[20] Ibid para 47.
[21] *Brown v Economic Freedom Fighters and others* 2019 (6) SA 23 (GJ) paras 28-29.

[29] Considering the structure of the relevant provisions, no preference is expressed by the legislature for the specialist court as a court of first instance save in relation to sanctions under s 96(2)*(h)* and *(i)* of the Act. The respondents' challenge to the jurisdiction of this court must thus fail.' (My emphasis, and footnotes omitted)

[31] Most importantly, in my view, is the Constitutional Court's decision in *Democratic Alliance v African National Congress and another*[22] (albeit the minority judgment but the finding is confirmed by the majority[23]):

'This court's jurisdiction is not ousted by the provisions of s 96(1) of the Electoral Act.'

And:

'Therefore, in respect of appeals from the Electoral Court to the Supreme Court of Appeal in electoral disputes or complaints about the infringement of the Electoral Code of Conduct, s 96(1) must be interpreted in the same way in which this court interpreted it in *African National Congress* in relation to the jurisdiction of this court. The result is that appeals from the Electoral Court to the Supreme Court of Appeal concerning electoral disputes or complaints about alleged infringements of the Electoral Code of Conduct are competent.'[24] (My emphasis, and footnotes omitted.)

[32] The aforementioned dicta confirm inter alia that the Electoral Court may sit as a court of first instance and that there will be recourse to challenge the decision of this Court. As stated earlier, such litigants will be in a position to approach the Supreme Court of Appeal or the Constitutional Court. The application before this Court is, however, qualified by the nature of the relief sought. Importantly, the relief that is sought by the Commission is relief that only this Court is empowered to grant. Furthermore, s 96(1) cannot be read in isolation but in conjunction with Rule 2(3) of this Court. This finding gives context to the right to free and fair elections and this is what the Commission in its application before us seeks to enforce. There is accordingly no merit to the contention of the respondents that 'final jurisdiction' in s 96(1) only refers to appellate jurisdiction.

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[22] *Democratic Alliance v African National Congress and another* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) para 22.

[23] See para 118 where the majority stated: 'We embrace the main judgment's fuller exposition of the facts, as well as its findings that this court has jurisdiction to hear the matter.'

[24] *Democratic Alliance v African National Congress and another* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) para 27.

[33] In as much as the original complaint related to infringements of the Code, it is evident that they also constitute transgressions of the Act. The Commission elected to pursue these transgressions as prohibited by the Act. In light of the nature of the relief sought against Mr Reddy, this Court has jurisdiction. It would have served no purpose to institute a separate application before the high court to hear the matter of Mr Khanyile because the same complaint, albeit relating to different statements, apply to both of the respondents. No prejudice is suffered by any of the respondents if this Court is hearing the application as a court of first instance. Rule 2(3) specifically provides for such an application. In my view, the said rule re-emphasizes direct access to this Court where a sanction of disqualification is sought.

Urgency

[34] The respondents took issue with the lack of urgency displayed by the Commission in bringing this application. In essence, it was submitted that the Commission's delay of six weeks to institute the proceedings was inordinate and resulted in urgency being self-created. The Commission submitted that the application was brought with the requisite degree of urgency. It is not clear from the founding affidavit why the Commission required six weeks to investigate the conduct of Messrs Reddy and Khanyile. Moreover, it has not sufficiently explained why the matter was further delayed from 26 March 2024, the date on which the investigation report was received by the Commission, until 25 April 2024, when the papers were issued. In my view, given the serious allegations against Messrs Reddy and Khanyile, the matter ought to have been dealt with far more expeditiously. Electoral matters, by their very nature, are urgent and ought to be given the necessary preference and urgency. They should be brought at the earliest possible opportunity because of their potential of having an impact on elections. In my view, the circumstances relating to this matter are not exceptional. The lateness of launching the application resulted in this matter being heard a day before the national and provincial elections.[25]

[25] This court was in session until long after normal court hours.

[35] In my view, despite the lack of treating the matter with the required urgency, it does not result in the matter not being heard. It is, however, a factor to consider in awarding costs.

[36] This matter raises important electoral issues and the interests of justice dictate that it be heard without any further delay. Counsel for the applicant has argued, correctly in my view, that unlike reviews, there is no stipulated period in which the application had to be brought and hence no condonation was required, as was submitted by the respondents.

