IN THE ELECTORAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: 007/2019

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES : YES / NO
(3) REVISED ✓

SIGNATURE

DATE: 19 June 2019

In the matter of:

THE DEMOCRATIC ALLIANCE	Applicant
and	
ELECTORAL COMMISSION OF SOUTH AFRICA	First Respondent
THE GOOD PARTY	Second Respondent
THE AFRICAN NATIONAL CONGRESS	Third Respondent

Date of Hearing: 3 June 2019

Date of Judgment: 19 June 2019

Coram: Mbha JA, Lamont et Wepener JJ, Ms Pather, Member

Summary: Electoral law – Review of decision of Commission - Powers of Commission to adjudicate disputes and issue sanctions. Such powers limited according to the prescripts of national legislation.

JUDGMENT

WEPENER J (MBHA JA, LAMONT J and MS PATHER (MEMBER), CONCURRING):

[1] The applicant is the Democratic Alliance (the DA), a political party, registered pursuant to the provisions of the Electoral Commission Act (the ECA).[1] The first Respondent is the Electoral Commission (the Commission), a body established pursuant to Chapter 9 of the Constitution, and which conducts itself in terms of the Electoral Commission Act.[2] The second respondent is the GOOD Party (GOOD), a political party registered pursuant to the provisions of the ECA. The third respondent is the African National Congress (the ANC), a political party registered pursuant to the provisions of the ECA.

[2] The applicant sought to review two decisions taken by the Commission in the prelude to the general elections, which were held on 8 May 2019. The first decision (the GOOD decision) concerned a finding by the Commission that the applicant had violated Item 9(1)(b) of the Electoral Code of Conduct annexed to Schedule 2 of the Electoral Act[3] (the Code) by making a false statement that the applicant had 'fired' Ms. Patricia de Lille, now a member of GOOD. The second review concerns a decision taken on 15 April 2019 directing the applicant to 'cease and desist from making any further false statements in relation to Ms. Patricia de Lille being 'fired from the [applicant]' and to issue an apology for the false statement it published in respect of Ms. De Lille. These two decisions are referred to as the GOOD decision. The applicant also sought to review and set aside the Commission's decision, taken on 4 April 2019, not to investigate the applicant's complaint

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[1] Act 51 of 1996.
[2] Supra.
[3] Act 73 of 1998.

against the ANC's statement that the applicant had made a profit of R1 billion from water tariffs in the city of Cape Town (the DA - ANC decision).

[3] In its answering affidavit, the Commission said in relation to the DA – ANC decision that

> '. . . it is willing to accede to the DA's request and will accordingly re-open the matter to allow for an external investigation to take place.'

and

> 'In paragraph 39 of the founding affidavit it rightly stated that "[s]hould the IEC accede to the DA's demand to reverse the ANC decision, prayer 3 and paragraph 4 of the Notice of Motion will be moot."'

The parties regarded the Commission's conduct as a withdrawal of the DA - ANC decision and it no longer featured in the proceedings before this court.

[4] The powers of the Commission lie at the heart of these proceedings. In a document titled 'FINDINGS INTO COMPLAINT BY MS. PATRICIA DE LILLE, LEADER OF THE GOOD PARTY, AGAINST THE DEMOCRATIC ALLIANCE' dated 15 April 2019, the Commission furnished a summary of what it understands the powers of the Commission to be. After setting out its establishment in terms of the Constitution and s 5 of the ECA[4] the Commission continues to record that:

> 'Cumulatively, the prescripts above limit the nature of the disputes which the Commission is authorised to adjudicate to those that are administrative, that arise during an election and are connected to the organising of elections. Such administrative adjudication includes, for instance, appeals against the decisions of the Chief Electoral Officer (CEO), regarding an application for the registration of a party.'

[5] The Commission concluded as follows:

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[4] 5. Powers, duties and functions of Commission
(1) The functions of the Commission include to -
(a) manage an election;
(b) ensure that any election is free and fair
(o) adjudicate disputes which may arise from the organisation, administration or conducting of elections and which are of an administrative nature;'

'In the exercise of its administrative adjudicative powers, the Commission makes the findings below:

(a) 'Complaint: "We fired Patricia de Lille. . . ."

(i) With respect to the statement made by the DA that Ms De Lille was "fired", the Commission finds that the statement is false. This finding is based on the agreement concluded between the parties on 4 August 2018 and the resignation letter of Ms. De Lille, dated 3 August 2018. Furthermore, the DA, on its own submissions, dated 20 March 2019 admitted that:

"Ms. De Lille resigned as Mayor in exchange for the DA dropping the disciplinary charges against her."

