

NOT REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO: 995/2012

In the matter between:

PRINCE MANGOSUTHU BUTHELEZI

Applicant

and

MEC FOR CO-OPERATIVE
GOVERNANCE AND TRADITIONAL
AFFAIRS, KWAZULU-NATAL

First Respondent

DEPARTMENT OF CO-OPERATIVE
GOVERNANCE AND TRADITIONAL
AFFAIRS, KWAZULU-NATAL

Second Respondent

ELECTORAL COMMISSION

Third Respondent

JUDGMENT

GORVEN J

[1] On 6 February 2012, the applicant launched an urgent application for the following relief:

- ‘1. The failure on the part of the First and Second Respondents to comply with the requirements of the KwaZulu-Natal Traditional Leadership Regulations, 2006, published in PN 1646 of 2006 in the Provincial Gazette 6509 of 15 September 2006 (“*the Regulations*”) and Chapter 2 of the Electoral Act 73 of 1998 (“*the Electoral Act*”) in preparing the voters’ roll for the KwaZulu-Natal Traditional Council Elections to be held on 19 February 2012 is declared irregular and unlawful.
2. The First and Second Respondents are interdicted and restrained from:
 - a. holding the KwaZulu-Natal Traditional Council Elections on 19 February 2012; and from
 - b. holding the KwaZulu Natal Traditional Council Elections on any other date, until the procedural requirements for the compilation of a voters’ roll as set forth in the Regulations and the Electoral Act have been complied with.
3. The First and Second Respondents are directed to pay the costs of this application jointly and severally on the attorney and client scale, such costs to include the costs consequent on the employment by the applicant of two counsel.
4. In the event of the Third Respondent opposing the relief sought by the Applicant herein, the Third Respondent is directed to pay the costs of this application, such costs to include the costs consequent on the employment by the applicant of two counsel, jointly and severally with the First and Second Respondents.’

[2] The application was opposed by the first and second respondents. The third respondent delivered a notice of intention to abide the outcome of the application. Although the third respondent was represented at the hearing of the application, no submissions were made and nothing further need be said about its involvement. As a result, I shall refer to the first and second respondents, where they are dealt with jointly, simply as ‘the respondents’. The matter came before me as an urgent opposed application on 15 February 2012. Counsel for both the applicant and the respondents

requested that I make an order on that occasion, even if reasons could not be given at the time, since the Traditional Council Elections were scheduled to be held on 19 February 2012. I ordered on that day that the application be dismissed with costs. The reasons why I made this order follow.

[3] Traditional councils are established in this province pursuant to s 6 of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 (the KZN Act). This provides that, except in specified circumstances, women must make up at least one-third of the members of each council. The *Inkosi* of the traditional community selects 60 percent of the members. Section 6(3)(b) of the KZN Act provides as follows:

‘[T]he remaining members of that traditional council, who must constitute 40 percent thereof, must be elected from other members of that traditional community, in a democratic manner, at an *imbizo* specially convened for that purpose, and called by *Inkosi* concerned’.

The Act does not further specify how elections are to be held and who should be included on the voters’ roll but provision is made for Regulations to be promulgated in this regard.

[4] It is clear from the notice of motion that the substantive relief sought was twofold; namely a declaration of rights and an interdict based on that declaration of rights. In application proceedings, the affidavits form both the pleadings and the evidence.¹ The Notice of Motion sets out the relief claimed which flows from the pleadings and evidence. As such, any party opposing those proceedings is entitled to address only those issues pleaded, namely, those raised in the affidavits which support the relief claimed in the Notice of Motion. It should be said that the founding

¹ *Minister of Land Affairs and Agriculture & others v D&F Wevell Trust & others* 2008 (2) SA 184 (SCA) at 200C-E

affidavit, after setting out a history of objections by the applicant to the procedures adopted by the respondents for the traditional council elections, contained largely legal assertions with very little evidence of events that had taken place, other than the exchange of correspondence.

[5] Part C of the KwaZulu-Natal Traditional Leadership Regulations of 2006 promulgated under the KZN Act deals with elections. Both sets of counsel agreed that the crisp issue in the matter related to the interpretation of Regulation 25(2). Regulation 25 is headed ‘Registration of voters and compilation of the voters’ roll’ and reads as follows:

- (1) A voters’ roll must be compiled by the Department for each voting station before the date of the elections is proclaimed by the MEC: Provided that the voter registration must be conducted per *isigodi* in each traditional community.
- (2) The Department must, in compiling a voters’ roll, take into account the provisions of Chapter 2 of the Electoral Act.
- (3) The voters’ roll compiled in terms of sub regulation (1) above must be certified by the MEC on the date contemplated on the election time table.

