



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 64/15

In the matter between:

XOLILE DAVID KHAM First Applicant

JOHANNES SESING JOHNSON Second Applicant

AARON PASELA MHLOPE Third Applicant

JOHANNA SHONU XABA Fourth Applicant

NTOMBI BEAUTY DIKUPE Fifth Applicant

DIKELEDI CATHRINE MOLEFE Sixth Applicant

VELILELE JAMES ZICINA Seventh Applicant

KHOTSO RATIKOANE Eighth Applicant

and

**ELECTORAL COMMISSION
OF SOUTH AFRICA** First Respondent

**MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF LOCAL GOVERNMENT
AND HUMAN SETTLEMENTS,
NORTH WEST PROVINCIAL GOVERNMENT** Second Respondent

Neutral citation: *Kham and Others v Electoral Commission and Another* [2015]
ZACC 37

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J

Judgment: Wallis AJ (unanimous)

Heard on: 10 September 2015

Decided on: 30 November 2015

Summary: Municipal elections — whether free and fair — obligations of the Electoral Commission — duty to register voters in correct voting district — duty to show addresses on voters roll — adherence to election timetable — non-compliance resulting in by-elections not being free and fair — just and equitable relief — outcome of by-elections set aside — fresh by-elections ordered — procedure to be followed in accordance with Local Government: Municipal Structures Act 117 of 1998

ORDER

On appeal from the Electoral Court:

1. Condonation for the late filing of the complete record is granted.
2. The Electoral Commission is to pay the costs of the application for condonation.
3. Leave to appeal is granted to the first to seventh applicants and refused in respect of the eighth applicant.
4. The appeal is upheld with costs, including those consequent upon the employment of two counsel.
5. The order of the Electoral Court delivered on 19 March 2015 is set aside and replaced by the following order:
 - (a) It is declared that the by-elections conducted in the Tlokwe Local Municipality on 12 September 2013 in ward 18 and on 10

December 2013 in wards 1, 4, 11, 12, 13 and 20, were not free and fair.

- (b) The outcome of those by-elections is set aside and fresh by-elections are to be held in terms of section 25 of the Local Government: Municipal Structures Act 117 of 1998.
 - (c) It is declared that when registering a voter to vote in a particular voting district after the date of this order the Electoral Commission is obliged to obtain sufficient particularity of the voter's address to enable it to ensure that the voter is at the time of registration ordinarily resident in that voting district.
 - (d) It is declared that in all future municipal elections or by-elections the Electoral Commission is obliged in terms of section 16(3) of the Electoral Act 73 of 1998 to provide all candidates in municipal elections, on the date on which they are certified, with a copy of the segment of the national voters' roll to be used in that ward in that election including the addresses of all voters, where these addresses are available.
 - (e) The Electoral Commission is directed to pay the applicants' costs, save for any additional costs occasioned by the joinder of the eighth applicant.
6. The orders in 5(c) and (d) are prospective in their operation from the date of this order and do not affect the validity of any election or by-election held prior to the date of this order.

JUDGMENT

WALLIS AJ (Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, and Zondo J concurring):

Introduction

[1] This case is a by-product of eight by-elections held in various wards in the Tlokwe Local Municipality between August and December 2013. The applicants were unsuccessful candidates in the wards in which each of them had stood for election. They challenged the outcome of the by-elections in the Electoral Court, but their challenge failed and they now apply for leave to appeal to this Court. The order they seek is that the results in the by-elections be set aside and that the respondent, the Electoral Commission (IEC),¹ be ordered to hold fresh by-elections in the affected wards. Their application is opposed by the IEC.

[2] This local electoral dispute might be thought to be of little moment, save to the citizenry of Tlokwe, but the applicants' challenge to the outcome of the by-elections poses questions that go to the heart of our constitutional commitment to a democratic and open society in which government is based on the will of the people.² The founding values of the Constitution include universal adult suffrage, a national common voters' roll and a multi-party system of democratic government to ensure accountability, responsiveness and openness.³ The political rights of all citizens are enshrined in the Bill of Rights.⁴ The Constitution requires that one of the State institutions supporting constitutional democracy must be an Electoral Commission with responsibility for the management of elections at all three levels of government.⁵ The Electoral Commission's core responsibility is to ensure that those elections are free and fair.⁶

¹ The respondent is widely known as the "Independent Electoral Commission" (IEC), but correctly described under the relevant statutes as the Electoral Commission.

² The preamble to the Constitution states that one of its purposes is to "[l]ay the foundations for a democratic and open society in which government is based on the will of the people".

³ Section 1(d) of the Constitution.

⁴ Section 19 of the Bill of Rights.

⁵ Section 190(1)(a) of the Constitution.

⁶ Section 190(1)(b) of the Constitution.

[3] The IEC was established in terms of the Electoral Commission Act⁷ (Commission Act). This case requires us to examine the manner in which the IEC discharged its functions in relation to the Tlokwe by-elections. Commendably, the IEC has asked that this Court should provide it with guidance on its responsibilities, particularly in relation to the registration of voters – the primary source of the disputes in this case.

The facts

[4] The first three applicants were formerly members of the African National Congress (ANC) and elected councillors, in wards 18, 13 and 20 respectively, in the Tlokwe Local Municipality. They fell out with their party and, in the by-elections in question, stood as “independent candidates united against corruption”. The other five applicants joined them and stood under the same banner in other wards. They are not a political party, but are informally aligned with one another as a group of which Mr Kham, the first applicant, is the leader. They all lost to candidates representing the ANC.

[5] The first by-election was held in ward 9 on 7 August 2013 and the eighth applicant was unsuccessful in his bid for election. According to the official poll results issued by the IEC, he received 504 votes as against the 738 votes recorded for the successful candidate.

[6] The second by-election was held in ward 18 on 18 September 2013, where Mr Kham was a candidate. He received 520 votes and his successful opponent 884 votes. In the immediate aftermath of this by-election Mr Kham lodged a complaint against the outcome with the IEC in terms of section 65 of the Local Government: Municipal Electoral Act⁸ (Municipal Electoral Act), but the IEC dismissed the complaint. The basis for the complaint was that he believed that voters had been

⁷ Act 51 of 1996.

⁸ 57 of 2000.

registered and permitted to vote in ward 18 even though they were not entitled to do so, because they were not resident in the ward when they registered. He suspected that his political opponents had orchestrated these improper registrations so as to ensure his defeat at the polls. Whether and, if so, to what extent his suspicions of electoral impropriety were justified is a matter to which I will revert.

[7] On 20 September 2013, when preparations were underway for further by-elections to be held on 23 October 2013, Mr Kham sought information from the IEC concerning the registration of voters in all wards in which by-elections were held in Tlokwe, both on his own behalf and on behalf of members of his group. The request was made formally in terms of PAIA.⁹ Some documents were furnished to him pursuant to this request on 1 November 2013. These too will be dealt with later.

[8] The further by-elections scheduled for 23 October 2013 were to take place in wards 1, 4, 11, 12, 13 and 20. Objections were lodged to this date with the IEC, on behalf of those of the applicants who wished to contest them. As a result, the by-elections were postponed.¹⁰ A fresh date was fixed for 11 December 2013. This date also attracted an objection, this time that it was inconvenient to voters because of its proximity to the Christmas holiday season. The IEC rejected the objection and it plays no further role in the events leading up to the present litigation.

[9] Once again the spectre of improper registration of voters in the wards where by-elections were to be held reared its head. In addition the segments of the national voters' roll to be used for the purposes of the by-elections were only given to candidates on 4 December 2013, instead of 26 November 2013, the date applicable in accordance with the electoral timetable published by the IEC.¹¹ The segments of the voters' roll for each ward given to the candidates were unhelpful in that they did not

⁹ Promotion of Access to Information Act 4 of 2000.

¹⁰ In terms of section 8 of the Municipal Electoral Act.

¹¹ The date on which the candidates were certified as such.

include residential addresses for any of the voters, rendering it difficult, if not impossible, for candidates to find, visit and canvass voters.

[10] In the light of these problems and concerns, the applicants approached the Electoral Court for an order that the by-elections be again postponed and for further relief. Unfortunately, due to the lamented death of the late President Mandela, the Electoral Court was unable to convene to hear the application.¹² Accordingly, the by-elections proceeded as scheduled and the six applicants who were candidates lost.¹³

[11] In the founding and supplementary affidavits, the applicants sought to paint a picture of wide ranging irregularities in regard to the registration of voters. They said that more new voters had been registered in certain wards than was feasible given the stability of the population in those wards and the absence of any significant influx of new residents. They relied upon a statement by an unidentified whistle-blower that some 2100 voters from other wards had been registered to vote in all of the affected wards as well as in two others. The documents received by Mr Kham from the IEC, consisting of copies of voter registration forms,¹⁴ were said, on analysis, to support the proposition that voters who did not reside in these wards had been permitted to register there.

[12] Mr Kham complained that the analysis of these forms was logistically difficult, as the applicants lacked sophisticated facilities, manpower and resources to analyse

¹² As a result the requirements of section 20(1)(b) of the Electoral Act 73 of 1998 were not satisfied.

¹³ The voting figures were as follows:

Ward 13:	Second applicant received 373 votes and the successful candidate 844.
Ward 20:	Third applicant received 346 votes and the successful candidate 543.
Ward 4:	Fourth applicant received 450 votes and the successful candidate 1064. The runner-up polled 1022 votes.
Ward 12:	Fifth applicant received 106 votes and the successful candidate 1206.
Ward 1:	Sixth applicant received 253 votes and the successful candidate 1144.
Ward 11:	Seventh applicant received 96 votes and the successful candidate 655.

¹⁴ Six boxes of registration forms for various wards were delivered to him.

the forms and that without addresses it was impossible to verify the existence of particular voters or their right to be registered in a particular ward. Furthermore, some of the addresses on the forms were confusing because they merely showed the voter to be resident in a named informal settlement, the boundaries of which spanned more than one ward. The result, so he said, was that voters from wards 17 and 21 were registered in ward 13. He complained that, in the ward he had contested in September, there were 612 registration forms bearing addresses that did not fall within the boundaries of the ward.

[13] The founding affidavit culminated with the following statement:

“It is impossible for the applicants to accurately reflect the irregularities in respect of each ward, given the limited time, resources and manpower. As such the relevant bundles dealing with ward 13, ward 19 and ward 20 constitute clear evidence of the irregularities. A sampled result in all the other wards suggests the same pattern. I state without hesitation that the investigation envisaged in the Notice of Motion will reveal the fatally flawed process in the wards not covered by the clear evidence referred to herein.”

[14] After the December by-elections, and in response to the present litigation, the IEC conducted its own investigation into the allegations that voters not entitled to registration in these wards had been registered and that their participation had affected the result of the by-elections. It concluded that there were a number of such registrations and that some of those voters had voted, but that in no case had they done so in sufficient numbers to affect the result of the elections.¹⁵ Its stance was, and in this Court is, that this meant that the result of the by-elections could not be disturbed. It accepted that the relevant segments of the voters' roll were only distributed on 4 December 2013 and that all the parties involved in the election had complained of

¹⁵ The adjusted margins of victory taking into account the voters identified as not being entitled to registration in these wards fluctuated. In ward 4 if their votes were discounted and deducted from the total of the winning candidate the victory margin shrank to three, but, even if it extinguished the victory margin entirely, that would not have helped the fourth applicant, Ms Johanna Shona Xaba, who came third. It might have assisted the runner-up from another party.

this. It also accepted that the segments of the voters' roll that it made available to the parties did not contain the addresses of the voters.

[15] From a factual perspective the applicants were content to advance their case in this Court largely on the basis of the IEC's investigation. They did not abandon the wider allegations made in the founding and supplementary affidavits, but proceeded on the footing that without further investigation these were not at this stage proven. However, they said that it was proper for the Court to find that the eight by-elections had not been free and fair on the basis of the concessions by the IEC in relation to these three matters alone.

Electoral Court

[16] The application for an interdict to prevent the by-elections being held on 11 December 2013 was, as already indicated, overtaken by events. But, instead of starting afresh with their case, the applicants amended the relief they were seeking from the Electoral Court and continued with the litigation. Originally they had sought an order postponing the by-elections to be held on 11 December 2013 together with the following relief:

- “2. That the First Respondent, at its own expense, be ordered to instruct a suitably qualified, reputable and independent firm of forensic investigators to conduct a full forensic investigation into the registration process adopted and implemented by the First Respondent for all by-elections held on 17 and 18 September 2013 [and to] be held on 10 and 11 December 2013 in the district of the Tlokwe Local Municipality, North West Province in 2013 and revert to the abovementioned Honourable Court with [a] full report in writing of the said firm's findings within 60 days (sixty days) from [the] date upon which the order is granted.”

Prayer three dealt in some detail with the contents of the forensic report. Prayer four read:

“That depending on the results of the investigation ordered herein and the recommendations in the report in 3.2 above it be ordered that:

- 4.1 The unlawful election of any candidate be set aside and that new by-elections be convened in the ward where such candidate was elected.
- 4.2 Any political party and/or candidate of a political party involved with or responsible for an orchestrated or collective effort or the provision of assistance to registered voters, to illegally register in any ward where by-elections in the Tlokwe [Local] Municipality were held or are due to be held in 2013, be disqualified from participating in the by-elections.”

