

DEEPENING DEMOCRACY: CONSTITUTIONAL COURT DECISION IN IEC MATTER

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The Centre for Constitutional Rights welcomes the Constitutional Court's (the Court) decision in *Electoral Commission v Mhlope and Others*, handed down today, in which the importance of free and fair elections for South Africa is underscored.

The case arose as an appeal by the Independent Electoral Commission (IEC) of the Electoral Court's earlier decision to postpone by-elections in Tlokwe over irregularities on names in the voters' roll. The Electoral Court had held that permitting elections while 4000 names on the voters' roll lacked addresses would mean that the ensuing elections would not be free and fair, in direct contravention of section 19 in the Constitution, which provides every adult South African with the right to free, fair and regular elections.

The Court's majority decision rejected the IEC's argument that the Electoral Court's interpretation of the law was flawed and further that the IEC's only obligation was to furnish voters addresses in its possession. The IEC had further argued that adherence to the Electoral Court's decision would have seen the disenfranchisement of over 12 million voters whose names would have to be removed from the roll on the basis that they did not have addresses. This, despite the IEC's own undertaking, following the November 2015 Court decision in a related matter, to require an averment from individuals with informal addresses when capturing their details. It is also worth noting that that decision recognises the particular socio-economic environment of South Africa by stressing that the requirement that the IEC should record addresses "where such addresses are available" refers to addresses that are objectively available or can be ascertained with sufficient certainty. This is a recognition that the right to access adequate housing, for many South Africans, is yet to be fulfilled.

It is of concern that the IEC failed to capture all addresses despite the *Electoral Act* requiring, since 2003, that addresses be captured where available. In this regard, the Court found that the IEC's conduct was unlawful and inconsistent with the Constitution.

The Constitutional Court further declared that the current voters' roll is unlawful and thus unconstitutional, but pragmatically suspended this declaration for two years. This means, importantly, that the local government elections, scheduled for 3 August 2016, will go ahead. It must be stated though, that the minority decision cautions that the use of a flawed voters' roll in the August 2016 elections could open up a challenge to the election results, on the basis of not being free and fair.

In many respects, this decision marks the deepening of South Africa's constitutional democracy in that the Constitutional Court has established stricter criteria which must be met before an election can be declared free and fair. This is an important affirmation of the nation's foundational values, as established by the Constitution, including "universal adult suffrage, a national common voters' roll, regular elections and a multiparty system of



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democratic government, to ensure accountability, responsiveness and openness". The decision ultimately safeguards the integrity of South Africa's elections through shoring up the existing checks and balances to ensure free and fair elections.