

IN THE ELECTORAL COURT OF SOUTH AFRICA /ES

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO.
- (2) OF INTEREST TO OTHER JUDGES: YES/NO.
- (3) REVISED. ✓

CASE NO: 3/2001

3.10.2001

DATE

SIGNATURE

In the matter between:

THE INKATHA FREEDOM PARTY

APPELLANT

AND

THE INDEPENDENT ELECTORAL COMMISSION

RESPONDENT

CORAM: VAN DER WALT, PILLAY and MASIPA JJ

DATE OF HEARING: DEALT WITH ON WRITTEN SUBMISSIONS ONLY.

DELIVERY DATE: 3.10.2001

JUDGMENT

VAN DER WALT, J

On 14 July 2001 by-elections were held in wards 5 and 12 of the Mandeni municipality in KwaZulu-Natal.

The result of the by-election in ward 5 was as follows:

the candidate of the Ubumbano Iwesizwe Independent Residents' Association ("UIIRA"), Sibani Mdletshe, polled 360 votes;

- 2 -

the candidate of the Inkatha Freedom Party ("IFP"), Zeblon Z B Gogo, polled 179 votes.

The UIIRA had a majority of 181 votes.

In ward 12 the by-election result was as follows:

the candidate of the African National Congress ("ANC"), Boyi B B Shandu, polled 405 votes;

the candidate of the IFP, Simon S D Shange, polled 402 votes;

the candidate of the UIIRA, S Busiso S M Mclunu, polled 358 votes.

The ANC had a majority of 3 votes over the IFP.

By letter dated 14 July 2001 and in terms of section 65(i) of the Local Government Municipal Electoral Act 27 of 2000, the IFP lodged a formal objection with the Independent Electoral Commission ("IEC") against the election results in wards 5 and 12.

- 3 -

The reference to section 65(i) should correctly be to section 65(1) of the Local Government: Municipal Electoral Act ("the Act").

Apart from certain incidents that took place prior to the day of the election and which had been reported to the police, the objection was directed at certain occurrences on the day of the election - 14 July 2001.

The incidents that occurred and were on that day reported to the IEC were the following:

In ward 5

UIIRA candidate for ward 5 Mr Mdlathe verbally abused voters whom he perceived to be IFP voters;

at Kwamathonzi school the UIIRA party agent chased away voters whom he perceived to be IFP voters;

at Kwamathonzi school two IEC officials were found to be under the influence of liquor and they were chased away.

In ward 12

The ANC openly campaigned in two vehicles with registration numbers GAGAZI ZN and NZZ4926 fitted with loudspeakers. The IEC senior officials witnessed this.

At Wetane school the IFP candidate was refused entry into the voting station by the presiding officer.

At Wetane school ANC and UJiRA party agents chased away a number of voters who were perceived to be IFP voters.

It was alleged in the objection by the appellant that the above-mentioned transgressions had a material effect on the result of the by-elections in both wards.

On 19 July 2001 these objections were rejected by the delegated member of the IEC.

In the written reasons the following aspects are relevant to the rejection of the objections:

- 5 -

Paragraph 5 "The objections were lodged in a letter form and were not accompanied by any supporting documentation."

Paragraph 8 "No objections are raised concerning irregularities in the voting procedures, the ballot papers, the number of votes cast, or the number of spoilt ballot papers and the reasons for their rejection."

Paragraph 9 "The alleged incidents that happened before the elections and could have materially affected the outcome of the election (and were reported to the police) are matters that could and should have been dealt with under chapter 7 of the Act. The allegations concerning the election day are not supported by any affidavits of voters who intended to vote for the IFP candidates but were scared away or intimidated into not voting.

These allegations have not been shown to have been material to the declared result of the elections in either of the two wards."

Paragraph 10 "The objections in respect of both wards 5 and 12 are rejected."

Thereafter the appellant lodged an application for leave to appeal and an application for the review of the rejection of the objections in respect of both ward 5 and 12.

- 6 -

The chairperson of the electoral court refused leave to appeal in respect of ward 5 but granted leave in respect of ward 12.

Before the court is therefore an appeal in respect of the rejection of the objection to the election result in ward 12 and review proceedings in regard to the rejection of the objections in both wards.

The procedure for dealing with reviews and appeals before the electoral court is set out in section 20 of the Electoral Commission Act 51 of 1996.

Section 20(2)(c) of that Act provides that an appeal may be summarily determined on written submissions. Reviews in terms of section 20(1)(b) should similarly be dealt with as expeditiously as possible.

In terms of section 20 and the rules of the electoral court notice was given to the appellant, the respondent and other interested parties that the court was of the view that the review and appeal could be dealt with summarily after the submission of full written argument without a formal court hearing. No objections to the suggested procedure were received.

In addition to the initial written submissions by the parties full written argument has been filed on behalf of the appellant (IFP) and the IEC as respondent. No submissions have been made by other interested parties.

In the submissions made on behalf of appellant reliance is placed upon the ground of complaint set out in paragraph 5.4.3 of the initial complaint regarding ward 12, namely that on the day of the election -

"At Wetane school ANC and UIIRA party agents chased away a number of voters who were perceived to be IFP voters."

This paragraph must be read in conjunction with paragraph E.3 of the complaint where the following is stated:

"On the day of the by-elections the rules of the elections were broken in full view of the IEC and the police and the IFP reported to all relevant authorities but only verbal warnings were given to the transgressors."

In regard to this complaint the IEC's rejection is worded succinctly

- 8 -

"The allegations concerning the election day are not supported by any affidavits of voters who intended to vote for the IFP candidates but were scared away or intimidated into not voting. These allegations have not been shown to have been material to the declared result of the elections in either of the two wards."

