THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case Nos: 1233/2017
and 1268/2017

In the matters between:

THE ELECTORAL COMMISSION OF SOUTH AFRICA	**APPELLANT**
and	
THE CAPE PARTY	**RESPONDENT**
and	
THE ELECTORAL COMMISSION OF SOUTH AFRICA	**APPELLANT**
and	
KHAI-MA ONAFHANKLIKE KANDIDATE KOALISIE	**FIRST RESPONDENT**
AFRICAN NATIONAL CONGRESS	**SECOND RESPONDENT**
DEMOCRATIC ALLIANCE	**THIRD RESPONDENT**
DIE FORUM	**FOURTH RESPONDENT**
FREEDOM FRONT PLUS	**FIFTH RESPONDENT**

Neutral citation: *IEC v Cape Party* (1233/17); *IEC v Khai-Ma Onafhanklike Kandidate Koalisie* (1268/17) [2017] ZASCA 161 (27 November 2017)

Coram: Bosielo and Willis JJA and Plasket, Meyer and Makgoka AJJA
Heard: 16 November 2017

Delivered: 27 November 2017

Summary: Application for leave to appeal to this court from Electoral Court in matters involving municipal elections - leave granted - objections in one matter not material - in the other incorrect conclusions of fact - appeals upheld - Electoral Commission decisions confirmed.

ORDER

On appeal from: The Electoral Court, Bloemfontein and Johannesburg, respectively (Shongwe JA, Moshidi and Wepener JJ and Ms Pather (member) sitting in each instance).

In both matters, the Cape Party matter (case no. 1233/2016) and the Khai-Ma Onafhanklike Kandidate matter (case no. 1268/2016), the same order was made.

1. Leave is granted to the applicant, the IEC, to appeal to this court.
2. The appeal is upheld.
3. The orders of the Electoral Court are set aside and the following substituted therefor:

'The application is dismissed.'

4. There is no order as to costs.

JUDGMENT

Willis JA (Bosielo JA and Plasket, Meyer and Makgoka AJJA concurring):

Introduction

[1] These two matters have been set down for hearing together because they both turn on the question of the appealabilty of orders of the Electoral Court. I shall refer to the matter in which the Khai-Ma Onafhanklike Kandidate Koalisie (KOKO) was the applicant as 'the Khai-Ma Onafhanklike Kandidate matter'. In that matter, this court directed on 26 January 2017 that the application for leave to appeal be referred to it for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 (the SPA). Differently constituted, on 30 January 2017, this court made a similar order in the matter in which the Cape Party was the applicant ('the Cape Party matter'). Both matters relate to orders made by the Electoral Court pertaining to the municipal elections that took place in South Africa on 3 August 2016.

[2] In the Cape Party matter, the Electoral Court (Shongwe JA and Moshidi and Wepener JJ, with Ms Pather as a member), sitting in chambers in Bloemfontein on 14 September 2016, made an order, by a majority, that there be a recount and verification of votes cast in certain municipal wards in the Western Cape Province. One of these was a ward within the city of Cape Town itself. The others were in Bergrivier and Swartland. In the Khai-Ma Onafhanklike Kandidate matter, the same court consisting of the same members, but sitting in Johannesburg, unanimously made an order on 23 September 2016 setting aside the Namakwa District municipal elections held on 3 August 2016. The court directed that a revote be held but made an order that the declared results in the Namakwa District remained effective until the outcome of the revote. In the Cape Party matter the Electoral Court did not hand down a written judgment in support of the order but, in the Khai-Ma Onafhanklike Kandidate matter, it did so.

[3] The Electoral Commission of South Africa was the respondent in the Cape Party matter and the first respondent in Khai-Ma Onafhanklike Kandidate matter. The Commission is widely known as the Independent Electoral Commission (or, more simply, as the IEC) and refers to itself as such. For convenience, I shall refer to it in this judgment as 'the IEC'. The other respondents in the Khai-Ma Onafhanklike Kandidate matter were the other political parties who were contestants in the Namakwa district.

