

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 45/09
[2009] ZACC 13

AFRICAN NATIONAL CONGRESS

Applicant

versus

CHIEF ELECTORAL OFFICER OF
THE INDEPENDENT ELECTORAL COMMISSION

Respondent

Heard on : 5 May 2009

Decided on : 5 May 2009

Reasons furnished on : 3 June 2009

JUDGMENT

THE COURT:

Introduction

[1] On 5 May 2009 this Court issued the following order in this matter:

- “1. The applicant’s non-compliance with the form of service of process as provided for in the Rules of this Court is condoned.
2. The applicant is granted leave to appeal against the decision of the Electoral Court dated 30 April 2009, under case number 04/2009, upholding the respondent’s objection to the eligibility of Mr Holmes Peter Maluleka as member of Parliament.
3. The appeal is granted and the decision of the Electoral Court relating to Mr Holmes Peter Maluleka is set aside.

4. It is declared that Mr Holmes Peter Maluleka is eligible to be on the list of candidates for Provincial and National Elections of 2009.
5. It is declared that Mr Holmes Peter Maluleka does qualify for inclusion on the list as a candidate for the elections held on 22 April 2009.
6. Reasons for this decision will be furnished later.”¹

[2] The reasons referred to in paragraph 6 of the order now follow. The order resulted from an application brought on the basis of urgency by the African National Congress (ANC), a political party registered in terms of the electoral laws of the Republic of South Africa.

[3] The facts of the case are briefly as follows. The ANC included Mr Holmes Peter Maluleka on its list of candidates for election to the National Assembly in the general elections held on 22 April 2009. Section 30 of the Electoral Act 73 of 1998 (the Act) provides that any person, including the Chief Electoral Officer (the CEO), may object to the nomination of a candidate on a number of grounds.² The CEO

¹ Minor textual amendments have subsequently been made to the order.

² Section 30 of the Act provides as follows:

- “(1) Any person, including the chief electoral officer, may object to the nomination of a candidate on the following grounds:
- (a) The candidate is not qualified to stand in the election;
 - (b) there is no prescribed acceptance of nomination signed by the candidate; or
 - (c) there is no prescribed undertaking, signed by the candidate, that the candidate is bound by the Code.
- (2) The objection must be made to the Commission in the prescribed manner by not later than the relevant date stated in the election timetable, and must be served on the registered party that nominated the candidate.
- (3) The Commission must decide the objection, and must notify the objector and the registered party that nominated the candidate of the decision in the prescribed manner by not later than the relevant date stated in the election timetable.
- (4) The objector, or the registered party who nominated the candidate, may appeal against the decision of the Commission to the Electoral Court in the prescribed manner and by not later than the relevant date stated in the election timetable.

objected to Mr Maluleka's candidature (and to the candidature of several other nominated candidates) on the ground that his name did not appear on the voters' roll. As a result, the CEO reasoned that he was ineligible to be a member of the National Assembly.³ The objection was considered and rejected by the Electoral Commission on 22 March 2009.

[4] The CEO then appealed against that decision to the Electoral Court in terms of section 30(4) of the Electoral Act. The Electoral Court upheld the objection of the CEO on 4 April 2009 but only furnished its reasons for this decision on 30 April, after the general elections were held on 22 April.⁴ The applicant then applied urgently for leave to appeal against the judgment of the Electoral Court. The papers in this Court were lodged on 5 May 2009 and the application was heard on the same day at 17h00. The swearing in of members of Parliament was scheduled to take place – and in fact took place – the next day, 6 May 2009.

[5] The CEO – the respondent – did not oppose the application. In fact, an affidavit filed on her behalf stated that she supported the relief sought in the

(5) The Electoral Court must consider and decide the appeal and notify the parties to the appeal and the chief electoral officer of the decision in the prescribed manner and by not later than the relevant date stated in the election timetable.

(6) If the Commission or the Electoral Court decides that a candidate's nomination does not comply with section 27, the Commission or the Electoral Court may allow the registered party an opportunity to comply with that section, including an opportunity to substitute a candidate and to re-order the names on the list as a result of that substitution."

