

IN THE ELECTORAL COURT OF SOUTH AFRICA

HELD AT BLOEMFONTEIN



**Reportable
CASE NO: 007/20 IEC**

In the matter between:

PLAASLIKE BESORGDE INWONERS

APPLICANT

and

INDEPENDENT ELECTORAL COMMISSION

FIRST RESPONDENT

DEMOCRATIC ALLIANCE

SECOND RESPONDENT

AFRICAN PROGRESSIVE MOVEMENT

THIRD RESPONDENT

GOOD PARTY

FOURTH RESPONDENT

VRYHEIDSFRONT PLUS

FIFTH RESPONDENT

AFRICAN NATIONAL CONGRESS

SIXTH RESPONDENT

ECONOMIC FREEDOM FIGHTERS

SEVENTH RESPONDENT

AL JAMA-AH

DANIEL ELDARICH HANNES



ROBURTO ROWAN POTTS

TENTH RESPONDENT

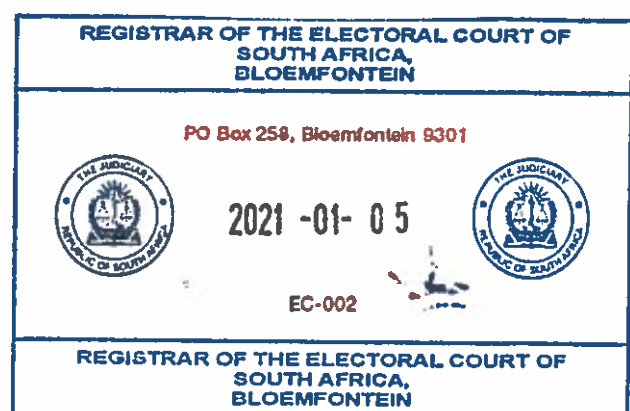
GEORGE MUNICIPALITY

ELEVENTH RESPONDENT

MR GERRIE PRETORIUS

TWELFTH RESPONDENT

Summary: Electoral law – application seeking declaratory relief that the outcome of the by-elections for four wards in the George Local Municipality namely, wards 8, 14, 17 and 27 be declared null and void – various complaints raised by applicant – Court finding that applicant failed to show that the conduct it complained of either happened or that wherever it occurred, was material to have rendered the by-elections not to be free and fair – Court unanimously dismissed the application with no order as to costs.



JUDGMENT

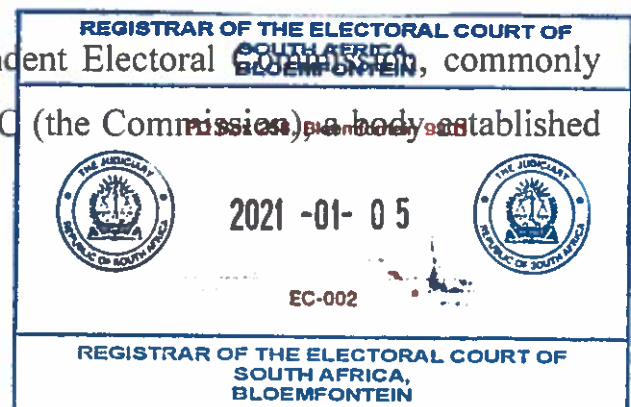
Mbha JA (Lamont J, Shongwe AJ and Ms Pather concurring):

[1] On 19 November 2020, the applicant launched an application seeking declaratory relief that the outcome of the local government elections (the by-elections) for four wards in the George Local Municipality namely, wards 8, 14, 17 and 27 (the affected wards), be declared null and void. The said by-elections took place on 11 November 2020.

[2] Pursuant to directives issued by this Court, extensive papers in opposition were filed by the first and fourth respondents. The other cited parties chose either to abide by the decision of the Court or not to participate in these proceedings. The applicant duly filed a reply to the opposing affidavits. On 10 December 2020, having read the papers and considered the matter, the Court unanimously granted an order dismissing the application with no order as to costs, and that reasons would follow in due course. These are the reasons for that order.

[3] The applicant is a political party registered in terms of the Electoral Commission Act 51 of 1996 (the Electoral Commission Act), and the Electoral Act 73 of 1998 (the Electoral Act). It contested and duly fielded candidates in the by-elections for the affected wards.

