

IN THE ELECTORAL COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO: 019/2016

In the matter between:

BLESSING PRINCE MWALI

Applicant

and

THE ELECTORAL COMMISSION OF SOUTH AFRICA

First Respondent

AFRICAN NATIONAL CONGRESS

Second Respondent

CORAM: WEPENER J et ADV. MTHEMBU et Ms PATHER – Members

HEARD: 10, 11 October and 9 and 18 November 2016

DELIVERED: 22 November 2016

SUMMARY: Electoral law – Duty of Commission to investigate complaints properly restated. Voters not residing in ward registered to vote in that ward unlawful rendering the election not free and fair.

JUDGMENT

Wepener J (Adv Mthembu and Ms Pather concurring):

[1] The applicant was a duly nominated candidate for the national municipal elections which were held on 3 August 2016. He was an independent ward candidate for ward 23 in the Newcastle municipality, Kwazulu-Natal.

[2] The first respondent is the Electoral Commission, commonly known as the Independent Electoral Commission or IEC ('the Commission'), a body established pursuant to the Constitution with its objects set out in s 4 of the Electoral Commission Act¹ ('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 (the Municipal Electoral Act).²

[3] The second respondent is the African National Congress (the ANC), a political party who contested the election relevant to this application. Only the Commission appeared at the initial hearing despite other interested parties having been served with the papers. At the second hearing, during November 2016, the ANC was represented by counsel who confirmed that the ANC had received the papers in this matter but due to internal administrative difficulties failed to appear at the first hearing. Counsel for the ANC requested time in order to make submissions by 18 November 2016 but agreed that the proceedings should be concluded at the November hearing. Initially, counsel

¹ Act 51 of 1996.

² Act 27 of 2000.

for the ANC sought leave to intervene in the proceedings but it was accepted that such leave was not necessary, as the ANC was served with the documents being an interested party in the matter.

[4] The applicant, who was unhappy with a number of issues or irregularities relating to the election that occurred in ward 23, initially sought from the Commission certain relief. That relief was sought pursuant to s 65 of the Municipal Electoral Act when the applicant lodged an objection with the Commission regarding the result of the election in ward 23.

[5] The Commission, after an enquiry (the first enquiry), which I will refer to again, rejected the applicant's objection. The applicant then approached this court for relief. The approach is competent both by virtue of this court's power to review a decision of the Commission³ and by virtue of the applicant's right

³ Section 20(1)(a) of the Electoral Commission Act 51 of 1996 (The Electoral Commission Act). *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC) at paras 38–40 where it was held:

'[38] The consideration of the jurisdiction and powers of the Electoral Court should commence with the Commission Act under which the Electoral Court was established. It is established for the whole of the Republic of South Africa with the status of the High Court. Its chairperson must be a judge of the Supreme Court of Appeal. It has two other members who are judges and two who are South African citizens. Its powers, duties and functions are spelled out in section 20. As regards the ambit of its jurisdiction this is defined in section 20(1), which reads that "[t]he Electoral Court may review any decision of the Commission relating to an electoral matter". If the Electoral Court had jurisdiction in this case, it is in this provision that one would expect to find it.

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

"[a]ny' is, upon the face of it, a word of wide and unqualified generality. It may be restricted by the subject-matter or the context, but prima facie it is unlimited."

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

[40] Is there anything in the context that would warrant a more restrictive interpretation of the section and hence of the Electoral Court's jurisdiction? I think not. The clear purpose was to establish a court that would be able to deal with all electoral matters. It was constituted with the same status as the High Court and with a judge of the Supreme Court of Appeal as its chairperson. It is to resolve electoral disputes as a matter of urgency. There is not the

to lodge an appeal against a decision of the Commission in terms of s 65(9) of the Municipal Electoral Act. Although an electoral dispute is not defined, it is not difficult to conclude that such is to relate to an election, the latter being

'1. A formal procedure whereby a person is elected to political office.

2. The action or fact of electing or being elected.'⁴

The applicant's complaint is in relation to such a dispute.

[6] The significance of the distinction between the review and appeal proceedings lies therein that the court is empowered to make the orders pursuant to s 65(10) of the Municipal Electoral Act when an appeal is heard whilst the Electoral Commission Act does not specifically provide for the relief set out in s 65(10) of the first mentioned Act.