³ Section 47(1) of the Constitution provides that "[e]very citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly".

⁴ *The Chief Electoral Officer v The Electoral Commission and Others*, Case No 04/2009, Electoral Court, 30 April 2009, unreported.

application and her counsel furnished an oral explanation of the events leading up to the application to this Court.

Jurisdiction

[6] A preliminary point to be considered is the question whether this Court has jurisdiction to consider an application for leave to appeal against a ruling of the Electoral Court. Section 96(1) of the Electoral Act provides:

“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.”

The parties did not address this question in their submissions and proceeded from the premise that this Court indeed had jurisdiction.

[7] In *African Christian Democratic Party*,⁵ O’Regan J (for the majority of this Court) refrained from considering the effect of section 96(1) of the Electoral Act on the jurisdiction of this Court in relation to disputes arising from national or provincial elections. That matter dealt with local government elections to which section 96 is expressly not applicable. She held that “[l]egislation should not be presumed to have intended to oust this Court’s jurisdiction when it does not expressly state as such”, and

⁵ *African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC). See also *Liberal Party v The Electoral Commission and Others* [2004] ZACC 1; 2004 (8) BCLR 810 (CC) at para 15 in which the effect of section 96 on this Court’s jurisdiction was also left undetermined.

concluded that section 96(1) does not oust this Court's jurisdiction in disputes arising from municipal elections.⁶

[8] The question we must consider now is whether section 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.⁷ Indeed, section 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”.⁸ It is clear that were section 96(1) to be interpreted to oust this Court's jurisdiction to consider constitutional matters, it would be inconsistent with section 167(3)(a) of the Constitution which provides that this Court is the highest court in all constitutional matters. Accordingly, section 96(1) should in the light of section 2 of the Electoral Act be read in a manner consistent with section 167(3)(a). This can be achieved by reading section 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.

⁶ *African Christian Democratic Party* above n 5 at paras 14-6. See also *Liberal Party* above n 5 at paras 11-5.

⁷ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 23.

⁸ Section 2 of the Act provides:

“Every person interpreting or applying this 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.”

[9] In this case, the applicant argued that Mr Maluleka had a constitutional right in terms of section 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 section 96(1) of the Electoral Act does not oust.

[10] Given that the case raises a constitutional matter, and given the prospects of success as shall emerge later in this judgment, it was clearly in the interests of justice for this Court to hear the matter and to grant leave to appeal.

Urgency

[11] Ordinarily, this Court is not suited to hear urgent matters, because of its composition and functions. The Court consists of eleven judges, who sit together *en banc*. Every matter must be heard by at least eight judges.⁹ From what follows below though, it is clear that this matter was indeed one of urgency and that it was in the interests of justice that it be dealt with expeditiously, as was done in *African Christian Democratic Party*.¹⁰

Judgment of the Electoral Court

⁹ See section 167 of the Constitution. See also *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) at para 9.

¹⁰ See above n 5 at para 1. See also *African National Congress v United Democratic Movement and Others (Krog and Others Intervening)* [2002] ZACC 24; 2003 (1) SA 533 (CC); 2003 (1) BCLR 1 (CC) at para 13.

[12] In its judgment handed down on 30 April 2009, the Electoral Court held that the CEO's objection was justified and "legally sound".¹¹ It held that Mr Maluleka, after correcting his identity documentation, should also have rectified the situation with regard to his registration on the voters' roll; in failing to do so he had only himself to blame for his predicament.¹²

[13] We turn now to deal with the circumstances surrounding the appearance of Mr Maluleka's name on the voters' roll.