[4] Dissatisfied with the outcome in both the Cape Party and the Khai-Ma Onafhanklike Kandidate matters, the IEC brought the respective applications for leave to appeal to this court. In both instances, the IEC chose to use the term 'application', rather than 'petition'. These applications resulted in the directions by this court, to which reference has been made above, that the parties must first argue whether leave to appeal should be granted. In both matters, this court directed that the parties should be prepared to argue the merits of the appeal, in the event that the IEC succeeded in being granted leave to appeal. The IEC has done so. It has not sought any order as to costs.

[5] In neither appeal has there been any opposition by or appearance on behalf of the respondents. During the recess immediately before the hearing of the appeal,

it came to the attention of the acting president of this court, that no heads of argument had been filed on behalf of the respondents in either case. After consultation with the president, he directed the registrar to address a letter to the Johannesburg Bar Council requesting the appointment of an amicus curiae. The Bar Council duly invited several amici to act. We are grateful to them for their submissions. Shortly before the hearing of the appeal, the amici filed their heads of argument. They agreed that the IEC's appeal in the Cape Party matter was good but contended that in the Khai-Ma Onafhanklike Kandidate matter, it had been correctly decided by the Electoral Court.

[6] These heads came to the attention of the Cape Party. Mr Carlo Viljoen, an advocate at the Cape Bar and one of the leading dramatis personae in the Cape Party, wrote a letter to the registrar dissociating the Cape Party from the submissions of the amici and requesting a postponement, in order to enable it to obtain representation. No formal application for a postponement was put before us. After hearing counsel for the IEC and the amici, we decided to proceed with the hearing. There were a number of factors that influenced the decision. The IEC needs to know where it stands in regard to the issues in question. The other parties and the voters need finality in the matter. Five judges, several of whom hold acting appointments and will not necessarily all be back at this court at the same time, have spent precious time reading and preparing for the case. There are other litigants, anxiously waiting for the hearing of their matters, who would be prejudiced if those hearings were delayed in order to accommodate the Cape Party by postponing the hearing.

[7] I shall now deal separately with the relevant facts in each matter.

The facts in the Cape Party matter

[8] There were originally three separate complaints made by the Cape Party to the Electoral Court in its review application dated 30 August 2016:

(a) That in the Cape Town Metropolitan election, in a certain ward three people living in a retirement village had informed the Cape Party that they had voted

for it but, when the votes were counted, the party was recorded as having received no votes in that particular ward;

(b) In Swartland a count of votes at the offices of the IEC at Malmesbury showed that the party had received five votes but a later count at the counting centre and published by the IEC records four votes;

(c) In Bergrivier, a person reported that the party had received three votes but the final results for that station reflected that the party had received no votes at all.

The complaint relating to the Cape Town Metropolitan election was based on inadmissible hearsay evidence. In the founding affidavit filed on behalf of the Cape Party by its leader, Mr Carlo Viljoen, it is alleged that there are 'more incidents than I [Mr Viljoen] have space or time to report here before the cut-off time for submission at 17h00 today.' In that affidavit he complains, en passant, that in Esterhof (Swartland) an initial vote count recorded the party as having received 153 votes but the final, published tally was 151 votes. No relief was sought in regard to Bergrivier.

[9] The Cape Party lodged its objections with the IEC on 5 August 2016. Relying on the provisions of s 65 of the Local Government: Municipal Electoral Act 27 of 2000 (the Municipal Electoral Act), on 8 August 2016 the IEC rejected the party's objection by reason of their general lack of materiality and, more particularly, the unlikelihood that the matters in respect of which there had been a complaint could have been material to the final result.

[10] As mentioned above, in their objections to the IEC the party mentions reports that it had received three votes in Bergrivier but the final tally recorded that it had received no votes there. This complaint was not, however, persisted with in the application before the Electoral Court. It is therefore unclear why the Electoral Court made an order affecting the Bergrivier election.

The facts in the Khai-Ma Onafhanklike Kandidate matter

[11] The Khai-Ma Onafhanklike Kandidate matter is concerned, essentially, with KOKO's abortive attempts, as a political party, to have registered its candidate in the

Namakwa District Municipal election. In addition to Namakwa, KOKO was also interested in contesting the Khai-Ma Local Municipal election.

