



**THE ELECTORAL COURT OF SOUTH AFRICA,
BLOEMFONTEIN**

Not Reportable

CASE NO: 0039/24EC

In the matter between:

UMKHONTO WESIZWE PARTY

Applicant

and

ELECTORAL COMMISSION OF SOUTH AFRICA

First Respondent

CHIEF ELECTORAL OFFICER

Second Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Third Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Fourth Respondent

SPEAKERS OF THE NINE PROVINCIAL LEGISLATURES

Fifth Respondent

**ALL POLITICAL PARTIES REPRESENTED
IN THE NATIONAL ASSEMBLY**

Sixth Respondent

**ALL POLITICAL PARTIES REPRESENTED IN
THE NINE PROVINCIAL LEGISLATURES**

Seventh Respondent

Neutral Citation: *Umkhonto Wesizwe Party v Electoral Commission of SA and Others* (0039/24EC) [2026] ZAEC 06 (25 September 2026)

Coram: ADAMS J, STEYN and MANGCU-LOCKWOOD AJJ, PROFESSOR NTLAMA-MAKHANYA and PROFESSOR PHOOKO (Additional Members)

Heard: 17 June 2026

Delivered: 25 September 2026 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by publication on the website of the Supreme Court of Appeal and by release to SAFLII. The date and time for hand-down is deemed to be 12H00 on 25 September 2026.

Summary: Electoral Commission Act 51 of 1996 – Section 5(1)(b) confirms the Electoral Commission's constitutional mandate to ensure that elections are free and fair – Electoral Commission required to have electoral systems in place, which guarantee accurate election results, as declared by it – it must ensure that the elections results represent the will of the electorate – applicant (MKP) contends that National and Provincial Elections held during May 2024 (2024 NPE) were not free and fair – and that the Electoral Commission in declaring same to have been free and fair, failed in its duties – MKP therefore applied initially for an order declaring that the 2024 NPE were not free and fair as required by section 19(2) of the Constitution, read together with the provisions of the Electoral Act 73 of 1998 – MKP's case was that the Electoral Commission deliberately interfered with the functioning of the digital votes capturing and reporting system (system) – this resulted in the system malfunctioning for two hours, which, according to MKP, interfered with the election results to the prejudice of a free and fair election – Electoral Commission denies MKP's claim – there was no system 'crash', 'system downtime' or 'blackout', as the MKP maintains – Factual dispute – did the digital votes capturing and reporting system malfunction on 31 May 2024 such that it resulted in the capturing, counting and the reporting of the votes from the 2024 NPE being wholly inaccurate and skewed – dispute decided in favour of the Electoral Commission – Application dismissed – no order as to costs.

ORDER

- (1) The application is dismissed.
 - (2) Each party to pay its own costs.
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JUDGMENT

Adams J (Steyn and Mangcu-Lockwood AJJ and Professor Ntlama-Makhanya and Professor Phooko (additional members) (concurring)):

[1] In terms of the Constitution of the Republic of South Africa and the legislation enacted in terms of and pursuant thereto, the first respondent, the Electoral Commission of South Africa (Electoral Commission), is required, and legally obligated, to ensure fairness and the proper administration of free and fair elections. In particular, s 190 of the Constitution mandates the Electoral Commission to manage elections of national, provincial and municipal legislative bodies in accordance with national legislation and to ensure that those elections are free and fair. The national legislation adopted to give the Electoral Commission the necessary legislative power to perform its constitutional obligations is the Electoral Commission Act 51 of 1996 (Electoral Commission Act). Section 5(1)(b) of the said Act confirms the Electoral Commission's constitutional mandate to ensure that elections are free and fair. This requires of the Electoral Commission to have electoral systems in place during elections, which guarantee that the results of an election, as declared by it, accurately reflect and precisely represent the will of the electorate.

[2] In this judicial review application, the applicant, uMkhonto WeSizwe Party (MKP), contends that the Electoral Commission, in managing and administering the National and Provincial Elections held during May 2024 (2024 NPE) and declaring

same to have been free and fair, failed in its aforementioned duties. MKP therefore applies for an order declaring that the 2024 NPE (held on 29 May 2024) were not free and fair as required by s 19(2) of the Constitution, read together with the provisions of the Electoral Act 73 of 1998 (Electoral Act). It also applies to have reviewed and set aside the decision of the Electoral Commission to declare the 2024 NPE to be free and fair. MKP alleges that the Electoral Commission failed to manage the said elections in breach of the principle of legality. In that regard, the averment is made by MKP that the Electoral Commission, on or about 31 May 2024 during the vote capturing and counting process, deliberately interfered with the functioning of the digital votes capturing and reporting system (system). This, in turn, resulted in the system malfunctioning for two hours, which, according to MKP, interfered with the election results to the prejudice of a free and fair election.

[3] A central issue in the dispute between the parties is the incident which occurred on the morning of Friday, 31 May 2024, referred to by the parties as the 'leaderboard incident'. What happened is that midstream the vote capturing, counting and reporting process, the leaderboard at the Commission's National Results Operation Centre (ROC), as well as similar Leaderboards at the Provincial ROCs and the Commission's website and online results dashboard, experienced a technical problem. For about two hours, from 06h30 to 08h30 on the said morning, the Leaderboard at the ROC and the online dashboard failed to display results for approximately two hours. The public-facing leaderboards and results dashboards went blank or stalled – it displayed zero for all results. The leaderboard and online results dashboard were restored to full operation by 08h45.

[4] An important component of MKP's case in this review application is its contention that the Electoral Commission's deliberate interference with the digital votes capturing and reporting system has not been explained by it in terms that are credible. Therefore, the inescapable inference to be drawn is that the interference was designed to undermine a free and fair election. The deliberate interference, so the case on behalf of MKP goes, was so irrational and unjustified, from the perspective of experts in information technology systems, that it leads to the inescapable conclusion that the decision was deliberately made to undermine the

accurate recordal and reporting of the election results. Importantly, MKP contends that the Electoral Commission has failed to support its deliberate interference with the proper functioning of its system with any credible expert reports. This means, so the argument is concluded, that the opinion of MKP's expert remains unchallenged and should therefore be accepted.

[5] The Electoral Commission opposes the application on the basis that there had been no damage or loss to the election data and the system had continued to perform its votes capturing and reporting functions. MKP's case, so the Electoral Commission contends, is misconceived from a factual point of view. It relies almost exclusively on the 'leaderboard incident' on the morning of 31 May 2024. The Electoral Commission states that this reliance on this incident is wholly misplaced – MKP's complaints are premised on a misconception of the nature of the technical problem that arose. In sum, the case on behalf of the Electoral Commission is that there was no system 'crash', 'system downtime' or 'blackout', as MKP maintains.