[4] The first respondent is the Independent Electoral Commission, commonly known as the Electoral Commission or IEC (the Commission), a body established

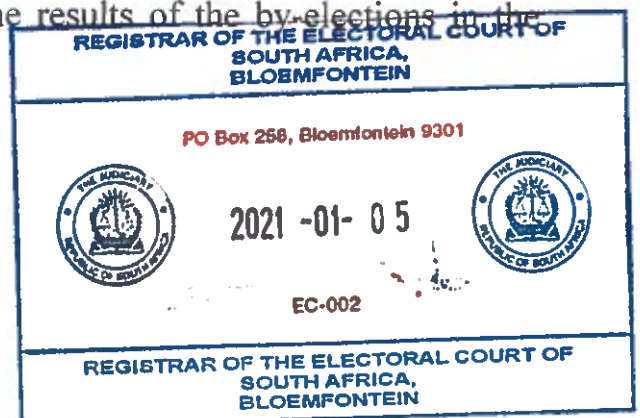


pursuant to Chapter 9 of the Constitution of the Republic Act 108 of 1996 (the Constitution) with its primary objective set out in s 4 of the Electoral Commission Act as being to strengthen constitutional democracy and promote democratic electoral processes. The Constitution obliges the Commission to manage elections in accordance with national legislation, in this case inter alia, the Local Government: Municipal Electoral Act 27 of 2000 (the Municipal Electoral Act or MEA).

[5] The eleventh respondent, George Municipality, is cited as the municipality within which the relevant by-elections were held, and the remainder of the parties are political parties and independent candidates who contested the by-elections.

[6] The basis of the applicant's application is briefly, that during the aforesaid by-elections, the applicant's representatives and candidates witnessed various incidents of discrepancies, wrongs and irregularities which were material and therefore justify the setting aside of the outcome of the by-elections. The said irregularities, the applicant maintains, had the effect of rendering the by-elections not to be free and fair and accordingly justify the setting aside of the outcome thereof.

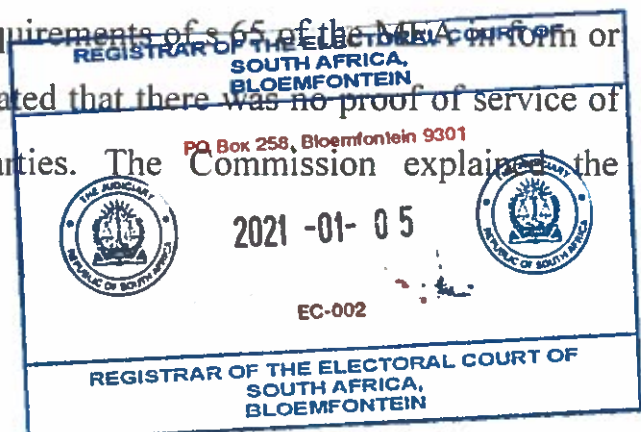
[7] It is necessary to understand the context and the factual matrix which gave rise to the dispute. It is common cause that the Commission organised and conducted by-elections in 95 wards across the country on 11 November 2020, including in the affected wards in which the applicant fielded candidates. On 12 November 2020, the Commission declared the results of the by-elections in the affected wards, which indicated that:



- (a) The second respondent, the Democratic Alliance (DA), won the by-election in ward 8 with 559 (36.20%) of the 1544 valid votes cast. The applicant's candidate came second with 307 votes. CORRECT
- (b) The DA won the by-election in ward 14 with 481 (32.86%) of the 1464 valid votes cast. The fourth respondent's (Good Party) candidate was second with 425 votes and the applicant's candidate came third with 350 votes.
- (c) The DA also won the by-elections in ward 17 with 635 (37.69%) of the 1685 valid votes cast. The Good Party candidate came second with 462 votes and the applicant's candidate came third with 322 votes; and
- (d) The Good Party won the by-election in ward 27 with 595 (37.63%) of the 1581 valid votes cast. The DA candidate came second with 498 votes and the applicant's candidate came third with 402 votes.

[8] On 13 November 2020, the applicant sent an email to the Commission in which it raised a number of objections, purportedly in terms of s 65 of the MEA, against various practises that occurred during the by-elections in the affected wards; that the applicant had lodged various objections with the presiding officers and officials of the Commission and that while in some instances the applicant had received feedback, in other instances it had not received written answers. I will deal specifically with the various practises complained of later in the judgment.

[9] On 13 November 2020 the Commission responded to the applicant's aforementioned email and pointed out that the various complaints that purported to be objections did not comply with the requirements of s 65 of the MEA in form or content. In particular, the Commission stated that there was no proof of service of the objections on other interested parties. The Commission explained the



requirements of s 65 of the MEA and invited the applicants to re-submit its objection in the proper form, should it still wish to do so. The applicant responded on 16 November 2020, this time copying a number of other email addresses ostensibly those of other parties and candidates, who had contested the by-elections.