[17] On 28 March 2014, the applicants amended the relief they were seeking. They continued to pray for an order compelling the IEC to commission an independent forensic investigation into the registration of voters in the eight wards in which they had been unsuccessful candidates. The by-election of 7 August 2013 was added to the list of those to be investigated. But the relief prayed consequent upon receipt of the report of the proposed investigation was not substantially altered. It now read as follows:

“Should the report contain any adverse findings in respect of the by-elections in 2013 within the Tlokwe Local Municipality, which findings indicate irregularities which may have had an adverse effect on the freeness and fairness of the by-elections in the Tlokwe Local Municipality in the 2013 by-elections, it is ordered that:

- 4.1 The unlawful election of any candidate in any particular ward be set aside and that the First Respondent be ordered to convene new by-elections in such ward where such candidate(s) was/were elected.
- 4.2 Any political party and/or candidate of a political party involved with or responsible for an orchestrated or collective effort or the provision of assistance to registered voters to illegally register in any ward where by-elections in the Tlokwe Local Municipality were held in 2013, be disqualified from participating in the by-elections.”

[18] Eventually the Electoral Court heard the case in January 2015. By then the evidence before the Court ranged over a wider area than in the original application.

The IEC had filed an opposing affidavit before the date of the December by-elections. Thereafter the applicants delivered an extensive reply together with the amended notice of motion. That in turn resulted in the delivery by the IEC of a rejoining affidavit setting out in some detail, with copious annexures, the results of its own investigations after the by-elections. These revealed the matters around which the later debate concerning irregularities has revolved. The affidavit prompted a surrejoinder from the applicants and shortly before the hearing nine additional bundles of documents were delivered to the Electoral Court. It is apparent from this that the material before the Electoral Court had so altered in character by the time that the case was heard, that it was in many respects a different case from that which had initially been brought.

[19] The Electoral Court held that it lacked jurisdiction to order the IEC to commission an independent forensic investigation into the registration of voters as requested by the applicants. That this might be its conclusion must have emerged in the course of argument, because the judgment records that in reply counsel confined the claim to one for alternative relief along the lines set out in paragraphs 4.1 and 4.2 of the amended relief, but shorn of the preamble linking it to the investigation. For various reasons the majority in the Electoral Court refused this relief in a judgment by Moshidi J.

[20] First, it held that, in view of the manner in which the prayer for relief was couched, the grant of this relief depended on the order that the IEC commission an independent forensic investigation. It followed that the refusal of the prior relief inevitably dictated the refusal of the prayer to set aside the result of the by-elections. Second, it held that the outcome of the by-elections was not materially affected by the registration in these wards of some voters who were not entitled to be so registered because, if the total number of votes cast by such voters were deducted from the total of the winning candidate, the latter would still have won. Third, it held that the applicants' remedy for their complaint about the registration of voters in these wards, who were not at the time of registration ordinarily resident in them, was to pursue an

objection in terms of section 15 of the Electoral Act, and that had not been done. Lastly, it held that the complaint about such voters' participation in the elections should have been pursued in terms of section 65 of the Municipal Electoral Act and the applicants, save for Mr Kham in September, had not done this.

[21] Wepener J dissented from these conclusions. He held that it was an exercise in placing form over substance to non-suit the applicants because of the manner in which they had originally framed their prayer. On the facts he held, as had the majority, that on the IEC's own affidavits there were serious irregularities in the electoral process. These consisted of the registration of voters in wards where they were not entitled to be registered;¹⁶ the failure to adhere to the election timetable in providing the candidates with a free copy of the voters' roll; and, the fact that the voters' roll that was made available did not include voters' addresses. In his view these irregularities meant that the election had not been free and fair. As his was a minority judgment he did not formulate the relief that he would have granted flowing from this conclusion.

In this Court

[22] The applicants accept that the Electoral Court was correct to hold that the relief by way of an order that the IEC commission a forensic investigation was beyond its jurisdiction. They confined themselves to seeking an order setting aside the by-election results in the eight wards relying on the irregularities that emerged from the IEC's own papers. Their complaint was that on the evidence of irregularities in the IEC's own affidavit, especially the rejoining affidavit, the by-elections could not be said to have been free and fair and accordingly they should be set aside.

Issues

[23] The following issues must be addressed:

¹⁶ It was not suggested that these individuals were not entitled to be registered as voters on the national common voters' roll. The objection was confined to saying that they were not entitled to be registered in these particular wards.

- (a) Should leave to appeal be granted?
- (b) Did the Electoral Court have jurisdiction to hear and determine the applicants' complaints?
- (c) Were the applicants confined to the remedies provided by section 15 of the Electoral Act and section 65 of the Municipal Electoral Act?
- (d) Were there electoral irregularities?
- (e) Were the by-elections free and fair?
- (f) If not, what relief should be granted?

Condonation

[24] On 28 August 2015 the Registrar received a letter from the IEC's attorneys informing him that due to a miscommunication between the attorneys and counsel the record delivered on behalf of the applicants did not include the annexures to the answering affidavit on behalf of the IEC, as well as some other documents. The record had originally been delivered on 28 July 2015 and the IEC's written submissions were delivered on 13 August 2015, so this was very late to submit additional documents to this Court.

[25] The attorneys informed the Registrar that they would deliver three further volumes of record on 31 August 2015 and this was done. There was no formal application seeking the leave of the Court to supplement the record. On 2 September 2015, the IEC was directed to make a substantive application for the admission of these documents and condonation for the failure to deliver them at an earlier stage.

[26] An application was duly lodged on 4 September 2015 and the applicants indicated that they did not oppose condonation. However, the application made no attempt to explain how the alleged miscommunication between the attorneys and counsel occurred. So there was no explanation for the failure to resolve the problems with the record when it was originally filed, nor any explanation why this was not

addressed when written submissions were filed. What made this particularly unsatisfactory was that attached to the IEC's statement of facts were the "combined extracts of the record of the court *a quo* that the applicants and first respondent will rely on and refer to". How that document came to be prepared and filed under the misleading description was not explained. This is quite unsatisfactory and a blatant disregard of the Rules of this Court.¹⁷ The parties were obliged to endeavour to reach

¹⁷ Rule 20 provides in relevant part as follows:

"(1) If leave to appeal is given in terms of rule 19, the appellant shall note and prosecute the appeal as follows:

- (a) The appellant shall prepare and lodge the appeal record with the Registrar within such time as may be fixed by the Chief Justice in directions.
- (b) Subject to the provisions of subrule (1) (c) below, the appeal record shall consist of the judgment of the court from which the appeal is noted, together with all the documentation lodged by the parties in that court and all the evidence which may have been led in the proceedings and which may be relevant to the issues that are to be determined.
- (c) (i) The parties shall endeavour to reach agreement on what should be included in the record and, in the absence of such agreement, the appellant shall apply to the Chief Justice for directions to be given in regard to the compilation of the record.

...

- (2) (a) One of the copies of the record lodged with the Registrar shall be certified as correct by the Registrar of the court appealed from.
- (b) Copies of the record shall be clearly typed on stout A4-size paper, double-spaced in black record ink, on one side of the paper only.
- (c) Legible documents that were typed or printed in their original form such as cheques and the like shall not be retyped and clear photocopies on A4-size paper shall be provided instead.
- (d) The pages shall be numbered clearly and consecutively and every tenth line on each page shall be numbered and the pagination used in the court *a quo* shall be retained where possible.
- (e) Bulky records shall be divided into separate conveniently-sized volumes of approximately 100 pages each. The record shall be securely bound in book format to withstand constant use and shall be so bound that upon being used will lie open without manual or other restraint.
- (f) All records shall be securely bound in suitable covers disclosing the case number, names of the parties, the volume number and the numbers of the pages contained in that volume, the total number of volumes, the court *a quo* and the names of the attorneys of the parties.
- (g) The binding required by this rule shall be sufficiently secure to ensure the stability of the papers contained within the volume; and where the record consists of more than one volume, the number of each volume and the number of the pages contained in a volume shall appear on the upper third of the spine of the volume."

agreement on the contents of the record. Had they done so, the alleged miscommunication would not have occurred.

[27] Save in cases of direct access and applications for the confirmation of orders of constitutional invalidity, this Court sits as a court of appeal and decides cases on the basis of the record of the proceedings before the court from which the appeal lies.¹⁸ It is essential therefore that the record be properly compiled in terms of the Rules and that omissions from the record occur by way of agreement between the parties' representatives. There is nothing unusual in this. It is the norm in all courts in this country where records have to be prepared and has been so for many years. The Rules of this Court in this regard bear a marked similarity to those of the Supreme Court of Appeal.¹⁹ There is no reason why this Court should accept records prepared with less

¹⁸ *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 19. That case dealt with the original Rule 19(1) but in the relevant provisions its terms were the same as the present Rule 20.

¹⁹ The relevant portions of Rule 8 of the Supreme Court of Appeal Rules provides:

- “(6) (a) The copies of the record shall be clearly typed on stout A4 standard paper in double-spacing in black record ink, on one side of the paper only.
- (b) Legible documents that were typed or printed in the original, including all process in the court a quo forming part of the record on appeal, and documents such as typed or printed contracts and cheques (whether hand-written, typed or printed) and the like shall not be retyped and a clear photocopy shall be provided instead.
- (c) The pages shall be numbered clearly and consecutively, and every tenth line on each page shall be numbered and the pagination used in the court a quo shall be retained where possible.
- (d) (i) At the top of each page containing evidence, the name of the witness and, at the top of each page containing exhibits, the number of the exhibit, shall appear.
- (ii) All references in the record to page numbers of exhibits shall be transposed to reflect the page numbers of such exhibits in the appeal record.
- (e) The record shall be divided into separate conveniently sized volumes of approximately 100 pages each.
- (f) The record shall be securely bound in suitable covers disclosing—
- (i) the case number;
- (ii) the names of the parties;
- (iii) the volume number and the numbers of the pages contained in that volume;
- (iv) the total number of volumes in the record;

care and attention to the Rules of this Court than is expected of legal practitioners in other courts. Furthermore, when records are not properly prepared, there is a risk of

- (v) the court appealed from; and
- (vi) the names and addresses of all the parties for service.
- (g) (i) The volume number and the numbers of the pages contained in a volume shall also appear on the upper third of the spine of the volume.
- (ii) Each volume shall be so bound that upon being eased open it will lie open without any manual or other restraint and upon being so opened and thereafter repeatedly closed, the binding shall not fail.
- (h) The—
 - (i) judgement and order appealed against;
 - (ii) judgement and order granting leave to appeal; and
 - (iii) notice of appeal,

shall, if the record consists of more than one volume, be contained in a separate volume.

- (i) The record, in the first or in a separate volume, shall contain a correct and complete index of the evidence, documents and exhibits in the case, the nature of the documents and exhibits being briefly stated therein.
- (j) Unless it is essential for the determination of the appeal and the parties agree thereto in writing, the record shall not contain—
 - (i) argument and opening address;
 - (ii) formal documents;
 - (iii) discovery affidavits and the like;
 - (iv) identical duplicates of any document; or
 - (v) documents not proved or admitted, and

the registrar shall mero motu disallow the costs, also between attorney and own client, of such documents.

- (7)(a) A core bundle of documents shall be prepared if to do so is appropriate to the appeal.
- (b) The core bundle shall consist of the material documents of the case in a proper, preferably chronological, sequence.
- (c) Documents contained in the core bundle shall be omitted from the record, but the record shall indicate where each such document is to be found in the core bundle.
- (8)(a) Whenever the decision of an appeal is likely to hinge exclusively on a specific issue or issues of law and/or fact, the appellant shall, within 10 days of the noting of the appeal, request the respondent's consent to submit such issue or issues to the Court, failing which the respondent shall, within 10 days thereafter, make a similar request to the appellant.

...

- (9)(a) Whenever the decision of an appeal is likely to hinge exclusively on part of the record in the court a quo, the appellant shall, within 10 days of the noting of the appeal, request the respondent's consent to omit the unnecessary parts from the record, failing which the respondent shall, within 10 days thereafter, make a similar request to the appellant.”

both duplication and of factual matter being wrongly omitted. In the former case, the burden of reading on members of this Court, already heavy, is aggravated. In the latter it may arise that this Court is asked to adjudicate cases on a different factual basis to that on which the court below decided them. It hardly seems necessary to highlight that this is unsatisfactory and inconsistent with the judicial comity with which this Court treats the other courts in our legal system.

[28] This Court has on previous occasions deprecated the practice of many parties, including those represented by experienced legal practitioners, of submitting documents late, or not in proper form, or producing fresh documents at a very late stage of the proceedings, sometimes only a day or two prior to a hearing.²⁰ This cannot be permitted to continue. The workload of this Court is rapidly expanding and the demands being made on judicial time are ever increasing. In order to cope with this challenging environment it is essential that practitioners observe the Rules and comply with time limits. Applications for condonation of a failure to do so are not to be had for the asking.

[29] Having said that, it is plain that a number of the documents contained in the supplementary record are helpful in fleshing out the factual picture and explaining what occurred in the conduct of these by-elections. It is in the interests of justice that this Court should have regard to them in determining the outcome of the case. For that reason condonation should be granted. But this judgment must stand as a warning to practitioners that playing fast and loose with the Rules of this Court is not to be tolerated.

