



CONSTITUTIONAL COURT OF SOUTH AFRICA

*African Congress for Transformation v Electoral Commission of South Africa;
Labour Party of South Africa v Electoral Commission of South Africa and Others; and
Afrikan Alliance of Social Democrats v Electoral Commission of South Africa*

CCT 106/24

CCT 113/24

CCT 114/24

Date of order: 10 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 10 May 2024, the Constitutional Court issued orders in respect of the three urgent applications heard on 8 May 2024. The Court will provide reasons for these orders in due course.

The applicants in the respective applications are the African Congress for Transformation (ACT), Labour Party of South Africa (Labour Party) and Afrikan Alliance of Social Democrats (AASD). The main respondent in all three applications is the Electoral Commission of South Africa (IEC).

In CCT 106/24 *African Congress for Transformation v Electoral Commission of South Africa*, the Court dismissed ACT's application for leave to appeal. It also dismissed the IEC's application to lead new evidence.

In CCT 113/24 *Labour Party of South Africa v Electoral Commission of South Africa and Others*, the Court dismissed the Labour Party's application for direct access. It also regarded both the Labour Party's further affidavit, styled "replying affidavit", and the affidavits filed by co-respondents, variously styled "supporting" or "answering" affidavits, as *pro non scripto* (as if never written) and disregarded these.

In CCT 114/24 *Afrikan Alliance of Social Democrats v Electoral Commission of South Africa*, the Court dismissed AASD's application for leave to appeal. It also dismissed the IEC's application to lead new evidence.



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CCT 106/24; CCT 113/24; CCT 114/24

Date of reasons for orders: 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 20 May 2024, the Constitutional Court issued reasons for the orders issued on 10 May 2024 in respect of three urgent applications heard together on 8 May 2024. The three applications followed the judgment of the Electoral Court of South Africa (Electoral Court), dated 15 April 2024.

The applicants in the respective applications were the African Congress for Transformation (ACT); Labour Party of South Africa (Labour Party); and Afrikan Alliance of Social Democrats (AASD). The main respondent in all three applications was the Electoral Commission of South Africa (Commission). The Labour Party's application joined the President of the Republic of South Africa as the second respondent and additional political parties as the third and further respondents. The Commission opposed all three applications.

Ahead of the upcoming elections scheduled for 29 May 2024, the Commission, in terms of section 20 of the Electoral Act 73 of 1998 (Electoral Act), promulgated the Election Timetable for the Election of the National Assembly and the Election of Provincial Legislatures GN 2340 GG 50185 dated 24 February 2024 (Election Timetable). Item 9 of the Election Timetable set the deadline for the submission of parties' minimum supporter lists and nominated candidate lists by 17h00 on 8 March 2024. Parties had the option of submitting their lists either via the Commission's Online Candidate Nomination System (OCNS), or physically at the Commission's office in Centurion, Gauteng.

The applicants failed to submit their lists by the deadline, rendering them non-compliant with section 27 of the Electoral Act and thus barred from participating in the elections. The applicants submitted that they failed to meet the deadline because the OCNS allegedly malfunctioned, making it impossible to submit their full lists. The Commission submitted that the OCNS did not malfunction and that the reason the applicants failed to meet the deadline was because they managed their time poorly and chose inefficient methods for submitting. The applicants raised complaints with the Commission, but the Commission refused to make ad hoc arrangements as an indulgence to allow the applicants to submit their full candidate lists after the deadline.

The applicants brought separate applications before the Electoral Court. That Court dismissed their applications by a narrow majority, which found that the Commission's insistence on strict compliance with the Election Timetable's time limits was not unlawful or irrational. It consequently held that the applicants' failure to meet the deadlines was a result of their unpreparedness, rather than any deficiencies in the OCNS system or the Election Timetable itself.

Aggrieved by this outcome, the applicants approached the Constitutional Court. ACT and AASD brought applications for leave to appeal against the Electoral Court's judgment and the Labour Party brought an application for direct access to the Constitutional Court. In respect of jurisdiction, ACT and AASD submitted that the upcoming elections on 29 May 2024 warranted urgent, direct appeals to this Court. They contended that the exclusion of their candidates would disenfranchise a significant portion of their supporters and disrupt the electoral process. These circumstances implicate their section 18 and 19 constitutional rights and would jeopardise the fairness of the elections. They also submitted that there were good prospects of success and that the factual disputes in the matter could be resolved by having regard to the evidence presented and by applying the well-established principles applicable to resolving factual disputes on the papers. The Labour Party contended that the matter concerned the possible disenfranchisement of many citizens and consequently impacts their political rights in terms of section 19 of the Constitution.

