IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

12.03.2014
DATE

SIGNATURE

CASE NO: 16247/14

DATE: 11 MARCH 2014

In the matter between:

ECONOMIC FREEDOM FIGHTERS	**APPLICANT**
and	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**1st RESPONDENT**
MINISTER OF HOME AFFAIRS	**2nd RESPONDENT**
INDEPENDENT ELECTORAL COMMISSION	**3rd RESPONDENT**

JUDGMENT

RAULINGA,

INTRODUCTION

[1] The applicant has brought an application before this court for a relief, that pending the determination of Part B in the Notice of Motion, an order couched in the following items be granted:

(a) Condoning the non-compliance with Rules of the Court with regard to time limits in terms of Rule 6(12)(a) and hearing the matter on an urgent basis;
(b) Suspending the operation of Regulation 3(1)(a) and (b) of the regulation concerning the submission of lists of candidates, 2004 as amended by GenN1203 in GG31451 and GN R1168 in GG31558;
(c) Mandating the third respondent to determine that the applicant and/or other registered political parties which are prejudiced by the prescribed deposits but would otherwise qualify to contest elections be temporarily exempted from paying the prescribed deposits as they do not receive parliament party funding; alternatively , that a small nominal deposit be prescribed in relation to new entrant parties such as the applicant; and
(d) Interdicting and prohibiting the third respondent from rejecting any party list for failure to pay the deposit as currently prescribed.

Part B

Declaring section 27(2)(c) and/or 27(3)(a) of the Electoral Act unconstitutional and invalid.

FACTUAL BACKGROUND

[2] The applicant was registered as a political party on the 3rd October 2013. The party is still finding its feet financially and administratively. It has recently acquired its headquarters in Braamfontein, Johannesburg. Unlike other political parties currently

represented in Parliament, the applicant does not receive any funding from Parliament. The applicant "has hundreds of thousands of members and an estimated support base of millions". According to the applicant, the deposits which have been prescribed by the third respondent are "unaffordable" to the applicant. Attempt to ask the third respondent to waive the deposit requirements has received no favourable response.

[3] The third respondent is the Electoral Commission created in terms of the Constitution[1] of the Republic of South Africa and mandated to administer and conduct elections, with its principal place of business at Election House, Riverside Office Park, 1303 Heuwel Avenue; Centurion; 157.

PRELIMINARY ISSUES

[4] This matter was enrolled for hearing for 4 March 2014, but was stood down to the 5 March 2014 due to certain glitches on the part of the applicant. As a consequence, costs were reserved.

[5] In their notice of motion the applicant asks that Part A be heard first, before the determination of Part B. However, in their introductory remarks, Counsel for the applicant submitted that Part A and B be heard together. Ironically, this was the original contention of the third respondent when the matter was called on the 4 March 2014, before they pleaded for separation of Part A and Part B. The court then ruled that only Part A will be deliberated upon. Parties also submitted supplementary heads at the request of the court.

[6] Both parties raised points in limine prior to the hearing of the interim interdict application.

(a) The applicant contends that the third respondent as a creature of statute, and being bound by the Electoral Act and Regulations has no locus standi and/or requisite

[1] Act no 108 of 1996

authority to oppose a constitutional challenge of the very act and regulations that bind it. I am with the submission of the third respondent that although in terms of Section 181(1) of the Constitution[2], its function is to strengthen constitutional democracy in the Republic, it also has to enforce the provisions of the Electoral Act[3] and has a legal interest in the outcome of the proceedings. In my view, the court in *Independent Electoral Commission v Longerberg Municipality*[4] dealt in essence with disputes involving intergovernmental institutions. The fact that the first and second respondents have chosen to abide by the decision of the court and not argue the matter is of no moment. In the same vein, the submission by the third respondent that the applicant ought to have joined parties who have a direct and substantial interest in these proceedings cannot be sustained. The first and second respondents are parties to these proceedings. Moreover, in such proceedings, a reference to a Minister of Home Affairs is construed as a reference to the Chairperson of the Commission. The third respondent in its capacity as the administrator of the Electoral Act[5] and manager of elections can substitute the National Party Liaison Committee in these proceedings. In my view the provisions of Rule 10 and 10A have been complied with.

(b) The third respondent is of the view that the applicant has overlooked Rule 16A[6] in that it has failed to give notice in the form of a clear and succinct description of the constitutional issues raised in the application, to the registrar at the time of filing the relevant affidavit. It seems to me that Rule 16A is applicable to any interested party in a constitutional issue raised in proceedings before a court who may, with the written consent of the parties to the proceedings, give notice not later than 20 days after the filing of the affidavit on pleadings in which the constitutional issue was first raised, be admitted therein as *amicus curiae*. In the first instance, the applicant is a party to the proceedings and secondly it is not an *amicus curiae*. The submission of the third respondent must be dismissed on this ground.