[6] Reduced to the essentials and with a little simplification in order to assist the narrative, the issue in dispute in this application is a factual one. Simply put, did the Electoral Commission's digital votes capturing and reporting system malfunction on 31 May 2024, such that it resulted in the capturing, counting and the reporting of the votes from the 2024 NPE being wholly inaccurate and skewed. Crystallised further, the question to be considered by us is whether the explanation proffered by the Electoral Commission can and should be accepted as reasonable.

[7] There are other preliminary and peripheral issues raised by the parties, which are also required to be addressed by this Court.

[8] Firstly, on 11 June 2026 – under a week before the hearing of the application – MKP delivered a notice of intention to amend its notice of motion. In delivering the aforesaid notice of intention to amend, MKP changed tact altogether in that it indicated that it was no longer seeking a review and a setting aside of the 2024 NPE. Instead, it intended asking for declaratory relief relating to the integrity and auditability of the information and communications technological (ICT) systems used during the

2024 NPE. Importantly, MKP restated its intention to apply for a referral of certain of the disputes between the parties to oral evidence. It had initially delivered another application for referral to oral evidence during April 2025 although that initial application was based on different grounds. So, for example, the intended amended notice of motion sought an order '[d]eclaring that the evidence before the Court is insufficient to permit a final determination that the ICT systems used by the [Electoral Commission] in the 2024 elections satisfied the constitutional requirements of transparency, reliability and integrity required by ss 181, 190 and 195 of the Constitution and referring the dispute to oral evidence'.

[9] The Electoral Commission opposes the proposed amendment *inter alia* on the basis that it materially deviates from the relief sought by MKP in its original notice of motion. Moreover, so the Commission contends, the relief in the proposed amended notice of motion is not supported by the founding affidavit and it entails a fishing expedition.

[10] The second preliminary issue is in fact the application for referral of some of the disputes to oral evidence, which the Electoral Commission also opposes.

[11] We intend dealing with the foregoing issues after having considered the merits of the MKP's main application. It is our view that it is convenient to do so for the simple reason that a resolution of the preliminary issues falls into place as a result of a determination of the merits of the application.

[12] There is, however, one other aspect of the matter which needs to be dealt with before any other issues. That relates to MKP's alleged non-compliance with the procedural requirements of s 55 of the Electoral Act, which, according to the Electoral Commission, is a fatal defect, and may very well be dispositive of the matter. The Electoral Commission alleges that MKP has not complied with the mandatory procedure in s 55 of the Electoral Act in seeking to challenge the results of the 2024 NPE.

[13] The foregoing issues are to be decided against the facts in the matter as set out in the paragraphs which follow.

The Factual Matrix

[14] The applicant is MKP, a political party registered as such with the Electoral Commission. The first respondent, the Electoral Commission of South Africa, is the election management body in South Africa and the second respondent is its Chief Electoral Officer. The first and the second respondents are referred to collectively as the 'Electoral Commission'. The other respondents are all parties with a possible interest in the outcome of the litigation in the matter. None of them has, however, participated in the litigation herein.

[15] MKP's case is that the management of elections are governed by the following non-negotiable principles – transparency, reliability, honesty and integrity of election management systems and decisions of the Electoral Commission. Whatever management tools and decisions the Electoral Commission employs, so the case goes, cannot violate, breach or undermine these non-negotiable requirements – which guarantee a free and fair election.

[16] In violation of these non-negotiables, the Electoral Commission, so it is alleged by MKP, decided to deliberately interfere with a live and functioning digital votes capturing and reporting system. It is alleged that the Electoral Commission acted unlawfully. This, in turn, means that the 2024 NPE were neither free nor fair. MKP also avers that the Electoral Commission used a digital votes capturing and reporting system that is not reliable and that this caused serious doubts that it announced credible and accurate election results reflective of the will of the voters. In that regard, MKP points out that the system experienced inexplicable technical glitches. We revert to the alleged technical glitches later.

[17] Importantly, and this requires particular emphasis, MKP has no issue with the process of physical voting – up to the point when the votes were physically counted and manually recorded on the voter slips. It does however take issue with the reliability of the system which was used by the Electoral Commission to capture the manually recorded votes and the processing and the reporting of those votes.

[18] MKP's case is founded almost exclusively on an opinion and report by an Information Systems and Technology (IS & T) Expert, Dr Vusi Blessing Bongani Mhlongo (Dr Mhlongo), who holds a PhD in IS & T and a master's degree in commerce (majoring in IS & T).

[19] In his initial report, Dr Mhlongo, after assessing and evaluating all the evidence available to him, concludes that it is 'patently clear' that the Electoral Commission has not demonstrated, with any tangible proof, that the system has integrity or that it has been comprehensively tested or evaluated. The Electoral Commission, so it was contended, has instead relied on bold assertions without evidence, coupled with a report by a firm of registered Auditors, Deloitte & Touche (Deloitte), as a backing of integrity. That report does not however, according to Dr Mhlomgo, provide any such assurances. He therefore concludes that, based on a careful analysis, the Deloitte's report cannot be considered as any kind of guarantee of system or data integrity and accordingly that there is no tangible evidence to support the Electoral Commission's assertions that their system has integrity.

[20] Importantly, Dr Mhlongo expresses the opinion that what he calls the 'system downtime' – referring to the 'leaderboard incident' – was an event that exposed some aspects of the inner workings of the system. He surmises that there are one of two possibilities with respect to the Electoral Commission's explanation for the downtime. The first possibility, according to Dr Mhlongo, is that the Electoral Commission's reason / explanation given for the downtime is true, which would have the serious implication that the decision taken by the Electoral Commission to interfere with the running of the system was deeply irresponsible and unjustified. This also means, so Dr Mhlongo reasons, that there is a serious flaw with the design and functioning of the digital votes capturing and reporting system, especially as regards the manner in which it is updated and maintained.

[21] The second possibility, Dr Mhlongo states, is that the reason / explanation proffered for the downtime by the Electoral Commission is partially or wholly untrue, in which case many questions arise about: (a) the true cause(s) of the glitch; (b) the

integrity of the system; and (c) the honesty, transparency and integrity of the Electoral Commission.

[22] In either case, so the summation is concluded by Dr Mhlongo, the Electoral Commission's competence and the integrity and correct functioning of their system become significantly doubtful. That is so especially if one is to consider the gross lack of any kind of evidence supporting the assertions about the alleged integrity of the system.