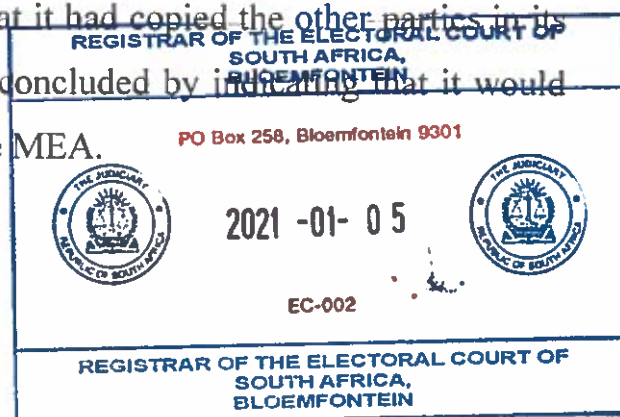
[10] On 17 November 2020 the Commission formally responded to the applicant's purported objections. I deem it necessary to quote in full the Commission's response. It reads:

'I advise that the Commission has considered the allegations that were made in your email and has come to the decision that Plaaslike Besorgde Inwoners ("PBI") did not comply with the provisions of s 65(1)(a) of the MEA, in that PBI had failed to substantiate their allegations as an objection that is material to the result of an election concerning any aspect of the voting or counting procedures provided for in Chapter 5 or Chapter 6 respectively. Furthermore, there is no evidence that your purported "objection" was served on the other interested parties as per the provisions of s 65(2)(i). . .

The Commission has no option than to dismiss it as an objection and will consider it as a complaint. The Commission will provide the Democratic Alliance and the Good Party an opportunity to respond to the allegation aimed against them and will afford you an opportunity to reply to their response. The necessary complaint letter will be dispatched to all parties by close of business on 17 November 2020.

The Commission will then finalise the complaint once all parties were afforded the opportunity to respond if they so prefer.'

[11] The applicant responded to this letter by email on 18 November 2020, in which it decried the fact that the Commission was more concerned about procedural correctness, than the actual objection, and that it had copied the other parties in its email of 16 November 2020. The applicant concluded by indicating that it would consider its position in terms of s 65(5) of the MEA.



[12] The Commission raised two points in limine against this application, namely:

(a) The relief sought by the applicant is inapposite for failure to comply with the provisions of s 65(1)(a) of the MEA, read with s 20 of the Electoral Commission Act.

(b) The relief sought in respect of ward 17 in particular is defective in that a necessary party thereto has not been cited. I examine both points in turn.

[13] Section 65(9) of the MEA provides that

‘An objecting party . . . who feels aggrieved by the decision of the Commission may, within seven days of the Commission’s decision, lodge an appeal to the Electoral Court in terms of section 20 of the Electoral Commission Act and the Rules of the Electoral Court.’

[14] As can be seen above, the Commission made a decision, which decision the applicant was aggrieved with. In terms of the prescribed procedure, the applicant ought to have lodged an appeal to this Court, but instead the applicant launched a substantive application seeking final relief declaring the results of the affected by-elections to be null and void on the basis that the affected by-elections were not free and fair, presumably in the exercise of this Court’s broad powers of review. It is undisputed that this application is neither a review nor an appeal referred to in s 20 of the Electoral Commission Act.¹ Further, there are no grounds of appeal which have been put forward by the applicant. The applicant has failed to inform this Court about any error of facts or law allegedly committed by the Commission. Neither has

¹ 1. Section 20 of the Electoral Commission Act provides 51 of 1996, in s 20(1)(a) and (b).
 ‘(1)(a) The Electoral Court may review any decision of the Commission relating to an election or by-election.
 (2)(a) The Electoral Court may hear and determine an appeal against any decision of the Commission only in so far as such decision relates to the interpretation of any law or any other matter for which an appeal is provided by law.
 (b) No such appeal may be heard save with the prior leave of the chairperson of the Electoral Court granted on application within the period and in the manner determined by that Court.’



there been an application lodged with the chairperson of the Electoral Court for its prior leave to hear an appeal.

[15] In the circumstances, there are no exceptional circumstances justifying any deviation from the provisions of s 65(1)(a) of the MEA. Accordingly, the applicant is not entitled to ignore the applicable appeal procedure and is thus not exempted from the provisions of s 65(1)(a) of the MEA. Thus, in my view, the relief the applicant is seeking is not available to it given that all the complaints of electoral irregularities upon which it relies for the relief it seeks are matters that fall within the grounds set out in s 65(1)² of the MEA. These are complaints that the legislature intended should be determined by the Commission in terms of s 65 of the MEA and failing its determination being accepted by this Court on appeal from the decision of the Commission in terms of s 65(9) of the MEA and s 20 of the Electoral Commission Act.