Leave to appeal

[30] The issues revolve around foundational principles of our Constitution and the assertion by the applicants of the rights protected by section 19 of the Bill of Rights. In addition, they concern the manner in which the IEC discharges its constitutional

²⁰ *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport and Others* [2015] ZACC 15 at para 39.

function of ensuring free and fair elections. The case is manifestly within this Court's jurisdiction. The issues are important, concerning, as they do, irregularities in the conduct of elections. But the outcome of the by-election in August 2013 was not initially challenged and the eighth applicant's participation in the case was merely with a view to supporting the claim for relief in relation to an enquiry. Unlike Mr Kham, he did not challenge the outcome of the by-election in ward 9 until an advanced stage of this litigation. No affidavit was filed detailing specific complaints in respect of that by-election. The delays are unexplained. When combined with the paucity of information in respect of that by-election, it means that he should not be granted leave to appeal. The remaining applicants, to whom I will henceforth be referring when I speak of "the applicants", have prospects of success and leave to appeal should be granted to them.

Constitutional and statutory framework

[31] The constitutional right lying at the heart of this case is the guarantee of political rights in section 19 of the Bill of Rights. It provides that:

- “(1) Every citizen is free to make political choices, which includes the right—
 - (a) to form a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; and
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right—
 - (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - (b) to stand for public office and, if elected, to hold office.”

[32] The relationship between the right to vote and the need for elections to be free and fair was eloquently explained in the prisoners' vote case of August.²¹ Speaking for the Court, Sachs J said:

“Universal adult suffrage on a common voters' roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. 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 of personhood. Quite literally, it says that everybody counts.”²²

[33] The IEC has the constitutional mandate to manage elections at all three levels of government. The manner in which it discharges this function is determined by national legislation.²³ The need for this and its main purpose was dealt with in *New National Party*,²⁴ where it was said:

“The right to vote is, of course, indispensable to and empty without, the right to free and fair elections; the latter gives content and meaning to the former. The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised. Two of these implications are material for this case: each citizen entitled to do so must not vote more than once in any election; any person not entitled to vote must not be permitted to do so. The extent to which these deviations occur will have an impact on the fairness of the election. This means that the regulation of the exercise of the right to vote is necessary so that these deviations can be eliminated or restricted in order to ensure the proper implementation of the right to vote.”

²¹ *August and Another v Electoral Commission and Others* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) (*August*).

²² *Id* at para 17.

²³ Section 190(1)(a) of the Constitution.

²⁴ *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) (*New National Party*) at para 12.

[34] There is no internationally accepted definition of the term “free and fair elections”.²⁵ Whether any election can be so characterised must always be assessed in context.²⁶ Ultimately it involves a value judgement. The following elements can be distilled as being of fundamental importance to the conduct of free and fair elections. First, every person who is entitled to vote should, if possible, be registered to do so. Second, no one who is not entitled to vote should be permitted to do so. Third, insofar as elections have a territorial component, as is the case with municipal elections where candidates are in the first instance elected to represent particular wards, the registration of voters must be undertaken in such a way as to ensure that only voters in that particular area (ward) are registered and permitted to vote. Fourth, the

²⁵ There is even a shift among international observers towards abandoning the “free and fair” standard and to ask instead whether the election is a legitimate expression of the will of the people or properly reflects the wishes of the people. In response to a question from the Swedish Ministry of Foreign Affairs regarding this shift in the public discourse over elections, the ACE Electoral Knowledge Network said:

“[A] shift has indeed taken place in the discourse of terms used to characterize the conduct of elections, and that consequently there are fewer references to elections as “free and fair”. This shift was seen as a trend which began in the 1990s, when elections that were described as “free and fair” at the same time could be seen by analysts to lack integrity, and it was also predicted to become a more widespread trend in the future. Moreover, one [Practitioners’ Network] member expected that the trend would go further as countries engage with new elections related technologies.

Behind the shift in discourse lies a rising awareness among analysts that election observation should be less of a ‘thumbs up/thumbs down’ judgement on an election-day event, and increasingly an effort to monitor and evaluate the process of an election, against international obligations voluntarily undertaken by countries.”

Information available from the ACE website (15 February 2013), at <http://aceproject.org/electoral-advice/archive/questions/replies/54818966>.

The ACE (Administration and Cost of Elections) Project was established by IDEA (International Institute for Democracy and Electoral Assistance), IFES (International Foundation for Electoral Systems) and UNDESA (United Nations Department for Economic and Social Affairs). In 2006 the name was changed to the ACE Electoral Knowledge Network (with the letters ACE no longer standing for Administration and Cost of Elections). ACE is a collaborative effort between nine organisations: IDEA, EISA (Electoral Institute for Sustainable Democracy), Elections Canada, INE (the National Electoral Institute of Mexico), IFES, The Carter Center, UNDESA, UNDP and the UNEAD (United Nations Electoral Assistance Division).

²⁶ Bjornlund *Beyond Free and Fair* (Woodrow Wilson Centre Press, Washington DC 2004) at 94-128. The most comprehensive statement of the requirements for free and fair elections appears to be the Declaration on Criteria for Free and Fair Elections (Unanimously adopted by the Inter-Parliamentary Council at its 154th session (Paris, 26 March 1994)). The Inter-Parliamentary Council is the international organisation of Parliaments established in 1899 to foster parliamentary dialogue, work for global peace and co-operation and promote representative democracy. Bjornlund at 100-117 provides a synoptic analysis of various attempts to state the requirements that must be satisfied for an election to be regarded as free and fair. Many of these requirements are inconsistent and contested.

Constitution protects not only the act of voting and the outcome of elections, but also the right to participate in elections as a candidate and to seek public office.

[35] In the case of municipal elections, this right is not dependent upon membership of, and support by, a political party. It is equally available to all citizens who wish to make themselves available for election for whatever reason. The applicants may not have had the support of the big electoral battalions,²⁷ but they were entitled to stand for election and to be treated in the same manner and have exhibited towards them the same concern for the election being free and fair, as the large political parties that dominate the political landscape in this, as in other, countries.

[36] The statutes that are relevant to the present case are: the Commission Act, the Electoral Act and the Municipal Electoral Act. The Commission Act established both the Electoral Commission and the Electoral Court and is central to the jurisdiction, powers and functions of the latter. The Electoral Act deals with the registration of voters and the preparation of the national voters' roll. As its name implies the Municipal Electoral Act deals with the conduct of elections in the municipal sphere. Their provisions bear upon different issues and it is most appropriate to deal with them as they become relevant to the issues identified above. At the outset, however, it is appropriate to recognise that the purpose of all these statutes is to provide the statutory framework required by section 190(2) of the Constitution for the operations of the IEC. It follows that they provide an indication of what needs to be done to ensure that elections are free and fair and that material non-compliance with their requirements will support a contention that an election was not conducted in a free and fair manner.

²⁷ The Comte de Bussy-Rabutin (1618-1693) and Marshall Henri Turenne (1611-1675) are both credited with the remark that "God is usually (or always) on the side of the big battalions". See Cohen and Cohen *The New Penguin Dictionary of Quotations* (Viking, London 1992) at 433. The usual attribution is to Voltaire who wrote: "Dieu n'est pas pour les gros batallions, mais pour ceux qui tirent le mieux", which is translated in Knowles *Oxford Dictionary of Quotations* 6 ed (OUP, Oxford 2004) at 816 as "God is on the side not of the heavy battalions, but on the side of the best shots."

The Electoral Court's jurisdiction

[37] This was not addressed by the parties, but was raised in the course of the hearing. Neither party suggested that the Electoral Court lacked jurisdiction, but the grounds therefor need to be considered, because they will determine whether it was able to deal with the issues raised by the applicants and the scope of its powers in doing so. In response to this Court's query, counsel for the applicants submitted that the case was brought in terms of section 56 of the Electoral Act. But that cannot be accepted, because, in the case of municipal elections, the provisions of the Municipal Electoral Act govern the proceedings. The provisions of the Electoral Act apply only where they are made applicable by a provision of the Municipal Electoral Act.²⁸ That is not the case with section 56. The source of the Electoral Court's jurisdiction in this matter must therefore be sought elsewhere.

[38] The consideration of the jurisdiction and powers of the Electoral Court should commence with the Commission Act under which the Electoral Court was established. It is established for the whole of the Republic of South Africa with the status of the High Court.²⁹ Its chairperson must be a judge of the Supreme Court of Appeal.³⁰ It has two other members who are judges and two who are South African citizens.³¹ Its powers, duties and functions are spelled out in section 20. As regards the ambit of its jurisdiction this is defined in section 20(1), which reads that "[t]he Electoral Court may review any decision of the Commission relating to an electoral matter". If the Electoral Court had jurisdiction in this case, it is in this provision that one would expect to find it.

²⁸ Section 3(2) of the Municipal Electoral Act. See also *African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) at para 15.

²⁹ Section 18 of the Commission Act.

³⁰ At the time Justice KK Mthiyane and now Justice JBZ Shongwe.

³¹ Section 19(1) of the Commission Act.

[39] The point that strikes one immediately about section 20(1) is that the jurisdiction it confers on the Electoral Court is extremely broad. It is a power to review “any decision” by the IEC. Many years ago Innes CJ pointed out that-

“‘[a]ny’ is, upon the face of it, a word of wide and unqualified generality. It may be restricted by the subject-matter or the context, but *prima facie* it is unlimited.”³²

The use of the word “any” to describe the decisions of the IEC that are subject to the review powers of the Electoral Court must be taken to mean each and every decision, unless there is something in the context that justifies a more restrictive meaning. But the only restriction is that the decisions that are subject to this judicial oversight are decisions “relating to an electoral matter”. In other words, decisions by the IEC over where to locate its offices, or how to source equipment, or who should be employed, are not included. But, if the decision relates to an electoral matter, then it is included and “any” decision in that regard is subject to review by the Electoral Court.

[40] Is there anything in the context that would warrant a more restrictive interpretation of the section and hence of the Electoral Court’s jurisdiction? I think not. The clear purpose was to establish a court that would be able to deal with all electoral matters. It was constituted with the same status as the High Court and with a judge of the Supreme Court of Appeal as its chairperson. It is to resolve electoral disputes as a matter of urgency.³³ There is not the slightest indication that the intention was to limit the range of disputes that would fall within the ambit of the Electoral Court’s jurisdiction, so that some electoral issues would fall within its jurisdiction and others not. Instead, the breadth of language used suggests that the statutory purpose was to create a specialist court that would deal with all electoral matters. And our jurisprudence holds that when a specialist court is created the apparent purpose of creating a single forum for resolving disputes of a particular type

³² *R v Hugo* 1926 AD 268 at 271 and *Arprint Ltd v Gerber Goldschmidt Group SA (Pty) Ltd* 1983 (1) SA 254 (A) at 261B-D.

³³ Section 20(2) of the Commission Act.

is not to be stultified by a resort to undue literalism and too careful a parsing of statutory language.³⁴

[41] This construction is strengthened by considering what is encompassed by a power of review in this context. In ordinary language, it is a power to reconsider and, if necessary, replace the decision of the IEC. It is not a narrow appeal power, bound to a record, where the court decides merely whether on that record the decision was right or wrong. Nor is it the even narrower review power, where the process through which the decision was taken is scrutinised, but the merits of the decision are not considered. Instead it is the widest possible type of review where the decision in question is subjected to reconsideration, if necessary on new or additional facts, and the body exercising review power is free to substitute its own decision for the decision under review.³⁵ It is notable that section 56 of the Electoral Act contemplates that any serious irregularity concerning any aspect of an election may be brought before the Electoral Court, whether arising under section 55 of the Electoral Act, which provides for an appeal to the Electoral Court, or otherwise. On the face of it, the jurisdiction of the Electoral Court to deal with such an irregularity must arise under section 20(1)(a) of the Commission Act. It could not effectively exercise that jurisdiction unless the review power under that section is as described above.

[42] The jurisdiction to review any decision of the IEC relating to an electoral matter affords the Electoral Court a power of judicial oversight over the activities of the IEC. The Electoral Court can examine any decision by the IEC and substitute it with its own. The range of electoral matters may be great. Certainly all the issues arising in the present case relate to electoral matters. They concern who may vote and whether all those who voted were entitled to do so. They also concern the ability of

³⁴ See *Chirwa v Transnet Ltd* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at paras 47-54 and 101-113 and *Gcaba v Minister of Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) (*Gcaba*) at para 57.

³⁵ *Tikly v Johannes NO* 1963 (2) SA 588 (T) at 590G-591A and *Road Accident Fund v Duma & Three Similar Cases* [2012] ZASCA 169; 2013 (6) SA 9 (SCA) at para 26. Although the statutes in those cases dealt with the appellate powers of the tribunal, the delineation of the various manifestations of that power is equally applicable to an analysis of the nature of a general power of review.

candidates to ascertain who their electorate is and to canvass for support. These matters are fundamental to the electoral process and the conduct of free and fair elections.

