



THE ELECTORAL COURT OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE ELECTORAL COURT OF SOUTH AFRICA

From: The Registrar, Electoral Court

Date: 26 April 2024

Status: Immediate

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Democratic Alliance and Another v Electoral Commission of South Africa and Others (004/2024EC)
[2024] ZAEC 06 (26 April 2024)

Today the Electoral Court (EC) granted an application for condonation for the late filing of the review application. It further declared that the word 'consulate' in s 33(3) of the Electoral Act 73 of 1998 (the Electoral Act) includes a consulate headed by an honorary consul and ordered that, to the extent that the first respondent, the Electoral Commission of South Africa (the Electoral Commission), made a decision not to allow the casting of special votes at consulates headed by honorary consuls, the decision is reviewed and set aside. Lastly, the EC made no order as to costs.

In order to comply with the timelines of the election timetable published by the Electoral Commission on 24 February 2024, the EC issued an order, without reasons, on 9 April 2024 and indicated that reasons therefor would be given in due course. The present judgment provides the reasons for the order granted by the EC on the specified date. Even though the application for review was late, the application for condonation was not opposed and, additionally, the EC reasoned that there was a satisfactory explanation for the delay as the period of delay was not excessive, and the respondents were not materially prejudiced by the delay. Furthermore, the EC reasoned that the issues involved in the matter were of substantial importance to the parties and the public. Ultimately, the EC granted condonation to the applicants.

The dispute arose when some registered voters who live in Perth, Australia enquired from the South African consulate, in Perth, whether they could cast their special votes there in the upcoming election on 29 May 2024. The consulate told them that they could not vote in Perth and that they needed to cast their vote at the high commission in Canberra, Australia because 'according to the Act of Parliament of the Republic of South Africa, voting can only take place in South African Embassies, High Commissions and Consulates. Consulate only refer to those that are headed by transferred staff from South Africa excluding Honorary consuls'. As a result of a dispute between the parties regarding the meaning of the word 'consulate', the first applicant, the Democratic Alliance (the DA) which is a registered political party, on 15 February 2024, brought an application in which it sought an order declaring that the Electoral Commission must allow the casting of special votes in terms of s 33 of the Electoral Act at any (all) South African embassy, high commission, or consulate abroad; that the Electoral Commission's decision not to allow the casting of special votes at any (all) South African embassy, high commission, or consulate is reviewed and set aside; alternatively, the Electoral Commission's failure to decide whether to allow the casting of special votes at any (all) South African embassy, high commission, or

consulate is reviewed and set aside; and the Electoral Commission be directed to allow the casting of special votes in terms of s 33 at any (all) South African embassy, high commission, or consulate abroad.

The DA's main argument was that the meaning of the word 'consulate' is not confined to consulates headed by career consular officers. It includes consulates headed by honorary consuls and, that being so, eligible voters can cast their votes at such consulates. On the other hand, the respondents, the Electoral Commission, the Chief Electoral Officer: Electoral Commission (collectively referred to as 'the Commission') and the Minister of the Department of International Relations and Cooperation (the Department) submit that the word 'consulate' does not include a consulate headed by honorary consuls and, therefore, eligible voters cannot cast special votes at such consulates. The Commission and the Department argue that the Electoral Act and Election Regulations, 2004 published under GN R12 in GG 25894 of 7 January 2004 (Election Regulations) confer the right to vote at 'consulates', but not honorary consulates. The Department later filed a notice to abide and no longer participated in the proceedings.

The issue before the EC related to whether the word 'consulate' in s 33 of the Electoral Act, read with regulation 10(3) of the Elections Regulations, should be assigned a narrow meaning so as to be confined to consulates headed by career consular officers, or a wide meaning so as to include consulates headed by honorary consuls.

In coming to a conclusion, the EC reasoned that it was correct that the Electoral Act and Elections Regulations refer to 'consulate' and not to an honorary consulate and that it discriminates against the category of the registered voters who live or happen to be in a country which does not have a South African embassy, high commission or consulate. On this interpretation, the EC held the view that these voters are deprived of the benefit derived from the special dispensation afforded by s 33 and there was no indication that legislature expressly, or by necessary implication, intended to exclude them. This interpretation undermined the context and purpose of s 33(3).

The EC further stated that while it agreed with counsel for the Commission in that the meaning of 'consulate' must be considered in its context, by having regard to the accompanying words 'embassy and high commission', it disagrees with the proposition that the consulate, headed by an honorary consul, was intended to be excluded on the basis that it is not a diplomatic mission and does not have full foreign immunities, privileges, powers and functions which apply to not a diplomatic mission.

Lastly, the EC held the view that the purpose of s 33(3) and regulation 10(3) is to operationalize the rights under s 19(2) of the Constitution: a right to free, fair and regular elections for any legislative body established in terms of the Constitution. Section 33 broadens the opportunity to vote, by creating opportunities to do so outside South Africa. These rights must be protected and an interpretation which results in the promotion of these rights must be preferred. The EC thus reasoned that the interpretation contended for by the DA was a plausible one because, by extending the ambit of the definition of 'consulate', it enables the eligible voters who happen to be outside the Republic on voting day to exercise their s 19(2) right.

In the result, the EC concluded that the Commission and the Department may not decide which certain consulates may facilitate voting and which ones may not and that their decision cannot influence the interpretation of s 33 and regulation 10(3) that career consular officers must facilitate voting.

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