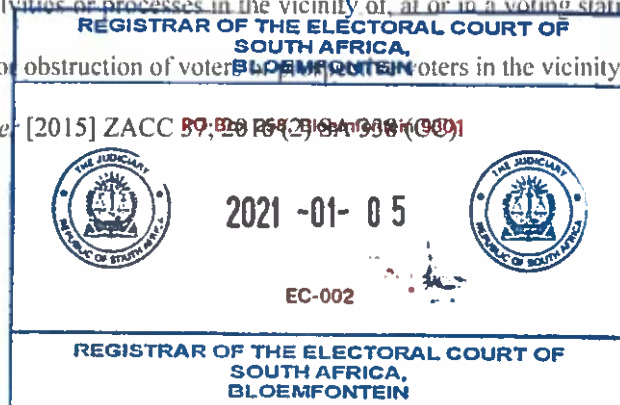
[16] The applicant's reliance on the decision in *Kham and Others v Electoral Commission and Another*³ is misplaced. The applicant's right to relief in that case was not constrained by the need to show that the result of the election would have been materially different had the alleged irregularities not occurred. I am therefore satisfied that the applicant has not complied with the mandatory provisions of s 65(9)

² Section 65(1) provides –

‘(1) An interested party may lodge with the Commission an objection material to the result of an election, concerning-
(a) any aspect of the voting or counting proceedings provided for in Chapter 5 or Chapter 6, respectively; or
(b) alleged unlawful-

(i) interference with or obstruction of election activities or processes in the vicinity of, at or in a voting station; or
(ii) interference with or influencing, intimidation or obstruction of voters or voters in the vicinity of, at or in a voting station.’

³ *Kham and Others v Electoral Commission and Another* [2015] ZACC 57; 2015 (2) SA 558 (CC)

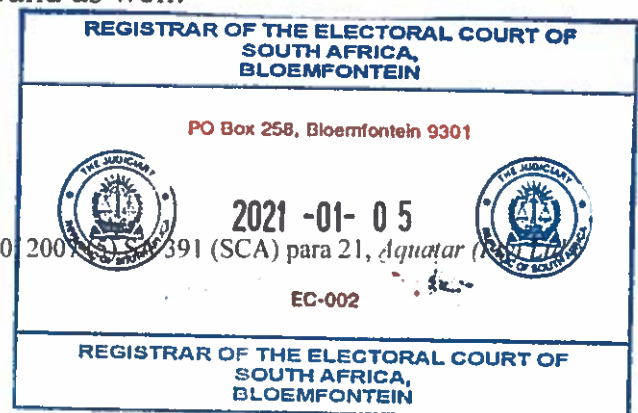


of the MEA. Accordingly, the Commission's first point in limine is upheld and the application falls to be dismissed on this ground.

[17] I now turn to consider the second point in limine pertaining to the non-joinder of an interested party in these proceedings, raised by the Commission. Although the applicant has cited some of the registered political parties that nominated candidates to contest the by-elections, it failed to cite the African Independent Congress (AIC) which nominated a candidate to contest the by-elections in ward 17. Significantly, the Commission drew the applicant's attention to this material fact in previous correspondence. In reply, the applicant has admitted these averments stating that they were a mere oversight on its part and that the candidate concerned did not actively canvass for votes and that this oversight should not affect the outcome of these procedures.

[18] There is no doubt that the AIC and its candidate have a direct and substantial interest in the relief sought by the applicant, but that the applicant elected not to cite it. The law on joinder of necessity is well established. The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court in the proceedings concerned.⁴ In the event the non-joinder of the AIC to these proceedings is fatal to the application. Consequently, this application falls to be dismissed on this ground as well.

⁴ *Bowring NO v Vrededorp Properties CC* [2007] ZASCA 80 (2007) 391 (SCA) para 21, *Aquatar (Pty) Ltd v Sacks and Another* 1989 (1) SA 56 (A).



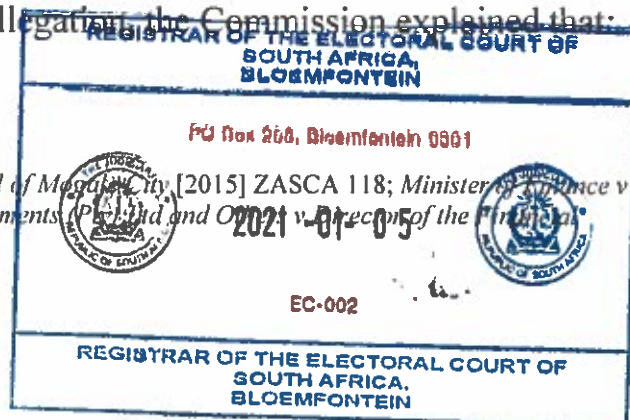
[19] In the remainder of this judgment I will focus on the exact objections that have been raised by the applicant. As will be demonstrated, the said objections are either completely lacking in merit or in cases where the incidents complained of happened, these did not in any way render the by-elections not to be free and fair. Consequently, the facts and circumstances did not justify this Court in the exercise of its discretion, to grant the final declaratory relief that was sought.