[43] In addition to this broad power of review, the Electoral Court may hear an appeal against any decision of the IEC insofar as that decision involves a question of law or is provided for in any law.³⁶ The latter includes appeals in terms of section 55(5) of the Electoral Act and section 65(9) of the Municipal Electoral Act, but those as much involve decisions by the IEC on an electoral matter, as do its decisions on other questions. Nor is clarity to be found in seeking to distinguish general decisions by the IEC on electoral matters, which are subject to review, from decisions by it on questions of the interpretation of any law, where an appeal lies with leave of the chairperson.³⁷ Drawing a clear line of demarcation between these two powers is not easy. There may be a measure of overlap between the two functions. But that is not a reason to restrict the scope of the power of review under section 20(1)(a). Rather it is indicative of a situation where certain specific matters involving questions of the interpretation of laws and challenges to the outcome of objections lodged with the IEC after elections, in terms of very specific statutory requirements for objections of that type to be made, are dealt with by processes of appeal, while all other matters involving challenges to the decisions of the IEC are pursued under the Electoral Court's power of review.

[44] This approach is also consistent with section 78(1) of the Municipal Electoral Act, which provides that the Electoral Court has jurisdiction "in respect of all electoral disputes" as well as in respect of complaints about infringements of the Electoral Code of Conduct issued under the Electoral Act.³⁸ In the absence of any statement that this jurisdiction is by way of appeal, it must be exercised under the

³⁶ Section 20(2)(a) of the Commission Act.

³⁷ Section 20(2)(b) of the Commission Act.

³⁸ Schedule 2 to the Electoral Act.

Electoral Court's power to review decisions by the IEC. And all electoral disputes, apart from infractions of the Electoral Code, will necessarily have arisen because the IEC has, in the exercise of its powers, made a decision concerning an electoral matter. Until that has occurred one way or the other the dispute will not have crystallised sufficiently for it to be pursued before the Electoral Court.

[45] The necessary conclusion is that the Electoral Court had jurisdiction to review decisions by the IEC. The remaining question is whether the case advanced on behalf of the applicants identified particular decisions by the IEC that it asked the Electoral Court to review.

[46] The relief sought by the applicants before the Electoral Court narrowed considerably in the course of argument. Before this Court it was confined to seeking an order that the outcome of the by-elections should be set aside and fresh by-elections held. But this relief was consequential upon the Electoral Court concluding that there were decisions by the IEC that were susceptible of review in terms of section 20(1)(a) of the Commission Act. That requires an examination of the underlying complaints that the applicants said justified the grant of this relief. As this Court held in *Gcaba*,³⁹ questions of jurisdiction are to be determined on the basis of the issues identified in the pleadings and in application proceedings the affidavits represent both the pleadings and the evidence.⁴⁰

[47] The irregularities on which the applicants relied were threefold. They concerned the registration of voters on the voters' rolls in wards in which they were not resident; the late issue to candidates of voters' rolls without the addresses of voters; and the declaration by the IEC of the outcome of these by-elections. Each of those involved a decision by the IEC. In terms of section 8(1), read with section 8(3)

³⁹ *Gcaba* above n 34 at para 75.

⁴⁰ See also *Theron and Another NNO v Loubser NO and Others* [2013] ZASCA 195; 2014 (3) SA 323 (SCA) at para 26; *Transnet Ltd v Rubenstein* [2005] ZASCA 60; 2006 (1) SA 591 (SCA) at para 28 and; *Hart v Pinetown Drive-in Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469C-E.

of the Electoral Act, the chief electoral officer, who is the head of administration of the IEC,⁴¹ must decide in which voting district a voter must be registered. It is the IEC that makes the regulations governing the contents of the voters' roll⁴² and therefore determined that the roll need not contain the addresses of voters. It is the IEC that determines the electoral timetable⁴³ and is obliged to comply with it. It is the IEC that determined the outcome of these by-elections in terms of section 64(1)(a) of the Municipal Electoral Act and declared the results to the public.⁴⁴

[48] As each of these involved a decision by the IEC, either directly or through its principal administrative officer, or under delegated powers,⁴⁵ they were each subject to review by the Electoral Court under section 20(1)(a) of the Commission Act, read with section 78(1) of the Municipal Electoral Act. In exercising its powers the Electoral Court was entitled to have regard to matters not known to the IEC at the time they made their decisions and to replace those decisions with its own. That is what the applicants asked it to do and it had jurisdiction to do so.

[49] The IEC did not pursue with any vigour the argument that the form in which the applicants couched the relief in the original and amended notices of motion precluded the Electoral Court from reviewing these three decisions on the basis of the IEC's own investigations and, if appropriate, granting relief. In that it was correct, as was the minority judgment in the Electoral Court, in holding that this put form above substance. As the history of the litigation outlined earlier in this judgment demonstrates, the issues clarified themselves and transmuted over time. The Electoral Court had a large volume of evidence before it and on these issues there was no dispute of facts. In those circumstances, the Electoral Court could, and should,

⁴¹ Section 12(2)(a) of the Commission Act.

⁴² In terms of section 100 of the Electoral Act the IEC made the Regulations Concerning Registration of Voters, GN R 1340 GG 19388, 16 October 1998.

⁴³ Section 20(1)(a) of the Electoral Act.

⁴⁴ Section 64(1)(c) of the Municipal Electoral Act.

⁴⁵ Sections 90 and 91 of the Municipal Electoral Act.

have determined the application on its merits, without regard to the form in which the relief ultimately sought had originally been cast.

Section 15 of the Electoral Act

[50] The IEC did not deal in argument with the scope of the jurisdiction of the Electoral Court. It did, however, contend that, insofar as the applicants were raising objections to the registration of voters on the voters' rolls for these seven wards, they were confined to doing so by way of the procedure for objecting to the voters' roll contained in section 15 of the Electoral Act.⁴⁶ It was common cause that this procedure had not been followed and accordingly the IEC contended that it was not open to the applicants to advance their objections by other means. In doing so, it endorsed the finding of the Electoral Court that the applicants were obliged to follow this route to pursue their objections.

⁴⁶ Section 15 provides:

“Objections to voters’ roll—

- (1) In relation to any segment of the voters’ roll or a provisionally compiled voters’ roll, any person may object to the Commission in the prescribed manner to—
 - (a) the exclusion of any person’s name from that segment;
 - (b) the inclusion of any person’s name in that segment; or
 - (c) the correctness of any person’s registration details in that segment.
- (2) A person who objects to the exclusion or inclusion of the name of another person, or to the correctness of that person’s registration details, must serve notice of the objection on that person.
- (3) The Commission must decide an objection and, except for an objection in relation to a provisionally compiled voters’ roll, by not later than 14 days after the objection was made, notify the following persons of the decision:
 - (a) The person who made the objection;
 - (b) the chief electoral officer; and
 - (c) in the case of an objection against the exclusion or inclusion of the name, or the correctness of the registration details, of a person other than the objector, that other person.
- (4) The chief electoral officer must give effect to a decision of the Commission in terms of subsection (3) within three days.
- (5) No appeal may be brought against the Commission’s decision, subject to section 20(2)(a) of the Electoral Commission Act.”

[51] Section 15 does indeed provide a mechanism for lodging objections to the voters' roll. The question is whether it is the only one. Importantly, it does not say that its use is exclusive. In order to lodge an objection, the objector first has to identify the voters who are wrongly registered, and serve notice of their objection on the people to whose registration they object.⁴⁷ It is unclear how the applicants were supposed to comply with this requirement and the IEC does not suggest that it was practically feasible for them to do so.

[52] To recapitulate, they received their free copies of their segments of the voters' rolls on the afternoon of 4 December 2013 and the election was held on 11 December 2013. The copies they received contained no addresses. In order to lodge an objection under section 15, they had to identify from this unhelpful document the voters to whose registration they objected; formulate their objection and support it with documentary evidence;⁴⁸ serve the objection on the voters concerned and then wait for up to fourteen days for the IEC to make a decision.⁴⁹ That would have taken them well past the election. To construe section 15 in the restrictive fashion suggested by the IEC might advance bureaucratic interests, but it is not consistent with its broader obligation to create an environment in which free and fair elections can take place in which all qualified citizens may participate either as candidates or voters.

[53] Section 15 is simply not structured to deal with objections of the type that the applicants were making in sufficient time to enable by-elections to be held on a corrected voters' roll. It may well provide a workable procedure for adoption by large and well-resourced political parties, who can monitor the roll throughout the year as voters are added to it or removed from it. They have their own records regarding voters and other means to enable them to cross-check against the voters' roll any registration that they regard as doubtful. In addition, they are likely to have available

⁴⁷ Section 15(2) of the Electoral Act.

⁴⁸ Mr Kham's objection in September 2013, on the basis of erroneous registrations and the bussing in of voters, was rejected on the grounds that he failed to produce supporting documents.

⁴⁹ Section 15(3) of the Electoral Act.

sophisticated computer programmes that enable them to correlate the contents of the voters' roll with other information and enable them to detect errors.⁵⁰

[54] But resources of this nature are not freely available to independent candidates such as the applicants, or ratepayers' bodies participating in municipal elections, or smaller political parties seeking to make a political breakthrough. To restrict their capacity to object to the voters' roll to a mode of objection suited only to the large and the well-resourced, would be a substantial check on their ability to participate meaningfully in elections and their constitutional right to stand as candidates for public office. It would be a particularly acute problem at the level of local government where one finds the majority of such candidates and groupings. That construction of section 15 would not be in accordance with the spirit, purport and objects of the Bill of Rights as required by section 39(2). The clear and ample rights to participate in the political process protected by section 19 of the Bill of Rights would be unnecessarily constricted by this interpretation. It follows that the applicants were not confined to objections under section 15 of the Electoral Act to pursue their objections to the registration of voters in wards where they were not entitled to be registered.

Section 65 of the Municipal Electoral Act

[55] The IEC also contended that insofar as the outcome of the by-elections was concerned the remedy for the applicants lay in pursuing an objection to the results in terms of section 65 of the Municipal Electoral Act. The Electoral Court upheld this contention. In doing so it overlooked the fact, as had the IEC, that section 65(1)(a) is limited to objections concerning "any aspect of the voting or counting proceedings provided for in Chapter 5 or Chapter 6" of the Municipal Electoral Act. But these chapters deal with the mechanics of voting and counting of votes on and after election

⁵⁰ The formidable electoral capability of political parties is apparent from the decision of this Court in *Democratic Alliance v African National Congress and Another* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC), where a text message in relation to a forthcoming election was sent to 1.6 million voters.

day. They are not concerned with the matters that constituted the irregularities on which the applicants relied.

[56] Counsel pointed somewhat diffidently to section 47(1)(a) in Chapter 5, which provides that a voter may only vote at the voting station in the voting district where the voter is registered. But the complaint is that the voters who had been incorrectly registered to vote in certain wards should not have been permitted to vote at all. That is not a complaint falling under this section. Section 65 (1) was not therefore a route that the applicants could, much less should, have followed to pursue their grievances. That conclusion renders the argument about whether the incorrect registrations were material to the outcome of the elections – a requirement for relief under section 65(1) – redundant. The applicants’ right to relief is not constrained by the need to show that the result of the election would have been materially different had the incorrect registrations not occurred.

Were there electoral irregularities?

[57] The answer to this question requires an examination of the obligations of the IEC in regard to the electoral issues giving rise to the applicants’ complaints. In terms of section 190(2) of the Constitution the powers and functions of the IEC must be prescribed by national legislation. And the need for such legislation is readily apparent. For “the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless”.⁵¹

[58] The starting point is the preparation of the segments of the voters’ roll to be used in each ward where a by-election was held. This takes place against the backdrop of the IEC’s own investigation after the December by-elections, which revealed that of 3832 new registrations in nine affected wards, including the six with which we are concerned, between 2000 and 2013, a total of 1040 involved the registration of people in wards where they were not and had not been resident at the

⁵¹ *New National Party* above n 24 at para 11.

time that they registered and their names were placed on the national voters' roll. A further 332 registrations did not have sufficient conventional addresses to determine whether they were correctly registered. Although registered in the correct ward, 359 people were registered in the incorrect voting district.

[59] The relevant provisions of the Electoral Act dealing with the registration of voters are the following:

- “6. Persons who may apply for registration as voter–
- (1) Any South African citizen in possession of an identity document may apply for registration as a voter: Provided that where that citizen is ordinarily resident outside the Republic, he or she must in addition to the identity document produce a valid South African passport.
- ...
7. Applications for registration as voter–
- (1) A person applying for registration as a voter must do so in person in the prescribed manner.
- ...
- (3) (a) A person is regarded to be ordinarily resident at the home or place where that person normally lives and to which that person regularly returns after any period of temporary absence.
- (b) For the purpose of registration on the voters' roll a person is not regarded to be ordinarily resident at a place where that person is lawfully imprisoned or detained, but at the last home or place where that person normally lived when not imprisoned or detained.
8. Registration
- (1) If satisfied that a person's application for registration complies with this Act, and that the person is a South African citizen and is at least 18 years of age, the chief electoral officer must register that person as a voter by making the requisite entries in the voters' roll.
- ...
- (3) A person's name must be entered in the voters' roll only for the voting district in which that person is ordinarily resident and for no

other voting district: Provided that where that person is ordinarily resident outside the Republic, his or her name must be entered in a segment of the voters' roll created for that purpose.”

