



CONSTITUTIONAL COURT OF SOUTH AFRICA

Electoral Commission of South Africa v Umkhonto Wesizwe Political Party and Others

Case CCT 97/24

Date of hearing: 10 May 2024
Date of Judgment: 20 May 2024

MEDIA SUMMARY

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 May 2024, at 10h00, the Constitutional Court handed down judgment in an application by the Electoral Commission (Commission) for leave to appeal directly to this Court against the decision of the Electoral Court dated 26 April 2024.

Following this Court convicting Mr Zuma of the offence of contempt of court and sentencing him to 15 months' imprisonment without the option of a fine, Mr Zuma started serving his sentence on 8 July 2021. He was released on medical parole on 5 September 2021 by the National Commissioner of Correctional Services.

On 21 November 2022, the Supreme Court of Appeal set aside the decision of the National Commissioner of Correctional Services and directed Mr Zuma to return to the Department of Correctional Services to serve out the remainder of his sentence of imprisonment. Mr Zuma returned to prison on 11 August 2023. On the same day, President Cyril Ramaphosa granted thousands of prisoners a 12-month remission of sentence, in an effort to reduce prison overcrowding. Mr Zuma benefitted from this remission and was released on 11 August 2023. Consequently, he only served about three months of his sentence.

On 8 March 2024, the Umkhonto Wesizwe Political Party (MK party) submitted its list of candidates for the National Assembly in the upcoming election to the Commission. Mr Zuma was included in this list. The Commission received 22 objections to his nomination. On 28 March 2024, the Commission upheld two of these objections. It decided that in terms of section 47(1)(e) of the Constitution, Mr Zuma was not qualified to stand as a candidate for the National Assembly.

On 2 April 2024, the MK Party and Mr Zuma (respondents) appealed to the Electoral Court against the decision of the Commission. The Electoral Court upheld the respondents' appeal and set aside the decision of the Commission to uphold the objection. The Electoral Court found that Mr Zuma was convicted of an offence as contemplated in section 47(1)(e), as he was convicted of a crime. It held that "the contention that Mr Zuma was not convicted of an offence is rejected. He disobeyed an order of court which is a crime. He was in contempt of court. The order of the Constitutional Court (para 3) declared Mr Zuma to be guilty of a crime". Nonetheless, Zondi JA concluded that this Court's sentence is not a sentence of the nature envisaged in section 47(1)(e) as Mr Zuma could not appeal against the conviction and sentence.

On the legal effect of a remission of sentence, the Electoral Court was split. Zondi JA and Yacoob AJ were of the view that a remission meant that Mr Zuma's time spent in prison was reduced and did not reduce the effective sentence. Modiba J (Professors Ntlama-Makhanya and Phooko concurring) found that the remission reduced Mr Zuma's sentence to three months. Therefore, he was not disqualified from being a member of the National Assembly.

In this Court, the Commission contended that section 47(1)(e) of the Constitution disqualifies an individual from being a member of the National Assembly if they have been convicted of an offence and sentenced to more than 12 months' imprisonment, without the option of a fine. This disqualification persists for a period of five years after the sentence has been completed. Mr Zuma was convicted of an offence, contempt of court, and was sentenced to more than 12 months' imprisonment without the option of a fine. Therefore, according to the Commission, from the clear language of the sentence, he is disqualified from being a member of the National Assembly.

In respect of remission of sentence, the Commission contended that section 47(1)(e) is concerned with the sentence imposed rather than the sentence served. As a result, Mr Zuma's remission did not impact his disqualification under section 47(1)(e).

The Commission argues that where this Court, acting as a court of first and last instance, convicts and sentences, the disqualification will come into operation immediately as the conviction and sentence are final and immune from appeal.

The respondents contended that the matter is not urgent or ripe, as eligibility to be a member of the National Assembly will be determined at the first sitting of the National Assembly.