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[2] Supra 1
[3] Act 73 of 1998
[4] 2001(9) BCLR883(CC)
[5] Supra 3
[6] Rules of the Superior Courts

(c) It is also argued by the third respondent that the applicant failed to annex a properly executed resolution granting authority to the deponent to the founding affidavit. In the case of companies or other corporate entities a resolution giving authority to the deponent must be attached. Once such a resolution is attached, it is left to the discretion of the court whether to accept it or not. According to the Constitution[7] of the applicant clause 40 on page 9, the deponent to the founding affidavit is the General Secretary of the political party. The resolution was issued by what is referred to as the Central Command Team which appears on page 8 of the Constitution. The date on which the resolution was issued is not reflected on the purported resolution. The person who signed it does not state his or her title. The court can exercise its discretion in favour of the applicant if the crucial requirements have been complied with. In the circumstances I am unable to condone the non-compliance with the Rules of Court.

(d) The third respondent joins issue with Rule 6(12) procedure that has been adopted by the applicant, in that no urgency exists and that no case for urgency has been made out on paper. The applicant registered as a political party on the 3 October 2013, and was co-opted to the National Party Liaison Committee as a member in November 2013. The applicant must have been aware of the 2014 election when it registered as a party in October 2013. If the applicant missed this important public knowledge issue in October 2013, then it ought to have been aware of this fact in November when it became a member of the National Party Liaison Committee. It is at that time that the urgent application ought to have been launched. Matters launched on an urgent basis must show a potential for loss or disadvantage and that the applicant could not be afforded substantial redress at a hearing in due course. The degree of urgency, in a matter, ought not to be greater than the exigency that the case demands, but must commensurate therewith – *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin Furniture Manufactures*[8]. Even in the event that the applicant alleges the infringement of Constitutional rights, the rules of court must still be complied with. As a party wishing to contest the 2014 elections seriously, the applicant is bound to know the provisions of the relevant statutes even before registration as a party. The applicant does not substantiate the

[7] Constitution of the Economic Freedom Fighters
[8] 1977(4) SA 135(W) at 127A

reasons for the urgency of the matter. It does not explain the events leading to the issuance of the election time-table by the third respondent, after the election date was pronounced by the President of the Republic. There is a long process that was followed prior to the implementation of the decision taken by the third respondent. Moreover, at all material times, the applicant was a member of the National Party Liaison Committee. It is of paramount importance to mention that the deposit amount is contained in a Regulation as published under GN R969[9] in GG37133 of the 6 December 2013. It is at that time that the application could have been launched. In my view the claim of urgency is unwarranted. There is no urgency.

RELEVANT LEGAL PROVISIONS

[7] The Electoral Commission is established in terms of section 181 of the Constitution as one of the State Institutions Supporting Constitutional Democracy. In terms of Section 190(1) of the Constitution[10] the Electoral Commission has the following functions:

(a) to manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;
(b) to ensure that those elections are free and fair; and
(c) to declare the results of those elections within a period prescribed by national legislation and that is as short as reasonably possible.

[8] Section 190(2) of the Constitution[11] provides also that the Electoral Commission has the additional powers and functions prescribed by national legislation. Some of the powers include the compilation, publication of the election voters roll and the setting of the mechanisms to ensure the registration of political parties to take part in the elections, including determining compliance with any electoral procedures.

[9] Part 3 of the Electoral Act deals with requirements on parties contesting elections. Section 26 of the Electoral Act[12] provides that a party may contest an election only if

[9] Supra 3
[10] Supra 1
[11] Supra 1
[12] Supra 3

it is a registered party and has submitted a list of candidates in terms of section 27[13]. Section 27, in turn deals with submission of lists of candidates. It states as follows:

(1) A registered party intending to contest an election must nominate candidates and submit a list or lists of those candidates for that election to the Chief Electoral Officer in the prescribed manner by no later than the relevant date stated in the election timetable.

(2) The list or lists must be accompanied by a prescribed –

(a) undertaking , signed by the duly authorised representative of the party, binding the party, persons holding political office in the party, and its representatives and members to the code,

(b) declaration, signed by the duly authorised representative of the party, that each candidate on the list is qualified to stand for election in terms of the Constitution or national or provincial legislation under chapter 7 of the Constitution;

(c) acceptance of nomination, signed by each candidate;

(d) undertaking signed by each candidate, that the candidate will be bound by the code; and

(e) deposit.