(ii) In addition, the DA's claim that the script was not to be read out verbatim, is disingenuous as the heading of the script says "*standard responses to be used*". The fact of the matter is that the script supplied to call centre operators provides guidance and direction on how to answer particular issues or questions raised by the person with whom the call centre operator is communicating. The script directs what should be stated by the call centre operator in relation to particular issues. In the circumstances, the suggestion by the DA that the script was not meant to be read out verbatim is a tacit concession that it, in all likelihood, may well be read out verbatim or, at the very least, the substance of its contents would be communicated.'

The Commission then issued the following direction:

'REMEDIES

(a) In the light of the above the mentioned findings, the Commission has invoked item 7(c) of the Electoral Code of Conduct which provides that:

"Every registered party and every registered candidate must give effect to any lawful direction, instruction, or order of the Commission or a member, employee, officer of the Commission or the chief electoral officer."

Accordingly the Commission directs the DA:

(b) To cease and desist from making any further false statements in relation to Ms. De Lille being "fired" from the DA.

(c) to issue a public apology for the false statement it published in respect of Ms. De Lille being 'fired' within three (3) days of the receipt of this letter.'

[6] The question to be answered is whether the dispute raised by GOOD falls within the parameters of the powers conferred upon the Commission. The Commission relied on s 190 of the Constitution[5] and s 5(1)(o) of the ECA and Item 9(1)(b) of the Code. The Commission argued that the power to take its decision and impose a sanction, while not expressly stated, is to be inferred. Section 190 deals with the constitutional establishment of the Commission. Section 190 sets out the obligations of the Commission. It does not set out the steps which are to be taken by the Commission to comply with the obligations which are imposed upon it. It is not for the Commission to select the mechanism by which obligations are to be fulfilled. It is for the Constitution to clothe the Commission with the mechanism by identifying it. The Constitution does not create the power the Commission sought to use. The conferment of powers to adjudicate matters and impose sanctions are dealt with in national legislation.[6] We were referred to the legislation concerning the Public Protector and the authorities dealing with her rights to exercise powers. The Commission compared the powers granted to the Public Protector in s 182 of the Constitution with its own position. This comparison is unhelpful. Section 182 specifically confers a power on the Public Protector, inter alia, 'to take appropriate remedial action'. There is no equivalent section concerning the Commission in s 190. In addition, the nature and functions of the Commission are different. It operates in a different sphere of our constitutional democracy. The constitution sets out, as a matter of principle, the obligation the Commission is to pursue. The national legislation sets out the powers the Commission may use to achieve that objective.

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[5] Functions of Electoral Commission
190. (1) The Electoral Commission must—
(a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;
(b) ensure that those elections are free and fair; and
(c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.
(2) The Electoral Commission has the additional powers and functions prescribed by national legislation.'

[6] The Electoral Act 73 and the ECA.

[7] The Commission relied on s 5(1)(o) of the ECA. Section 5(1)(o) empowers the Commission to adjudicate disputes which may arise from the organisation, administration or conducting of elections. The meaning of the words organisation, administration or conducting of elections must be considered. According to the Concise Oxford Dictionary the word 'organisation' means 'the action of organising. Systemic arrangement of elements. Systemic approach to tasks; 'make arrangements or preparations for. . . .' In addition the word 'administration' means 'the organisation and running of a business or system', and finally, 'conduct', 'the *directing or managing of something*'. These words all import a meaning that the Commission may adjudicate disputes regarding the mechanics of an election. Legal disputes in the nature of the one under consideration are not encompassed by the definition. Section 5(1)(o) qualifies the conduct over which the Commission has power to adjudicate as being 'of an administrative nature'. The conduct complained of by GOOD is a dispute which arose from none of the three categories referred to in s 5(1)(o). The conduct does not concern the 'organisation', 'administration' or 'conducting' and is not of an administrative nature.

[8] The Commission was alert to the fact that its authority is limited to disputes which are 'administrative' in nature. On its own version, as set out in paragraph 4 above, the prescripts of s 5 of the ECA limit the nature of the disputes which it is authorised to adjudicate to those that are administrative, which arise during an election and are connected to the organisation of elections. Clearly, the Commission misconceived its powers by equating the decision which it took to an administrative decision. In *President of the Republic of South Africa v South African Rugby Football Union*[7] the Constitutional Court held as follows:[8]

> '[141] In s 33 the adjective "administrative" not "executive" is used to qualify "action". This suggests that the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be as

[7] 2000 (1) SA 1 (CC) para 48.
[8] AT para 141.

contemplated in *Fedsure,* that some acts of the legislature may constitute "administrative action". Similarly, judicial officers may from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.'