On the merits, the respondents contended that the sentence contemplated in section 47(1)(e) of the Constitution is one that is appealable, and that because Mr Zuma could not appeal against the sentence imposed on him by this Court, the sentence imposed on him is not a “sentence” for the purpose of section 47(1)(e). The respondents contended further that Mr Zuma’s sentence was reduced to three months when the President granted him a remission of sentence and as such, he is not disqualified under section 47(1)(e) of the Constitution, because his effective sentence was less than 12 months.

The respondents also applied for leave to cross-appeal in the event that the main application was upheld. In the cross-appeal they contended that the Commission did not have the authority to implement section 47(1)(e) of the Constitution as this falls under the powers of the National Assembly. Further, the respondents contended that there was a reasonable apprehension that Commissioner Love and/or the Commission was biased. Lastly, they contended that the Electoral Court erred when it found that Mr Zuma’s conviction was a “conviction” as contemplated in section 47(1)(e) of the Constitution. If Mr Zuma’s sentence was not one contemplated in section 47(1)(e), then the conviction would also not be contemplated by section 47(1)(e).

The Council for the Advancement of the South African Constitution (CASAC) was admitted as the first *amicus curiae* (friend of the court). According to CASAC, a remission means that an individual completes their sentence at an earlier date and does not retrospectively alter a sentence imposed by a court. CASAC also contended that Mr Zuma was disqualified under section 47(1)(e) even though he was not entitled to an appeal, owing to the fact that where this Court imposes a conviction and sentence directly for contempt, its decision is final and unappealable, and therefore, Mr Zuma was finally convicted and sentenced.

Corruption Watch (RF) NPC was admitted as the second *amicus curiae*. It submitted that when this Court convicts and sentences an individual, the disqualification from being a member of

the National Assembly under section 47(1)(e) begins immediately. This accords with the purpose of section 47(1)(e), which is to ensure that members of the National Assembly are not serious violators of the law. To allow an individual to stand just because they cannot appeal their conviction and sentence would subvert the purpose of the section. It would also amount to an arbitrary distinction between individuals convicted and sentenced by this Court as opposed to those convicted and sentenced by the lower courts.

The Ahmed Kathrada Foundation was admitted as the third *amicus curiae*. It submitted that when a person is convicted and sentenced by this Court, the disqualification will take effect immediately. It also contended that sections 47(1) and 19 of the Constitution must be read in harmony, and thus there is nothing constitutionally untenable about the fact that not every adult citizen can stand and hold political office.

The Black Lawyers Association was admitted as the fourth *amicus curiae*. It sought to provide assistance to this Court on why the recusal application should have been granted. It submitted that the judges should have been recused and that if they were, the doctrine of necessity would not apply, as acting judges could have been appointed to hear this matter in terms of section 175(1) of the Constitution.

At the hearing of this matter on 10 May 2024, the Court dismissed the application for recusal and indicated that reasons would follow in the main judgment.

In a unanimous judgment penned by Theron J (with Maya DCJ, Bilchitz AJ, Gamble AJ, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring), this Court found that no case was made out for the recusal of the named judges because the respondents failed to prove that the judges would be unable to bring an impartial mind to bear on the adjudication of this matter. The Court found that it is not uncommon for judges to interpret and apply their previous decisions. In any event this matter was only about a narrow and defined legal issue that was capable of determination without an interpretation of the contempt judgment.

In the main application, the Court found that its constitutional jurisdiction was engaged because Mr Zuma's eligibility to stand for election turned on the proper interpretation and application of section 47(1)(e) of the Constitution. This Court found that it was in the interests of justice to hear this matter because the consequences of the contempt judgment, and in particular, the effect of a conviction and sentence on eligibility for the National Assembly, are of public

interest. The general public needs to know if candidates on a party list are eligible to be members of the National Assembly.

On the merits, this Court found that the purpose of the disqualification in section 47(1)(e) was aimed at maintaining the integrity of South Africa's democratic regime, which is founded on the rule of law, by ensuring that members of the National Assembly possess the requisite respect for the rule of law.