***Locus standi* and/or non-joinder**

[37] It was submitted by the respondents that since the application has been instituted in terms of s 95(1) of the Act, the Commission lacked the necessary *locus standi* to institute the application. It was argued that the section vests authority in the chief electoral officer to bring the proceedings and not the Commission, and that the chief electoral officer should have been joined, with such failure being fatal. The section provides:

'Subject to this Act and any other law, the chief electoral officer may institute civil proceedings before a court, including the Electoral Court, to enforce a provision of this Act or the Code.'

The respondents' defence must fail. The purpose of s 95(1) is to ensure that the proceedings are instituted by a person who, in terms of the ECA, is the head of the Commission. Although the chief electoral officer is identified as the person who must bring the proceedings, he does so on behalf of the Commission. He brings the enforcement proceedings on behalf of the Commission. In the present matter, the chief electoral officer deposed to all the affidavits on behalf of the Commission. The purpose of the Act was satisfied in this matter. I am satisfied that the applicant has the necessary *locus standi* to institute the proceedings against the respondents. The applicant is furthermore acting in accordance with its constitutional mandate.

[38] There is no merit in any of the points in *limine*. I am satisfied that this Court has the necessary jurisdiction to hear the application and will now consider the merits. The merits were fully canvassed in arguments by both parties before this Court.

Merits

Mr Reddy's statements

[39] In terms of s 27 of the Act, MK has nominated Mr Reddy as one of its candidates for the national election scheduled for 29 May 2024. Mr Reddy is an active member of the party and on 5 March 2024, and whilst applications were pending before the KwaZulu-Natal Division of the High Court, Durban and this Court, he made the following statement whilst being interviewed by a journalist:

'It's not EFF, it's not the DA, it's not the IFP, it's no other party except MK, so they are trying all tricks, they are going to the courts, they want to stop MK from registering. But MK, please ANC, listen, MK is uMkhonto Wesizwe. You talking about the military veteran's association, which the ANC disbanded years ago. It's not the same; you don't have a trademark on this MK logo. So what gives you the right to claim that MK belongs to you. You got no chance in court. But, we are sending a loud and clear message that if these courts, which are sometimes captured, if they stop MK, there will be anarchy in this country. There will be riots like you've never seen in this country. There will be no election. No South African will go to the polls if MK is not on the ballot.' (My emphasis.)

[40] It is common cause that a video recording of Mr Reddy's statement was widely published and distributed on social media. The video was viewed by 138 000 people. When the statement was made, Mr Reddy was wearing MK regalia and he was surrounded by other persons wearing similar clothing. It is contended by the Commission that a reasonable and informed observer would understand the statement to mean that if the courts decide in favour of the ANC then:

(a) there would be anarchy in South Africa;

(b) there would be riots of an unprecedented scale; and

(c) the upcoming elections would not take place.

Another video recording, also of Mr Reddy, was disseminated on social media in early March 2024 making statements, inter alia, that if MK was not allowed to campaign, that there will be civil war and no one will vote.

Mr Khanyile' s statements

[41] Mr Khanyile was the national co-ordinator of the MK Youth League and was appointed as the leader of the MK Youth League. On 13 March 2024, whilst urgent applications of the ANC's were pending before the courts, he stated inter alia:

'We are not scared of Cyril Ramaphosa, the [berets], and the army. Let me tell you and proclaim this comrades: If they removed the ballot of MK, they removed President Zuma as the president and our fact of the campaign, and try to take our right which is enshrined in Chapter 2 of the Constitution, current, there won't be elections in South Africa. There won't be elections in South Africa. Let me repeat this so that when we are arrested they can use it as evidence in court because they always use our videos. Comrades, comrades, you must believe in what I'm telling you. This leadership is leadership which is genuine, we mean what we say and we say what we mean. For the defence of this democracy, we are willing to lay down our lives. Chapter 2 of the Constitution we have freedom of choice, freedom of association, a right to choose, to choose our president, to associate with any logo, to wear any kind of t-shirt, to campaign in anyway *(sic)* we want, to campaign everywhere we want, and to choose a party of our choice. Because you can smell defeat, because you know that you are defeated, you take us into court. Because you know that Zondo is not only a spy, he is a scammer, he is fraud lawyer, he is going to want to infiltrate and change the Constitution to remove us on the ballot. Remove MK on the ballot, remove Zuma on the ballot, there won't be elections. *[Inaudible]* Because we have numbers on our side and we are fearless. For this election to be free and fair, it will have uMkhonto Wesizwe and Zuma as our choice, we are prepared to lay down our lives.' (My emphasis.)