[23] We interpose here to note that the Electoral Commission's digital votes capturing and reporting system dashboard, as well as the leaderboard displayed at the ROC, were the front facing interface of the system, to be contrasted with the backend, on which all of the results of the 2024 NPE were captured, stored, aggregated and reported on.

[24] Dr Mhlongo furthermore concludes (and this is his other main complaint) that, upon an analysis of the reports generated by the Electoral Commission's results dashboard at various levels – at high-level provincial results versus municipal-level results versus voting station results for both the Regional and National ballot – grave inconsistencies and serious discrepancies were uncovered. Detailed results at the lowest voting district (VD or voting station) level, according to Dr Mhlongo, did not tally with higher-level aggregated results reported by the Electoral Commission at municipal or provincial level. According to Dr Mhlongo, these result reports contained grave inconsistencies and inaccuracies and were rife with obvious and patent errors.

[25] So, for example, Dr Mhlongo draws attention to the fact that, whilst the total votes cast in any VD should be exactly equal to the sum of total valid votes plus total spoilt votes, that appears never to be the case in any of the National or Regional ballot voting station result reports observed. Specifically, the total valid votes exceeded the total votes cast for every voting station observed, sometimes by a very large number, and many by a factor of two. A specific example highlighted by him is VD 32871382, in which the total votes cast was indicated to be 1103, which is significantly less than the sum of the total valid votes, which added up to 2794 votes.

The excess in this VD is 1691 votes, which is unaccounted for by the Electoral Commission.

[26] In some of the reports, Dr Mhlongo points out that the total votes cast exceeded the registered population in the voting district. For the specific example VD 32871382 referred to above, the total votes cast was 1103, which exceeds the registered population for this VD, which is 917 – there is an excess of 186 votes over and above the registered population that are unaccounted for. He also drew attention to the fact that the National ballot voting station report and the Regional ballot voting station report for each voting station were identical. This cannot and should not be, so Dr Mhlongo points out.

[27] In sum, the discrepancies and inconsistencies found by MKP's expert were: (a) According to the result reports on the Electoral Commission election results dashboard, the sum of valid and spoilt votes exceeded the total votes cast in 23 288 voting stations, with an excess of 15 858 564 votes for the National ballot and 16 038 258 votes for the Regional ballot; (b) Total valid votes percentages exceeded by 100% the recorded votes in all voting stations, averaging 199% for National and 201% for Regional ballots; (c) There were 697 822 repeated entries for political parties with non-zero votes across both sets of reports; (d) Independent Candidates incorrectly appeared on 9 170 National ballot reports, contributing 19 302 votes to the total valid votes; and (e) In 73 voting stations, total votes cast exceeded the registered population, with a total excess of 10 983 votes.

[28] Dr Mhlongo, in conclusion, expresses the view that these foregoing discrepancies and other similar inconsistencies in the result reports found on the Electoral Commission's results dashboard, place serious doubts on and reservations about the integrity and reliability of the Electoral Commission's digital votes capturing and reporting system. According to Dr Mhlongo's information technology language, it is most likely that the code that is responsible for generating the VD reports operates incorrectly. When generating the VD reports, the relevant code has to query the database for the line items in the list of political parties / independent candidates pertaining to that report, which includes the name of each political party / independent

candidate and its corresponding number of valid votes. Unfortunately, the code fails to correctly filter the line items retrieved according to the Ballot Type, that being regardless of whether a National or Regional ballot report is being generated, it retrieves and displays both the National and Regional line items pertaining to that VD.

[29] The result of this, according to Dr Mhlongo, is that all line items pertaining to National (and Regional) reports end up appearing in Regional reports; and all line items pertaining to Regional (and National) reports, including independent candidates, end up appearing in National reports, as observed. This also results in (at most) two entries per political party in each report, one of which pertains to the Regional ballot result, and the other, the National ballot result, regardless of whether the report itself is meant to report on the National or Regional ballot results.

[30] From the foregoing, Dr Mhlongo concludes that there is evidence of malfunction in the system, which undermines the requirement of transparency and falsifies the election data. There is therefore a duty on the Electoral Commission to take adequate corrective measures to ensure that the systems perform its constitutional obligation and give effect to the rights guaranteed in s 19 of the Constitution. This, so Dr Mhlongo contends on behalf of MKP, the Electoral Commission has failed to do. What it did instead was to engage in a cover-up of the technical failures of the digital votes capturing and reporting system by deliberately giving false reports, engaging in sophistry or attacking with insults those seeking to hold them to account for their conduct.

[31] Moreover, Dr Mhlongo contends that the glaring errors in VD-level result reports, that went undetected, indicate a lack of quality assurance and testing within the Electoral Commission's ICT team, raising further concerns about the system's integrity.

[32] The Expert's second report – in a way in response to the Electoral Commission's answering affidavit – concludes that the Electoral Commission has failed to address the serious concerns about its ICT system's integrity. The absence

of a comprehensive code audit, coupled with the evident errors and vulnerabilities, leads Mr Mhlongo to assert that it is unreasonable to assume the system's integrity without concrete evidence to the contrary. He emphasised the need for a thorough audit to ensure the system's reliability and transparency, especially given the critical nature of election processes. This calls for maximum transparency of the reports that the Electoral Commission contends it has that fully explains what happened with the election system when it was interfered with – by whom and for exactly what reasons. Dr Mhlongo and MKP claim that the Electoral Commission has avoided giving this critical information on the system.

[33] This is the case on behalf of MKP, to be contrasted with that of the Electoral Commission which, as I have already indicated, is to the effect that the serious electoral irregularities alleged by MKP on the basis of suspicion and incorrect factual assumptions or conclusions, are wholly unfounded.

[34] The Electoral Commission contends that the MKP's application falls to be dismissed because the case is based entirely on the two expert reports by Dr Mhlongo, which are inadmissible. Dr Mhlongo, so the Electoral Commission submits, is not an expert in election systems and has demonstrated overt bias in these proceedings. Once Dr Mhlongo's reports are found to be inadmissible, nothing remains of the MKP's case.

[35] The application should also fail, so the Electoral Commission contends, because there is no merit in any one of the two grounds on which the case is founded.

[36] First, as regards the so-called 'leaderboard incident', when the leaderboard at the ROC and the online dashboard failed to display results for approximately two hours on the morning of 31 May 2024, the Electoral Commission contends that MKP's complaints are premised on a misconception of the nature of the technical problem that arose.

[37] Moreover, there was also nothing nefarious or irrational about the Commission's decision to run the so called 'Extract, Transform and Load' (ETL) optimisation process that led to the leaderboard incident. The ETL optimisation was

done to replicate the results data faster to the ROC leaderboard, in response to complaints from the Commission's staff at Provincial ROCs and the auditors on the slow reporting of the results. The NPE Results System continued to run and remained fully operational and uncompromised. The only issue, according to the Electoral Commission, was that a system command or flag was inadvertently and incorrectly set to 'not ready for display' during the ETL optimisation process.