[9] It was argued before us that in the case under consideration the nature of the power exercised by the Commission was an exercise in determining what the truth was and what an appropriate sanction should have been. If the statement made by the applicant exceeded a right to free speech and was made during election time,[9] the Commission then obtained jurisdiction as that issue impacted on whether the election was free and fair. Consequently, so the argument went, the Commission is obliged by s 190 of the Constitution to ensure that the elections are free and fair and hence the Commission was vested with the right to both receive the complaint and deal with the matter.

[10] The flaw in this argument is that the Constitution does not say how this is to be done. The national legislation does not provide a power for the Commission, save for those matters set out in s 5(1)(o). This matter in not one of those. The Commission cannot change the character of the subject matter founding the complaint by making an administrative decision in relation to it. A decision whether there is indeed a transgression and whether an appropriate remedy is to be applied compels the decision-maker to act judicially and not administratively. The decision-maker . . . 'brings a judicial mind to

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[9] See the remarks of Cameron J in *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) paras 134-135 (DA v ANC):

'[134] During an election this open and vigorous debate is given another, more immediate, dimension. Assertions, claims, statements and comments by one political party may be countered most effectively and quickly by refuting them in public meetings, on the internet, on radio and television and in the newspapers. An election provides greater opportunity for intensive and immediate public debate to refute possible inaccuracies and misconceptions aired by one's political opponents.

[135] So freedom of expression to its fullest extent during elections enhances, and does not diminish, the right to free and fair elections. The right individuals enjoy to make political choices is made more meaningful by challenging, vigorous and fractious debate.'

bear'.[10] In *South African Association of Personal Injury Lawyers v Heath*[11] it was said that the decision is judicial when it requires

> 'independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of a consideration of relevant information.'

[11] On the assumption that the decision reached is indeed due to an administrative process (which I have indicated it is not) the Commission issued a sanction and required of the applicant to, inter alia, issue a public apology.[12]

[12] No person or body can impose a penalty or sanction, administrative or otherwise, without being specifically authorised by law to do so. The Commission owes its existence and powers to statutes and being created by statute it is required to act within the confines of the statute[13]. It has no powers beyond those specifically conferred upon it. In the absence of a power to impose a sanction the imposition of a remedy is ultra vires and unlawful. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*[14] the Constitutional Court said that it is

> '. . . central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.'

and[15]

> '[139] The fact that the TMC has such a power, does not mean that annexure B must be construed as denying a similar power to the substructures. The substructures clearly have that power, which can be exercised in respect of roads, bridges, etc, which are situated or to be situated on land of which they are the owners or which are under their control. And

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[10] *Pretoria Portland Cement Co Limited v Competition Commission 2003 (2) SA 385 (SCA)* at 384A-G.
[11] 2001 (1) SA 883 (CC) para 34.
[12] See para 5 above.
[13] It is often said in such circumstances that the body is 'a creature of statute'.
[14] 1999 (1) SA 374 (CC) para 58.
[15] At paras 139 – 142.

the same applies to other specific powers relevant to the functional competences of the TMC and the substructures referred to in section 79 and in other provisions of the LGO.

[140] There are also certain powers set out in section 79 of the LGO which are "general" in the sense that they are unrelated to specific functional competences. These include the powers to provide financial assistance to persons affected by disaster, to establish and maintain public lavatories, to guarantee loans required by employees for particular purposes, to establish housing schemes for employees and to grant loans to corporations erecting houses for employees, to pay employees' medical or funeral expenses in certain circumstances, to promote and oppose legislation in the interest of the municipality, and to establish bursary and loan funds to assist students (whether or not related to an employee) in attending approved colleges. Like any other local authority, the TMC and its substructures are entitled to exercise general powers of this sort, provided of course that they are not inconsistent with the LGTA or any proclamation issued thereunder.

[141] The power to make grants falls within this category of general powers. Sections 79(15), (16) and (17) all deal with the power to make grants and donations. Once regard is had to the detailed provisions of these sections and the various purposes for which grants and donations can be made, it becomes clear that the powers are in many instances expressed in general terms and thus not tied to a particular functional competence of a council. Perhaps the clearest example of such a power is contained in section 79(15)(i), which authorises a local government to "make a grant or donation to another local authority."