[42] It is contended, by the applicant, that the video of Mr Khanyile was also widely published and over 243 000 people watched it.

[43] It is these statements that triggered the complaint by the ANC. The complaint originally was for the alleged breach of the Code of Conduct and the unlawful conduct that posed a threat to the upcoming election.

[44] In defence of these statements, the third respondent filed an answering affidavit and both Messrs Reddy and Khanyile filed confirmatory affidavits. The respondents contended that the Commission had failed in its onus to exclude that a reasonable and informed observer would understand the comments to mean:

(a) If the rights enshrined in Chapter 2 of the Constitution (the Bill of Rights) and/or Mr Zuma is unjustly removed, there would be no elections or an election boycott or stayaway, which MK will make sure is a success;

(b) For the election to be free and fair, MK must be allowed to participate; and

(c) People of MK are prepared to die or be killed by the police or soldiers for their vote.

(d) There may be civil war if citizens are not allowed to vote or campaign for MK.

[45] The aforesaid interpretation was proffered by the respondents as the innocent meaning of the said statements. Accordingly, so it was argued, the Commission gave a skewed interpretation that was not borne out by the text. I shall return to this submission later on.

[46] In its reply, the Commission, amongst others, submitted that the respondents' implicit acknowledgement that Messrs Reddy and Khanyile needed to apologise and express remorse for wrongdoing is not in line with their firm stance of innocence. The Commission contended that the deponent to the answering affidavit is not in a position to provide evidence to defend the conduct of Messrs Reddy and Khanyile, especially since the intention behind their impugned conduct needed to be explained. The submission is fairly made that courts are entitled to expect the actual witness who can depose to the events in question to do so under oath.

[47] The meaning to be attributed to the impugned statements must be considered in the context of s 16 of the Constitution, which guarantees the right to freedom of expression. In other words, the question is whether the impugned statements are protected under s 16 of the Constitution. Section 16 reads:

'Freedom of expression. – (1) Everyone has the right to freedom of expression, which includes –

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to –

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.' (My emphasis.)

[48] In *Khumalo and others v Holomisa*,[26] the Constitutional Court held:

'[A]though freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution.'[27]

[49] As was held in *Islamic Unity Convention v Independent Broadcasting Authority*,[28] there are boundaries to the right to freedom of expression, and those boundaries are defined in s 16(2) of the Constitution. Langa ACJ, as he then was, stated that 'Implicit in its provisions is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm.'[29] (My emphasis.)

[50] An objective test must be applied in determining the meaning of the impugned statements. In *Le Roux v Dey*,[30] the Constitutional Court held:

'In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied.'[31] (My emphasis.)

An analysis of the statements made by Messrs Reddy and Khanyile, objectively viewed, most certainly leaves the reader with the conclusion that, if their demands are not met, harm will ensue and there will be no election. Various threats appear in these statements and such threats of violence are neither worthy, nor deserving, of protection in terms of our Constitution.

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[26] *Khumalo and others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC).
[27] Ibid para 25.
[28] *Islamic Unity Convention v Independent Broadcasting Authority and others* [2002] ZACC 26; 2002 (4) SA 294 (CC).
[29] Ibid para 32.
[30] *Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC).
[31] Ibid para 89.

[51] There can be no doubt that, viewed objectively, the statements made by Mr Reddy constitute prohibited conduct in terms of s 87 of the Act. They convey serious threats of violence and intimidation. The intimidation was aimed at citizens not to vote. Moreover, these uttered threats also interfered with the work off the Commission, especially the independence of the Commission. The threats were aimed at coercing the Commission and its employees from taking any steps that would prohibit MK from campaigning, even if there was a lawful basis to do so. Assessed in the context of the prohibited conduct in terms of the Act, these constituted contraventions of s 87(1)*(a)–(c),* and, on a *prima facie* level, had to hinder the Commission in fulfilling its duties. Undoubtedly, the statements also contravened s 87(2). After a careful analysis of the facts contained in the Commission's founding affidavit, I am not persuaded that a case has been made out that supports a transgression in terms of s 93(2) of the Act. No details were given by the Commission of the kind of obstruction caused by Messrs Reddy and Khanyile or the specific directions that were given to them by the Commission that were not carried out.