[12] The president of KOKO, Mr Nicolaas Jano, visited the IEC's head office in Pretoria on 1 June 2016 to make enquiries about the registration of KOKO's candidates in both the Khai-Ma and Namakwa elections. He made the requisite payment to contest the elections. He thereupon returned to the Northern Cape, intending to submit his candidate nomination forms the following day. He submitted the requisite form for the Khai-Ma election but not for that to be held in Namakwa. Instead, the form upon which KOKO relies is the separate and different proportional nomination representation form for the Khai-Ma election. That form listed only the Khai-Ma municipality as that in respect of which nominations had been made.

[13] The acceptance form, signed by Mr Brunhild Strauss, KOKO's intended candidate for the Namakwa election, did not indicate that the acceptance was in respect of the District Municipality but rather Khai-Ma. It was for this reason that the IEC did not place Mr Strauss' name on the ballot paper for Namakwa. The election proceeded accordingly.

[14] In KOKO's founding affidavit, however, Mr Jano alleges that he had 'followed all steps to comply with the regulations and rules of the IEC in order to have my party [KOKO] ready to and to participate in the elections of 3 August 2016'. He also alleges that he had paid a deposit of R3000.00 of which R2000.00 was for KOKO's participation in the Khai-Ma elections and R1000.00 in the Namakwa elections. Mr Jano claims that he had been told by Ms Jeneve Brandt of the IEC's local office in Khai-Ma that 'there is no specific form for district candidate registration and that my district candidate can be added on the party PR list.'

[15] Mr Jano goes on to allege that he first discovered that KOKO did not appear on the Namakwa ballot paper on 4 July 2016. He says that when he complained to the local office of the IEC in Pofadder he was told that nothing could be done because the Namakwa ballot papers were being administered in Springbok and the ballot papers had already been printed throughout the land. It was on the basis that the IEC had failed to address KOKO's complaint of its having been excluded from

the Namakwa ballot form that KOKO applied to the Electoral Court, exercising its powers of review, to set aside the Namakwa election and to order a revote.

[16] It is not in dispute that KOKO failed to follow the correct procedures to have Mr Stauss' candidacy appear on the ballot forms for the Namakwa election. In its answering affidavit, the IEC contends that its officials and, in particular, Mr Kgosi Tshoke, carefully explained the correct procedures to Mr Jano. In particular, Mr Tshoke says that at the IEC head office on 1 June 2016 he explained to Mr Jano that if he were to choose to submit his nominations manually, he had to do so at the respective local and district offices of the IEC (ie Pofadder and Springbok, respectively). On this issue there is a fundamental dispute of fact: did an IEC official explain the correct procedures to Mr Jano or did he not? That dispute of fact cannot be glossed over or ignored. There is another fundamental dispute of fact: Mr Jano alleges that on the following day, 2 June 2016, he was informed by Ms Jeneve Brandt, an employee of the IEC at its Pofadder branch, that no specific form was required for registration as a district candidate and that his district candidate could simply be added to the party list. This allegation is categorically denied by Ms Brandt. There was no application made to the Electoral Court for the matter to be referred to oral evidence or to trial.

[17] The second respondent in the application before the Electoral Court was the African National Congress (ANC). In its answering affidavit, the ANC alleges that Mr Jano was a seasoned politician, having previously been active in both the ANC and the Congress of the People (COPE).

[18] The Electoral Court found, however, that there was 'inherent credibility' in Mr Jano's complaint that he had not been properly advised by the IEC about the forms that needed to be filled in and concluded that 'the facts and circumstances of this matter call for the adoption of a common sense and robust approach.' It also concluded that even if Mr Jano had been advised on the forms, the IEC had not taken or given 'reasonable care' and 'assistance'. It was on this basis that the court intervened in the matter to set aside the Namakwa election and ordered a revote.

[19] The Electoral Court also appeared to have found that a candidate registered in respect of the Khai-Ma Municipal elections was automatically registered for the Namakwa District elections, the latter being subsumed under the former.

The jurisdiction of this court to hear the prospective appeals

[20] Section 96(1) of the Electoral Act 73 of 1998 (which is not to be confused with the subsequently enacted Municipal Electoral Act) provides that:

'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.'