[38] The Electoral Commission alleges that the audit trail on the NPE Results System and the management reports evidence that the operation of the NPE Results System and the results data were unaffected by the display flag error on the leaderboard. This is also specifically confirmed by the auditors responsible for verifying the captured results (the SNS Consortium). Deloitte's director, Mr Mautsa, also confirmed that any technical problems or errors arising downstream from the NPE Results System – including on the Commission's website and dashboard and leaderboard – would not and did not impact the integrity of the election data or the results reports and seat calculations generated by the NPE Results System as these systems do not feed into the NPE Results System.

[39] Second, as regards the inconsistencies and discrepancies identified by Dr Mhlongo in the election result reports generated by the Electoral Commission's website and online results dashboard, the Electoral Commission points out that these reports have nothing to do with the integrity of the election data and the declared election results. The reports generated on the Commission's website are separate from the Results System. Moreover, other reporting functions on the website and dashboard reflect the results without the filtering omission. All the results are thus readily discernible on its website and online dashboard, so the Electoral Commission avers, notwithstanding the filtering error.

[40] In opposing MKP's application, the Electoral Commission places substantial reliance on an independent recalculation of the 2024 NPE results, conducted by Deloitte and Touche South Africa (Deloitte) dated 17 April 2025. That report presents the findings of the independent recalculation of the 2024 NPE results based on the transactional vote records provided by the Electoral Commission. The objective was

to independently determine the total votes per political party and seat allocations at different electoral levels and compare them with the official results as provided by the Commission.

[41] Deloitte reported that no variances or exceptions were found in the recalculation process and the report concluded with the following final comments:

‘The recalculation process was successfully completed, ensuring that all election results were correctly processed, validated, and matched against official data.

- Data validation steps confirmed no discrepancies.
- During the election there was a period when the results dashboard went down, a request was made to confirm whether data was being consistently captured in the database specifically during the period between 06:00 and 09:00 on 31 May 2024. No discrepancies in the processing of voting transactions were noted during this period. A sample set of voting transactions during this period may be viewed under Appendix I.
- Seat allocation calculations aligned with official seat allocation for National Assembly and Provincial Legislature.’

[42] As submitted on behalf of the Electoral Commission, a proper reading of the Deloitte report confirms that it entailed both a functional review and a data integrity review of the NPE Results System. It involved end-to-end system testing (using test scenarios and applying the seat calculation models); a security review; and the review and retesting of ‘fixes’, that being actions taken to remediate risks identified during the review process.

[43] Deloitte documented its findings and observations, which were tabled for discussion and actioning with management at the Electoral Commission on a weekly basis. Where risks were identified, fixes were implemented and then re-tested. Overall, the Deloitte assessment process spanned over six weeks. The Electoral Commission accordingly contends that the constructive process of system review and testing, adaptation and re-testing, is clearly reflected in the report and should trump the report by Dr Mhlongo.

[44] With that factual background in mind, we now turn our attention to a discussion and an analysis of the issues before us.

Section 55 of the Electoral Act

[45] The Electoral Commission contends that MKP, in seeking to challenge the results of the 2024 NPE, has not complied with the mandatory procedure in s 55 of the Electoral Act 73 of 1998 (Electoral Act).

[46] In *African Transformation Movement v Electoral Commission of South Africa and Others*,¹ this Court held that non-compliance with s 55 is ‘a fatal defect’ and described the scheme of s 55 as follows:

‘[33] [Section 55] provides that where a party wishes to challenge the results, it must first lodge an objection in terms of s 55(1). The scheme of the section requires that any objection that is material to the determination of the final result of the election and that concerns voting or the counting of votes must first be lodged with the Commission (s 55(1)). The objection must be lodged in the prescribed manner and within the time stipulated in s 55(2) unless the Commission condones the late objection under s 55(3).

[34] Once an objection has been lodged, the Commission must decide the objection and notify the objector, and any other parties involved in the objection of the decision (s 55(4)). An objector or other party involved in the objection and who feels aggrieved by the decision of the Commission, may appeal to the Electoral Court in the prescribed manner against the Commission’s decision (s 55(5)). And the Electoral Court must consider and decide the appeal in the prescribed manner (s 55(6)).

[35] No appeal is competent against a declaration of results unless the procedure followed in terms of s 55 has been exhausted. The Electoral Court is only empowered to decide an appeal once the objection procedure has been exhausted, and the Commission has taken a decision in response. It is the Commission’s decision pursuant to a s 55 objection that may be appealed to this Court, not “the declaration of the election results”.’

[47] *In casu* MKP failed to follow the prescribed procedure. Just as the African Transformation Movement had sought to do, MKP presents its challenge as a review of the Commission’s decision to declare the results as free and fair. It thereby seeks to avoid the consequences of its failure to follow the mandatory objections procedure in s 55. However, as this Court held in *African Transformation Movement*, no

¹ *African Transformation Movement v Electoral Commission of South Africa and Others* 2025 JDR 0229 (EC) (*African Transformation Movement*) paras 33-35.

competent review lies in relation to the declaration of results. The process is: results-objections-appeal.

[48] MKP's application to review the declaration of results is thus not competent in law. Therefore, insofar as MKP applies to have set aside the 2024 NPE results, the application must be dismissed for this reason alone. However, insofar as it applies for declaratory relief in relation to the integrity of the Electoral Commission's system, MKP's cause is not defeated by this point.

The Merits of the Application

[49] As I have indicated *supra*, the general tenet of the case on behalf of MKP is that the Electoral Commission's explanation for the 'leaderboard incident' is sorely lacking, which gives rise to the ineluctable conclusion that there was something untoward happening behind the scenes. In other words, the case is based on inferential reasoning.

[50] MKP claims that there is 'in fact tangible proof that the system does not have integrity'. It further claims that there was a 'deliberate decision to undermine the accurate recordal and reporting of the election results' and that it is 'clear that the digital votes capturing and reporting system of the Electoral Commission could be exposed to malignant intentions'.

[51] This reasoning is however, in our view, flawed for the following reasons.

[52] The Electoral Commission explained that the audit trail on the NPE Results System evidences that the operation of the NPE Results System and the results data were unaffected by the display flag error on the leaderboard. The audit trail is a system-generated record of every input or change on the Results System with the time it occurred (to the millisecond). The Commission attached an extract of the audit trail for the MKP's results on the national ballot over the time that the ETL optimisation process was being implemented and the leaderboard and dashboard were displaying zero – that being from 6 am on Friday, 31 May, to 9 am (the leaderboard and

dashboard were restored to full operation by 08.45). The audit trail indicates that the results continued to be captured and edited over this period, unaffected.

