



**THE ELECTORAL COURT OF SOUTH AFRICA
BLOEMFONTEIN**

Not Reportable

Case NO: 003-2024EC

In the matter between:

AFRICAN INDEPENDENT CONGRESS

Applicant

And

ELECTORAL COMMISSION OF SOUTH AFRICA

Respondent

Neutral Citation: *African Independent Congress v Electoral Commission of South Africa and Others* (003/2024EC) [2024] ZAEC 19 (07 June 2024)

Coram: Zondi JA, Shongwe AJ, Adams AJ, Professors Ntlama-Makhanya and Phooko (Additional Members)

Heard: 06 March 2024 – via videoconference on *Microsoft Teams*

Delivered: 07 June 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by publication on the website of the Supreme Court of Appeal and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 07 June 2024.

Summary: Application to compel Electoral Commission by two previously opposing factions of political party for declaratory and interdictory relief – to recognise current party leadership as lawful structure of a registered party.

ORDER

1. The applicant's failure to comply with the forms and service provided for in the Rules of Court is condoned, and that the application is heard on urgent basis;
 2. The respondent is ordered to recognize the applicant's members whose names appear on annexure 'A' to the Notice of Motion as constituting its Interim National Executive Committee;
 3. The applicant is ordered to comply with section 12 of the Political Party Funding Act 6 of 2018 by preparing its financial statements and submitting the same to the respondent within 30 (thirty) days of the granting of this order.
 4. The relief sought in prayers 4 and 5 of the Notice of Motion is dismissed.
 5. There is no order as to costs.
 6. The reasons for the order will follow.
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REASONS FOR JUDGMENT

Professor Phooko (Zondi JA, Shongwe and Adams AJJ and Professor Ntlama-Makhanya (Additional Member) concurring):

[1] On 6 March 2024 we granted an order without reasons. We indicated that the reasons for the order would follow in due course. These are the reasons for the order we made. The applicant, African Independent Congress (AIC) in this matter approaches this court for an order compelling the respondent, the Electoral

Commission of South Africa (the Commission) to recognise an Interim National Executive Committee (INEC) elected in 2022 as the lawful structure that is bestowed with authority and responsible for the day-to-day of its affairs. The application is not opposed by the Commission.

[2] A dispute existed between the members of the applicant post 12 July 2012 when the party was formed. As a result, the party has been unable to hold its elective conference to elect its governing structure due to infighting for leadership positions. The term of the original leadership structure that was elected on 12 July 2012 has ended. Attempts to hold an elective conference have failed.

[3] Because of the internal party strife, two factions emerged one headed by Mandlenkosi Phillip Galo (Mr Galo), and another led by the late Mr Lulama Maxwell Ntshayisa (Mr Ntshayisa). Both Mr Galo and Mr Ntshayisa claimed to be lawful leaders of the party. This severely affected the functioning of the party. Litigation also ensued between the two factions and ended on 9 May 2022.

[4] As a result of the protracted infightings, on 31 May 2022, the Commission *inter alia* decided to bar the AIC from nominating candidates for any scheduled by-elections and replacing its proportional representation councillors. The AIC also had its bank accounts frozen by the First National Bank ("FNB"), Matatiele.

[5] On 1 October 2022, the AIC finally resolved its internal disputes and elected an INEC. A further consultative process among party members to receive names of nominations from other provinces for persons to be included in the INEC was completed on 15 December 2023. There was also an agreement concluded between the two factions on 17 January 2024 to the effect that internal disputes have been resolved and that there is a new leadership structure, an INEC.

[6] On 17 January 2024, the AIC met with the Commission to *inter alia* have its INEC structure recognized. However, the Commission advised the AIC that it would only recognize their INEC structure as lawful if directed to do so by a court order. This resulted in the current litigation by the AIC.

[7] The relief sought by the AIC is as follows:

1. That the AIC's failure to comply with the forms and service provided for in the Rules of Court be condoned and that the application be dealt with as an urgent application in terms of the Rules of this Court;
2. Granting an order compelling the Commission to recognize the Interim National Executive Committee of the AIC, whose members' names appear on annexure "A", as the lawful leadership of the AIC.
3. Granting an order revoking the restrictions imposed by the Commission in its letter to the [AIC] dated 31 May 2022 in terms of which the [AIC] was prohibited from nominating candidates in any upcoming scheduled by-elections; replacing proportional representative councillors; from being represented or participating in any Party Liaison Committee meetings and not making any payments of any allocations provided for in the Political Party Funding Act No. 6 of 2018 from all activities and positions on the various structures of the Commission be revoked and that the rights and benefits of the [AIC] as a registered political party be reinstated forthwith.
4. Granting an order that all payments which were due and payable to the [AIC] from the date of its suspension to the date of its reinstatement be paid to the [AIC] forthwith.
5. Granting an order unfreezing all the banking accounts for the [AIC].
6. No order as to costs, unless in event of opposition.