It is in respect of this provision that we invited submissions as to this court's jurisdiction to hear the prospective appeals.

[21] In *African Christian Democratic Party v Electoral Commission*[1] O'Regan J, expressing the views of the majority of the Constitutional Court, said:

'The question of this Court's jurisdiction to hear matters in the light of section 96 of the Electoral Act was expressly left open by this Court in *Liberal Party v The Electoral Commission*.[7] 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, 2000 (Act 27 of 2000)."

There is no provision in the Municipal Electoral Act which renders section 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, section 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 section 96 applies to disputes arising from municipal elections and accordingly cannot on any terms be held to oust the jurisdiction of this Court to

[1] *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC).

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.'[2] (Emphasis added.)

[22] It is therefore clear that the prohibition on appeals from the Electoral Court, as provided for in s 96 of the Electoral Act, does not apply to matters dealt with by that court under the subsequent Municipal Electoral Act.

[23] Section 16(1)*(c)* of the SPA provides that:

'an appeal against any decision of a court of a status similar to the High Court lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal, and the provisions of section 17 apply with the changes required by context.' (Emphasis added.)

In terms of s 18 of the Electoral Commission Act 51 of 1996 (the Commission Act), the Electoral Court is expressly given a status similar to that of a High Court.[3] Accordingly, this court may grant the IEC leave to appeal to this court in both the Cape Party and the Khai-Ma Onafhanklike Kandidate matter. The question is whether the court should allow the respective appeals. Relevant to that determination are the merits of the respective cases, to which I shall now turn.

The merits of the Cape Party matter

[24] Apart from the inadmissibility of the evidence in the complaint relating to the Cape Town Metropolitan election, there was no basis for the Electoral Court to have interfered with the decision by the IEC. The IEC was correct to rely on the provisions of s 65 of the Municipal Electoral Act to dismiss the Cape Party's objections for want of materiality in respect of Cape Town, Swartland and Bergrivier. The amici agreed. The requirement of materiality, before an irregularity or defect can result in the

[2] Para 15.
[3] The Commission Act uses the old terminology of the now repealed Supreme Court Act 59 of 1959 to refer to the High Court - viz the Supreme Court but it obviously does not, in so doing, refer to this court, the Supreme Court of Appeal.

setting aside of an election, is not only clear from the wording of the section itself but has also been affirmed by the Constitutional Court in *Kham & others v Electoral Commission & another*.[4] In *Pitso v Electoral Commission*[5] it was said that s 65 covers 'any irregularity which would affect the tally of votes to the extent that an unsuccessful party may gain sufficient votes to reverse the election result.'[6] The 'loss' of a handful of voters had no impact on the result of any of the elections that had been challenged.

[25] The issue of the Bergrivier municipality was, moreover, not properly before the court. No relief had been sought in relation to that election and, accordingly, none could have been granted. The merits of the Cape Party matter cry out for leave to appeal to be granted and for the appeal to succeed.

The merits of the Khai-Ma Onafhanklike Kandidate matter

[26] In the end, it seems that there was no real dispute that KOKO's intended candidate could not automatically be registered for the Namakwa District Municipality, under which the Khai-Ma Local Municipality falls. The Electoral Court may have been confused between the registration of political parties under sections 15 and 15A of the Electoral Commission Act 51 of 1996 (the Commission Act) and the requirements of s 14(1)*(a)*(ii) of the Municipal Electoral Act for the registration of candidates each time there is a local or district municipal election. Section 15A(3) of the Commission Act provides that: 'A party registered for a particular municipality or municipalities, may under such registration only participate in elections for councils for those municipalities.'