Appellant submits that section 65 of the Act is not clear on whether supporting affidavits are required or whether the objection is to be contained in an affidavit. In any event with the extremely limited time periods within which the objection is to be filed at the Pretoria office of the IEC the overriding consideration was to lodge the objection as soon as possible.

It is further submitted on behalf of appellant that an allegation that voters of a party, losing the election by only 3 votes, have been kept from voting is certainly in the wording of section 65(1) an "aspect of an election that is material to the declared result of the election".

In any event if the objection lacked detail the IEC in terms of section 65(3) could have called upon the objecting party to submit further information besides investigating the factual basis of the objection [section 65(3)(a) and (d)].

- 9 -

In its submissions the IEC as respondent relies on a judgment of this court in the matter of *Pitso v The Electoral Commission* case no 1/2001 and in particular on the following passage in the judgment:

"In my view objections material to the declared results of an election in terms of section 65 of the Act will in the overwhelming majority of cases be concerned with the irregularities in the voting procedure, the ballot papers, the number of votes cast and the number of spoilt ballot papers and the reasons why those ballot papers were rejected. In other words any irregularity which would affect the tally of votes to the extent that an unsuccessful candidate may gain sufficient votes to reverse the election result.

Should an objector rely on an irregularity such as the display of a poster or an unlawful interference with a voter's choice of candidate, then a sufficient number of affidavits of voters concerned would probably have to be filed in support of the objection to show that the declared result of the election might have been materially affected."

It would appear that the latter portion of the judgment has not received the attention which it merited.

- 10 -

In its submissions appellant has stated that it has since the objection was lodged obtained affidavits from a number of voters prevented from casting their votes. Only four such voters are required to materially affect the declared result of the election.

The IEC has submitted that the commission is not a court and does not have the jurisdiction to adjudicate such objections. The power to adjudicate electoral disputes and complaints concerning conduct prohibited by the Electoral Code of Conduct in Schedule 1 of the Act, has been specifically placed within the jurisdiction of this court and other courts designated by this court.

As a general proposition regarding transgressions of the Electoral Code this is substantially correct.

However, this submission overlooks the specific powers given to the IEC in section 65 of the Act regarding objections material to the declared result of an election. In terms of section 65(4) the commission is obliged to consider the objection and to decide it. In considering and deciding the objection the commission in terms of section 65(3) may-

"(a) investigate the factual basis of the objection;

- (b) afford interested parties an opportunity to make written or verbal submissions;
- (c) call for written or verbal submissions from other persons or parties;
- (d) call upon the objecting party to submit further information or arguments in writing or verbally; and
- (e) conduct a hearing on the objection."

In other words the IEC has the power and duty to investigate and conduct a hearing to decide an objection concerning any aspect of an election that is material to the declared result of the election.

The reason for burdening the IEC with this duty, I would suggest, is because the commission is the only entity with original jurisdiction to rescind the declared result of an election. Such jurisdiction is only given to this court on appeal to it from a decision of the IEC in terms of section 65(6)(a) of the Act.

The submission by the IEC that it does not have the jurisdiction or the power necessary to adjudicate such an objection is without merit.

- 12 -

Contraventions of the code of conduct in the days preceding the election and even on election day that have not been shown to be material to the declared result of the election should be dealt with by the designated courts as the IEC has correctly submitted.

The other objections raised by the appellant both in respect of ward 5 and the balance of the objections relating to ward 12 lie within this field and were correctly dismissed by the IEC as respondent.

In ward 5 with a winning majority of 181 votes it cannot readily be shown on the probabilities that if a number of voters were prevented from casting their votes it would have had a material effect on the declared result of the election.

However, in ward 12 with a majority of only 3 votes such an allegation by the mere fact of being made calls for an investigation and cannot be dismissed on the basis that no affidavits were filed. The affidavits could and should have been called for by the IEC.

In terms of section 19(3) of the Constitution Act 108 of 1996, every adult citizen has the right to vote and in terms of section 1(d) of the Constitution one of the founding values of our Republic is universal adult suffrage.

- 13 -

After all the objects of the commission are "to strengthen constitutional democracy and promote democratic electoral processes (section 4 of the Electoral Commission Act 51 of 1996) and it has the duty to ensure that any election is free and fair [section 5(1)(b)].

In terms of the Local Government: Municipal Electoral Act 27 of 2000 the Act is administered by the commission and the commission must administer this Act in a manner conducive to free and fair elections [section 4(1) and (2)].

It is manifest that the IEC should have considered this objection on its merits.

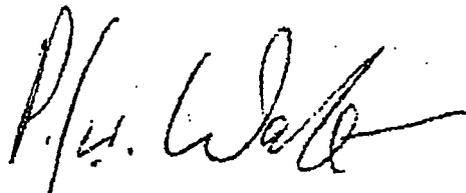
In the premises the following order is made:

- ~~1. The application for review of the election result in ward 5 Mandeni is dismissed.~~
2. The appeal against the dismissal by the electoral commission of the complaint lodged by the Inkatha Freedom Party against the election result in ward 12 Mandeni is allowed.
3. The electoral commission is directed to consider and decide, in terms of section 65 of the Municipal Electoral Act 27 of 2000, on the merits of the

- 14 -

objection lodged by the Inkatha Freedom party in regard to the alleged turning away of its voters on election day and whether it was material to the declared result of the election in ward 12 and to furnish reasons for its decision.

4. The electoral commission is to pay the costs of the appellant in relation to the appeal.



P J VAN DER WALT  
JUDGE OF THE HIGH COURT

Pillay J            Concur  
Masipa J

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