[142] It has not been suggested, nor do I see any reason for concluding, that sections 79(15), (16) and (17) are in conflict with the provisions of the LGTA or of any proclamation to which our attention has been drawn.'

[13] The empowering statute or Code does not provide for any remedies which the Commission may enforce. This is, in my view, yet a further indication of the absence of a power or authority to make findings of the nature which it did. The Commission can only exercise such powers as it is lawfully authorised to exercise and its actions must be

justified by reference to the authority for that particular act. Bristowe J said in *De Villiers v The Pretoria Municipality*:[16]

> '. . . A statutory corporation established for a particular purpose has no power qua corporation outside the sphere of activity expressly or impliedly prescribed for it by the legislature. Its acts outside those limits are therefore void, not so much because the Legislature has prohibited them, as because the powers which it has conferred upon the being which it has created do not extend it to them. For the purpose of such acts the corporate persona is in fact non-existent.'

In the result the Commission had no power or authority to adjudicate an issue which is not administrative in nature nor did it have power or authority to issue or prescribe a remedy.

[14] It follows that the Commission can only adjudicate a matter and issue a sanction if the power is specifically conferred upon it. The concession by the DA that the Commission may investigate any violation of s 89(2) of the ECA or Item 9(1)(b) of the Code, does not detract from the enquiry whether it does have the power to pass a binding judgment and impose a remedy. Section 103A of the Electoral Act provides that the Commission may attempt to resolve disputes through conciliation. But failing such conciliation, the Commission is bound to approach the Electoral Court and may utilise the provisions of s 95 of the Electoral Act.

[15] In my view such a power cannot be inferred from s 5(1)(o) of the ECA, it being limited in its scope.

[16] Firstly, s 5(1)(o) clothes the Commission with authority to adjudicate matters of an administrative nature and it cannot be said that the conduct complained of falls within any of the limited matters being administrative in nature and set out in s 5(1)(o):

> 'Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of "an administrative nature") that have emerged from the construction that has been placed on s 33 of the Constitution are that it

[16] 1912 TPD 626 at 645 – 646.

> does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of state. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.'[17]

Secondly, the statement complained of is one made by a political party against an individual. It falls within the realm of free speech and it does not pertain to the mechanics and conduct of the election itself. In *DA v ANC* it was held that the primary purpose of s 89(2)(c) is to

> '"*protect the mechanics of the conduct of an election*"[18]. Therefore, the prohibition on disseminating false information concerns "*election-related information*". In other words, a contextual reading of the provisions suggests that the kind of false statements prohibited are those that could include directly against the practical arrangements and successful operation of an election.'[19]

[17] Counsel for the Commission submitted that Cameron J dealt with the provisions of s 89(2) of the Electoral Act and not Item 9(1)(b) the Code. I disagree. When discussing the question of freedom of speech during elections, Cameron J's judgment refers to both s 89(2) and Item 9(1)(b):[20]

> '*Meaning of section 89(2) and item 9(1)(b)*
>
> [136] Now to the nub. What do the prohibitions in section 89(2) and item 9(1)(b) mean? We must, of course, read the provisions in context. Chapter 7 of the statute, in which section 89(2) appears, has five parts: prohibited conduct; enforcement; offences and penalties; additional powers and duties of the Electoral Commission; and other general provisions.

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[17] *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 24.
[18] *DA v ANC* para 138.
[19] *DA v ANC* para 139.
[20] *DA v ANC* paras 136 – 142.

[137] Part 1 groups the statute's prohibitions together. It creates several criminal offences. These are also, as explained, subject to the Electoral Court's additional sanction and penalty powers. In summary, these are prohibitions on "undue influence", particularised as prohibiting any person from compelling or persuading voters to register or to vote or interfering with the independence or impartiality of the Electoral Commission; impersonating a voter or candidate; "[i]ntentional false statements" – the provision at issue here; infringing a voter's right to secrecy in casting a ballot; unauthorised use of voting or election materials or the voters' roll; defacing or unlawfully removing billboards, placards or posters; obstructing the Electoral Commission, the chief electoral officer and other officers; and contravening the Code.