[6] In particular, what is in issue is what is meant by the words in sub paragraph (2) ‘must... take into account’. The case made out by the applicant appears from a number of places in the papers. The first is in paragraph 36 of the founding affidavit where the applicant states that a letter sent by his attorney drew to the attention of the first respondent ‘that the provisions of the Regulations and the Electoral Act had not been complied with concerning the publication and notice requirements of the voters’ roll...’ The second is in paragraph 40 of the founding affidavit where the applicant says the following:

‘... I am informed that the fact that the Regulations refer to chapter 2 of the Electoral Act means that the voter registration process must follow the same procedure as set out in the Electoral Act.’

Further averments are made in paragraph 47 of the founding affidavit to the following effect:

‘This further demonstrates the failure of the Respondents adequately to educate and encourage voter registration for the elections. Without such education and without following the lawful process as envisaged in chapter 2 of the Electoral Act, the 2012 elections will not be legitimate, and will not be democratic.’

The failure by the respondents to apply ss 14(2), 15 and 16 of the Electoral Act 73 of 1998 (the Electoral Act), which fall within chapter 2, is then criticised. All of this is consonant with the specific relief sought which, both in the declaratory relief and the interdict, claim relief because the respondents have not complied, inter alia, with chapter 2 of the Electoral Act.

[7] It is clear therefore that the case made out by the applicant on the founding papers is that the provisions of chapter 2 in general, and ss 14(2), 15 and 16 in particular, of the Electoral Act must be applied in order to give effect to Regulation 25(2). This was the narrow case which the respondents address in the answering affidavit. There they dispute the legal contentions made by the applicant in paragraph 36. They also dispute the averments contained in paragraphs 40 and 47 of the founding affidavit as well as that the provisions of the Electoral Act ‘prescribed the procedure to be followed’ as is claimed by the applicant. The deponent indicates that the second respondent took into account the provisions of chapter 2 of the Electoral Act but that ‘the rigid requirements of Chapter 2 were seen as being inappropriate to this kind of election’. On a conspectus of the answering affidavit, it is clear that the respondents deal only with the case made out by the applicant in the founding papers. They do not attempt to

define what is meant by the relevant words in Regulation 25(2). This is because, on the pleadings, they were not required to do so. They were called to answer to the application and deliberately tailored their opposition accordingly.

[8] In argument, counsel for the applicant made much of the failure of the respondents to take steps to provide for an objection procedure to the voters' roll on the basis that such a procedure is provided for in ss 14 and 15 of the Electoral Act. It may be that the words 'must...take into account' will ultimately be held to require some form of specified procedure to object to the voters' roll but that was not the question before me and I specifically decline to decide it. As I have already mentioned, the respondents, as they were entitled to do on the papers, do not attempt to specify what is meant by those words or even what they understand is meant by them. They do set out the background and context and aspects of the Traditional Council Election which they contend is unique to an election of this nature. All that I was called on to decide in this application, therefore, was whether those words mean that chapter 2 of the Electoral Act must be applied to the compilation of the voters' roll or whether something less than the application of that chapter is intended.

[9] There are certain conflicting provisions relating to the compilation of a voters' roll in chapter 2 of the Electoral Act and in the Regulations. In the first place, s 5 of the Electoral Act provides that the chief electoral officer must compile and maintain a national common voters' roll whereas Regulation 25(1) requires the second respondent to compile a voters' roll for each voting station. Secondly, the persons who qualify to vote differ since Regulation 20(1)(b) requires that the voter be a resident of the

traditional community concerned which does not find echo in s 6 of the Electoral Act.