In its application for leave to appeal, ACT sought an order that the Constitutional Court set aside the Electoral Court's dismissal of its application to review and set aside the Commission's decision to refuse ACT's submission of its full candidate list and, in the alternative, its failure to amend the Electoral Timetable. It contended, amongst other things, that the Electoral Court's strict application of the *Plascon-Evans* test neglected to consider whether the evidence tendered by the Commission raised a bona fide dispute of fact. It contended that the Electoral Court accepted the Commission's unsubstantiated version regarding similarly placed political parties and did not deal with the evidence submitted by ACT. Further, it contended that the only impediment that it had to uploading everything onto the OCNS was the portal's malfunction, and not because it did not have enough time as was held by the Electoral Court.

In its direct access application, the Labour Party sought orders that the Election Timetable be amended and that the Commission approach the President for a postponement of the

elections. The Labour Party submitted that the the Commission had prescribed a manner of compliance with section 27 of the Electoral Act for unrepresented parties that was too onerous to comply with. The OCNS presented technical difficulties that would “kick out” data capturers and the Commission had no mechanisms in place to deal with technical glitches. The Labour Party filed a further affidavit, styled “replying affidavit”, which it submitted would be in the interests of justice to admit. Furthermore, a large number of affidavits, styled “supporting” and “answering” affidavits, were filed by some of the co-respondents, purportedly to bolster the Labour Party’s case.

In its application for leave to appeal, AASD submitted that the Electoral Court’s conclusion was irrational. AASD submitted that the Electoral Court failed to properly consider the evidence with regard to the issues with the OCNS and that inadequate training was provided by the Commission. Further, it submitted that the Electoral Court misdirected itself by accepting evidence that other parties used the OCNS successfully as a basis for rejecting AASD’s complaints regarding the problems it faced with navigating the OCNS.

The Commission, in respect of all three applications, contended that the Constitutional Court lacks jurisdiction and should refuse leave to appeal, because the applications bear no prospects of success and they all turn exclusively on factual disputes. The Commission argued that the Labour Party’s application for direct access was an attempt to re-litigate the very same issue already determined by the Electoral Court, and was therefore impermissible and barred by the principle of issue estoppel. The Commission contended that the OCNS worked. To demonstrate this, the Commission applied for leave to adduce new evidence, namely a confirmatory affidavit of an employee at Lockdown IT, the Commission’s contractor to monitor the functioning of the OCNS website. The Commission argued that the applicants’ failure to meet deadline was due to their lack of understanding of how the OCNS worked, and their failure to commence the submission of their lists timeously.

In the majority judgment, penned by Majiedt J (Maya DCJ, Gamble AJ, Madlanga J, Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring), the Constitutional Court first dealt with the interlocutory matters. It determined that, absent a direction by the Chief Justice, in terms of rule 18(4) of the Court’s rules, for the filing of a replying affidavit or the grant of leave to file such affidavit, the Court was required to disregard the Labour Party’s further affidavit, styled “replying affidavit”. The Court also dismissed the Commission’s application to lead new evidence. It stated that while the evidence was relevant, it was neither common cause, incontrovertible or of an official, scientific, technical or statistical nature capable of easy verification. Moreover, the Commission’s application to introduce this evidence was pinned on the Labour Party’s introduction of the evidence as part of its answer. In this regard, the Court explained that admissibility in one case does not automatically translate into admissibility in another case. The Court also disregarded the affidavits filed by co-respondents, styled “supporting” or “answering” affidavits. It held that, given the extreme urgency of this matter, it was unfair, unjust and prejudicial to require of the Commission to respond to the multiplicity of affidavits filed by entities that made common cause with the applicants but failed to assert that they too were applicants and sought relief as applicants.