[20] The law governing declaratory relief is trite. A court has the discretion to grant or refuse such an order. Not only must the court be satisfied that the applicant has the necessary interest, but also that the case is a proper one for the exercise of the discretion given to the court.⁵

[21] The applicant's first complaint is that its party's colours on the voting ballot were markedly different from the official logo that was approved by the IEC on its founding application and branding documents. Whilst the applicant concedes it has no document to show any contrast in colours as it claims, it then states, unequivocally, that it relies in this regard on some information received to the effect that the 'colours were much darker than our bright colours and almost grey scale'. Reliance is placed on an affidavit by one Shadow Lombard, in which the latter merely stated that '[o]n 11 November 2020 he was working for the IEC and saw that the voting ballot did not reflect the true PBI colours'.

[22] In contrast to this patently vague allegation, the Commission explained that:

⁵ *Muldersdrift Sustainable Development Forum v Council of Middelburg City* [2015] ZASCA 118; *Minister of Defence v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v the Intelligence Centre* [2017] 4 ALL SA 150 (GP).



- (a) It used the logo provided by the applicant when it applied for registration as a party on the ballot papers used in the affected by-elections; and
- (b) On 26 October 2020 the applicant's representative attended a meeting of all representatives of parties and candidates contesting the affected by-elections to indicate their approval of the logo of each party.

The Commission attached to its papers the applicant's logo that appears on its record and the ballot paper used in the by-elections for ward 27; and submitted that a reasonable voter would have been able to recognise the applicant's logo and colours as it appeared on the ballot papers.

[23] In the absence of any proof by the applicant that a voter could have been confused by the logo and colours appearing on the ballot papers, I find that this complaint is completely without merit and falls to be rejected outright on the papers. In coming to this conclusion, I have been guided by the trite proposition that an applicant who seeks final relief, in motion proceedings as in this case, can in the event of a dispute only obtain such relief if the 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. However where the court is of the opinion that the respondent's demands do not raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable, the court is justified in rejecting them on papers.⁶

[24] The applicant also raised the complaint regarding the 'supplementary voters roll' of 189 voters who were shifted from ward 14 to ward 7 after the certification of the voters roll, averring that this was only brought to the parties' notice five days

⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 198 (4) SA 623 (A) at 634E-635C.



prior to the affected by-elections. But it is significant that in paragraph 10 of its founding affidavit, the deponent thereto had acknowledged that:

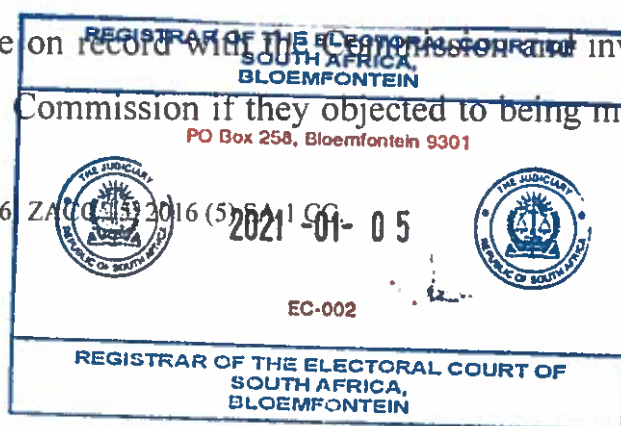
‘These voters (on the supplementary voters roll) were shifted in previous elections from ward 27 to ward 14, *although their permanent addresses were registered in ward 27.*’ (My emphasis.)

On the applicant’s own version, therefore, all that the Commission did was to place these voters on the segment of the voters roll for ward 27, which is where they are ordinarily resident.

[25] Clearly there was nothing unusual or irregular about the issuance of the supplementary voters roll which the applicant complains of. The Commission explained that it is accepted practice for it to conduct a ‘voters roll clean-up’ exercise⁷ in respect of segments of the voters roll in wards where by-elections are to be held in order to ensure that all voters who appear on a particular ward segment of the voters’ roll are in fact ordinarily resident in the ward concerned. Having conducted this exercise in the affected wards, the Commission came to the conclusion that the addresses of certain voters located them outside the voting districts or wards on whose respective segments of the voters roll their names appeared.

[26] Accordingly, between 10 and 13 October 2020, the Chief Executive Officer of the Commission (the CEO), issued notices in terms of s 12 of the Electoral Act to the affected voters, notifying them of the CEO’s intention to amend their registration details to locate them in the appropriate wards and voting districts given the details of their places of ordinary residence on record with the Electoral Commission inviting them to make representations to the Commission if they objected to being moved.