[60] In *August* this Court stressed the importance of permitting all citizens to vote in the absence of any justifiable limitation of that right.⁵² It accordingly set aside the failure by the chief electoral officer to register prisoners so as to enable them to vote.⁵³ Following upon that decision section 7(3) was amended to deal with the identification of the place or ordinary residence of persons entitled to vote. This was important because of the provisions of section 8(3) of the Electoral Act that impose a duty on the chief electoral officer, when making entries in the voters' roll, to ensure that the voter is registered “only for the voting district in which that person is ordinarily resident and no other voting district”.

[61] Ensuring that voters are correctly registered in the voting district where they are ordinarily resident is of particular importance in the context of municipal elections because they are conducted in the first instance on a ward basis. National and provincial elections are conducted on a party list system.⁵⁴

[62] All metropolitan municipalities and local authorities are required to be delimited in wards.⁵⁵ The reason for ward representation in municipalities is to bring the politicians dealing with issues that most directly impact upon ordinary citizens

⁵² *August* above n 21 at para 31.

⁵³ *Id* at para 38.

⁵⁴ In national elections, the number of persons elected to represent each party is determined by way of a calculation in which the number of votes cast for each party is divided by the number of seats in the National Assembly, or the relevant Provincial Legislature, minus one to determine the voting quota (number of votes) that is required for the election of one member. The seats are then apportioned accordingly, with the last few seats being allocated in accordance with the fractions of voters remaining to the credit of each party after their full number of seats allocated in accordance with voting quotas has been ascertained. See section 57A, read with Schedule 1A, of the Electoral Act. In regard to the National Assembly, see items 5 and 6, and in respect of provincial legislatures, see item 13 of Schedule 1A.

⁵⁵ Item 2 in Schedule 1 to the Local Government: Municipal Structures Act 117 of 1998. Demarcation is undertaken by the Demarcation Board established in terms of section 2 of the Local Government: Municipal Demarcation Act 27 of 1998.

closer to home. Instead of having to deal with an amorphous political party, citizens in a municipality have a local representative, who should be available to them, irrespective of political affiliation, to address their local problems. These may appear trivial in the greater political debate, but in a country where service delivery protests frequently feature in our news bulletins and newspapers, they are of central importance to the majority of ordinary citizens. If people lack, or have inadequate, water, electricity, housing and sewage removal, or have roads with potholes and without sidewalks, it is to the municipality that they turn and to their councillors that they have resort. The process of election to public office of councillors is therefore of cardinal importance for the healthy operation of our democracy at local government level.

[63] That process is particularly vulnerable to manipulation. If voters can be brought from outside, into a ward where the political balance is unclear, their votes may influence the outcome of the election at a ward level and even the outcome of an entire municipal election. We cannot shut our eyes to the reality that there are municipalities that are finely balanced electorally, where the result in a single ward may affect the balance of power in the municipality. That being so, it is right that particular attention is paid by the IEC to securing that, where there are elections and by-elections in wards, the people who are registered as voters and permitted to vote should be limited to those who are legitimately entitled to vote in that ward.

[64] For that reason section 8(3) of the Electoral Act requires the chief electoral officer when registering a voter on the voters' roll to register that voter in the voting district in which they are ordinarily resident.⁵⁶ That ensures that, when the segment of the national voters' roll to be used in the conduct of an election or a by-election in a

⁵⁶ This is reinforced by regulation 11 (see above n 42). The regulation reads:

“When registering a person in terms of section 8(1) of the Act or when recording a change of ordinary place of residence in terms of section 9(3) of the Act, or when changing the registration details in terms of section 11(1) of the Act, the chief electoral officer must ensure that the voter concerned is registered in the voting district in which he or she is ordinarily resident at that time.”

particular ward is prepared, it will include only voters qualified to vote in that ward. And it is as important to ensure that those who are not qualified to vote are excluded, as it is to enable those who are qualified to vote to do so.⁵⁷

[65] In order to enable the IEC to discharge the obligation imposed by section 8(3), the prescribed form that must be completed by every aspirant voter when registering to vote requires them to provide the address at which they ordinarily reside. The IEC contended that it was not part of its function to ascertain whether that address was correct. I would reserve any decision on that point, because it is not germane to the problem in the present case. As section 8(3) makes clear, what the IEC's chief administrator, the chief electoral officer, was obliged to do was to register the voters in the voting district in which they were ordinarily resident when they applied for registration. That obligation may not have required the chief electoral officer to undertake an investigation of the accuracy of the address given (although, in a society where one cannot lawfully acquire a mobile phone without providing such proof, one wonders why not), but it certainly required that the information given in regard to the voter's ordinary place of residence had to be sufficiently clear to ensure that the voter could be accurately placed in the correct voting district. A generic address, whether that of an informal settlement, such as Crossroads in Cape Town or Bester's Camp in Durban, or that of an upmarket suburb, such as Constantia in Cape Town or Morningside in Durban, is simply insufficient for this purpose.

[66] Voting districts are not, as the argument on behalf of the IEC would have it, areas the demarcation of which is in some way doubtful or debatable. They are established by the IEC itself in terms of section 60 of the Electoral Act. The IEC determines the boundaries of each voting district and must prepare a map showing those boundaries.⁵⁸ When a voter comes to register as such, it is for the IEC and its officials to procure as much information from that voter as is necessary to enable it to

⁵⁷ *New National Party* above n 24 at para 33.

⁵⁸ Section 60(1)(c) of the Electoral Act.

perform its statutory obligation and ensure that the voter is registered in the correct voting district and hence, for the purpose of municipal elections, in the correct ward. In almost all cases this will be relatively easy but in some instances it will present challenges. It is the IEC's responsibility to resolve those challenges.

[67] The IEC is well aware of these obligations and the challenges that accompany them. It provides its officials with a manual instructing them on how to proceed when registering voters. They are charged with ensuring that the registration form is properly completed and that all the required information is completed. In regard to the provision of addresses the manual reads as follows:

“Check that the address is complete

- **For urban addresses:** does it have a street name and number, suburb, town or flat name and number
- **For rural addresses:** does it have a village/farm name and plot number where applicable
- Is the spelling of street name, suburb, farm name etc. correct and consistent?
- ...
- Residential addresses are required to be completely filled in, including street numbers and postal codes (where applicable), as well as contact details”.

This is followed by an injunction that clearly relates to section 8(3) of the Electoral Act. If the addresses provided on the REC 1 form⁵⁹ fall outside the voting district in which registration is being applied for, and the applicant insists on being registered in that voting district the IEC official is obliged to issue a notification of refusal form. In other words they are obliged to refuse to register the voter in that voting district. This demonstrates that any belief on the part of the IEC and its officials that they have no option but to register as a voter in any particular ward everyone who seeks registration in that ward, whether or not entitled to it, is incorrect.

⁵⁹ Appendix 1 to the Regulations Concerning the Registration of Voters. See above n 42.

[68] That the IEC did not do this in the case of the wards in Tlokwe is apparent from its own investigation. But the limitations of that investigation must also not be overlooked. It dealt only with new registrations in the affected wards between 2000 and February 2014. It covered only 3832 voters. Of those 1040 were definitely registered in the incorrect ward. But 332 additional voters were problematic because the addresses given on their registration forms were so sketchy that it was impossible to say whether they were registered in the correct ward. A number of others were registered in the correct wards but in the wrong voting districts. No information was tendered in regard to other registrations in these wards or their accuracy.

[69] What is troubling about this is that there is no explanation of how the incorrect registrations were made. Assume that the addresses given by these voters were inadequate, so that it was unclear in which voting district, and hence in which ward, they should be registered. Why then were they placed in the incorrect wards instead of the correct ones? Was that purely random? It would be surprising if it were. The IEC had conducted voter registration drives in the wards where the by-elections took place. Many of these registrations must have occurred during those registration drives. Were voters automatically registered as falling in those wards? If so, the system adopted lent itself to manipulation because a well-organised political party or group would be able to present as new voters for registration, people who were not in fact qualified to be registered in that particular area and thereby strengthen its own cohort of support in that ward.

[70] The absence of an explanation lends credence to the detailed complaints by Mr Kham in regard to the registration process. For example, he complained that among the REC 1 forms furnished to him in response to his request was a bundle entitled “Maricana”. Among these were a number – he did not give the figure but said the bundle was voluminous – with no address other than the word “Maricana”. This is an informal settlement falling outside ward 13 but all the voters whose forms contained this address were registered in ward 13. Some of the forms in this bundle did have addresses, but the addresses given were all in ward 17. However all these

voters had been registered in ward 13. In response to this complaint the IEC did not analyse the documents or engage with the specific allegations made by Mr Kham. Its deponent simply annexed a single REC 1 form from the “Maricana” bundle showing a physical address, albeit not one with a street name or house number, and said that there was a physical address and that this complied with the legislation. But this was not a response to the pith of the allegations made by Mr Kham, which was that voters from this informal settlement had been registered in a ward other than that in which they were ordinarily resident.

[71] No proper response was forthcoming to another of Mr Kham’s complaints, this time in relation to ward 20. He produced and annexed to his affidavit a bundle titled “Ward 20” and said that in these forms no street names or numbers were mentioned on the forms, merely the name of a suburb. He pointed out that this was irregular because on either side of certain streets there are two different wards, presumably because the street constitutes the ward boundary. In other instances only an extension of a suburb was mentioned or there was reference to an informal settlement called “Baipei”, whereas there is more than one settlement with that name in various wards. His conclusion was that more than 350 voters on the segment of the roll in use in ward 20 were resident outside the ward. These specific and documented complaints attracted the cursory response that with regard to ward 20 “the requirements for the registration of voters as set out in Chapter 2 of the Electoral Act were adhered to”.

[72] It is unnecessary to try and tease out the implications of this any further. On the IEC’s own investigation there were a number of registrations of voters in the affected wards that should not have occurred. To that extent the by-elections were conducted on the basis of inaccurate voters’ rolls and some at least of the wrongly registered voters voted. In other words there was a breach of the principle that only those legally entitled to do so should be permitted to vote. It may well have been more extensive than the IEC report indicated but on any footing it was not insignificant and occurred across all the wards where by-elections took place.

[73] The next complaint relates to the production of the segment of the voters' roll used in each ward. It is common cause that this did not include the voters' addresses. This raises two issues. Was it permissible for the IEC to supply voters' rolls without addresses and what impact would this have on the ability of candidates, such as the applicants, to contest the by-elections?

[74] The part of section 16 of the Electoral Act dealing with the IEC's obligation to make the relevant portion of the voters' roll available during a by-election reads:

- “(1) A copy of the voters' roll as it exists at any time must be available for inspection during office hours at the Commission's head office, and the provincial and municipal segments of the voters' roll must be available for inspection at the times and venues mentioned in a notice published by the chief electoral officer in the Government Gazette.
- (2) The chief electoral officer must provide a certified copy of, or extract from, a segment of the voters' roll as it exists at that time, to any person who has paid the prescribed fee.
- (3) Notwithstanding subsection (2), the chief electoral officer must, on payment of the prescribed fee, provide copies of the voters' roll, or a segment thereof, which includes the addresses of voters, where such addresses are available, to all registered political parties contesting the elections.”

[75] The IEC's approach was that the voters' roll does not need to include the addresses of voters. It relied for this on the provisions of regulation 10 of the regulations governing the registration of voters, which says that:

“The particulars to be entered in the voters' roll when registering a person as a voter, are the consecutive number, the identity number and the name of the voter.”

The justification for omitting the address of the voter was said to be to prevent the abuse of the voters' roll by persons wishing to use it for purposes other than legitimate electoral purposes, for example, marketers. Such use is a criminal offence under section 16(4) of the Electoral Act.

[76] The difficulty with this approach is that section 16(3) of the Electoral Act explicitly requires the IEC to provide a voters' roll with the addresses of voters to all registered political parties contesting the election. It was wisely not suggested that political parties would be treated more favourably than independent or unaffiliated candidates. That would be a clear and unjustifiable breach of the constitutional right of such candidates to stand for public office in free and fair elections. The drafting of the section may have overlooked independent and unaffiliated candidates, but it must clearly be construed as referring to all candidates participating in an election.

[77] The obligation to provide all candidates with a copy of the relevant segment of the voters' roll containing the addresses of voters in the ward with their addresses ("where such addresses are available") was ignored by the IEC in this case. That was a serious breach of its statutory obligations. Without voters' addresses the ability of candidates to canvass voters is significantly impaired. In these wards, in addition to residences of a conventional type as reflected on the plans and photographs, where street names or numbers and house numbers should be available, there are areas of informal settlement. Candidates given a voters' roll that merely reflects names and ID numbers are faced with an enormous task in trying to identify which residents are registered to vote. Even in areas where there are formal dwellings many of the residents may not have telephones and be capable of identification by reference to the telephone directory. The ubiquitous mobile phone is not to be found in conventional directories. How then does a candidate convert the list of names into identifiable voters who they will want to contact and persuade to give them their votes?

[78] These difficulties would have been compounded by the fact that the candidates in the December by-elections were only provided with copies of the segments of the voters' roll applying to their wards on 4 December 2013, a mere seven days prior to the election. Section 11(1)(a) of the Municipal Electoral Act required the IEC to prepare an election timetable and, in the absence of any change to that timetable, it

was obliged to comply with it.⁶⁰ The timetable for the December by-elections provided that the segments of the voters' roll had to be prepared and certified by 14 November 2013 and that candidates had to be certified by 25 November 2013. That was accordingly the date upon which they became entitled to receive a copy of the segment of the voters' roll for their ward in terms of section 16(3) of the Electoral Act. They did not receive it until nine days later. That was a breach by the IEC of its obligation under section 11(3) of the Municipal Electoral Act to comply with the timetable. And it is interesting to note that the minutes of a meeting of the representatives of the candidates convened by the IEC on 3 December 2013 recorded that all candidates complained about the late delivery of the segments of the voters' roll.