[53] The Commission also explained that the management results reports generated on the NPE Results System were not affected by the display error as they are not dependent on the 'ready for display' flag. The Commission attached two management results reports (for the National Ballot and Regional Ballot) drawn at 07:36 on Friday, 31 May 2024, when the leaderboard and results dashboard were displaying zero. These reports show the regular uploading of election data, and thus also evidence that no data was lost when the leaderboard and dashboard displayed zero.

[54] Moreover, there is confirmation by the auditors responsible for verifying the captured results during the 2024 NPE, SNS Consortium, that the technical problem that arose with the leaderboard on 31 May 2024 did not impact the results audit and verification process. Also, the confirmation by Deloitte that any technical problems or errors arising downstream from the NPE Results System – including on the leaderboard and the Commission's website and dashboard – would not impact the integrity of the election data or the results reports and seat calculations generated by NPE Results System, as these systems do not feed into the NPE Results System.

[55] The Electoral Commission also explains in detail why the 'leaderboard incident' happened. The important part of the explanation is as follows: -

'The entire NPE Results System – i.e. its functional system (online transaction programming system) and its reporting system, including the national data warehouse – continued to run and remained fully operational and uncompromised. The only issue was that a system command (or flag) was inadvertently set to 'not ready for display' during the [Extract, Transform and Load] ETL optimisation process.

The disaster recovery mechanism that the Commission had in place was thus not necessary or activated. Simply put, there was nothing "to recover" as all election data remained intact and the NPE Results System continued to operate without interruption.'

[56] The Electoral Commission has explained the reasons for the ETL optimisation process. MKP's complaint about the Commission's decision to conduct the ETL

optimisation process – and specifically, its allegation that ‘there were absolutely no complaints about [the leaderboard’s] update frequency’, and hence that the decision was ‘unjustified’ – is incorrect.

[57] As alleged by the Electoral Commission:

‘Within the first 24 hours since the counting of results commenced, only 55% of the results had been reported as completed. This was in stark contrast to the previous two national and provincial elections: in 2014, 92% of the results had been reported as completed within the first 24 hours; and 90% in 2019. There was, therefore, an appreciable delay in the completion and reporting of results as compared to previous elections.

While some delay was to be expected in the 2024 NPE – as there was a greater volume of ballots to be processed, with the introduction of a third ballot – the Commission was nevertheless concerned to ensure that the results were declared within a period that is as short as reasonably possible as per section 190(1)(c) of the Constitution, to maximise transparency in the elections process.’

[58] The Commission explained further that:

‘[T]he Commission’s national team at the National ROC received complaints from the Commission’s staff at Provincial ROCs on the slow reporting of their results that had been uploaded at municipal level. Similarly, interaction with the auditors in the national ROC, provincial ROCs and the local offices indicated that the audit functions were complete, yet the results were not reporting on the leaderboard.

Accordingly, in the evening of Thursday, 30 May 2024, the Commission’s Electoral Matters team requested the Commission’s ICT: Business Systems team to investigate ways of replicating the results data faster to the ROC leaderboard. At that stage, the data warehouse ETL job was scheduled to run every 30 minutes, and required 30 and 35 minutes to process – in other words, more than 60 minutes for updates to display. Since adjusting the ETL job schedule was a simple process, and one that had been tested in the dry-run, the Commission’s ICT: Business System team took the operational decision to implement the change.’

[59] Moreover, the Electoral Commission also produced evidence to demonstrate that the leaderboard incident had no impact on the capturing and verification of the election results. Specifically: (a) an extract of the audit trail for the MKP’s results on the national ballot over the time the ETL optimisation process was being implemented

and the leaderboard and dashboard were displaying zero, which audit trail indicates that the results continued to be captured and edited over this period, unaffected; and (b) the management results reports generated on the NPE Results System, which also show the regular uploading of election data, and evidence that no data was lost at the time that the leaderboard and dashboard displayed zero.

[60] None of this evidence was meaningfully challenged or disputed.

[61] This explanation is eminently sound and makes sense. We are at a loss to understand the basis on which same is rejected out of hand by Dr Mhlongo. The point about the explanation is that it confirms, through objectively ascertainable and verified facts, that the NPE Results System and the data therein were unaffected by the 'leaderboard incident'. In our view, Dr Mhlongo has no justification or merit in doubting the integrity of the audit trail maintained on the NPE Results System.

[62] Importantly, the audit trail is not a stand-alone record. It is supported by the external auditors' verification of the captured election results (with audit reports completed by some 600 auditors, for each of the three results slips for every voting district in the country), as well as the actual scanned results slips to which the MKP has had access via a link to the ROC database. Additionally, there are two copies of the NPE Results System: a copy of the National Database is maintained and protected through a disaster recovery mechanism and a copy of the National Database is also maintained at the Electoral Commission's national office, to serve as an additional security safeguard for the results. A manipulation of the audit trail would require access to and manipulation of both copies of the NPE Results System. It stands to reason that the feasibility of this is remote, if not impossible.

[63] In that regard, sight should not be lost of the fact, as alluded to above, that MKP has no issue with the process of physical voting – up to the point when the votes were physically counted and manually recorded on the voter slips. The importance of this point being that it forms the basis of the audit trail, which verified the integrity of the system.

[64] As for the anomalies and discrepancies in certain VD-level reports downloadable from its website or dashboard, the Electoral Commission acknowledged and readily accepted that there were errors in those reports. It explained that this was the result of a filtering omission, caused by a website coding error. The effect of the filtering omission is that, for certain VD-level reports, the votes for both the National Ballots and the Regional Ballots are shown unfiltered, when each report ought to have reflected only the votes cast on one of these ballots. The filtering omission on the VD-level reports is readily discernible and 'obvious' (as Dr Mhlongo himself puts it). Other results reporting functions on the Commission's website and dashboard were not impacted by this filtering omission. This means that the error can be readily identified and corrected by using other results reporting functions on the website and online dashboard.

[65] The critical point, however, as contended by the Electoral Commission, is that the filtering omission in the website coding has no bearing on the integrity of the NPE Results System or the election results. As the Commission explained, the declared results are based on the results that are captured, audited, collated and reported on the NPE Results System, which is separate and functionally independent of the website and online dashboard.