⁷ *Electoral Commission v Mhlope and Others* [2016] ZACC 13; 2016 (5) SA 1 CC.

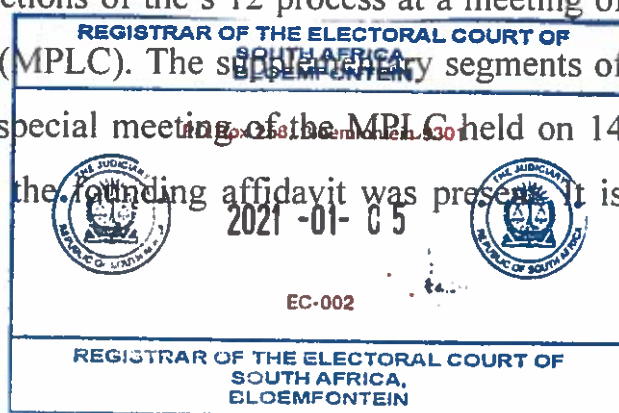


The Commission states that it in fact received a few enquiries and one objection, which was addressed, from the affected voters.

[27] The CEO thereafter duly amended the registration details of 886 voters across the four affected wards and voting districts given the details of their places of ordinary residence on record with the Commission. The result of this exercise was such that the registration details of certain of the voters were changed to place their names on the correct segments of the voters roll.

[28] The Commission explained further that because of the fact that these amendments were made after the proclamation of the by-elections, this meant that some voters whose registration details had been changed to locate them in the correct ward where there was a by-election, would not be able to vote in that by-election. As their names did not obviously appear on the relevant segment of the voters roll for that ward as at the date of the proclamation of the by-elections, they would thus be disfranchised. Thus in order to ensure that these particular voters were not disfranchised, the Commission decided, rightly in my view, to prepare supplementary segments of the voters roll for the affected wards on which the names of the voters were reflected, and those voters were then allowed to vote in the new wards for which they have been moved in terms of s 11 of the Electoral Act.

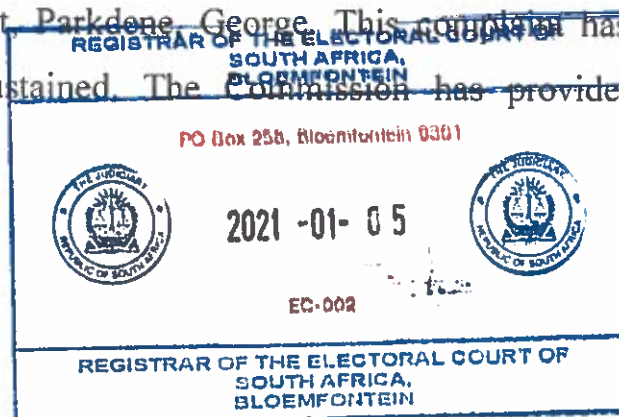
[29] On 28 October 2020, the Commission properly informed the parties and candidates contesting the affected by-elections of the s 12 process at a meeting of the Municipal Party Liaison Committee (MPLC). The supplementary segments of the voters roll were also discussed at a special meeting of the MPLC held on 14 November 2020, where the deponent to the founding affidavit was present. It is



noteworthy, that according to the minutes of that meeting, he expressed unsubstantiated and rather uncalled for speculative comments that the s 12 process concerned was ‘... a ploy from the ruling party in the Western Cape to move voters from one ward to another’. In my view all the contesting parties and candidates were subjected to the same treatment and there is nothing that indicates that the applicant was in any way disadvantaged by the aforesaid s 12 process.

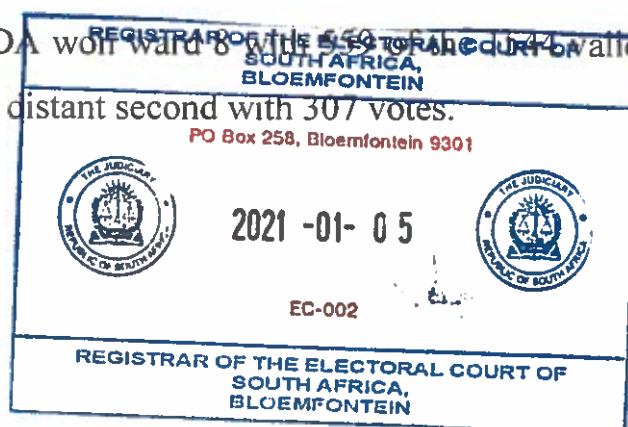
[30] I am satisfied that there was nothing irregular with the process followed by the Commission in ensuring that no eligible voter was wrongfully disfranchised. I am also satisfied with the Commission’s explanation that in each case, the names of the affected voters were placed on the correct segments of the voters roll and that those who voted, voted at the correct voting stations and in the correct wards, given their addresses of ordinary residence. Thus, the applicant’s complaint that the process compromised the fairness of the affected by-elections cannot be sustained and falls to be rejected.

