



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

Not Reportable

Case No: 0035/2024EC

In the matter between:

AFRICAN TRANSFORMATION MOVEMENT

Applicant

and

THE ELECTORAL COMMISSION OF SOUTH AFRICA

First Respondent

AFRICAN NATIONAL CONGRESS

Second Respondent

DEMOCRATIC ALLIANCE

Third Respondent

ECONOMIC FREEDOM FIGHTERS

Fourth Respondent

INKATHA FREEDOM PARTY

Fifth Respondent

FREEDOM FRONT PLUS

Sixth Respondent

UNITED DEMOCRATIC MOVEMENT

Seventh Respondent

AFRICAN INDEPENDENT CONGRESS

Eighth Respondent

CONGRESS OF THE PEOPLE

Ninth Respondent

GOOD PARTY

Tenth Respondent

AFRICAN CHRISTIAN DEMOCRATIC PARTY

Eleventh Respondent

PAN AFRICANIST CONGRESS OF AZANIA

Twelfth Respondent

AL JAMA-AH

Thirteenth Respondent

UMKHONTO WESIZWE PARTY

Fourteenth Respondent

ACTION SA

Fifteenth Respondent

RISE MZANSI

Sixteenth Respondent

BUILD ONE SOUTH AFRICA

Seventeenth Respondent

NATIONAL COLOURED CONGRESS

Eighteenth Respondent

UNITED AFRICANS FOR TRANSFORMATION

Nineteenth Respondent

PATRIOTIC ALLIANCE

Twentieth Respondent

Neutral Citation: *African Transformation Movement v Electoral Commission of South Africa and Others* (0035/2024EC) [2024] ZAEC 01 (14 January 2025)

Coram: ZONDI DP, ADAMS AJ and PROFESSOR NTLAMA-MAKHANYA (Additional Member)

Heard: Matter disposed of without oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email, by publication on the website of the Supreme Court of Appeal and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 14 January 2025.

Summary: The Electoral Act 73 of 1998 – chapter 4 (ss 55-56) – regulate any and all objections to the outcome of an election – objections material to final results of election – application for declaratory relief in relation to the validity and the lawfulness of the 2024 National and Provincial Elections (NPE) – application for order declaring the said elections not to have been ‘free and fair’ – application for order declaring s 24A of the Electoral Act unconstitutional – s 24A requires a voter to vote only in the voting district where she/he is registered – applicant alleges irregularities – therefore, NPE were not ‘free and fair’ – results of the 2024 NPE, as declared by the Commission on 2 June 2024, should be reviewed and set aside – factually found that applicant did not make out case for the relief sought – application lacks credible evidence – respondents’ legal points *in limine* also upheld – application dismissed with no order as to costs.

ORDER

The application is dismissed with no order as to costs.

JUDGMENT

Adams AJ (Zondi DP and Professor Ntlama-Makhanya (Additional Member) concurring):

[1] The applicant, African Transformation Movement (ATM), is a political party, duly registered as such in terms of s 15(1) of the Electoral Commission Act 51 of 1996 (the Commission Act). It participated in the May 2024 National and Provincial Elections (2024 NPE) and pursuant thereto won two seats in the National Assembly, as well one seat in a Provincial Legislature. The first respondent is the Electoral Commission of South Africa (Commission), established in terms of s 181(1)(f) of the Constitution of the Republic of South Africa, 1996 (Constitution) and it is the body constitutionally mandated to manage elections in this country. The second to the twentieth respondents are also registered political parties, which also participated in the 2024 NPE and all of them are now represented in the National Assembly and/or in one or more of the Provincial Legislatures.

[2] In this application ATM applies for wide ranging declaratory relief in relation to the validity and the lawfulness of the 2024 NPE. Importantly, ATM seeks an order declaring the said elections not to have been 'free and fair'. It may be apposite to cite the relevant portion of the notice of motion, which indicates that an order is applied for in the following terms: -

- '(1). The 2024 National and Provincial Elections be and are hereby declared not to have been free and fair insofar as there was no democratic electoral process by the Electoral Commission of South Africa.
- (2) The results of the National and Provincial Elections announced by the Electoral Commission of South Africa on 02 June 2024 be and are hereby declared as a nullity and are subsequently set aside.