[79] In the absence of greater detail it is not possible to assess the full impact of this breach by the IEC of its obligation to comply with the electoral timetable on the by-elections. We do not for example know what the candidates had been doing to canvass voters from October, when the by-elections were postponed, through November until the final roll was made available to them. We do not know what alternative means they had available to identify voters in these wards and make contact with them. However, it is probable that the political parties would have been better situated than independent candidates to do so.

[80] In three respects therefore the by-elections in December 2013 were infected with irregularities. Mr Kham's by-election in September involved irregular registration of voters and the provision of a segment of the voters' roll that lacked addresses. However, it was not established that there were any further irregularities in the preparation for and conduct of this by-election. Mr Kham made far-ranging allegations of further irregularities in regard to registration of unqualified voters, in respect of which the evidence available to him was limited, but which were not adequately rebutted by the IEC. He did not seek to establish these by oral evidence

⁶⁰ Section 11(3) of the Municipal Electoral Act.

before the Electoral Court. He was content, without abandoning them, to pursue the litigation relying largely on the IEC's own investigation. The impact of the established irregularities on the proper conduct of the by-elections must be assessed against this background.

[81] In regard to the December by-elections all three identified irregularities were present. They were more seriously affected by the irregularities than the earlier by-election in September. In respect of all seven the IEC urged the Court not to set aside the outcome. On its analysis of the number of voters irregularly registered who had voted in each ward, even if those voters were all assumed to have cast their ballots for the successful candidate, it would not have affected the outcome of the election.⁶¹ Although the argument was initially advanced on the basis of the principle set out in section 55 of the Electoral Act and section 65 of the Municipal Electoral Act, it was pursued on the general ground that the analysis demonstrated that the declared outcomes of the by-elections accorded with the broad will of the electorate and should not be disturbed. Reliance was placed on the preamble to the Constitution, which records that government is based on the will of the people.

Were the by-elections free and fair?

[82] Article 21 of the International Declaration of Human Rights provides that:

⁶¹ The outcome in the affected wards, according to the IEC, would have been the following:

Ward 1:	The winning candidate's majority would have decreased from 891 to 795.
Ward 4:	The winning candidate's majority would have decreased from 42 to 3.
Ward 11:	The winning candidate's majority would have decreased from 559 to 553.
Ward 12:	The winning candidate's majority would have decreased from 1100 to 1093.
Ward 13:	The winning candidate's majority would have decreased from 283 to 34. The Second Applicant finished third in this by-election behind the candidates from the ANC and the Democratic Alliance.
Ward 18:	The winning candidate's majority would have decreased from 364 to 356.
Ward 20:	The winning candidate's majority would have decreased from 197 to 107.

- “(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- ...
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”⁶²

[83] While not using the expression “free and fair elections” – an expression that entered the general political lexicon in 1978 when it featured in the United Nations Security Council Resolution 435 calling for “the early independence of Namibia through free and fair elections under the supervision and control of the United Nations”⁶³ – the Universal Declaration of Human Rights encapsulates the fundamental principles on which democratic societies rest. In our Constitution the principle finds expression in the commitment of our society to universal adult suffrage, a national common voters’ roll, regular elections and a multi-party system of government.⁶⁴ But that commitment, whilst necessary to achieve a democratic society, is not on its own sufficient for that purpose. For that reason our Constitution establishes the IEC as a Chapter 9 institution supporting constitutional democracy, and charges it with ensuring that all elections are free and fair.⁶⁵

[84] By what standard is a court to determine whether an election was free and fair? In this case the applicants complain that the registration of voters who were not

⁶² Universal Declaration of Human Rights, 10 December 1948. See also article 25 of the International Covenant on Civil and Political Rights, 16 December 1966, which reads:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”.

⁶³ Bjornlund above n 26 at 97.

⁶⁴ Section 1(d) of the Constitution.

⁶⁵ Section 190(1)(b) of the Constitution.

entitled to be registered in the wards they were contesting, coupled with the problems with the voters' roll, meant that the conduct of these by-elections did not measure up to the constitutional standard because they were not free and fair. The complaint does not relate so much to the outcome of the by-elections as to the manner in which they were held, although, no doubt, as with all unsuccessful candidates, the applicants harbour a lingering belief that if the by-elections had been conducted without these deficiencies the result would have been different. As was said by the First Chamber of the European Court of Human Rights in *Aliyev v Azerbaijan*:

“The applicant was entitled . . . to stand for election in fair and democratic conditions, regardless of whether ultimately he won or lost.”⁶⁶

[85] The applicants complain that, by virtue of the irregularities that affected the electoral process, these seven by-elections were not fairly conducted. Their ability to participate fully and effectively in the by-elections was hampered by the failure of the IEC to fulfil its obligations in regard to the registration of voters, and the content and timing of the production and provision of the relevant segments of the voters' roll. The focus must be on the impact that this had on their exercise of the right to stand for public office. It is not on whether they would have won or lost had the arrangements for the by-elections been different and not suffered from the flaws of which they complain, but on whether they were seriously hampered in their participation in the electoral process.

[86] It must be stressed that the judgement whether an election was free and fair has to be made in the specific context of the Constitution. In certain instances it may be appropriate to be guided by identifiable international norms, where these exist. But the constitutional requirement is that elections must be free and fair. This is a single requirement,⁶⁷ not a conjunction of two separate and disparate elements. The expression highlights both the freedom to participate in the electoral process and the

⁶⁶ *Case of Namat Aliyev v Azerbaijan* (Application no 18705/06) at para 75.

⁶⁷ Technically called a hendiadys (“one through two”).

ability of the political parties and candidates, both aligned and non-aligned, to compete with one another on relatively equal terms, so far as that can be achieved by the IEC. As to the former, from the perspective of a political party or an individual candidate seeking election in a municipal ward, it demands the freedom to canvass; to advertise; and to engage in the activities normal for a person seeking election. Phenomena like “no go” areas; the denial of facilities for the conduct of meetings; disruption of meetings; the destruction of advertising material or the intimidation of candidates, workers or supporters, could all prevent an election from being categorised as free and fair.⁶⁸ Fortunately these ugly electoral phenomena were not part of what occurred in Tlokwe on this occasion.

[87] As to the latter, organisationally and financially the larger political parties will have advantages that their smaller cousins and individual candidates will lack. But the latter may have advantages in greater local knowledge and understanding of the area, and be able to make a fuller commitment to the interests of the voters in a ward than someone who must hew to a party line. These are not issues with which the IEC need concern itself. Its concern in modern parlance is to try to ensure a “level playing field”,⁶⁹ in which all the participants can compete without any undue hindrance or

⁶⁸ See Sawyer *Elections Full, Free and Fair* (The Federation Press, Sydney 2001) at 1 and 4. She writes:

“While the right to vote is frequently commemorated, the freedom to vote without intimidation or corruption and the abolition of open nomination and open voting is less often celebrated. Yet the elimination of violence and drunkenness prepared the way not only for fair elections but also the participation of what was called the ‘fair sex’”.

She continues on the subject of “Elections before the Ballot” as follows:

“It is not only the right to vote, but the freedom to vote without intimidation or corruption, that is such a significant, though often forgotten, part of our political history. The violence, drunkenness and bribery associated with elections before the introduction of the ballot are vividly portrayed by the English painter William Hogarth in his series entitled ‘An Election’ . . . and depicts in grotesque detail the abuses involved in all stages of the election, from ‘treating’ and canvassing through to polling and the declaration of the poll.”

⁶⁹ The origin in its modern usage of providing for fair competition appears to be a statement by John Bolger, a lobbyist for the Pennsylvania Bankers’ Association, in which he said: “Our philosophy is that we have no problem competing with the mutual savings bank if they start from the level playing field”. It was carried in various newspapers, for example, *Lebanon Daily News* (5 January 1977) at 3. Many playing fields, for example, the famous Lords Cricket Ground are not level and have an identifiable slope that affects the game.

obstacle occasioned by the manner in which the preparations for the election have been undertaken or the way in which the election has been conducted.

[88] Measuring whether an election was free and fair starts by comparing what happened in the conduct of the election against the public standards put in place by legislation and the IEC itself for the conduct of free and fair elections. In the respects identified earlier in this judgment the IEC fell short of those standards. The precise effect of this on the outcome of the elections cannot be measured at this stage. That involves speculation. All that can safely be said is that the independent candidates were constrained to fight these by-elections under the shadow of uncertainty occasioned by the registration of an unknown number of voters who were not entitled to vote and an inability to identify who these were or to do anything about it. Their efforts were hampered by the late delivery of the segments of the voters' roll and, in particular, the absence of voters' addresses, when those segments were delivered.

[89] These problems are in turn linked to the problem of registration in the different wards of people not entitled to be so registered. The only mechanism available to the independent candidates to check on this was to compare the segments of the voters' roll, once received, with the forms that Mr Kham had obtained from the IEC on 1 October 2013. No such process of comparison could be undertaken until the segments of the voters' roll were delivered to candidates, which occurred only six days prior to voting. While the IEC concedes that 1040 people who were not entitled to be registered or to vote there, were registered to vote in these wards, the applicants contend that there is no satisfactory basis for relying upon even these figures. They said in their affidavits that, with the information at their disposal, it was impossible to check the accuracy of the IEC's figures.

[90] What is the test for determining whether an election process suffering from these defects is free and fair? The point has been made earlier that this involves a value judgement. The nature of the irregularities and their impact on the conduct, as well as the result of the election, so far as that can be assessed, must be measured

against the constitutional standard. The Electoral Court or another court required to make this judgment – in the present case, this Court – must weigh all the evidence and, in that light, determine whether the constitutional requirement was satisfied. Because the facts will be different in every instance where the question arises, it is appropriate to say that the existence of a particular deficiency in one case, does not necessarily mean that the presence of the same deficiency in another election held in differing circumstances, will result in the same conclusion. For example, in a national election, the fact that voters, otherwise qualified to vote, are registered in the incorrect voting district, may be of less significance than in a municipal by-election. But late delivery of voters' rolls, or delivery of rolls with important information missing, may assume even greater significance at the national than the local level.

[91] It is undesirable to articulate a general test expressed in language different from that of the Constitution, as that may be misleading. The Court must give full weight to the constitutional commitment to free and fair elections and the safeguard it provides of the right and ability of all who so wish to offer themselves for election to public office. It is essential to hold the IEC to the high standards that its constitutional duties impose upon it. It is insufficient for the Court to say that it has a doubt, or a feeling of disquiet, or is uncomfortable about the freedom and fairness of the election. It must be satisfied on all the evidence placed before it that there are real – not speculative or imaginary – grounds for concluding that they were not free and fair.

[92] These seven by-elections fail that test. They were conducted against the background of fears that voters had been wrongly registered in wards where they were not ordinarily resident and not entitled to vote. It transpired that these fears were well-founded. The IEC has proffered no satisfactory explanation for this occurring, seeking instead to shelter behind a contention that it is not obliged to verify voters' addresses. In adopting that stance, it revealed that it was non-compliant with its statutory obligation to ensure that voters are registered in the voting district in which they are ordinarily resident in over a quarter of cases over a thirteen year period. It also revealed that, in nearly one twelfth of new registrations in the affected wards, it

did not obtain addresses or information from voters that would enable it to perform this statutory obligation. On what basis then were these voters registered? And a similar proportion was registered in the wrong voting district, although in the correct wards. Was this purely fortuitous? We cannot tell. All that can be said is that an election conducted when there is a serious question as to the reliability of the voters' roll cannot be described as free and fair.

[93] In the case of the December by-elections that conclusion is compounded by the late delivery of the relevant segments of the voters' roll and the absence of addresses on those segments. (Whilst not the subject of an express complaint in the affidavits it must also have been the case that in the September by-election the segment of the voters' roll provided to Mr Kham lacked addresses). As to the former there is no explanation at all. As to the latter the IEC's approach, on the basis of a regulation that it had promulgated, was that it was under no obligation to do more. That would arguably be wrong even in the absence of an express provision such as section 16(3) of the Electoral Act.

[94] I can see force in the contention that in order for an election to be fairly conducted it is necessary that the participants have available to them not simply a list of voters' names and identity numbers but also some means of identifying and contacting them, of which the voters' addresses is the most obvious.⁷⁰ But it is unnecessary in the light of section 16(3) to reach a firm conclusion on this question and I would hesitate to do so without further enquiry into the electoral systems of other democratic countries and the requirements for the preparation of voters' rolls there. Here, the IEC was in breach of its obligations under section 16(3) of the Electoral Act in not furnishing segments of the voters' roll with addresses where those were available. That failure was compounded by its failure, in breach of the requirements of section 11(3) of the Municipal Electoral Act, to make the segments of the voters' roll available to certified candidates in accordance with the provisions of

⁷⁰ Sawyer above n 68 at 153.

the electoral timetable that it had promulgated. Once again no reason was proffered for this failure.