[31] I now deal with the applicant’s complaint that numerous voters were not allowed to vote on the day of the elections due to an alleged ‘system fault/error’, despite the fact that these voters reside in the relevant wards and have voted at the relevant voting stations in previous elections. In support of this allegation, the applicant has attached an affidavit by one Johnne Booysen, who claims that she was unable to vote at ward 8 where she normally would have been allowed to vote and that she is resident at 24 Lizard Street, Parkdene, George. This complaint has, likewise, no basis and cannot be sustained. The Commission has provided uncontroverted evidence that:



- (a) Johne Booysen with identity number 000709 1193 081 is registered to vote in voting district 97200266 in ward 7, not ward 8, George Municipality.
- (b) The address that she provided to the Commission is 24 Lizard Street, Parkdene, George, which the Commission's geo-coding locates in ward 7, George Municipality. Her voting station is accordingly located at Parkdene Senior Secondary School, 2 Ballot Street, Parkdene, George.
- (c) Another voter, Esmeraldo Booysen with identity number 850109 1271 089 is registered to vote in voting district 97200277 in ward 8, George Municipality. Her address on the Commission's voter registration system is 24 Apollo Street, Parkdene which the Commission's geo-coding technology locates in ward 8, George Municipality. Her voting station is accordingly located at Parkdene Community Hall, Ballot Street, Parkdene, George.
- (d) It is clear that Johne Booysen and Esmeraldo Booysen were treated differently because, according to the Commission's records, they have different addresses of ordinary residences which, although located in the same locality, fall in different wards. Importantly, Esmeraldo's address, is located in ward 8, where there was a by-election, while that of Johne is located in ward 7, where there was no by-election, hence she was not allowed to vote.

[32] I need to point out that a glimpse at the results of the by-elections puts it beyond any doubt that the applicant lost by substantial wide margins in as much as, even if this complaint was true, which it is not as has been demonstrated, it would hardly have made any difference. The DA won ward 8 with 559 of the 644 valid votes cast whilst the applicant came at a distant second with 307 votes.

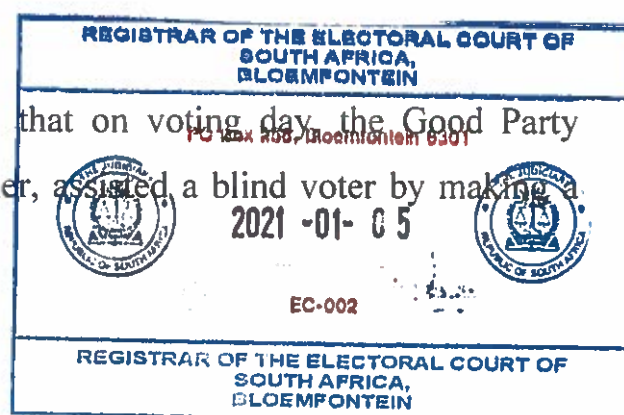


[33] In reply, the applicant sought to make a new case alleging that John Booyesen was not the only complainant and that there were many other dissatisfied voters who were similarly treated. This unsubstantiated and speculative allegation falls to be rejected outright on the papers.

[34] The applicant further complained that an IEC voting official was seen 'jumping into a car belonging to the DA candidate for ward 27 and driven by a DA activist. The IEC official was at the time carrying a bag of items which should have been kept secure . . . It is also significant that both the candidate and IEC official are apparently office bearers of a particular church. This increases the level of suspicion of what has happened in that car'. Clearly, this complaint is patently based on mere speculation and suspicion, as the applicant, inter alia, states that it is uncertain whether ballots were added in the said car. Nonetheless, the applicant has stated that this complaint was immediately investigated by the IEC, and that the concerned IEC official for ward 27 was duly removed.

[35] The IEC did conduct an investigation and the DA responded denying all those allegations. Nonetheless, it is relevant that the applicant only garnered, as stated previously, 402 votes in ward 27, which is 193 less than the Good Party which won the by-elections with 595 votes and 96 votes more than the DA candidate, who came second with 498 votes. Thus, even if the applicant's allegations were correct, which they are undoubtedly not, they would not have made any material difference in the result of the by-election in ward 27.

[36] The applicant's further complaint is that on voting day, the Good Party candidate in ward 17, Henry Gammat Turner, assisted a blind voter by making



cross on the ballot for that voter. The record shows that the Commission duly investigated the complaint and the Good Party was invited to respond. Good concedes in its answering affidavit that Mr Turner cast the blind voter's vote for himself, but that he did so bona fide because he was not aware of the fact that he was, as a candidate, proscribed from doing so.