This Court finds that the purpose of the proviso is to allow the appeal process to unfold. It is aimed at ensuring that a person is only disqualified from standing for and holding office once their conviction and sentence are final. It does not prevent a sentence that is final and immune from appeal from being a sentence for the purpose of section 47(1)(e).

The reasoning of the Electoral Court in finding that the sentence imposed on Mr Zuma could not be said to be a sentence which the section contemplated could not be sustained because it had no support in the text of section 47(1)(e). Section 47(1)(e) applies to anyone who has been "sentenced to more than 12 months' imprisonment". The text does not qualify the words "sentence" and "sentenced" to exclude sentences imposed by this Court. The Electoral Court's judgment and the respondents' contentions were tantamount to equating "until" in section 42(1)(b) to "unless". The interpretation of section 47(1)(e) of the Constitution adopted by the Electoral Court subverted the very purpose sought to be achieved by the section.

In relation to the legal effect of a remission of sentence, the Court found that section 47(1)(e) focuses on the length of the sentence imposed, not the length of the sentence served. It uses the words: "convicted of an offence and sentenced". The effect of a remission of sentence, is to bring forward a person's date of release. Remission of sentence concerns the execution of the sentence, and does not retrospectively alter the sentence imposed. Thus, for purposes of section 47(1)(e), remission of sentence is irrelevant.

In respect of the question whether the Commission exceeded its powers, the Court considered the relevant provisions of the Electoral Act 73 of 1998. Section 30(3) requires the Commission to "decide the objection", while section 27 deals with a party's list of candidates. Section 27(2)(b) requires that lists must be accompanied by a prescribed declaration from a representative of the party that "each candidate on the list is qualified to stand for election in terms of the Constitution". The form for a candidate list is prescribed in Appendix 1 to the Regulations concerning the Submission of Lists of Candidates, 2004. It requires that the

party's list must include an undertaking from a party representative that "each candidate on the list is qualified to stand for election in terms of section 47 . . . of the Constitution".

In terms of these provisions of the Electoral Act, therefore, the Commission was empowered to determine, before the election, qualification for membership of the National Assembly.

In relation to the question of bias on the part of Commissioner Love and/or the Commission, the respondents submitted that there was a reasonable apprehension of bias on the part of the Commission, to the extent that the Commission as a whole, was legally excluded from deciding the question of Mr Zuma's eligibility to stand as a candidate in the election. They relied on a statement made by Commissioner Love to the media in relation to Mr Zuma's eligibility to stand as a candidate in the elections. Commissioner Love was quoted to have made the following statement on 24 January 2024, at a press briefing, when a question was asked specifically about Mr Zuma's eligibility to stand as a candidate: "That excludes anybody who has been given a sentence that was not the subject of any deferral, and in that sense, it is not ourselves, but the laws of the country that would stand as an impediment for that candidacy".

The Court found that the Electoral Court correctly found that the context in which Commissioner Love was speaking for the Commission was "ambiguous" and "without specificity".

In respect of the question whether Mr Zuma was convicted as contemplated in section 47(1), the Court found that there was no difference between a conviction following criminal proceedings and a conviction following civil contempt of court proceedings, since a person is convicted of a criminal offence in both types of proceedings. Section 47(1)(e) draws no distinction between convictions for civil contempt and other convictions. Therefore, the ordinary meaning of an offence should be given to the word: that it is a criminal offence. It is not for a court to limit the scope of the provision. The section clearly says "convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine". Mr Zuma was "convicted in that this Court found him "guilty . . . of the crime of contempt of court".

The Court concluded that Mr Zuma was convicted of an offence and sentenced to more than 12 months' imprisonment for purposes of section 47(1)(e) of the Constitution and is accordingly not eligible to be a member of, and not qualified to stand for election to the National Assembly until five years have elapsed since the completion of his sentence.