[66] The Electoral Commission explains the 'inconsistencies' in the result reports generated by the website by reference to the architecture of the NPE Results System. The critical fact, as contended on behalf of the Electoral Commission, is that the declared results are based on the results that are captured, audited, collated and reported on the NPE Results System, which is separate from and functionally independent of the online website and dashboard. Thus, notwithstanding the obvious filtering errors in certain VD-level reports generated on the website, these have no bearing whatsoever on the integrity of the declared election results.

[67] MKP and its expert reject this reasonable explanation, which again is difficult to understand. The simple point of the explanation is that the architecture of the NPE Results System means that the reporting of results on the leaderboard has no impact on the capturing, auditing and verification of the election results. That is an

explanation which can and will be accepted by a reasonable mind. Similarly, the Electoral Commission's explanation that its website and dashboard were ancillary front facing reporting systems, which are not a part of the backend NPE Results System is undisputed. There is no reason why same should not be accepted.

[68] In any event, the Electoral Commission addressed, point by point, each of the specific findings in Dr Mhlongo's report of alleged 'grave inconsistencies' in the VD-level reports downloaded from the website or dashboard. The Commission explained that generally these inconsistencies resulted from the same filtering error referenced above. That explanation is to the effect that both the National Ballot and Regional Ballot results are included in the VD-level reports selected for the National Ballot or Regional Ballot, with consequent errors in the number of 'Total Valid Votes' on these reports.

[69] As for the fact that from these reports, Dr Mhlongo identifies 73 voting stations – out of a total of 23 292 – in which the number of total votes cast on either the National Ballot or Regional Ballot, or both, exceeded the registered population in the voting station, the Electoral Commission explains this supposed anomaly with reference to s 24A of the Electoral Act, which allows voters to vote outside the voting station where they are registered if certain requirements are met. Dr Mhlongo identifies 10 983 votes that he describes as 'anomalous excess votes'. The Commission demonstrates the fallacy in Dr Mhlongo's argument by pointing out that in only thirty-five voting stations the total number of section 24A approved voters – as per National Ballot (NB) and Regional Ballot (RB) results slips – exceeds the number of alleged excess votes. Therefore, it cannot be accepted that there were unexplained excess votes.

[70] The Electoral Commission therefore submits that there are no 'grave inconsistencies' in the 2024 NPE results. We agree. It has not been demonstrated that the NPE Results System lacks integrity.

[71] In sum, we conclude that insofar as there is a factual dispute between MKP and the Electoral Commission in relation to the integrity and the reliability of the digital

votes capturing and reporting system, such a dispute should be decided in favour of the Commission. The version of the Commission based on proven and undisputed facts is to be preferred over the version of MKP, which is based on inferences. The inferential reasoning employed by MKP falls flat at the foundation level in that the premise on which that reasoning is based, in particular the expert report, are not sound.

[72] Although the applicable test as per *Plascon-Evans Paints Ltd v Van Riebeeck Paints*,² to be applied to the evidence before us is lower, we are of the view that the version of the Electoral Commission is more probable than that of MKP. That test in the context of this opposed application based on the principle in *Plascon Evans*, requires of us to accept the version of the Electoral Commission unless it is so far-fetched and untenable that this Court can reject it out of hand. Put differently, the version of the Commission on the facts cannot and should not be rejected by this Court out of hand, unless it is so patently implausible and far-fetched to be rejected on the papers. On the basis of this principle, the version of the Electoral Commission should prevail.

[73] The application therefore falls to be dismissed, including any application for declaratory orders relating to the integrity of the Electoral Commission's digital votes capturing and reporting system.

[74] That brings us back to the preliminary issue alluded to above, which we intend making short thrift of.

² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A); at 634-635 held as follows: -

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact ... Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers ...' (*Plascon Evans*).

The Application for Referral to Oral Evidence

[75] Rule 11(2)(e) and (f) of the Electoral Court Rules sets out that ‘the Court may, whenever it deems appropriate ... direct that oral evidence be heard on specified issues’. Rule 6(5)(g) of the Uniform Rules of Court also regulates when referral to oral evidence is warranted. The Court will do so ‘with a view to ensuring a just and expeditious decision’, and also only ‘on specified issues’.

[76] Case law has crystallised the principles governing referrals to oral evidence. Those principles are as follows.

[77] The Court must examine the affidavits to determine whether a real or genuine dispute of fact exists that cannot be satisfactorily determined without the aid of oral evidence. A dispute of this nature ‘can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed’.³ A Court must assess the credibility and reliability of the parties’ respective averments, having regard to whether the deponent has personal knowledge thereof and whether the averments are supported by evidence.

[78] The test for whether a real or genuine dispute exists is ‘a stringent one not easily satisfied’.⁴ The high-threshold test means that bare denials of allegations and vague and insubstantial allegations are insufficient to raise the kind of dispute of fact that should be referred for oral evidence.⁵ Allegations that are far-fetched, clearly untenable or palpably implausible may be rejected on the papers.⁶

[79] Importantly, a referral to oral evidence is not a mechanism for a party to simply amplify affidavits by additional evidence where the affidavits themselves, even if

³ *Wightman t/a JW Construction v Headfour (Pty) Ltd* [2008] 2 All SA 512; [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at 375F-376B.

⁴ *National Scrap Metal (Cape Town) (Pty) Ltd and Another v Murray & Roberts Ltd and Others* 2012 (5) SA 300 (SCA); 2012 (5) SA 300 (SCA) at 307F.

⁵ *Peterson v Cuthbert Co Ltd* 1945 AD 420 at 428-9; *King William’s Town Transitional Local Council v Border Alliance Taxi Association (BATA)* 2000 (3) BCLR 295; 2002 (4) SA 152 (E) at 156I-J.

⁶ *Administrator, Transvaal & Others v Theletsane* (1991) 12 ILJ 506 (A); 1991 (2) SA 192 (A) at 197A-B.

accepted, do not make out a clear case, but leave the case ambiguous, uncertain or fail to make out a cause of action at all.⁷

[80] If an applicant chooses not to respond to factual allegations outlined in the answering affidavit, they do so at their own peril and run the risk of the application to refer the matter to oral evidence being refused.⁸

[81] Moreover, only 'specified issues' may be referred to oral evidence. General referral to oral evidence is appropriate only where a factual dispute has a 'narrow compass' and can be 'expeditiously disposed of' where the disputed issues are 'clearly defined', 'comparatively simple, and capable of 'speedy determination'.⁹

[82] The timing of the application for referral to oral evidence also matters. A court will permit an applicant to apply for referral to oral evidence at a late stage only in exceptional circumstances.¹⁰ Typically, an application for a referral to oral evidence should be made *in limine* and not when an applicant realises that they are failing to convince the court on the papers.