[7] The applicant's objection to the outcome of the election was based on a number of grounds, some of which he did not pursue before us. Due to the paucity of information but the seriousness of the allegations, this court directed that oral evidence be heard pursuant to the provisions of Rule 11(2)(e) of the Rules.⁵

[8] Save for the main issue of voters who voted in incorrect voting districts, the applicant persisted with a complaint that the Commission had failed to mark the identity documents of voters as provided for in s 38(5)(aA) of the Electoral Act⁶ (the Electoral Act). However, during the municipal elections the latter Act only applies to the extent as stated in the Municipal Electoral Act.⁷ The Municipal Electoral Act does not import the requirement contained in the

slightest indication that the intention was to limit the range of disputes that would fall within the ambit of the Electoral Court's jurisdiction, so that some electoral issues would fall within its jurisdiction and others not. Instead, the breadth of language used suggests that the statutory purpose was to create a specialist court that would deal with all electoral matters. And our jurisprudence holds that when a specialist court is created the apparent purpose of creating a single forum for resolving disputes of a particular type is not to be stultified by a resort to undue literalism and too careful a parsing of statutory language.'

⁴ *Concise Oxford Dictionary*.

⁵ Rules Regulating the Conduct of the Proceedings of the Electoral Court – GN 794 of Government Gazette 18908 of 15 May 1998.

⁶ Act 73 of 1998.

⁷ Section 3(2) of the Municipal Electoral Act.

Electoral Act regarding the marking of identity documents, which will only apply to national elections. The Municipal Electoral Act provides in s 47 for the procedure to be followed when voting takes place and the reference to the marking of identity documents is absent. In this respect the Municipal Electoral Act is more advanced than the Electoral Act as many citizens do not have identity documents as there is now a system of issuing identity cards in the place of identity documents and the cards do not allow for a marking thereon. The requirement of the marking of the identity document, although still applicable and a possible problem at the next national elections or a by-election unless attended to, is not applicable to the election under consideration.

[9] During the course of the day on 3 August 2016, while the local government elections were in progress, the applicant who was a duly nominated candidate in ward 23, realised that there were irregularities regarding votes being cast in ward 23 and neighbouring wards. The main irregularity was that voters who resided outside of ward 23 were voting in ward 23 whilst voters who resided in ward 23 were sent away to vote elsewhere. This was the essence of the complaint or objection which the applicant lodged with the Commission. At the outset, the applicant estimated the number of persons who were unlawfully allowed to vote in ward 23 to be approximately five hundred in number. After submitting his complaint and after the Commission rejected his objection to the outcome of the election, the applicant made a detailed analysis of the voters roll and concluded that more than six hundred addresses of voters who voted in ward 23, fell outside of that ward and in other wards. When the applicant brought the objection to the notice of the Commission, it appointed an attorney to investigate the merits of the objection. The less I say about that investigation the better. The applicant's uncontested evidence was that he was telephoned late at night and asked in which ward he resided. This was the sum total of any communication with him regarding his complaint. The attorney who conducted the first investigation did not contradict this evidence. His report to the Commission recommends that the objections of the applicant be investigated

further before a decision to dismiss or uphold the objection was made, whilst acknowledging the gravity of the complaint.

[10] It is therefore clear that whatever investigation was embarked upon by the attorney, it led to inconclusive answers and he recommended that the Commission should embark on a further investigation – a stance that was clearly justified due to his own inadequate investigation if it can be called an investigation at all. Despite the recommendation by the attorney that the Commission should further investigate the allegations of the applicant, this did not occur. The Commission responded to the applicant on the basis that it was of the view that the objection did not comply with the criteria and requirements of s 65 of the Municipal Electoral Act. This stance was rather unfortunate. This court has, on a number of occasions, said that when there are allegations of large scale irregularities the Commission should investigate the allegations on its own accord.⁸

[11] The second ground for dismissing the objection was that the objection would not have been material to the outcome of the result of the election to which it relates.

[12] The Commission, consequently, rejected the objection without embarking on any investigation despite such having been recommended to it due to the gravity of the complaint. Had it done so, the facts which became common cause before this court would have been discovered and acted upon. The manner in which the objection was treated and investigated is, in my view, wholly inadequate and if not a dereliction of the Commission's duties at least a matter for serious concern that needs effective remedial action by the Commission.

[12] In a supplementary affidavit before this court, the Commission laments that it did not have the information available to it which the applicant placed before the court. But it could have had it available if It had conducted a proper

⁸ *Lötter v Electoral Commission and Others* [2013] 4 AllSA 152 (Elect CT) para 36; *Mhlope and Others v Electoral Commission* (011/2016 EC) [2016] SAEC 1 para 13.

investigation by contacting the applicant and ascertaining the basis of his objection as it is obliged to do in terms of s 65(4) of the Municipal Electoral Act.⁹ The failure of the Commission to investigate the complaint led to this court having to assemble twice, the first during October 2016 and then at a postponed date during November 2016, the postponement being due to the Commission wishing to investigate the matter further.