[27] In terms of s 13(1) of the Municipal Electoral Act, elections in municipalities take place on both a proportional representation basis and a ward/constituency basis. The Khai-Ma Local Municipality is a local municipality falling within the Namakwa District Municipality. In terms of s 13(12)*(b)* of the Municipal Electoral Act, a registered party nominates its individual candidate for a ward and, in terms of

[4] *Kham & others v Electoral Commission & another* 2016 (2) SA 338 (CC) para 56. See also *Pitso v Electoral Commission* [2001] 3 All SA 607 (Elect Ct) at p610.
[5] *Pitso v Electoral Commission* [2001] 3 All SA 607 (Elect Ct).
[6] At p610.

s 14(1)(*a)*(ii), read with s 13(1)*(a)* thereof, it separately puts the name of a candidate on a 'party list' for the proportional representation election in ''the prescribed format'. There are different processes. Furthermore, in terms of s 14(1A)*(a)* of the Municipal Electoral Act, if a party submits the relevant documents by hand, it must do so 'at the office of the Commission's local representatives'. The handing in of the party list for Khai-Ma at Pofadder would not have resulted in the automatic registration in Springbok, for the Namakwa District Municipality. There could therefore have been no automatic placing of KOKO's candidate on the party list in Namakwa. Accordingly, to the extent that the Electoral Court found that there was 'automatic' registration of KOKO's intended candidate for Namakwa, it was wrong. It seems, however, that this was not really so much a finding as a setting out of the argument put forward by KOKO. Indeed, there would be a certain logical inconsistency in holding, on the one hand, that there was automatic registration of this kind and, on the other, that the IEC had been remiss in not advising KOKO accordingly.

[28] The amici contended that in a modern, democratic state, the IEC should have been more proactive in their advice to KOKO. In other words, the amici argued that the IEC"s advice concerning the question of registration at different centres could have been more helpful to KOKO. This was not KOKO's case. Moreover, there is not only a fundamental dispute of fact about what Mr Jano was told at Pofadder on 2 June 2016 but before one even gets there, there is the factual dispute about what happened at the IEC offices on 1 June 2016. As set out above, Mr Tshoke of the IEC was adamant that he told Mr Jano that, if he chose to submit his documents manually, he had to do so at the respective local office (Pofadder) as well as the district office (Springbok). This is no bare denial. It is neither bald nor palpably implausible and far-fetched. Mr Tshoke's version is, accordingly, the version upon which the dispute must be determined.

[29] The Electoral Court misapplied the time-honoured *Plascon-Evans* rule.[7] In *National Director of Public Prosecutions v Zuma*[8] this court said:

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be

[7] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.
[8] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA).

used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.'[9]

Moreover, this *Plascon-Evans* rule has been emphatically endorsed by the Constitutional Court.[10]

[30] That the Electoral Court has to deal with matters pertaining to elections cannot justify a departure from this rule. On the contrary, when it comes to politics and the seeking of final relief in motion proceedings, the dangers of dealing with disputes of fact in any other way may be especially acute. There was no acceptable basis for the Electoral Court to have found that there was 'inherent credibility' in Mr Jano's complaint that he had not been properly advised by the IEC about the necessary forms to be submitted to it. The same applies in respect of the finding that the IEC had not taken 'reasonable care' or given KOKO reasonable 'assistance'. The circumstances of this matter were not, in any way, 'special'. If anything, 'robustness' and 'common sense' favour a decision in favour of the IEC, rather than against it.

[31] The merits of the Khai-Ma Onafhanklike Kandidate matter also compel the granting of leave to appeal and the consequent upholding of the appeal.

The Orders of this Court

[9] Para 26.
[10] See for example *President of the Republic of South Africa & others v M & G Media Ltd* 2012 (2) SA 50 (CC); [2011] ZACC 32 para 34.

[32] In both matters, the Cape Party matter (case no. 1233/2016) and the Khai-Ma Onafhanklike Kandidate matter (case no. 1268/2016), the following identical orders are made:

1. Leave is granted to the applicant, the IEC, to appeal to this court.
2. The appeal is upheld.
3. The orders of the Electoral Court are set aside and the following substituted therefor:

'The application is dismissed.'

4. There is no order as to costs.

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N P WILLIS
Judge of Appeal

APPEARANCES:

For Appellant:	S Budlender (with him, MR Musandiwa) Instructed by: Gildenhuys Attorneys, Sandton c/o Honey Attorneys, Bloemfontein
For the Respondents:	None.
Amici curiae:	LG Nkosi-Thomas SC (with her, GC Ngcangisa OS Ohunronbi and NN Makhaye) At the invitation of the Johannesburg Bar Council