- (3) The provisions of Section 24A of the Electoral Court Act, 1998, are hereby declared to be unconstitutional as far as they limit the right to vote entrenched in Section 19(3) of the Constitution.
- (4) The President of the Republic of South Africa is directed to, by Proclamation as directed by Section 49(3) of the Constitution, call and set a date for election re-run, and/or re-vote, which must be held within 90 days from the date of grant of this order.
- (5) The applicant is directed to serve copy of this Court Order to the President of the Republic of South Africa and the Speaker of the National Assembly within five days from the date of grant of this order.
- (6) The Respondents opposing this application be directed to pay costs of this application, such costs to include costs incurred for the employment of two Counsel.
- (7) Granting the applicant such further and/or alternative relief.'

[3] The applicant's case, in a nutshell, is that, because of alleged inaccuracies and inconsistencies in the Voters' Roll, discrepancies in respect of the ballot boxes, the alleged malfunction of the Voter Management Devices (VMD's) and misconduct on the part of certain Commissioners, it cannot be said that the 2024 NPE were 'free and fair'. This, in turn, means, according to the applicant's case, that the results of the 2024 NPE, as declared by the Commission on 2 June 2024, should be reviewed, declared a nullity and falls to be set aside. The applicant also contends that s 24A of the Electoral Act 73 of 1998, as inserted by s 7 of Act 34 of 2003 and as amended by s 9 of Act 4 of 2021 (Electoral Act), should be declared to be unconstitutional as far as the provision limits the right to vote entrenched in s 19(3) of the Constitution. Section 24A requires, as a general rule, a voter to vote only in the voting district where she/he is registered.

[4] The Commission, as well as the third respondent (Democratic Alliance or DA), oppose the application on the basis that no case is made out by the applicant for the relief sought. These respondents contend that the applicant has failed to demonstrate that there were indeed such serious irregularities prior to, during and/or after the elections as to justify an order declaring the 2024 NPE to have been not 'free and fair'. Additionally, the Commission and the DA raise a number of legal points in limine, which, according to them, are fatal to the applicant's cause in this application. Those legal points are non-joinder; lack of proper and effective service; lack of jurisdiction

and non-compliance with the timeframes for the institution of reviews under the Electoral Court Rule 6.

[5] The issues to be considered in this application are therefore of a factual nature. The question to be decided by this Court is whether or not factually, there were these irregularities in the election processes complained of by the applicant, and, if so, whether those irregularities were of such a material nature that they invalidate the 2024 NPE. This Court should also consider whether there is any merit in the legal points raised by the Commission and the DA.

[6] A convenient starting point for a discussion on the issues concerned is the applicable legislative framework, notably Chapter 4 (ss 55-56) of the Electoral Act, which deals with objections to the outcome of an election. It reads as follows: -

'Part 4 – Objections material to final results of election (ss 55-56)

55 Objections material to final results of election

- (1) Any interested party may lodge with the Commission *an objection that is material to the determination of the final result of the election*, in respect of proceedings provided for in –
 - (a) Part 1 of Chapter 4 concerning voting; and
 - (b) Parts 2 and 3 of Chapter 4 concerning the counting of votes.
- (2) The objection must be made to the Commission in the prescribed manner not later than 21:00 on the second day after the voting day.
- (3) The Commission, on good cause shown, may condone a late objection.
- (4) The Commission, in the prescribed manner, must decide the objection, and must notify the objector and any other parties involved in the objection, of the decision.
- (5) An objector or other party involved in the objection and who feels aggrieved by the decision of the Commission, may appeal to the Electoral Court in the prescribed manner.
- (6) The Electoral Court, in the prescribed manner, must consider and decide the appeal and notify the parties to the appeal of its decision.
- (7) The result of an election is not suspended pending the decision of the Electoral Court.

56 Powers of Commission and Electoral Court

If the Commission or the Electoral Court decides whether as a result of an objection or appeal brought under section 55 or otherwise, that *a serious irregularity* has occurred concerning any aspect of an election, the Commission or the Electoral Court may order –

- (a) that the votes cast at a particular voting station do not count in whole or in part; or
- (b) that the votes cast in favour of a registered party at a particular voting station must be deducted in whole or in part from the votes cast in favour of that registered party in that election.'