[52] In relation to Mr Khanyile, his statements also contravened s 87(1)*(a)-(c)* and s 87(2) of the Act. His statements, assessed in the context of when and how they were said, would have been interpreted by a reasonable and informed observer as a threat to prevent the election. He repeatedly stated that if their demands are not met then there will be no election. The statements that were made by both of them had the potential to create social unrest and instability in the country. In the case of Mr Reddy, it has to be borne in mind that he is a candidate of MK and ought to set an example. His disqualification would promote accountability and send out a message that no one is above the law. The transgressions committed by Mr Reddy, given his position within MK, are serious in nature, and inconsistent with the rule of law.[32] In my view, the relief sought in relation to the penalties and sanctions of the Act is not only warranted but also appropriate.

[32] *Economic Freedom Fighters v Speaker, National Assembly and others* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC); *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party and others* [2024] ZACC 6.

Contempt of Court

[53] The Commission also sought an order declaring that both Messrs Reddy and Khanyile are in contempt of court. In *S v Mamabolo* ('*Mamabolo*'),[33] the Constitution Court stated:

'How far can one go in criticising a judge? Our law, while saying that "(j)ustice is not a cloistered virtue" and that "it is right and proper that . . . [Judges] should be publicly accountable", does place limits on the criticism of judicial officers and the administration of justice for which they are responsible. This appeal concerns the constitutional validity of some of these limits. More specifically it relates to a conviction for contempt of court resulting from the publication of criticism of a judicial order. Leave was granted to appeal directly to this Court because the case raised constitutional issues of substance on which a ruling by this Court was desirable in the interests of justice.' (My emphasis, and footnotes omitted.)

[54] It was submitted by the respondents that the applicant is relying on a cause of action that is supposedly based on the crime of scandalising the court, and that the Constitutional Court has held in *Mamabolo* that a summary procedure which does not afford the contempt or his or her procedural rights guaranteed in the Constitution is inappropriate. In response it was submitted on behalf of the Commission that its cause of action is based on the legal principles as set out by the Constitutional Court in *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma* ('*Zuma*').[34] The Commission's alleged cause of action is not supported by its papers. In the founding affidavit the Commission avers the following in para 139:

'The Commission asks this court to declare that Mr Reddy and Mr Khanyile are in contempt of court on account of their wilful disobedience of this Court's judgments.'

And para 141 of the founding affidavit states:

'The relief sought by the Commission concerning the contempt of court would protect the Judiciary against vilification, deter disparaging remarks calculated to bring the judicial process into disrepute and safeguard the authority of court orders. Final orders of the courts must be obeyed, and the authority of the courts to independently adjudicate the matters before them must be

[33] *S v Mamabolo (E-TV and others intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC) para 1.
[34] *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and others* [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC).

respected. The sanction sought by the Commission is supported by the need to affirm the authority of final court orders and of courts to make those orders. If the impression were to be created that court orders are not binding, or can be flouted or unlawfully influenced with impunity, the future of the judiciary, and the rule of law, would be bleak.' (My emphasis.)

[55] In argument before us, counsel for the Commission disavowed any reliance on paras 139 and 141. He submitted that the reference to the 'final court orders' in para 139 was meant to be a reference to prospective judgments. It is difficult to follow counsel's submission. The law relating to civil contempt of court is straightforward and well established. An applicant must establish:

(a) that a court order was made;

(b) that the order had been served;

(c) non-compliance with the order; and

(d) wilfulness and *mala fides.*[35]

[56] The Constitutional Court in *Zuma* re-affirmed the importance of court orders and the obedience thereof when it stated that:[36]

'[26] The thrust of s 165 of the Constitution was expounded by Nkabinde J in *Pheko II*, in which it was stated that —

> "(t)he rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.
>
> Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the

[35] *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 22.

[36] *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and others* [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC).at paras 26-27.

rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest."