[37] There can be no denying that what Mr Turner did was wrong. However, given his explanation, it cannot by any stretch of imagination be contended that this singular incident was such as to render the by-election in ward 17 not to be free and fair. What is significant is that the Good Party did not win this ward. It was won by the DA which obtained 635 of the 1685 valid votes cast, while the Good Party candidate came second with 462 votes and the applicant came at a dismal third with 322 votes, which is 313 votes adrift of the winner. Therefore, even if one were to subtract one vote from the total votes cast for the Good Party as contemplated in s 65(6)(c) of the MEA,⁸ it would not have had a material impact on the result of the by-election in ward 17.

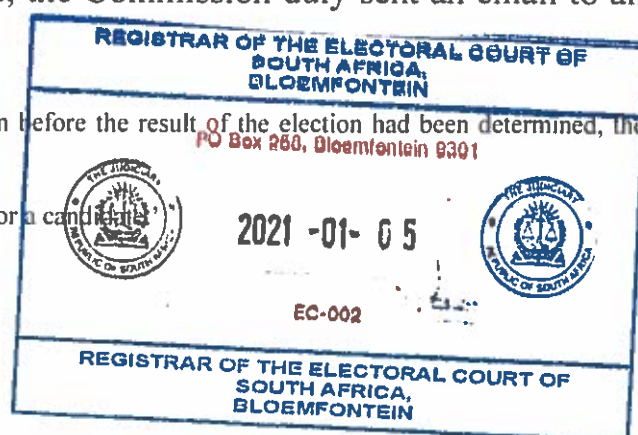
[38] The applicant's final complaint was that on the day of the by-elections, canvassing was allowed within the boundaries in ward 8 by a party and that a voter was given a party T-shirt by a member of the Good Party in the presence of the presiding officer, and nothing was done about this. The applicant complains further that canvassing by parties continued well into the day of voting and that after reporting the matter to the IEC officials, the Commission duly sent an email to all

⁸ Section 65(6)(c) provides

'(6) If the Commission decides to uphold the objection before the result of the election had been determined, the Commission may –

...

(c) reduce the number of votes cast in favour of a party or a candidate

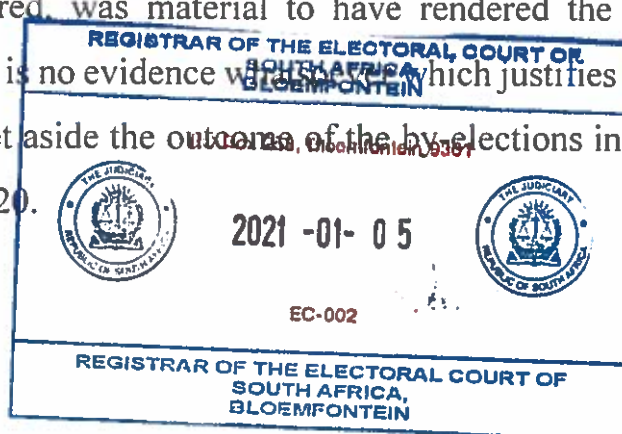


parties alerting them to stop canvassing but that the parties continued to canvass regardless of the warning. Furthermore, the Commission failed to alert the South African Police Service of this practice.

[39] On the applicant's own version, the Commission duly reacted to the complaint and took remedial action. In addition, according to the copies of the voting station diaries of the particular two voting stations in ward 8, attached to the Commission's answering affidavit, there is no recordal of a complaint of canvassing taking place within the boundaries of a voting station or a voter being given a party T-shirt. Importantly, the Good Party has denied in its answering papers the allegation that one of its members dressed a voter with a party T-shirt inside the boundaries of a voting station.

[40] Importantly, even if the allegation about canvassing within the boundaries of a voting station were correct, which I find not to be of any substance, there is no evidence that any of the voters so canvassed were influenced to vote for the party that was doing the canvassing, nor is the party named. In any event, the DA won the by-election in ward 8 with 559 votes, while the applicant's candidate came second with 307 votes, ie 252 votes less than the winner. Clearly, the alleged infractions could not have materially affected the results of the by-election in ward 8.

[41] The applicant has failed to show that the conduct it complains of either happened or that wherever it occurred, was material to have rendered the by-elections not to be free and fair. There is no evidence which justifies this Court to exercise its discretion and set aside the outcome of the by-elections in the concerned wards on 11 November 2020.



[42] Having regard to the foregoing, the Court issued the order set out in the second paragraph of this judgment.



Mbha JA

Chairperson of the Electoral Court