[8] The issues to be determined are:

- (a) whether the INEC of the AIC should be recognized and that the Commission should be ordered to recognize it?
- (b) Whether the Commission should be ordered to pay all the finances due to the AIC from the date of its suspension to the date of reinstatement.
- (c) Whether this Court should order FNB to unfreeze of all the banking accounts belonging to the AIC.

[9] The evidence presented before this court shows that the deponent to the founding affidavit, Mr. Steven Mahlubunzima Jafta, has the authority to bring this application in terms of a signed resolution by members of the AIC. Importantly, there is evidence before this Court in the form of an agreement signed by both factions on 17 January 2024 which confirms that the internal conflicts have been resolved, and that the INEC is the structure responsible for executing the activities of the AIC. In my view, this is evident in that there are no longer scuffles between party leaders and that a legitimate structure in the form of the INEC has been established. The AIC has made out a case for the relief sought.

[10] As regards the payments of any allocations provided for in the Political Party Funding Act 6 of 2018 (PPFA), and finances due and payable to the AIC, these prayers fall outside the scope of this Court as they seek to bypass a procedure and powers of the Commission as provided for in s 16(1)(b) of the PPFA.

[11] Section 16(1)(b) of the PPFA is headed '**Power to suspend payment of money**'. It provides as follows:

"16. (1) Subject to subsection (2), the Commission—

(a) may suspend the payment of money to a represented political party envisaged in section 6(7) if it is satisfied on reasonable grounds that the represented political party has failed to comply with this Act; and

...."

[12] Section 16(1)(b) deals with the suspension of payments and the upliftment of such suspension. The wording of s 16(1) makes it clear that the power to suspend payments and uplift such payments is vested in the Commission. The exercise of this power is subject to the Commission being satisfied on reasonable ground that a represented political party has failed to comply with the PPFA. It is not in dispute in the present matter that the AIC has not accounted for its income to the Commission as required by s 12 of the PPFA. Failure to comply with s 12 attracts sanctions. The Commission is empowered to suspend payment of finances that may be due to a

defaulting party. This Court may therefore not order the Commission to uplift suspension and direct it to make payment in circumstances where there is no suggestion that in suspending the payment the Commission acted arbitrarily and without reasonable grounds. To do otherwise, would be tantamount to usurping the powers that are statutorily vested in the Commission. It would therefore not be appropriate for this Court to make an order the effect of which would be to allow the AIC to undermine the provisions of the PPFA.

[13] Concerning the unfreezing of account by FNB, the AIC seeks an order against FNB without having them joined as a party in these proceedings. It has now become settled law that if that party has a direct and substantial interest in the matter, it ought to be joined.¹ In my view, non-joinder of FNB marks the end of the relief sought.

[14] The non-recognition of AIC leadership structure, due to internal disputes, by the Commission impedes on its ability to discharge its responsibilities including the exercise of constitutional rights to freedom of association and political activities for the elections that were held on 29 May 2024. The application was also brought timeously after the Commission had informed the AIC that it would only recognise its INEC structure through a court order. Electoral matters are by their nature inherently urgent. Accordingly, this matter requires urgent intervention of this Court.

Costs

[15] As a general rule, costs orders are not imposed upon a losing party in electoral matters unless such party's conduct has been vexatious, frivolous or abusive of the court processes.² I can think of no reason why the foregoing general rule should be departed from. In the circumstances I am not inclined to make any order as to costs.

Order

[16] In the result, I make the following order:

¹ *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391(SCA) para at 2.

² *Arise Afrika Arise (AAAR) v Electoral Commission of South Africa* (008/2023 EC) [2024] ZAEC 1 at para 31.

1. The applicant's failure to comply with the forms and service provided for in the Rules of Court is condoned, and that the application is heard on urgent basis;
2. The respondent is ordered to recognize the applicant's members whose names appear on annexure 'A' to the Notice of Motion as constituting its Interim National Executive Committee;
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4. The relief sought in prayers 4 and 5 of the Notice of Motion is dismissed.
5. There is no order as to costs.

PROF MR PHOOKO
Additional Member of the Electoral Court

I concur,

D H ZONDI
Chairperson of the Electoral Court

I concur,

Z J SHONGWE
Acting Judge of the Electoral Court

I concur,

L R ADAMS
Acting Judge of the Electoral Court

I concur,

PROF N NTLAMA-MAKHANYA
Additional Member of the Electoral Court

APPEARANCES

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