(Emphasis added).

[7] By all accounts, ATM has failed miserably to comply with the procedural requirements prescribed by s 55. I will revert to that aspect of the matter later on in the judgment. First, I need to deal with the factual issues in the matter.

[8] It is contended by the Commission and the DA that the ATM's application as a whole has no merit. I agree. I do so for the reasons set out in the paragraphs which follow.

[9] The case of ATM is that serious irregularities occurred concerning many aspects of the 2024 NPE. They complain of 'voters roll inconsistencies, the irregular vote counting, acts of misconduct by Commission employers', all of which ATM alleges 'point to vote rigging and vote corruption coupled with manipulation of results to the advantage of one or more political parties.' ATM also submits that the evidence it has adduced demonstrates that the 2024 NPE were not free and fair and that for that reason, the Commission should not have declared the elections 'free and fair' on 2 June 2024. ATM, in particular, avers that it 'has been a victim of miscalculations, voter rigging and voter corruption'.

[10] The main difficulty with ATM's case is that, as contended by the Commission and by the DA, the application consists almost exclusively of a series of sweeping, vague and general allegations, none of which are supported by any evidence, let alone credible evidence. The unsubstantiated averments, which litter the founding papers of ATM, are nothing more than mere assertions and expressions based on unfounded suspicions and more often than not based on inadmissible hearsay. This is in fact admitted by the deponent to the founding affidavit, Vuyolwethu Zungula (Mr Zungula), who, for example, has this to say at para 73 of the founding affidavit: - 'There has been speculations and allegations that the current Commission is biased to the ruling party, is nothing but the vehicle of the ruling party as it mostly favours its intentions.

This speculation, unproven as it may be, but is sufficient to alarm a threat to the independence and impartiality of the Commission.' (Emphasis added).

[11] In its answer to the application, the Commission denies all of these allegations of irregularities and points out, over and over again, that no evidence is produced by ATM in support of the allegations advanced by it.

[12] The Commission also contends that the application is fatally defective as a result of ATM's repeated failure to appreciate and utilise the appropriate mechanisms under the Electoral Act to raise its complaints at the appropriate time. This pertains to its complaints of alleged inaccuracies in the certified voters' roll; refusals to furnish voters with ballot papers; tampering with ballot boxes; manipulation in the sorting and counting of votes; and manipulation in the verification of votes. Moreover, so the Commission contends, ATM does not appreciate the purpose and effect of the provisions in the Electoral Act on which it relies.

[13] I agree with these contentions. The simple point is that ATM disregards the requirements for a valid s 55 objection, and it fails to recognise that s 55 objections concern 'voting and counting of votes, that is material to the determination of the final result of the election'. ATM's complaints and objections do not move the needle in respect of the final results of the election (even if they were valid s 55 objections, which they are not). The point is that the non-compliance with the procedural requirements of s 55 objections supports a conclusion that, at a factual level, there is no basis for the complaints. Moreover, nowhere in its papers does ATM make out a case that the irregularities complained of are of a serious nature such that it is 'material to the determination of the final result of the elections', as envisaged by s 55. In fact, that essential averment is not made anywhere in the founding papers, nor is any evidence tendered as proof of such materiality. That, in my view, should be the end of the applicant's case.

[14] In any event, the Commission, in dealing with ATM's case in its answering affidavit, adequately addresses any and all of the complaints and objections raised by ATM in support of their cause. First, as regards the allegations that ATM voters were incorrectly registered on the voters roll and refused ballot papers when they

attended at voting stations on voting day, the Commission alleges that those allegations are vague and unspecific. They are not supported by evidence, but are based solely on hearsay and unsubstantiated, general assertions. I can find no fault with this assertion by the Commission. The evidence thereof lies in a perusal and consideration of the founding affidavit of ATM.

[15] The reliance in that regard by ATM on a confirmatory affidavit by one Mr Nyaniso Jeku (Mr Jeku) dated 20 June 2024 is singularly unhelpful. The statement Mr Jeku makes about the issue of voters being registered in the incorrect voting district is, as contended by the Commission, a generalised statement about the objections he allegedly received, without any evidence. Mr Jeku does not purport to state facts of which he has any personal knowledge; he only describes 'alleged' objections he received, without giving any further details in relations to such reports. His affidavit has no probative value – none whatsoever.