[95] It follows that these elections were not free and fair.

Relief

[96] It is plain that there must be a declaratory order. That follows from the Court's obligation to declare law and conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.⁷¹ The more difficult question is whether, as the applicants asked, in granting a just and equitable remedy,⁷² we should set aside the outcome of the by-elections and direct the IEC to conduct fresh by-elections in the affected wards.

[97] This Court's jurisprudence directs that we should grant a successful litigant effective relief.⁷³ It also holds that when dealing with public bodies a declaratory order often suffices to provide effective relief without the need to go further.⁷⁴ But the overriding obligation is to grant just and equitable relief and that requires the Court to consider carefully all the possible ramifications of its order.

[98] It is tempting to conclude that an election that was not free and fair must inevitably be set aside. But that may be an unduly facile conclusion. Overturning an election is a serious business.⁷⁵ Lucas CJ in California said:

⁷¹ Section 172(1)(a) of the Constitution.

⁷² Section 172(1)(b) of the Constitution.

⁷³ *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 97.

⁷⁴ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 108.

⁷⁵ Per Rothstein and Maldaver JJ in *Opitz v Wrzesnewskyj* 2012 SCC 55; [2013] 3 SCR 76 at para 87 (*Opitz*). See to similar effect *Cusimano v. Toronto (City)* 2011 ONSC 7271 at para 63; *Gooch v Hendrix* 851 P 2d 1321 (Cal. Sup. Ct. 1993) (*Gooch*) at 1327-8; *McEwing v. Canada (Attorney General)* [2013] 4 FCR 63; 2013 FC 525 at para 56.

“It is a primary principle of law as applied to election contests that it is the duty of the court to validate the election if possible. That is to say, the election must be held valid unless plainly illegal.”⁷⁶

These are cautionary words that we do well to bear in mind. But they cannot be decisive. For the other side of the coin is that where the integrity of an election is in doubt—

“...preservation of the integrity of the election process is far more important in the long run than the resolution of any one particular election.”⁷⁷

[99] Electoral legitimacy and the integrity of the electoral process are of enormous importance in South Africa.⁷⁸ Many people, in many different ways, struggled and fought to secure the right to vote for all people in South Africa. It was a right denied to the vast majority of this country’s citizens. Many devoted their lives to the struggle for democracy. Others were imprisoned, banned, harassed and exiled. No-one who was in, or has seen photographs of, the patient queues that waited for hours to cast their votes in the first democratic election can have any doubt that the right to vote is a precious one for all South Africans. The struggle of all those who worked to bring

⁷⁶ *Gooch* id at 1327.

⁷⁷ *Fair v Hernandez* (1981) 116 Cal. App. 3d 868, 881 [172 Cal. Rptr. 379]; *Gooch* id at 1327

⁷⁸ As it is in other countries. In *Marks v Stinson* 19 F 3d 873 (1994) at 887, a case involving a disputed election for a seat in the Senate of the state of Pennsylvania, it was said:

“The integrity of the election process lies at the heart of any republic. The people, the ultimate source of governmental power, delegate to their elected representatives the authority to take measures which affect their welfare in a multitude of important ways. When a representative exercises that authority under circumstances where the electors have no assurance that he or she was the choice of the plurality of the electors, the legitimacy of the governmental actions taken is suspect. Accordingly, where there is substantial wrongdoing in an election, the effects of which are not capable of quantification but which render the apparent result an unreliable indicium of the will of the electorate, courts have frequently declined to allow the apparent winner to exercise the delegated power.

...

For the actions of a democratically elected body of representatives to be legitimate, the electorate must be assured that each of the representatives was the choice of the electorate.”

See also *Bell v Southwell* 376 F 2d 659 (5th Cir. 1967) where an election, the integrity of which had been infected by poisonous racial discrimination, was set aside, despite the fact that the evidence did not suggest that the outcome would have been any different had the discrimination not occurred.

democracy to this country is properly honoured when we conduct free and fair elections to determine the will of those who now have the right to vote. It is vital therefore that we are jealous of the privilege so hardly won. In determining a just and equitable remedy, where an election has been held not to be free and fair, these considerations must form the backdrop to the performance of the Court's role as the guardian of the Constitution and the IEC's performance of its obligation to ensure free and fair elections.

[100] In many countries, where elections are conducted on a constituency basis the only ground for setting aside an election is proof that the exclusion of votes tainted by irregularity would mean that the result of the election could have been different. That was the basis upon which electoral petitions were disposed of under the pre-democratic dispensation, drawing upon precedents in electoral law from England.⁷⁹ The Court's sole task was to determine whether the irregularities would have affected the result of the election. In doing so it would examine and rule on disputed votes and then re-count the votes to see whether the outcome would have been any different. It is the basis for what is referred to in Canada as the "magic number" test, that being the number of irregular votes that a claimant must prove were admitted in order to have the result of an election set aside.⁸⁰ But in South Africa that cannot be the sole determinant of just and equitable relief, where the elections conducted by the IEC were not free and fair and the constitutional right to participate in and contest those elections was infringed. In any event it is always difficult to predict what would have occurred had those electoral irregularities been absent.

[101] Does that mean that the views of those legitimate voters who voted in these by-elections are irrelevant? Surely not. Elections are not solely or principally about councillors or candidates. They are primarily about the right of voters to participate in elections and thereby to have their say in how they are governed. The expression

⁷⁹ *Putter v Tighy* 1949 (2) SA 400 (A) at 408 and *Gerdener v Returning Officer and Another* 1976 (2) SA 663 (N) at 673H-677E.

⁸⁰ *Opitz* above n 75 at paras 71-73.

“government of the people, by the people, for the people” was coined on a different continent in a country wracked by civil war,⁸¹ but it resonates in South African ears. We too are committed to a government based on the will of the people and that will finds its primary expression in the outcome of elections at all levels. If these by-elections are set aside the legitimate votes of legitimate voters will have been fruitless. And, for all we know, had the irregularities not been present their choice would have fallen on the same candidates who were declared elected.

[102] This consideration is what lies at the heart of the IEC’s submission that whatever the deficiencies in the election process the results must stand. And there is substance in the point they make. The applicants do not suggest that with a segment of the voters’ roll in each ward, shorn of improper registrations, there was any real likelihood of their achieving electoral success. They do not deal at all with the effect of the irregularities on their election campaigns. Their focus in the affidavits is almost exclusively on their efforts to ascertain whether voters had been improperly registered. But a closer examination of the elections indicates that their electoral prospects were poor. In two of the wards (wards 4 and 13) the independent candidate finished third and the representatives of the party that finished in the runner-up position, do not challenge the outcome. In three wards (wards 1, 11 and 12) the margins of victory by the successful candidates over the independent candidates were so large and the number of votes cast for the latter so small (253, 106 and 96 respectively), that improper registrations were unlikely to have been the cause of the successful candidates’ victories. In only three wards did the independent candidates achieve reasonably substantial numbers of votes and restrict the successful candidates’ majorities to more modest, albeit still significant, levels.⁸² This must be compared with the outcome of the election in ward 26 on 18 September 2013, which also involved a contest between an independent candidate and one representing the ANC.

⁸¹ Abraham Lincoln in his Gettysburg Address on Thursday, 19 November, 1863 commemorating the sacrifice of those from both sides who died at the Battle of Gettysburg during the American Civil War. See Shapiro *The Yale Book of Quotations* (Yale University Press, London 2006) at 463.

⁸² The margins varied between 15 and 20% of the total number of votes cast.

This ward was also, according to the evidence, affected by the registration of persons not entitled to register. But that did not prevent the independent candidate from winning with a substantial majority.

[103] We are faced with the need to weigh disparate interests. The applicants rightly complain that the by-elections were not free and fair and that their constitutional right to participate in the by-elections was thereby infringed. One can add that their constitutional right of freedom of speech was also limited in that they were restricted in their ability to convey their political message to their chosen electorate. The IEC points to the interests of those voters who participated legitimately in the by-elections and made their choice, but face having that set aside. It is true that they will have the opportunity in that event to vote again in a by-election but that is not a perfect answer.⁸³ Not only will the electorate have changed, by virtue of death, people moving elsewhere, new registrations, especially of younger voters, and possible expansion of residential areas in the wards, but there may also be different candidates. The issues in fresh by-elections are likely to be different from those that were relevant two years ago. The media attention they are likely to receive will be different. All in all they will be different elections.⁸⁴

⁸³ The reason is explained by Professor Huefner “Remedying Election Wrongs” (2007) 44 *Harvard Journal on Legislation* 265 at 295-96 in a passage cited in *Opitz* above n 75 at para 48:

“[A] new election can never be run on a clean slate, but will always be colored by the perceived outcome of the election it superseded. New elections may also be an inconvenience for the voters, and almost certainly will mean that a different set of voters, with different information, will be deciding the election. Moreover, there can be no guarantee that the new election will itself be free from additional problems, including fraud. In the long term, rerunning elections might lead to disillusionment or apathy, even if in the short term they excite interest in the particular contest. Frequent new elections also would undercut democratic stability by calling into question the security and efficiency of the voting mechanics.”

⁸⁴ In *Cusimano v. Toronto (City)* above n 75 at para 66, Dambrot J said that a by-election is an inexact substitute for the election that is set aside. The judgment proceeds at para 67-8:

“A by-election is an entirely different election from the one it replaces. The candidates may be different. The issues may be different. The level of media attention may be different. The turnout may be different. And the electorate will be different: some voters will have died; some will have moved out of the ward and be entirely disenfranchised; some will have moved into the ward and may have already voted in another ward on October 25, 2010.

I do not intend to belittle the value of a by-election as a remedy when there are irregularities in an election that violate the principles of the [Municipal Electoral Act 1966] or affect the

[104] If the outcome of these by-elections is set aside, that will have certain consequences beyond merely the need to hold fresh by-elections. Councillors who have been holding office for between 22 months and two years will be removed, with the loss of salary and other benefits to which the holding of that office entitles them. The evidence does not go so far as to suggest that any of them or the party they represent were responsible for the electoral irregularities. But none of them, although afforded the opportunity to do so by the Electoral Court, entered the lists to point out why, if there were deficiencies in the electoral process, these should not be remedied by setting aside the elections and holding by-elections. Nor did the IEC suggest that there were any insuperable logistical difficulties facing it in convening further by-elections. I do not think that these issues are relevant to the decision we must make.

[105] A possible relevant factor is that a national municipal election must take place at some time between next May and next August. Allowing for the elapse of time between the argument and the finalisation of this judgment, as well as the logistical requirements for holding by-elections, it seems unlikely that fresh by-elections could be arranged and held more than a few months prior to the national municipal elections. The voters in these wards will then have the opportunity to choose fresh councillors and the applicants will have a renewed opportunity to advance their claims to election to public office. Elections are not inexpensive and impose costs upon public funds as well as upon the participants. Is it desirable that these costs be imposed upon all concerned when the voters will in any event go to the polls a matter of a few months later?

[106] It is notorious that voter turnout in by-elections is usually low and voters who know that they will in any event be called on to vote again relatively soon, will be

results of an election. I simply say that a by-election is second best and cannot serve to lessen the significance of setting aside an election or the caution that must be exercised before doing so.”

disinclined to make a great effort to vote in the by-election as well. This points against an order setting aside the by-elections. But again it cannot be decisive. The voters in these wards were deprived of the free and fair election to which they were entitled. The candidates were deprived of the right to participate in a free and fair election. Saying to them that in any event they will have an opportunity in May to elect fresh representatives and stand for election will not redress that. That is a right they already have. To merge it with the need to hold fresh by-elections is effectively to deprive the voters of their initial right to a free and fair election.

[107] But there is a statutory reason why the impending national municipal election does not provide a ground for not setting aside these by-elections and ordering that fresh by-elections be held. It is that the proximity of national municipal elections to a possible by-election is dealt with in section 25 of the Local Government: Municipal Structures Act 117 of 1998 (Structures Act). In terms of section 25(1)(b) a by-election must be held if a court sets aside the election in a ward. The municipal manager is obliged in terms of section 25(3)(b), after consulting the IEC, to call and set a date for the by-election which is within 90 days of the court's order. If the municipal manager fails to do that then the MEC for local government of the province must do so instead, but within the same time parameters.⁸⁵ This does not interrupt the term of a municipal council.⁸⁶

[108] Section 25(6) provides:

- “(6) The municipal manager of a municipality may not call a by-election in terms of subsection (3) if—
- (a) the next election of all municipal councils must be held—

⁸⁵ Section 25(4) of the Structures Act.

⁸⁶ Section 25(5) of the Structures Act.

- (i) within nine calendar months of the applicable date mentioned in paragraph (a), (b) or (c) of subsection (3); or
 - (ii) if it is a by-election in a ward, within six calendar months of the applicable date mentioned in paragraph (a), (b) or (d) of subsection (3); and
- (b) the MEC for local government in the province decides that the by-election must stand over until the next election of all municipal councils.”