(3) (a) the Commission may prescribe the amount to be deposited in terms of the sub-section 2(e)

(b) the amount to be deposited by the registered party contesting the election of a provincial legislature, must be less than the amount for contesting an election of the National Assembly".

THE DEPOSIT AMOUNT

[10] The Electoral Act[14] does not specify the amount to be paid as a deposit under section 27 (2) (e). That is left for determination by the Electoral Commission. The Act also does not specify any factors or guidelines to be taken into account by the Electoral

[13] Supra3
[14] Supra 3

Commission when specifying the deposit amount. The issue appears to be left entirely to the discretion of the Commission, except that the amount paid in respect of contesting provincial legislatures must be less than the amount for contesting national elections.

[11] Failure to pay the deposit constitutes non- compliance, resulting in disqualification from participating in the elections. Although there is a limited scope to correct lists which have been submitted in terms of section 28[15], there is notably no scope for condonation or waiver of the deposit requirement by the Electoral Commission itself, in terms of the Electoral Act.

[12] In terms of section 106 of the Electoral Act[16] the deposit paid under Section 27 (2)(e) may either be forfeited or returned. A party which is allocated at least one seat in the legislature whose election was contested by that party is refunded in full by the Commission. However, a party that fails to secure at least one seat in the legislature forfeits its deposit to the state.

[13] The regulations deal with a number of items, including lists of candidates and the deposit contemplated by section 27 of the Electoral Act[17]. The procedure for the submission of lists is a thorough and detailed process which requires meticulous attention to the procedural requirements in the Act and the Regulations. A party which seriously wishes to contest the elections is duly bound to scrupulously observe conditions, at the risk of disqualification.

[14] The deposit amount is contained in Regulation concerning the submission of Lists of Candidates, 2004 as published under GN R969 in GG37133 of 6 December 2013. Regulation 3[18] provides for the deposit in the 2014 elections:

"(1) *the amount to be deposited in terms of section 27(2) of the Act is –*

[15] Supra 3
[16] Supra 3
[17] Supra3
[18] Supra 3

(a) R200, 000, 00 (two hundred thousand rand) in respect of an election of the National Assembly; and

(b) R45 000, 00(forty five thousand rand) in respect of an election of a provincial legislature

(2) the deposit must be paid by bank guarantee cheque in favour of the Electoral Commission"

[15] A party which does not comply with either of the above requirements faces the risk of disqualification because the Electoral Commission is responsible for compiling the list of political parties and candidates contesting the elections. The regulations do not provide the IEC with discretion to waive the deposit requirement on good cause shown. Therefore, the deposit requirement is inflexible and non- compliance therewith will result in disqualification.

[16] The issue of paying a deposit in order to participate in an election was considered by the *Constitutional Court in African Christian Democratic Party v Electoral Commission and others*[19]. In that case there was no challenge to the constitutionality of deposits. The issue in dispute was whether the ACDP, the applicant in that case, had in fact paid the deposit to enable it to participate in local government election. However, the court emphasised the need for the payment of the deposit, stating that: "*it was complementary to the key notification required for organising the elections – the payment of an electoral deposit ensured that the participation of political parties was not frivolous*".

FOREIGN LAW

[17] It seems to me that the rationale behind the payment of the electoral deposit serves as a guarantee that a political party seriously wants to participate in elections. The third respondent annexes "M5M4" as confirmation that the electoral deposit is a general trend in other jurisdictions. In the DRC, eg, the deposit is R2, 441 030, 00(Two million Four hundred and Forty one thousand and thirty Rand). The DRC is comparatively speaking, per capita, poorer than South Africa.

[19] 2006(3) SA 305(CC)

[18] In Canada, the candidate for Member of Parliament must place a $100 000,00 deposit – this is an equivalent of almost R800 000,00 per candidate. At present, all candidates receive their deposit back if they turn in their properly completed financial paper work on time, and a portion of election expenses are reimbursed if 10% is reached. The same practice obtains in the USA and Australia.

[19] However, in *figueros v Canada* (Attorney General), the appellant challenged the constitutionality of the 50 – candidate threshold. Under the Canadian Elections Act, a political party must nominate candidates in at least 50 electoral districts in order to obtain, and then retain, registered party status. The court of Appeal held that the 50 – candidate threshold was not consistent with section 3 of the Charter, except to the extent that it denied candidates of non- registered parties the right to identify their party affiliation on the election ballot. The purpose of section 3 is effective representation. This was not a challenge to the constitutionality of a deposit per se.

[20] Taking a cue from Ghana Electoral Laws (Public Elections Regulations)[20] section 6(1)(a) requires a candidate for president or parliament at the time of nomination to deposit or cause to be deposited such sum as the Commission shall determine.