[16] Bizarrely, Mr Zungula attempts to justify the lack of evidence by stating in his founding affidavit that he 'need not burden the Court with voluminous papers' to evidence his claims. This is patently wrong. ATM's claims must be proved with evidence.

[17] Moreover, ATM's complaints about the voters' roll also cannot be sustained as they did not serve any notice of objection to the provisional voters' roll under s 15, which ought to have been raised with and decided upon by the Commission during March 2024. ATM also collected the certified voters' roll on 24 April 2024. No explanation is given for its delay in raising objections to the certified voters' roll at this late stage.

[18] Second, as regards the allegations of 'discrepancies with ballot boxes', the Commission contends, in my view rightly so, that ATM's allegations are entirely vague, unspecific and unsubstantiated. The Commission states that there were complaints about ballot boxes not being sealed properly or being tampered during the 2024 NPE. However, the Commission investigated and responded to all the complaints it received. If any of the objecting parties or other parties involved in the

objection felt aggrieved by the Commission's decision, it was open to them to appeal in terms of s 55(5) of the Electoral Act.

[19] I agree with the Commission's contention that the mere fact that there were complaints does not prove that they were well-founded and that the elections were compromised, as ATM appears to believe. What is more is that, as alluded to *supra*, ATM does not allege, let alone prove, that these so-called discrepancies are material to the final determination of the result of the elections.

[20] Third, as regards issues of vote counting, the Commission's response is that ATM's allegations are premised on supposition and suspicion, not proven facts. As is the theme throughout ATM's founding papers, these allegations are also made in the most sweeping and generalised terms, without any factual basis being laid, which allegations are, in any event, denied by the Commission. There also appears to be no merit in the conclusion drawn by ATM that faults would have crept into the vote counting processes because of the supposed long hours the vote counters would spent counting. The Commission described the measures it took to prevent fatigue compromising the counting process. I have no reason not to accept these explanations.

[21] The Commission also deals, in my view adequately so, with two s 55 objections raised by ATM. The first one, so the Commission explains, was made after the extended cut-off time for submission of s 55 objections (10:00 on 1 June 2024) and no condonation was sought. It was submitted at 18:26 on 2 June 2024. The complaint was not made under oath, as required under regulation 31. The complaint concerned the vote count in three wards in Mkhondo, Mpumalanga. The Commission prepared a table, together with the results slips, which details the vote count for each of the three wards referred to. These records indicate that there is no marked discrepancy in the number of votes cast across the three ballots in each ward, and that the number of votes recorded on the results slips and those captured on the Results System match.

[22] The second objection was, according to the Commission, not received by it and it was not made under oath. The complaint does not disclose a material 'discrepancy' in the votes counted. The complaint contains an allegation that the number of 44 votes was amended on the results slip to read 78. Even if the alleged change on the results slip was incorrectly made (which the Commission does not admit), it would not be material to the outcome of the elections.

[23] As regards the malfunctioning of Voter Management Devices (VMD's), the Commission denies that the devices were not working in most, if not all voting districts. In its answering affidavit, the Commission explains as follows: -

'On election day, the VMDs used by voter officials did not work consistently across all voting stations. In some cases, the devices malfunctioned, and others were impacted by a lack of or intermittent internet connectivity. The problem did not extend to "most" voting districts.'

[24] The Commission went on to emphatically state that '[t]he malfunctioning VMDs did not compromise the integrity of the election or the results at all'. In that regard, the Commission explain that all voting stations were provided with an analogue (hard copy) voters' roll together with VMDs. That means there were two methods to validate the eligibility of voters. This was precisely so that if there was any technical problem with the VMD, it would not affect the validation of eligible voters and the voting process.

[25] For all of these reasons, I come to the conclusion that factually ATM does not even begin to make out a case for the relief sought in its application. ATM has failed to prove any of the irregularities complained of. Moreover, it has not demonstrated – far from it – that the irregularities are material such that it had an effect on the determination of the final result of the election.