The Constitutional Court asserted that the Commission has only those powers granted to it by the law. Rigid adherence to such law by both the Commission and all parties is required so that there is fairness to all parties and to ensure that the Commission can properly arrange a free and fair election that runs smoothly. The Commission does not have the power in law to condone non-compliance with the Electoral Act and the Election Timetable. Where a party fails to comply with the Election Timetable, that party will be excluded from the election by operation of law. The Commission does, however, have the ability in law to amend the Election Timetable but that power should be exercised rarely and not on an ad hoc basis to accommodate non-compliance by political parties.

The Court dismissed the Labour Party's application for direct access. The Electoral Court had already decided the question of the alleged malfunctioning of the OCNS faced by the Labour Party. Issue estoppel barred the Labour Party from bringing this question before the Constitutional Court as if it has not litigated the matter previously. There was no reason why the Labour Party could not have appealed the Electoral Court's order. The Constitutional Court therefore found the Commission's reliance on issue estoppel to be meritorious.

The Court also dismissed ACT and AASD's applications for leave to appeal on the basis that they had no reasonable prospects of success. Applying the *Plascon-Evans* test, the Court determined that the Commission's version of the facts prevailed. The Court further held that there was ample objective evidence beyond the Commission's say so that the OCNS worked. The Court found that the applicants were the authors of their own misfortune: they failed to take the necessary steps, to understanding what was required of them and to use the most efficient methods to comply with section 27 of the Electoral Act and the Election Timetable.

The minority judgment penned by Bilchitz AJ, agreed with the majority judgment's dismissal of the Labour Party's direct access application based on issue estoppel. It also agreed with the dismissal of AASD's direct leave to appeal application but only on the basis that the relief sought was not permissible. The minority judgment, however, did not agree with the dismissal of ACT's direct leave to appeal application and would have granted limited relief. The minority judgment addressed four issues on which it differs from the majority judgment.

The first issue concerned the application of the long-standing *Plascon-Evans* rule to the circumstances of this case. The minority judgment considered the justification for the rule and found that there was no good reason to apply the rule in circumstances where the applicant had no choice but to institute motion proceedings. Such circumstances arise, for instance, where there is great urgency and where court rules do not permit an alternative procedure. The ACT matter was both urgent and brought initially in the Electoral Court where an applicant is required to institute motion proceedings. It also involved a party seeking to give effect to their centrally important political rights. The minority judgment concluded that there was no good rationale for applying the *Plascon-Evans* rule in these circumstances.

The minority judgment then considered whether the Commission's response to the many complaints it had received concerning its internet portal falls foul of several grounds of review in terms of the Promotion of Administrative Justice Act 3 of 2000. The Commission's response largely involved denying the veracity of the complaints it received and indicating that there was no route to cure the non-compliance of the parties. There was no evidence placed before the Court that it had instituted any investigation in response to the complaints about the functioning of its internet portal or conducted an internal process to decide whether the Election Timetable needed to be amended. The minority judgment placed great emphasis on the duty of organs of state to be responsive to the individuals and organisations they serve. In light of the multiple complaints levelled against the OCNS system, the minority judgment found that the Commission ought to have investigated the complaints and considered utilising its powers to amend the Election Timetable. The functionality or otherwise of its internet system had a significant impact on the ability of individuals or political parties to participate in the election – which was intimately tied to the mandate of the Commission to conduct free and fair elections. Consequently, the minority judgment concluded that the Commission had a duty to investigate and consider amending the Election Timetable and the administrative review requested by ACT succeeded.

Having made this finding, the minority judgment considered what would constitute a just and equitable remedy. In making this determination, the minority judgment considered a number of factors and concluded that ACT was entitled to a declaration of rights that the Commission had a duty to investigate and consider amending the Election Timetable in light of the multiple complaints received. That declaration would serve to clarify the legal position that the Commission has a duty to be responsive to political parties and that it must investigate and consider the validity of any complaints that are made to it and their impact on a free and fair election.

The minority judgment lastly found that it would have granted a number of the unusual interlocutory requests to admit additional affidavits in the Labour Party and ACT matters. In particular, the minority judgment found that, in general, individuals or organisations that have a legal interest in a matter and are joined as co-respondents should not be confined to the choice between opposing the case, abiding by a court's ruling or becoming applicants in their own right. They should, in addition, be permitted to lodge an affidavit providing information supporting the applicants' case, if that conforms with their legal interests. Such an approach favours inclusion in the legal process and provides a greater range of information that courts can have regard to in making their determinations.