[14] Mr Maluleka was issued two identity documents – one in 2000 and the other in 2006 – bearing different identity numbers. The second identity document was issued as a result of corrections made to the spelling of his name and his date of birth in the first identity document. Mr Maluleka used the first identity document to register as a voter. He however used the second identity document to accept nomination as a candidate in the elections. The discrepancy between the identity number on the voters' roll and the identity number on the nomination form gave rise to the objection of the CEO, who was of the view that he was not on the voters' roll. It was only subsequent to the Electoral Court's order that the circumstances surrounding Mr Maluleka's use of two identity numbers was brought to the attention of the CEO. She submits that, had she known of the facts relating to Mr Maluleka, she would not have objected to his candidature in the first place as she was only concerned with those candidates who were not on the voters' roll and thus not eligible to be candidates. As

¹¹ *Chief Electoral Officer* above n 4 at para 12.

¹² *Id* at paras 10-2.

he in fact appeared on the voters' roll, she erroneously believed that the order by the Electoral Court did not apply to him.

[15] Only after receiving the full reasons of the Electoral Court on 30 April 2009, did she realise that she was obliged to comply with the court order and thus remove Mr Maluleka from the list of candidates.¹³ Were the relief sought in this matter not granted, he would not have been eligible to be sworn in as a member of the National Assembly and would have been replaced by another candidate, and the CEO would have had to issue a correction notice in the Government Gazette. Given as appears from the facts set out – that there was no sound reason to justify prohibiting Mr Maluleka from standing for election – the effect of the Electoral Court decision would have given rise to an unjustifiable infringement of Mr Maluleka's right to stand for public office conferred by section 19(3)(b) of the Constitution.

[16] It is important to observe here, however, that were this issue to have been raised only after members of the National Assembly had been sworn in, it may well have been that this Court could not have granted any effective relief to Mr Maluleka. Given, however, that this application was brought before members of the National Assembly had been sworn in, this is not a question we have to determine now. Moreover, given that Mr Maluleka's name had not been removed from the list of candidates, despite the Electoral Court decision on 4 April, we also do not need to

¹³ As it happens, in terms of the Election Timetable published in terms of section 20 of the Electoral Act, the voters' roll should have been corrected by 3 April when the final list of candidates was to be published (see item 12 of the Election Timetable published under GN 189 GG 31906, 16 February 2009). Compliance with these provisions was not raised in the case before us and we need not address it here.

consider whether he would at this stage be entitled to relief if his name had been removed from the list on 3 April consistent with the Electoral Court decision, as the Election Timetable appears to contemplate. As his name does appear on the list, granting the relief the applicants seek will cause no prejudice to any third party.

Conclusion

[17] It is clear that the objection of the CEO, which was upheld by the Electoral Court, resulted from a misunderstanding as far as Mr Maluleka's situation is concerned. In spite of the confusion created by the two identity numbers, he was indeed on the voters' roll. There was no uncertainty about his identity. In fact, he had already served as a member of Parliament from 2004 to 2009. He was therefore entitled at any time to a rectification of his voters' roll details, and the fact that he overlooked doing so does not detract from the fact that he was on the roll.

[18] The urgency of the application lies in the fact that the reasons for the Electoral Court's decision were issued on Thursday 30 April. Friday 1 May was a public holiday. On Tuesday 5 May the applicants approached this Court in order to obtain the necessary relief before the swearing-in ceremony scheduled for the next day.¹⁴ As mentioned above it may well be that, if the application had been considered after the swearing-in ceremony, no effective relief could have been afforded to Mr Maluleka.

¹⁴ Section 51(1) of the Constitution provides:

“After an election, the first sitting of the National Assembly must take place at a time and on a date determined by the Chief Justice, but not more than 14 days after the election result has been declared. The Assembly may determine the time and duration of its other sittings and its recess periods.”

[19] Leave to appeal was granted and the appeal was upheld. Costs were neither sought, nor argued, and no costs order was therefore made.

Moseneke DCJ, Cameron J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J, Skweyiya J and Van der Westhuizen J.

For the Applicant: Advocate K Moroka SC and Advocate K Lengane
instructed by Edward Nathan Sonnenberg Inc.

For the Respondent: Advocate N Fourie instructed by Bowman Gilfillan Inc.