[83] There is a high bar for referral to oral evidence, for good reason. The Court must guard against the abuse of court process and ensure that referrals to oral evidence are not roving inquiries, fishing expeditions and employed as delaying tactics. As the SCA held in *Wevell Trust and Others*,¹¹ the Court must be '... astute to prevent an abuse of its process by an unscrupulous litigant intent only on delay or a litigant intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there was one'. This approach

⁷ *Liss Shoe Co (Pty), Ltd v Moffett Building & Contracting (Pty), Ltd* 1952 2 All SA 425 (O); 1952 (3) SA 484 (O).

⁸ *Lombaard v Droprop CC and Others* [2010] ZASCA 86; [2010] 4 All SA 229 (SCA) 2010 (5) SA 1 (SCA) at 10D–E.

⁹ *Standard Bank of SA Ltd v Neugarten* 1987 (3) SA 695 (W) at 699C.

¹⁰ *Law Society, Northern Provinces v Mogami and Others* [2009] ZASCA 107; [2010] 1 All SA 315 (SCA); 2010 (1) SA 186 (SCA) para 23.

¹¹ *Minister of Land Affairs and Agriculture v D&F Wevell Trust and Others* [2007] ZASCA 153; [2007] SCA 153 (RSA); 2008 (2) SA 184 (SCA) 205B–C.

is necessary to ensure that the effective functioning of the Court is not ‘hamstrung and circumvented by the most simple and blatant stratagem.’¹²

[84] After launching these proceedings on 3 October 2024, MKP, for the first time on 7 April 2025, applied for a referral to oral evidence. Its interlocutory notice of motion of that date indicated that MKP intended applying for an order in the following terms:

‘Directing that oral evidence be heard, in respect of the reliability of the digital votes capturing and reporting system that was employed by the first and second respondents to manage the National and Provincial Elections in 2024, in terms of Rule 6(5)(g) of the Uniform Rules of Court, read with Rule 11(2)(3) of the Rules of the Electoral Court.’

[85] In its founding affidavit in support of that interlocutory application, MKP elaborates on the relief it seeks and states that referral to oral evidence is sought on the following issues: (a) Dr Mhlongo’s expertise and objectivity; (b) the integrity of the Electoral Commission’s ICT system; and (c) grave inconsistencies and errors in VD-level reports.

[86] More recently, on 11 June 2026, in its notice of intention to amend its notice of motion, MKP indicated that it intended applying for a referral to oral evidence order in the following terms: -

‘(2) Declaring that the evidence before the Court is insufficient to permit a final determination that the ICT systems used by the IEC in the 2024 elections satisfied the constitutional requirements of transparency, reliability and integrity required by sections 181, 190 and 195 of the Constitution and referring the dispute to oral evidence.’

[87] On the basis of the above principles, we conclude that both these applications for referral to oral evidence are ill-founded. As contended by the Electoral Commission, MKP’s application for referral to oral evidence violates most, if not all of the above principles.

¹² *Soffiantini v Mould* [1956] 4 All SA 171 (E); 1956 (4) SA 150 (E) at 154G-H.

[88] First and foremost, the issues which MKP requires to have referred to oral evidence are not ‘specified issues’. They are in the nature of a general referral to oral evidence, which is appropriate only where the factual dispute has a ‘narrow compass’ and can be ‘expeditiously disposed of’. Here, the issues are in fact the main dispute between the parties. By no stretch can it be said that these issues which MKP applies to have referred to oral evidence, are ‘clearly defined’, ‘comparatively simple’ or capable of ‘speedy determination’. In fact, the referral would traverse the entire gamut of the main application and beyond.

[89] Moreover, as we have already found, MKP’s case is premised on inferences and suspicions unsubstantiated by facts. In fact, as held *supra*, the inferences which MKP urges the Court to draw fly in the face of undisputed and unchallenged objectively verifiable facts. This means that MKP, in applying for a referral to oral evidence, is attempting to amplify its affidavits and to make out a case where there is none.

[90] For all these reasons, MKP’s applications to have certain issues referred to oral evidence are dismissed.

MKP’s Application to Amend its Notice of Motion

[91] On 11 June 2026 – about a week before the hearing of the main application before us – MKP delivered a notice of intention to amend its notice of motion, indicating that the intention is to substitute paras 1 to 4 of the original notice of motion with the following paragraphs:

- ‘(1) Declaring that the IEC failed to adequately demonstrate the integrity and auditability of the ICT systems used during the 2024 election.
- (2) Declaring that the evidence before the Court is insufficient to permit a final determination that the ICT systems used by the IEC in the 2024 elections satisfied the constitutional requirements of transparency, reliability and integrity required by sections 181, 190 and 195 of the Constitution and referring the dispute to oral evidence.
- (3) In the alternative to the above, directing the IEC to undergo forensic investigation. In this regards, the IEC is directed to appoint:
 - (a) an independent forensic auditor;
 - (b) an independent cybersecurity specialist;

- (c) an independent election-systems expert.
- (4) The Forensic investigation must include examination of:
 - (a) production environment records;
 - (b) source-code repositories;
 - (c) audit trails;
 - (d) deployment logs;
 - (e) change-management records;
 - (f) cybersecurity controls.
- (5) Directing the IEC to produce the following:
 - (a) Records concerning the outage
 - (i) Incident reports;
 - (ii) Deployment records;
 - (iii) Audit logs;
 - (iv) Change-management records.
 - (b) System assurance records
 - (i) Testing reports;
 - (ii) Quality assurance reports;
 - (iii) Vulnerability assessments;
 - (iv) Independent audits.
 - (c) Governance documentation
 - (i) Approvals;
 - (ii) Risk assessments;
 - (iii) Change-control decisions.
 - (d) A declaration that the constitutional obligation to conduct free and fair elections include an obligation on the IEC to demonstrate the integrity, reliability, audibility and transparency of the ICT systems used to capture, process and declare election results.
 - (e) Directing the IEC to:
 - (i) Commission an independent audit;
 - (ii) Publish recommendations;
 - (iii) Implement corrective measures;
 - (iv) Report to the court.'

[93] The Electoral Commission objects to the proposed amendment on the basis that the Rules of the Electoral Court do not provide for the amendment of a notice of motion. Rule 12 provides that, when the rules are silent on a particular procedure, the party wishing to refer a matter to the Court which the rules do not address must

inform the Secretary of the Court and seek directives without delay. The applicant is not permitted to invoke the Uniform Rules of Court whenever it wishes without judicial supervision. The applicant has not obtained any directive under Rule 12 for the amendment of the notice of motion. The applicant's notice of 11 June 2026 is irregular, so the Electoral Commission contends

[94] The Electoral Commission also contends that the proposed amendment is an abuse of process, is *mala fide* and intended to delay the determination of the application. It is yet another dilatory tactic on the part of the applicant in its litigation challenging the results of the 2024 NPE.