[21] In my view, there does not seem to be any challenge to the constitutionality of the electoral deposit in the jurisdictions mentioned above. The fact that this has not been done in other countries does not deter political parties or any affected individual to launch such a challenge in South Africa. These are issues which can be entertained in Part B of the Notice of Motion.

THE RIGHT TO VOTE AND STAND FOR PUBLIC OFFICE

[22] The applicant paints a picture that analogously encapsulates the author's words in 'Animal Farm'[21] *"all animals are equal, but some animals are more equal than others"* I take judicial notice that there are millions of South African citizens who live

[20] Ghana Electoral Laws
[21] George Orwell

in abject poverty. I note what was said by the court in *August & Another v Electoral Commission & Others*[22]. I recognise these as foundational values which are accepted and applied universally – "*the universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally it says that everyone counts*". On the contrary, it does not mean that we must flout the rules and regulations – as was said in *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino(Pty) Ltd*[23]: -

"*.....laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determination cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislative and Executive will disappear*".

While foundational values as enshrined in the Constitution must supersede other considerations, this does not apply where there is a glaring disregard for rules and regulations. To do so, will be to act outside the framework of the law. The principles of legality and rule of law do not exist in a vacuum.

[23] Our Courts have ruled that a court may not usurp the powers of another branch of government unless a proper and strong case has been made. The following dicta in *Glenister v President of the Republic of South Africa*[24] is significant:

"*onus of establishing the absence of a legitimate government purpose, or of a national relationship between the law and the purpose, falls on the objector. To survive the rationality review, legislation need not be reasonable or appropriate*".

As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational a court cannot interfere with a decision simply because it disagrees with it or considers that the power was exercised inappropriately -

[22] 1999(3)SA 1(CC)
[23] 2001(4)SA 501(SCA)
[24] 2011(7)BCLR 651(CC)

Pharmaceutical Manufacturer's Association of SA and Another: In Re –Ex Parte President of the RSA and others.[25]

I am of the view that I cannot at this stage interfere with a determination made in terms of a legally valid legislative instruct.

[24] The suspension of Regulation 3(1)(a) and (b) would first require a determination that the said Regulations are invalid. I agree with the third respondent that no objective facts or proper basis for this court to reach such a conclusion has been laid, as I will indicate hereunder. These regulations have had legal force over years, as well as section 27(209e0 and 27(3)(a) of the Electoral Act. Because this is an application for an interim relief, I am unable to deal with the issues of unconstitutionally and invalidity in detail.

THE TEST REQUIRED FOR GRANTING INTERIM INTERDICTS

[25] The test for the granting of interim relief has been authoritatively laid down in *National Treasury and Others v Opposition to Urban Tolling Alliance & others*[26]. In that case the Constitutional Court said the following with regard to the test for interim relief: -

"*the test requires that an applicant that claims an interim interdict must establish : (a) a prima facie right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted.*
(c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other remedy".

[26] The court went further and stated that when weighing the balance of convenient requirement, a court "must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of

[25] 2000(2)SA 674(CC)
[26] 2012(6) SA 223(CC)

government. It is also true that different considerations may apply where "*the harm apprehend by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights*". However, there must be a pressing and convincing argument why the court will not readily close its doors to the granting of an interim interdict. The court went further and said the following "*whilst a court has the power to grant a restraining order of that kind, it does not readily do so except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases. The court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of power or duty that the law has vested in the authority to be interdicted*".

One may add that 'a proper and strong case' means where all the requirements for an interim interdict have been canvassed sufficiently. Whereas "in the clearest of cases" requires that no doubt should be cast on the evidence advanced by the claimant. I do not think this is the case in this matter.

[27] The applicant alleges that its inability to pay the prescribed deposit may prejudice voters in the exercise of their rights, under section 19(2) of the Constitution[27]. They also allege that the prescribed deposits are unaffordable and too high; that they are unjustifiable and constrain the ability of new political parties to participate in the elections thus portraying "the elections to be financially barred"

[28] In their founding affidavit, the applicant made bald statements, restating the requirements for an interim interdict without adding flesh to it. On urgency, the applicant merely states that (sic) the elections have already been announced to be on the 7 May 2014 and proclamation is thus underway, this matter will determine the participation of the applicant in the elections and those of its voters. The applicant also mentions faceless (sic) other new political parties and indeed all political parties and citizens. Yet for two days that the matter was before the court, not a single other political party or citizens approached the court as amici curiae. Applicant does not explain in detail why the application was not enrolled earlier, this is one of the reasons

[27] Supra 1

why the court ruled that the matter is not urgent. It is trite that a party's case is made in its pleadings. A case is not made in heads of argument.