[27] Contempt of court proceedings exist to protect the rule of law and the authority of the judiciary. As the applicant correctly avers, 'the authority of courts and obedience of their orders — the very foundation of a constitutional order founded on the rule of law — depends on public trust and respect for the courts'. Any disregard for this court's order and the judicial process requires this court to intervene. As enunciated in *Victoria Park Ratepayers' Association*, "contempt jurisdiction, whatever the situation may have been before 27 April 1994, now also involves the vindication of the Constitution". Thus, the issues at the heart of this matter are irrefutably constitutional issues that engage this court's jurisdiction.' (My emphasis, and footnotes omitted.)

[57] In my view, the Constitutional Court, in finding Mr Zuma in contempt of court, relied on the trite principles that apply to civil contempt. It did not create a new class of contempt procedure. The reality was that Mr Zuma failed to adhere to the Constitutional Court's order. The Constitutional Court held:[37]

'As set out by the Supreme Court of Appeal in *Fakie,* and approved by this court in *Pheko II*, it is trite that an applicant who alleges contempt of court must establish that *(a)* an order was granted against the alleged contemnor; *(b)* the alleged contemnor was served with the order or had knowledge of it; and *(c)* the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.' (My emphasis.)

[58] The Commission has failed to meet the requirements of civil contempt. It is evident from the facts that there were no court orders that have been disobeyed, as claimed by the Commission in its affidavits. The statements made are indeed scurrilous and constitute unfounded attacks on the judiciary. Scandalising the court is not akin to ordinary civil contempt proceedings. The Commission, in its founding affidavit, placed reliance on court orders that were disregarded. In *casu,* there are no court orders that have been defied. Scandalising the court falls within the domain of *Mamabolo* and the appropriate forum to have dealt with such statements ought to be a criminal court in the

[37] Ibid para 37.

area where Messrs Reddy and Khanyile made the relevant statements. Messrs Reddy and Khanyile would then be in a position to claim their rights in terms of s 35(3) of the Constitution. I accordingly disagree with the Commission that the statements constitute an independent basis for holding Messrs Reddy and Khanyile in contempt of court.

The counter-application

[59] This brings me to the counter-application instituted by the respondents in which they apply for a review of the Commission's decision to institute this application. The grounds on which the counter-application are based are that:

(a) The Commission decided to institute the application without allowing MK to be heard and without notifying the opposing respondents;

(b) The Commission's decision to bring the application is *ultra vires,* as the Commission was not duly authorised nor empowered in terms of s 95(1) of the Act to do so;

(c) The decision of the Commission is tainted by bias or improper motives as the Commission is 'consistently hell bent on unfairly targeting the MK Party for harsh and selective punishment, possibly due to its obvious animosity toward Mr Zuma or the dismissal of its earlier application';

(d) HNM received conflicting mandates from the Commission, which tainted the legality of the application; and

(e) Messrs Reddy and Khanyile were not allowed legal representation when they participated in the Commission's investigation of the ANC's complaint.

[60] It was submitted that the Commission attempted to enforce the Code of Conduct retrospectively to a period in which it was not applicable to either Mr Reddy or Mr Khanyile. The alleged statements were made on 3 March 2024 and 5 March 2024, respectively. Mr Reddy was only included in the MK's list on 8 March 2024 and Mr Khanyile was never included in such a list. Secondly, so it was argued, the third respondent was not granted an opportunity to be heard regarding the decision of the Commission to take steps aimed at the removal of its candidate, which affected its rights adversely.

[61] The counter-application was opposed on the ground that the decision to institute the application is not subject to judicial review, since it is not final in effect and has no adverse impact on the respondents. I am satisfied that the decision was not final in nature. The Commission submitted that there was no duty on them to notify the respondents of the application before it was brought, and in addition, the Commission was duly authorised in terms of s 95(1) of the Act to institute the application.

[62] The Commission submitted that the allegations of improper motives against it are unsubstantiated and not based on any factual foundation. It was further argued that both Mr Reddy and Mr Khanyile had no right to be legally represented when they were interviewed by HNM. It was submitted that the interviews could not in themselves have resulted in a determination of culpability. In any event, Mr Reddy requested to be interviewed on a date suitable to him and his legal representative, and HNM did not object to the request. Mr Khanyile did not request legal representation.

[63] On a procedural level, it has been contended by the Commission that the respondents were served with the application on 25 April 2024 and they only gave notice of the counter-application on 3 May 2024. The counter-application falls to be dismissed since it was brought outside the period stipulated in rule 6[38] and there is no application to condone the lateness. In fact, the respondents only filed an application for condonation for the late filing of its answering affidavit; no condonation was sought for non-compliance with rule 6.