[10] Counsel for the applicant conceded in argument that, where there is already provision in the regulations relating to matters of compiling the voters' roll, that must prevail over similar provisions in the Electoral Act where they are not identical. This is an obvious and correct concession but it immediately means that the case relied on by the applicant on the papers was not made out. On any interpretation of statutes approach, in any event, if the legislature had meant the provisions of chapter 2 to apply *mutatis mutandis* to elections of traditional councils, it would have said so rather than require only that the provisions of the chapter be 'taken into account'. Counsel submitted that the case made out is that ss 14(2), 15 and 16 of the Electoral Act should apply. This case is not, however, reflected in the founding affidavit and Notice of Motion. In any event, the reference in Regulation 25(2) is not to these sections but to chapter 2 as a whole. As counsel for the respondents submitted, to require compliance with these sections only is arbitrary, contrary to principle and contrary to the case which the applicant attempted to make out on the papers. Even if the fallback submission by the applicants can be considered, this was to the effect that the words mean that where there is no specific provision in the regulations, the provisions of chapter 2 will apply. The difficulty with this submission is twofold. First, it was not the case relied upon and answered to by the respondents. Secondly, if the regulations intend this, they would be formulated to say so. Instead they say that the second respondent must 'take into account' chapter 2, not apply it where the Regulations make no specific provision for matters dealt with in chapter 2. Again, on a basic approach to the interpretation of statutes, it follows that 'take into account' means something less than the straightforward application of chapter 2 of

the Electoral Act, even where the regulations do not themselves contain provisions similar to those in chapter 2.

[11] As I have said above, if the case of the applicant was that this meant something less than the application of chapter 2, this should have been made out on the papers. If that were done, it may have been possible to argue that the manner in which the respondents went about the compilation of the voters' roll did not 'take into account' the provisions of chapter 2. That was not the issue before me and I therefore cannot, and do not, decide that question. At least one reason for not doing so is that, if the issue had been formulated in that fashion on the papers, the respondents may well have put up a fuller answering affidavit dealing with those contentions. As I have already said, it is quite clear that the respondents consciously limited their answering affidavit to the specific case set up by the applicant. There is therefore no basis for finding that the pleadings have been broadened to include that issue. The attack on the failure of the respondents to apply the provisions of chapter 2 of the Electoral Act must therefore fail.

[12] The second substantive point relied on by the respondents was that Regulation 25(3) requires that the voters' roll must be certified by the MEC on the date contemplated on the election timetable and that no date for such certification was provided for and no such certification has therefore taken place. It must be said that this argument was advanced with considerably less force than that based on chapter 2 of the Electoral Act. The founding papers even concede that in the language of the Regulations, publication of the timetable is permissive rather than peremptory. The answer given by the respondents in the answering affidavit is that the certification of the voters' roll took place on 21 November 2011 and that

the election timetable was published on 22 November 2011. Regulation 19(2) provides that the ‘proclaimed day and date of the election must be published in the *Gazette* allowing at least sixty days for compliance with the election timetable’. This is the only publication required. Regulation 25(1) provides that the voters’ roll must be compiled before the date of the election is proclaimed. The respondents submitted that, if the voters’ roll had not been certified before the publication of the date of the elections, they would have been attacked as having published the date before it could be said that the voters’ roll was properly and finally compiled because it had not been certified and would have been subject to amendment. There is much force in this submission. In any event, as was submitted by the respondents, even if it was notionally possible to certify after publishing the date of the election, no prejudice ensues by the fact that certification took place before publication. Because certification took place beforehand, therefore, no date for certification needed to be mentioned in the timetable. This ground of attack of the applicant must therefore also fail.

[13] Even if I am wrong on the point regarding certification, the relief sought in both the declaration and interdict required a finding that the applicant had proved both grounds of attack. Because the first ground dealt with in this judgment was manifestly not proved, the relief sought could not be granted.

[14] The respondents raised a number of points *in limine* such as the non-joinder of the Traditional Councils, that the applicant had a domestic remedy which had not been exhausted and that the applicant was himself to blame for the urgency with which the application was brought. Although such points are normally dealt with at the outset of a judgment and, only if the applicant passes these hurdles is the substantive case addressed, I do

not see that approach as appropriate in these circumstances. Here the substantive case was clearly not made out and the substance of the application deserved to be dealt with. As a result, this judgment should not be construed as deciding these points one way or the other.

[15] For these reasons, the application was dismissed with costs.

DATE OF HEARING: 15 February 2012

DATE OF JUDGMENT: 2 March 2012

FOR THE APPLICANT: V Gajoo SC and D Tobias, instructed by
Lourens de Klerk Attorneys, locally
represented by Hay and Scott Attorneys

FOR THE FIRST AND

SECOND RESPONDENTS: AJ Dickson SC, instructed by PKK
Attorneys

FOR THE THIRD

RESPONDENT: VE Nkosi, attorney of Shepstone & Wylie.