[26] I come to the same conclusion when applying, in the context of this opposed application, the principle in *Plascon Evans*¹. The point is that it cannot possibly be

¹ *Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 at pp 634 and 635 held as follows: -

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent,

said that the version of the Commission is so far-fetched and untenable that this Court can reject it out of hand. Put another way, the Commission's version on the facts cannot and should not be rejected by this Court out of hand, as one being patently implausible and far-fetched. If anything, the version of the Commission should be accepted as being more probable than that of ATM.

[27] Accordingly, the applicant's application falls to be dismissed. The application is doomed because, at a factual and at a basic evidentiary level, there is no merit in the claim for the relief sought. I repeat that the application consists of a series of sweeping and vague allegations against the Commission, including of electoral fraud, vote rigging and political bias. The allegations are unsubstantiated and not supported by evidence. Instead, the application is based on mere assertion, suspicion and hearsay. As contended by the Commission, the application is unfounded on the facts and misguided on the law.

[28] The application should be dismissed also on the basis of all of the legal points in limine raised on behalf of the Commission and on behalf of the DA. I will deal briefly with those.

[29] A number of interested parties, notably at least one represented political party, the Speaker of the National Assembly, the Chairperson of the National Council of Provinces and the speakers of each of the Provincial Legislatures. All of these entities and persons have a direct and substantial interest in any order that has the effect of dissolving the legislatures that they represent. Moreover, the applicant ought to have also joined the President of the Republic of South Africa, being a party in respect of which specific relief is sought in prayer 4.

together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact ...

... Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers ...'

[30] Further, the relief in prayer 3, declaring s 24A of the Electoral Act constitutionally invalid, necessitates the joinder of the Minister of Home Affairs as the Member of the national Executive responsible for the Electoral Act.

[31] Another legal point on which the respondents rely relates to failure to properly and effectively serve the application on the respondents. Service by email in the circumstances of this matter is, in my view, wholly inadequate.

[32] The application should also fail on the basis of a procedural defect in the application, closely related to the issue of lack of jurisdiction of this Court. In that regard, there has clearly been non-compliance with the applicable s 55 of the Electoral Act, which prescribes the procedure to be followed when challenging the results of the 2024 NPE. This too is a fatal defect.

[33] This section provides that where a party wishes to challenge the results, it must first lodge an objection in terms of s 55(1). The scheme of section requires that any objection that is material to the determination of the final result of the election and that concerns voting or the counting of votes must first be lodged with the Commission (s 55(1)). The objection must be lodged in the prescribed manner and within the time stipulated in s 55(2) unless the Commission condones the late objection under s 55(3).

[34] Once an objection has been lodged, the Commission must decide the objection and notify the objector, and any other parties involved in the objection of the decision (s 55(4)). An objector or other party involved in the objection and who feels aggrieved by the decision of the Commission, may appeal to the Electoral Court in the prescribed manner against the Commission's decision (s 55(5)). And the Electoral Court must consider and decide the appeal in the prescribed manner (s 55(6)).

[35] No appeal is competent against a declaration of results unless the procedure followed in terms of s 55 has been exhausted. The Electoral Court is only empowered to decide an appeal once the objection procedure has been exhausted, and the Commission has taken a decision in response. It is the Commission's decision

pursuant to a s 55 objection that may be appealed to this Court, not ‘the declaration of the election results’.

[36] The applicant failed to follow the foregoing prescribed procedure and it therefore follows that the relief sought in prayers 1, 2 and the consequential relief in prayer 4 are incompetent at law.

[37] Furthermore, the relief in prayer 3 of the notice of motion also falls outside this court’s jurisdiction as the Electoral Court does not have jurisdiction to declare the provisions of an Act of Parliament invalid (*The Giving Foundation NPC v Electoral Commission of South Africa and Others*²).

[38] For these reasons, the application should fail.

Costs

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

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

Order

[41] In the result and for these reasons, the following order is granted:

The application is dismissed with no order as to costs.

² *The Giving Foundation NPC v Electoral Commission of South Africa and Others* [2024] ZAEC 21.

L R ADAMS

Acting Judge of the Electoral Court

Bloemfontein

APPEARANCES

For the applicant:

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T Ngcukaitobi SC and J Bleazard

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