[29] I am not convinced that the applicant managed to canvas the requirement of prima facie right. I say so because the submissions made mostly pertained to Part B of the notice of motion. An interdict is meant to prevent future conduct and not decision already made. Further to that, the applicant does not demonstrate a prima facie right that is threatened by impending or imminent irreparable harm.

[30] Again on the aspect of irreparable harm, the applicant does not explain to the court how much it can afford. Instead when requested to suggest a reasonable deposit amount they put forward a ridiculous amount of R10 000(Ten Thousand Rand). Instead they continue to submit that their members who are in hundreds of thousands and their followers who are in millions will suffer irreparable harm because they will not be able to vote. The applicant does not tell this court how many members have joined and an estimated number of followers. Much as it is accepted that members of a party vote through their political party, the converse is that the applicant did not advance sufficient evidence to support this requirement.

[31] A court must be satisfied that the balance of convenience favours the granting of a temporary interdict. It must first weigh the harm to be endured by an applicant if interim relief is not granted, as against the harm a respondent will bear if the interdict is granted. Thus, a court must assess all relevant factors carefully in order to decide where the balance of convenience rests.

[32] In the instant case, the argument of the applicant is (sic) the balance of convenience favours the granting of the interim order, as the horses will have bolted should the date for the submission of the lists and deposit(s) be allowed to pass before the determination of Part A of the application. Yet, in the case of the respondent there will be many disruptions and repercussions causing a lot of inconvenience –which will prejudice the third respondent:-

(i) the ballot paper has to be prepared and printed;

(ii) because the submission of lists of candidates triggers commencement of the ballot production process, production cannot kick -start;

(iii) as a consequence the printers cannot start with the determination of the length of the ballot paper;

(iv) the sequence of the political parties on the ballot paper cannot be determined in terms of an objective procedure;

(v) the approximately 60 million ballots with appropriate security features may not be printed within the prescribed 10 days at four pre-selected sites around the country;

(vi) The agreements already concluded with service providers will have to be altered or cancelled.

(vii) In order for the third respondent to prescribe a reduced or nominal amount, the third respondent must first consult with the National Party Liaison Committee. Such a meeting has been scheduled for the 13 March 2014 for purposes of discussing other urgent items; and

(viii) All these will disrupt the election timetable and upset the election date scheduled for the 7 May 2014, as announced by the President of the Country.

It is for these reasons that the balance convenience favours the third respondent.

[33] The alternative remedy is that the applicant may raise funds through its members who are "in hundreds of thousands" in order to pay the deposit. If this fails, the applicant may approach its funders who may pay the deposit, and once the applicant gains at least one seat in Parliament, the deposit will be refunded to them.

[34] In Moloko and Another[28], the Constitutional court dismissed the application because the applicant had not established exceptional circumstances and further that the application would disrupt the election time-table and the election date.

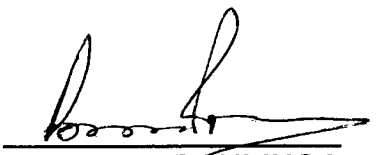
[28] 2009 (3) SA 649 (CC)

CONCLUSION

[35] The procedural failures by the applicant are fundamental and far reaching and warrant a dismissal of the application with costs.

[36] In the result I make the following order:

(a) The matter is not urgent.
(b) The application is dismissed with costs
(c) The applicant is ordered to pay costs of the postponement of the 4 March 2014.
(d) Costs include costs attendant on the employment of two Counsel.



T J RAULINGA
JUDGE OF THE HIGH COURT

FOR THE APPLICANTS	**: Adv D Ntsebeza SC**
	Adv M Zulu
	Adv M Qofa
INSTRUCTED BY	**: VB Shabalala Attorneys**
FOR THE 3rd RESPONDENT :	**: Adv MTK Moerane SC**
	Adv L Gcabashe
INSTRUCTED BY	**: Gildenhuys Malatji Inc**
HEARD ON	**: 4 March 2014**
DATE OF JUDGMENT	**: 11 March 2014**

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FOR THE APPLICANTS	**: Adv D Ntsebeza SC**
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INSTRUCTED BY	**: VB Shabalala Attorneys**
FOR THE 3rd RESPONDENT :	**: Adv MTK Moerane SC**
	Adv L Gcabashe
INSTRUCTED BY	**: Gildenhuys Malatji Inc**
HEARD ON	**: 4-5 March 2014**
DATE OF JUDGMENT	**: 11 March 2014**