[95] Moreover, so the Electoral Commission avers, the proposed amendment materially changes the relief MKP sought in its notice of motion. The relief in the proposed amended notice of motion is not supported by the founding affidavit. In effect, so the contention goes, MKP seeks to abandon its case before Court and to make a new case in the absence of supporting facts. Furthermore, the Electoral Commission contends that the proposed amendment is seriously prejudicial in that the Commission has already opposed and answered to three applications brought by MKP (the first in the Constitutional Court and two in this Court). The prejudice the Commission stands to suffer if the amendment were allowed cannot be cured by a postponement or compensated by a costs order. The Commission requires finality in this dispute, to put an end to MKP's unfounded maligning of its conduct of the 2024 NPE and undermining of the declared election results.

[96] Lastly, it is contended on behalf of the Electoral Commission that finality in election disputes is in the public interest, as delayed and prolonged election disputes threaten to undermine public trust in elections, the legitimacy of the democratic system and the democratically elected government. What is more, the notice to amend was filed on the eve of the hearing, more than 18 months after pleadings had closed (in December 2024) and a year after written submissions were filed in the main application (in April 2025). This Court directed on 9 March 2026 that no further postponements or removals of this matter will be accommodated.

[97] A portion of the proposed amended notice of motion, so the Electoral Commission argues, also seeks to relitigate MKP's rule 35(12) application which this Court has already dismissed, together with the applicant's consequent application for leave to appeal.

[98] For all these reasons, the Electoral Commission argues that MKP's application for leave to amend should be rejected.

[99] We disagree. A court hearing an application for an amendment has a discretion whether or not to grant it, a discretion which must be exercised judicially. The primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done. The general approach to be adopted in applications for amendment has been set out in numerous cases. The general rule is that an amendment will not be allowed if the application to amend is made *male fide* or if the amendment will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement.¹³

[100] There is, in our view, no prejudice to be suffered by the Electoral Commission if the amendment is allowed. The fact that, according to the Commission, MKP is not entitled to the relief sought in the amended notice of motion is not justification for refusing the granting of leave to amend.

[101] Moreover, we do not accept the contention by the Electoral Commission that MKP seeks to introduce a new case under the guise of an amendment. MKP does not seek to introduce new factual allegations and relies on the averments made in its papers in the application. It relies on precisely the same factual matrix that has always formed the subject matter of these proceedings. What has changed is not the factual foundation of the case but the relief sought in consequence of the disputes that have emerged from the Commission's answering papers and the expert evidence. As contended by MKP, the proposed amendment therefore narrows rather than expands the dispute. Instead of inviting the Court immediately to determine the ultimate validity

¹³ *Moolman v Estate Moolman* 1927 AD 133; 1927 CPD 29 at 29.

of the election, MKP in its amended notice of motion seeks relief directed at resolving the disputed issues concerning the integrity, reliability and auditability of the ICT systems upon which the declaration of election results depended.

[102] For these reasons, MKP should be granted leave to amend its notice of motion. And it is therefore ordered that MKP's notice of motion is amended in accordance with its notice of intention to amend dated 11 June 2026.

Other Issues raised by the Parties and Conclusion

[103] In light of our factual findings made and legal conclusions reached hereinbefore, MKP's application for the relief sought in its amended notice of motion does, however, fail to be dismissed. This includes the declaratory relief sought relative to the integrity, reliability and auditability of the ICT systems upon which the declaration of election results depended, as well as the application for the referral to oral evidence of certain issues.

[104] In light of our factual findings above, MKP has not made out a case for the declaratory relief. Its application for a referral to oral evidence should also fail. As we have already found, having regard to trite legal principles relating to the referral to oral evidence, the relief sought by MKP is not competent. No case is made out for the other relief sought in the amended notice of motion.

[105] A number of other issues have also been raised by the parties. Those include the admissibility of the expert testimony of Dr Mhlomo on the basis of his alleged bias and his supposed lack of expertise in the required field. The Electoral Commission also alleged that there has been an abuse of the process of this Court by MKP. In light of the factual findings made by us based on the approach to be adopted in assessing the facts in opposed applications, we do not believe it necessary to deal with any of these disputes. We must however say that, in our view, the contention by the Electoral Commission that the evidence of Dr Mhlomo should be ruled inadmissible on the basis of his alleged bias and lack of relevant expertise, is not legally sustainable. These considerations go to the probative value of the expert testimony and not to whether or not it is to be excluded altogether.

[106] In all the circumstances, MKP's application falls to be dismissed.

Costs

[107] The award of costs is a matter which is within the discretion of the Court considering the issue of costs. This discretion must be exercised judicially, having regard to all the relevant considerations. One such consideration is the principle, in line with *Biowatch Trust v Registrar, Genetic Resources, and Others*,¹⁴ that in general in this Court, an unsuccessful party is not ordered to pay costs. But this is not an inflexible rule, and it can be departed from where there are strong reasons justifying such departure, such as in instances where the litigation is frivolous or vexatious.

[108] In that regard, we have been urged by the Electoral Commission to grant a punitive costs order against MKP in relation to both the main application and the applications for referral to oral evidence, on the basis that the litigation herein was conducted vexatiously and there was an abuse of court process. The Commission contends that MKP's conduct in this application – and in the context of the litigation history – is undoubtedly 'extraordinary' and 'worthy of a court's rebuke'.

[109] We are not persuaded. The foregoing general rule normally applied in this Court should not be departed from. Each party should therefore bear its costs.

Order

[110] In the result and for these reasons, the following order is granted:

- (1) The application is dismissed.
- (2) Each party to pay its own costs.

¹⁴ As per the *ratio* in *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC), in which it was held that private parties that lost in constitutional litigation against the State should not as a rule be mulcted in costs. This means that when a private party sought to assert a constitutional right against the government and failed, each party should bear its own costs.

L R ADAMS
JUDGE OF THE ELECTORAL COURT
Bloemfontein

Appearances

For the Applicant: T Masuku SC, M Simelane and N Njiyako
 Instructed by: J G and Xulu Incorporated, Sandown,
 Sandton

For the First and Second Respondents: W Trengove SC and J Bleazard (Heads of
 Argument prepared by T Ngcukaitobi SC
 and J Bleazard)
 Instructed by: Moeti Kanyane Attorneys,
 Centurion, Pretoria

For the Third to Seventh Respondents: No appearance
 Instructed by: No appearance