



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### **Democratic Alliance in re Electoral Commission v Minister of Cooperative Governance and Traditional Affairs and Others**

**CCT 245/21**

**Date of Judgment: 20 September 2021**

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#### **MEDIA SUMMARY**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On Monday, 20 September 2021 at 10h00, the Constitutional Court handed down judgment in an urgent application by the Democratic Alliance (DA), for direct access and an order seeking to declare the decision made by the Electoral Commission (Commission) on 6 September 2021 to re-open the candidate nomination process in the 2021 local government elections, unconstitutional, unlawful invalid and that it be set aside.

The application came off the back of a separate urgent application (the main application) launched by the Commission under the same case number, in terms of which the Commission sought an order to the effect that it could hold the local government elections which were scheduled for 27 October 2021 in February 2022, due to the risk of the election not being free and fair because of the COVID-19 pandemic. In the alternative, the Commission had sought an order declaring that its failure to hold the local government elections on 27 October 2021 was unconstitutional and that such declaration of invalidity be suspended to allow it until 23 February 2022 to correct the constitutional defect.

Due to the urgency of that application, this Court issued an order on 3 September 2021 with reasons to follow. In terms of paragraph 5(a) of that order, the Commission was to determine within three days thereof, whether it was practically possible to hold a voter registration weekend with a view to registering new voters and changing registered voters' particulars on the national voters' roll in time for the local government elections.

Pursuant to the order, the Commission determined that it would be possible to hold a voter registration weekend during the weekend of 18-19 September 2021. However, in addition

to this, the Commission also advised that it would be amending the election timetable to include the re-opening of the candidate nomination process.

Aggrieved by this decision, the DA launched its urgent application, the subject of these proceedings. The DA argued that properly construed, paragraph 5(c)(iii) of the order only entitled the Commission to amend the election timetable to the extent that it may be “reasonably necessary”. According to the DA, this was limited to the addition of new voters to the roll and did not include any adjustment in respect of party lists and nominations. The DA further argued that this Court’s dismissal of the Economic Freedom Fighter’s relief in the main application, to amend the Disaster Management Act Regulations so as to permit gatherings of more than 100 persons for the sole purpose of enabling political parties to conduct their internal processes for selecting candidates, was a judicial determination to the effect that the candidate nomination process may not be re-opened. Lastly, the DA contended that the Commission’s decision to re-open the candidate nomination process was taken in order to give the African National Congress (ANC) a chance to remedy its failure to submit lists and candidates in certain municipalities.

The DA’s application was supported by Inkatha Freedom Party, Economic Freedom Fighters (EFF), African Transformation Movement and the South African Institute of Race Relations. The application was opposed by the Commission, the Minister of Cooperative Governance and Traditional Affairs (Minister), the ANC and Freedom Under Law who all contended for the dismissal of the application. With the exception of the Minister who was cited as a respondent in the main application, these parties were cited in their respective capacities as *amicus curiae* or intervening parties in the main application.

In opposition, the Commission argued that the re-opening of the candidate nomination process was a necessary corollary to holding a voter registration weekend. Quite apart from this however, the Commission also argued that it was empowered in terms of section 11(2) of the Municipal Electoral Act 27 of 2000 to amend the election timetable. Section 11(2) provides that the Commission may, by notice as required in subsection (1)(b), amend the election timetable if (a) it considers it necessary for a free and fair election; or (b) the voting day is postponed.

In a unanimous judgment decided without an oral hearing by the Court, it stated that the proper approach to interpretation involves a unitary exercise in which a court seeks to ascertain the meaning of a provision in light of the document as a whole and in context of admissible background evidence. The Court held that the proper interpretation to paragraph 5(a) of the order envisaged an amendment to the timetable in respect of registering new voters. The focus of the Commission’s determination in terms of the order was the voters and not candidates. The extension of the candidate cut-off date was therefore held to not fall within the ambit of amendments which paragraph 5(c)(iii) contemplated as reasonably necessary.

In respect of section 11(2), the Court held that it is doubtful whether section 11(2)(b) finds application because the election date in this case was not postponed but rather, the Minister’s proclamation was set aside with the effect that there was no election date at all. In respect of section 11(2)(a) the Court held that granting a candidate cut-off date would

be consistent with the legislative scheme and further, that with the Minister's intended proclamation date of 1 November 2021, the Commission would have five additional calendar days to work with.

In respect of the DA's contention that the Court's refusal to grant the EFF's relief in the main application was a judicial determination, the Court rejected this contention. The Court held that its refusal did not imply that the candidate cut-off date may not be extended.

Lastly and in relation to the assertion that the ANC would unduly benefit from the re-opening of candidates, the Court held that it was not possible on the papers and in conformity with the *Plascon-Evans* rule to reject the Commission's denial of those imputations.

In the result, the DA's application for direct access was granted but the application was dismissed with no order as to costs.