[138] It is evident from the setting in which section 89 appears that its prohibition on false information is designed, as are most of the other prohibitions grouped with it, primarily to protect the mechanics of the conduct of an election: voting, billboards, ballot papers, election stations, observers, vote counts. It is directed to protecting the rights enshrined in section 19 of the Bill of Rights, namely the rights to make political choices, to free, fair and regular elections and to vote and stand for public office. Here, that the prohibition relates specifically to false "information" is an indication, bolstered by the context, that it is election-related information that must not be falsely disseminated.

[139] Seen in this context, the "false information" prohibited by section 89(2) would, thus, for the most part, relate to the kind of statements that could produce the effects set out in the provision itself. These are disrupting or preventing an election; creating hostility or fear in order to influence the conduct or outcome of an election; or influencing the conduct or outcome of an election. In other words, a contextual reading of the provision suggests that the kind of false statements prohibited are those that could intrude directly against the practical arrangements and successful operation of an election.

[140] An example given during oral argument was a statement falsely informing voters that a voting station, or voting stations in a particular region, had been closed. Examples can easily be multiplied. False statements that a candidate for a particular office has died, or that voting hours have been changed, or that a bomb has been placed, or has exploded, at a particular voting station, or that ballot papers have not arrived, or omit a particular candidate or party, would all have the effect of jeopardising the practical mechanics of securing a free and fair election.

> [141] It is to these statements that the prohibition in section 89(2) is directed. The context indicates that section 89(2) is directed to those statements that are intended to influence the conduct or outcome of an election by falsely representing information about the practical arrangements regarding the conduct of the election itself.
>
> [142] The SMS at issue here was very far from the practical conduct of the election. It was designed to influence voters' views about the President and his party. It was not designed to thwart those who disagreed with its content from exercising their right to vote peaceably and effectively.'

[18] It consequently does not matter whether the statement is false or otherwise. The complainant may have other remedies, but Item 9(1)(b) is not applicable as the statement does not impact on the mechanics or conduct of an election.

[19] There is another reason why the Commission does not have such power. Each of the sections[21] in the Electoral Act, which empowers the Commission to decide an issue does so in specific words. There is no express power conferred upon the Commission to enforce Item 9(1)(b), which leads to the conclusion that it does not have that power for, if parliament intended to bestow that power, it would have done so as it did in the other sections. Counsel for the Commission conceded that he is unable to point to any legislative provision, other than the reference to the Constitution, where such powers are conferred on the Commission.

[20] In all the circumstances, the GOOD decision is invalid and void and falls to be reviewed and set aside.

[21] Relying on *S v Jordan and Others*,[22] counsel for the Commission submitted that this court should deal with both issues in its judgment, i.e. the issue of the power of the Commission to have adjudicated the matter and imposed a remedy and the question whether the impugned statement falls foul of the provisions of the Code. In my view, *Jordan* expressed the principle that when the constitutionality of a provision is challenged on a number of grounds, it is desirable that the court should express an opinion on all the

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[21] Sections 13(2), 15(3), 30(3), 55(4) and 56.
[22] 2002 (6) SA 642 (CC).

challenges. In this matter we are not dealing with a constitutional challenge as far as the impugned statement is concerned. It is as Cameron J said in *DA v ANC:*[23]

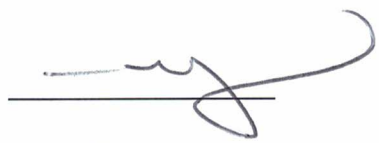
> 'This dispute is about the boundaries of free speech affecting the elections'

and the implementation and meaning of s 89(2) and Item 9(1)(b) of the Code and secondly, whether the DA transgressed Item 9(1)(b) of the Code, the latter not being a constitutional challenge.

[22] In addition, this matter may also serve before another court at the instance of Ms. De Lille and it is best for this court not to venture into an obiter analysis of the truthfulness of the statement or otherwise to embark on an analysis whether it can be classified as an expression of an opinion.

ORDER

1. The decision of the Commission that the statement made by the DA that Ms. De Lille was 'fired' was false, is reviewed and set aside.
2. The decision of the Commission that the applicant acted in violation of Item 9(1)(b) of the Electoral Code of Conduct is reviewed and set aside.
3. The remedies imposed by the Commission consequent upon its aforesaid decisions are reviewed and set aside.
4. There is no order as to costs.



W.L Wepener

Judge of the Electoral Court

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[23] Para 116.

I agree.

B. Mbha

Judge and Chairperson of the Electoral Court

I agree.

C. Lamont

Judge of the Electoral Court

I agree.

Ms. S. Pather

Member of the Electoral Court

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