[64] Assuming, without deciding, that the decision is reviewable, I am of the view that rule 6 should have been adhered to and that the application ought to have been lodged within three days after the decision had been made. The respondents have failed to apply for condonation for the counter-application. It is dismissed on this basis.

Sanctions

[38] Rules Regulating the Conduct of the Proceedings of the Electoral Court, GN 794, *GG* 18908, 15 May 1998.

[65] The offending conduct by the first and second respondents, as stated earlier, when assessed in the context of the recently concluded election and by a reasonable informed observer, constitute prohibited conduct in terms of the Act. This Court, having the necessary jurisdiction, is therefore empowered to impose the sanctions. The appropriateness of the sanctions sought by the Commission will now be considered. The penalties stipulated in the Act bear a close resemblance to criminal penalties and therefore a penalty to be imposed should be proportional in severity to the degree of blameworthiness of the respondents, the nature of the offence and its effect on the ability of the voters to exercise their political rights under s 19 of the Constitution.

[66] In considering the appropriate sanctions to impose, the following factors, in relation to Mr Reddy, are relevant and will be taken into account:

(a) The aggravating factors present are the serious nature of the transgressions, the fact that Mr Reddy is an active member of the MK, that he made the statements whilst wearing his party's regalia, and that he had not once but twice made these public statements that were viewed by thousands of people;

(b) The fact that these statements were made in March 2024, whilst the election was scheduled for the end of May 2024 - in other words, shortly before the election;

(c) The fact that he made scurrilous allegations against the judiciary, knowing that various matters were pending before the courts;

(d) The fact that the statements had the potential to derail the election;

(e) It is important that any sanction imposed should have the ability to dissuade other party members not to transgress the provisions of the Act or to commit acts that are prohibited by the Act; and

(f) In mitigation, it will be taken into account that Mr Reddy has no history of previous transgressions of the Act and that he attempted to make an apology, albeit very weakly, to clarify what he had said.

[67] In considering the appropriate sanctions to impose, the following factors, in relation to Mr Khanyile, are relevant and will be taken into account.

(a) His statement is as serious as that made by Mr Reddy. He, however, only engaged in prohibited conduct once by making a single statement.

(b) He was also removed from his position as the Youth leader of the MK and, in essence, had already suffered some consequences for his culpable conduct. His position stands to be distinguished from that of Mr Reddy who is still a candidate for the national election and whose conduct should be exemplary, as a member who wants to serve the national assembly.

[68] This Court is duty-bound to impose sanctions that will create conditions that are conducive to free and fair elections. The conduct of the first and second respondents impacted on a climate of democratic tolerance. The substance of the transgressions is, however, not the only factor that will be considered in imposing appropriate sanctions. This Court has been asked by the Commission to impose the maximum fine against both. In my view, having considered the various factors, imposing a maximum penalty of R200 000 would be disproportional given the fact that Mr Khanyile has already been punished by the MK by removing him from his position as its Youth leader. In my view whatever sanction is imposed by this Court should be aimed at protecting the electoral process in future.

Costs

[69] In general, this Court does not order an unsuccessful party to pay costs, but this rule is not inflexible as alluded to earlier in this judgment. The Commission applied for a punitive costs order, but ought to have brought this application much earlier. A fair order in my view is that each party should pay its own costs.

Order

[70] The following order is granted:

1. It is found that the first and second respondents contravened sections 87(1)*(a)*, *(b)* and *(c)*, and 87(2) of the Electoral Act 73 of 1998.

2. The first and second respondents are ordered to pay a fine of R150 000 each, this fine is suspended for a period of five (5) years from the date of this order on the following conditions:

   (i) That the two respondents do not contravene section 87(1) or 87(2) of the Electoral Act 73 of 1998 during the period of suspension; and

   (ii) That the two respondents do not make any statements that are intended to undermine the integrity of any electoral process during the period of suspension.

3. The counter-application is dismissed.

4. Each party to pay its own costs.

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EJS STEYN

Acting Judge of the Electoral Court

Appearances

Counsel for the applicant:	T Motau SC and D Sive
Instructed by:	Harris Nupen Molebatsi Inc
Counsel for the first to third respondent	: D Mpofu SC and P May
Instructed by	:Zungu Incorporated Attorneys