[109] The relevant provision is section 25(6)(a)(ii) which provides that if the next election of all municipal councils must be held within six calendar months of the court’s order then the municipal manager may not call a by-election in a ward, if the MEC in charge of local government decides that the by-election must stand over until the next election of all municipal councils. The corollary to this is that, if the period between the court order and the next election of all municipal councils is more than six calendar months and a vacancy arises in a ward for any of the reasons identified in the section, a by-election must be called. So the statute itself provides the benchmark against which to measure whether an impending election in all municipal councils should stand in the way of the grant of an order setting aside the outcome of a by-election in a ward. The clear intention is that unless there is less than six calendar months to go until the election in all municipal councils a by-election should be held.

[110] Section 25(a)(i) does not apply in this situation. It is only applicable in circumstances where the by-election relates to the election of the entire council, either because the IEC has not declared the results for an election for the council; or because a court has set aside the election for a council; or because a council has been dissolved. But where the vacancy arises in a specific ward it is section 25(a)(ii) that applies.

[111] In concluding this assessment of a just and equitable remedy, I return to the constitutional standard.⁸⁷ It is that elections must be free and fair. The reason is to protect the constitutional rights of voters and citizens who wish to offer themselves for election. When an election is not free and fair these rights are materially infringed. The Constitution points emphatically in the direction of the need to secure the integrity of the electoral process. Here, the unexplained registration of voters who were not entitled to vote corrupted that process. The failure to comply with the electoral timetable in December 2013 hampered the participants in the by-elections in their endeavours to canvass the support of their electorate.

[112] The absence of addresses in the segments of the voters' rolls provided to the candidates restricted their ability to identify and root out improper registrations as well as their ability to canvass voters effectively. To say that this made no difference is a matter for speculation. Even had the independent candidates lost, they may still have been able to build an electoral base that would have led to success at a later stage. Their ideas and arguments could have influenced the behaviour of elected office-bearers thereafter. It is apparent that the IEC misconstrued its obligations in material respects. This has to be corrected. Overall the balance must come down on the side of electoral integrity. The outcome of these seven by-elections must be set aside and the IEC must be directed to hold fresh by-elections. In terms of sections 25(3)(b) and 25(4) of the Structures Act there is a statutory obligation on the relevant officials and the IEC to arrange for the by-elections to be held within 90 days of this Court's order. It is accordingly unnecessary to put the IEC on terms to arrange for the by-elections to be held. The statutory period is definitive of their obligation.

[113] Nonetheless after the hearing, and as a precautionary measure, directions were issued to the parties asking them to deal with any practical problems that might arise

⁸⁷ Possibly by "a *commodius vicus* of recirculation". See the opening sentence of James Joyce *Finnegan's Wake*.

from an order setting aside the outcome of these by-elections. The terms of the directions were as follows:

- “1. The first respondent is directed to furnish the following information on affidavit on or before Wednesday, 18 November 2015:
 - (a) Should any declaration in regard to the outcome of the elections and steps to be taken by the Electoral Commission in conducting elections operate retrospectively or prospectively?
 - (b) Will it be practicable to hold fresh by-elections by 28 February 2016?
 - (c) If not, why will it be impracticable?
 - (d) If not practicable, how much additional time is required?
2. The second respondent is directed to furnish the following information on affidavit on or before Wednesday, 18 November 2015;
 - (a) Would an order setting aside the impugned by-elections with prospective effect disable the Municipality from performing its functions and, if so, in what respects and why?
3. The applicants are directed to furnish their representations, if any, on 1 and 2 above on affidavit on or before Friday, 20 November 2015.”

[114] The IEC responded to the first question by saying that any declaration in regard to the conduct of by-elections generally should operate prospectively. So did the applicants. I agree. It would not be appropriate for us to make an order that had within it the seed of possible legal challenges to the operations of the Tlokwe Local Municipality during the past two years or the seed of challenges to the outcome of other by-elections.

[115] The IEC’s response to the question whether it would be practicable to hold by-elections by 28 February 2016, which was slightly more than 90 days after the date the directions were issued, was more elliptical. The chief electoral officer said that it would be “possible but not realistic, workable or viable”. He explained that municipal elections for all municipal councils will, in terms of the Structures Act, have to be held between 18 May and 16 August 2016. But then he submitted that a municipal manager could not call a by-election on or after 16 November 2015, because that

would, so he said, be contrary to section 25(6)(a)(i) of the Structures Act. That is incorrect, because the relevant section is section 25(6)(a)(ii) as explained above. The position is that if the Court sets aside the outcome of those by-elections there will be an obligation on the municipal manager to call and set a date for by-elections in these wards. The date must be no more than 90 days from the date of the Court's order. According to the chief electoral officer's explanation of the timetable for a by-election, it can be called and held in 32 days. There is accordingly ample time to hold by-elections in the present case.

[116] The IEC's concern was that the quality of the by-elections could be compromised because of the failure of voters to register in what it described as "hastily convened elections" where it would be "under extreme pressure". On what basis the IEC said this is unclear. The question posed in this Court's directions related to the conduct of by-elections within the statutorily prescribed period of 90 days after a court order setting the result of the previous by-elections aside. In all four instances specified in section 25(1), where a by-election has to be held, the by-election must occur within 90 days of the event triggering that by-election. Since the Structures Act came into operation in 1999 the IEC has conducted countless by-elections in every part of the country, without apparently finding these time constraints irksome or in any way a hindrance to the conduct of free and fair elections in an efficient manner. It advances no good reason why Tlokwe should be any different. The by-elections in Tlokwe in September, October and December 2013 took 40, 34 and 46 days to finalise, inclusive of registration drives.

[117] In brief the reasons advanced by the IEC relate to the difficulties it says it faces in registering voters in informal townships. But this has not apparently been a difficulty in the past, nor is it suggested that Tlokwe poses unusual challenges. The IEC is also labouring under a misapprehension, which this judgment should help to dispel, that it is obliged to verify voters' addresses when they register. That is incorrect. What they are obliged to do is obtain sufficient information from the voter as to their ordinary place of residence, to ensure that they are registered in the correct

voting district and correct ward. This should not be unduly difficult as according to the affidavit of Mr Maduna, delivered by the applicants in their response to the directions, the only ward in which there are no verifiable addresses is ward 20 and that relates only to 10% of the ward area.

[118] If the voter does not have an address – and, even in informal settlements, very often sites or the dwellings are numbered or identified in some way – the IEC is not obliged to refuse them registration. Nor is the segment of the voters’ roll relating to that voter invalidated by the absence of an address. Section 16(3) makes it clear that their inclusion is dependent on the addresses being available. That means that the IEC must endeavour to ascertain from the person coming to register an address, where they have a physical address, or some detail that will serve as an address for the purposes of the roll. But if there is none then, provided they are registered in the correct ward, they must be registered and the absence of an address does not affect the validity of the voters’ roll.

[119] After dealing with the alleged difficulties in regard to registration of voters in these areas the chief electoral officer said that it would add three weeks to the election timetable. But that still leaves it well within the statutory 90 day period. The applicants say in their affidavit in response to the directions that there has been little movement in these wards since the national elections in 2014 so that compiling a roll for by-elections should be a matter of removing people whose names should not be there and updating the roll. The only other problem mentioned by the IEC is that we are approaching the Christmas holiday period and people may go away. But it rejected that as a ground for postponing the December by-elections in 2013, so it should not be able to rely on it now.

[120] In relation to paragraph 2 of the directions addressed to the MEC for Local Government and Human Settlements, the acting MEC and the Speaker of the Tlokwe Local Municipality delivered affidavits. The MEC pointed out that in order for council business to be undertaken it is necessary in terms of section 30 of the

Structures Act for a majority of councillors to be present. On the assumption that this means a majority in number of all possible councillors, ignoring any vacancies, she expressed concern that in view of the relatively close balance between major parties in the council⁸⁸ setting aside the election of these councillors would lead to a situation where either of the major parties could, by simply not attending council meetings, bring the work of the council to a standstill. She indicated that this had occurred in the period prior to the December 2013 by-elections. The Speaker shared this view. Both said they were concerned that the council would be rendered dysfunctional as a result of such tactics by one of the major parties.

[121] This concern is misplaced. Section 1 of the Structures Act defines “councillor” as being a “member of a municipal council”. The applicants correctly point out that the determination of a quorum is thus dependent on the number of elected councillors not the total number of wards and proportional representation seats on the council. This is reflected in the council’s standing rules of order. The effect of declaring the seven seats involved in these by-elections vacant would be to reduce the number of elected councillors to 45. A majority would then be 23 councillors, and there are 23 councillors who are not members of the majority party. Taken together with the Speaker, who is obliged under section 37 of the Structures Act to convene quarterly meetings of the council and preside over such meetings, there is a majority of elected councillors available to ensure that the council remains quorate even if the majority party chose to boycott meetings. Conversely, if the principal minority party were to boycott meetings there would be sufficient councillors from other parties to constitute a quorum.

[122] But if either major party in the council were to boycott its proceedings in order to prevent it from operating that would be gravely irresponsible. We should not assume that the governing party and the official opposition at national and most other

⁸⁸ The ANC currently has 29 members of whom seven would be unseated leaving it with 22; the DA has 19; the Freedom Front has 1; COPE has 1 and there are 2 independents.

levels of government in this country would behave in such a fashion in Tlokwe. Councillors are elected to undertake the work of the council on behalf of the whole citizenry. Sometimes the tides of politics will place one party in the majority and sometimes another. But it remains the duty of all councillors to facilitate and not obstruct the workings of the council. For councillors to continue to draw their salaries, while refusing to attend meetings and seeking thereby to stultify the working of a council would be a breach of their obligations as councillors. It is a breach of the Code of Conduct that binds all councillors and obliges them to attend all meetings of the council and of committees of which they are members.⁸⁹ But the possibility that a political party would behave in that way in response to an order by this Court cannot be a reason for this Court not to make an order that it regards as just and equitable. The MEC's suggestion that the operation of the order should be suspended, to enable councillors elected in by-elections that were not free and fair to retain their seats pending fresh by-elections, would undermine the principle on which this judgment is based.

[123] It is encouraging that the Speaker, herself a member of the ANC, ascribes the problems at the end of 2012 and 2013 to "in-fighting amongst the ANC Councillors".. It indicates that wiser heads now prevail. She says that the municipality is now functioning successfully. I assume that the progress made in the interim would not be thrown overboard for short term political purposes. Her suggestion that "Council meetings will not sit . . . and thereby resulting in no resolution being taken" ascribes to her colleagues an approach that is contrary to their statutory duties and irresponsible. This cannot be a legitimate reason for refusing to make the just and equitable order that we are required to make. The Speaker, of course, cannot lawfully be a party to such conduct or take any steps to prevent the lawful meetings of the council from taking place, as it is her duty to convene and chair those meetings.

⁸⁹ Code of Conduct for Councillors, items 3 and 4 contained in Schedule 1 to the Local Government: Municipal Systems Act 32 of 2000.

[124] The Speaker raises the fact that the Municipal Demarcation Board is contemplating combining Tlokwe Local Municipality with the Ventersdorp Local Municipality, which is at present in special measures. But, if that occurs, it will only be after the 2016 elections. She also refers to proposals to reconstitute some of the wards in Tlokwe. But this process is subject to objection and relates to possible future events. The by-elections with which this Court is concerned took place on the existing ward boundaries. Any by-elections to be held pursuant to our order must be held in respect of the wards with the boundaries as they existed at that time.

[125] The supplementary submissions in response to the Court's directions have usefully focussed attention on the key statutory provisions that apply to the conduct of by-elections. The by-elections that must be held as a result of this Court's order must accordingly be conducted in accordance with those statutory provisions and this will be reflected in the order.

Costs

[126] The applicants have been compelled to pursue their case to this Court in order to vindicate important constitutional rights. They should have their costs and it was not suggested otherwise. They asked for the costs of three counsel, but there is no warrant for that. The costs of two counsel is reasonable.

Order

[127] The following order is made:

1. Condonation for the late filing of the complete record is granted.
2. The Electoral Commission is to pay the costs of the application for condonation.
3. Leave to appeal is granted to the first to seventh applicants and refused in respect of the eighth applicant.
4. The appeal is upheld, with costs, including those consequent upon the employment of two counsel.

5. The order of the Electoral Court delivered on 19 March 2015 is set aside and replaced by the following order:
 - (a) It is declared that the by-elections conducted in the Tlokwe Local Municipality on 12 September 2013 in ward 18 and on 10 December 2013 in wards 1, 4, 11, 12, 13 and 20, were not free and fair.
 - (b) The outcome of those by-elections is set aside and fresh by-elections are to be held in terms of section 25 of the Local Government: Municipal Structures Act 117 of 1998.
 - (c) It is declared that when registering a voter to vote in a particular voting district after the date of this order the Electoral Commission is obliged to obtain sufficient particularity of the voter's address to enable it to ensure that the voter is at the time of registration ordinarily resident in that voting district.
 - (d) It is declared that in all future municipal elections or by-elections the Electoral Commission is obliged in terms of section 16(3) of the Electoral Act 73 of 1998 to provide all candidates in municipal elections, on the date on which they are certified, with a copy of the segment of the national voters' roll to be used in that ward in that election including the addresses of all voters, where these addresses are available.
 - (e) The Electoral Commission is directed to pay the applicants' costs, save for any additional costs occasioned by the joinder of the eighth applicant.
6. The orders in 5(c) and (d) are prospective in their operation from the date of this order and do not affect the validity of any election or by-election held prior to the date of this order.

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