[13] The further investigation (the second investigation) resulted in the applicant's allegations being proved to be correct. Although the second investigation of the Commission comes to a different conclusion as that reached by the applicant, that in excess of six hundred voters who were registered outside of ward 23 were allowed to vote in ward 23, the applicant vehemently disputed the Commission's version and tendered to place evidence before the court to prove that the Commission's second investigation was flawed. This was overcome by counsel for the Commission accepting to place the Commission's case before the court on the basis that the objections of the applicant could be accepted and that the number of incorrect registrations referred to by him to be regarded as correct. There is a disturbing aspect in this. That is that the second investigation of the Commission was also inadequate. It appears that the Commission's investigation was conducted by way of aerial photographs whilst the applicant had the ward plan with house numbers, something which the Commission did not have regard to. If one accepts the version of the applicant, which the Commission concedes this court should, in excess of six hundred persons were allowed to vote in ward 23, whilst they should not have voted in that ward. Some voters who should have voted in ward 23 were turned away to other wards. I need not consider the various numbers or percentages of incorrectly registered voters as contained in the Commission's supplementary

⁹ '(4) In considering and deciding the objection referred to in this section, the Commission may take any one or more, or all, of the following actions:

- (a) investigate the factual basis of the objection or cause it to be investigated;
- (b) afford other interested parties an opportunity to make written or verbal submissions;
- (c) call for written or verbal submissions from other persons or parties;
- (d) call upon the objecting party to submit further information or arguments in writing or verbally; or
- (e) conduct a hearing on the objection.'

affidavit in order to conclude that the election in ward 23 (and probably in some surrounding wards) was fundamentally flawed. The Commission did not argue to the contrary. The Constitutional Court held in *Kham*¹⁰ that the registration of voters on the voters roll in wards in which they were not resident was a breach of the principle that only those legally entitled to do so should be permitted to vote in a specific ward.¹¹ There is a duty on the Commission to ensure that a voter is registered only for the voting district in which that person is ordinarily resident and for no other voting district.¹²

[14] In *Kham* the Constitutional Court expressed concern regarding the fact that the Commission furnished no explanation for the incorrect registrations on the voters roll.¹³ An explanation proffered by the Commission for this large scale registration of voters in incorrect segments of the voters roll of ward 23 is as follows:

‘In the IEC’s opinion the driver of the incorrect registrations appears to be the geographic proximity and convenience for voters pertaining to the location of the voting stations.’

This is rather disturbing and implies that it was deliberately done as a convenience to voters. Such act would be unlawful and in breach of the Commission’s constitutional duties.¹⁴ But the explanation cannot hold true due to some addresses of voters being dotted throughout the ward and far removed from the theory of proximity. There is a serious problem with the manner in which the known addresses of voters are captured. If regard is had to the fact that the majority of voters registered in ward 23 do not have addresses disclosed on the voters roll, the magnitude of the problem becomes of greater concern. So does the contention of the Commission that it could not locate sixty addresses which do appear on the voters roll, but which

¹⁰ *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC).

¹¹ *Kham* paras 47, 56, 61, 64, 72, 84, 85 and 88.

¹² See s 8(3) of the Electoral Act:

‘(3) A person’s name must be entered in the voters’ roll only for the voting district in which that person is ordinarily resident and for no other voting district: Provided that where that person is ordinarily resident outside the Republic, his or her name must be entered in a segment of the voters’ roll created for that purpose.’

And see *Kham* para 60; *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC) para 109.

¹³ *Kham* para 69.

¹⁴ *Mhlope* para 124.

fell outside ward 23 according to the applicant. The applicant insisted that he had a map showing all the relevant addresses – the map issued by the local authority and which the Commission advised him to obtain for purposes of establishing the addresses. The second investigation conducted by the Commission appears to have been done inadequately. In any event, the Commission limited its investigation as it only ‘went through’ the six hundred and twenty two names furnished by the applicant, a layman, who painstakingly worked through the addresses and correlated it with the map containing the house numbers and addresses. I am of the view that the problem is much more serious and deserved more serious attention than the ease of blaming the state of affairs on a convenience for voters. It is clear that there is a series of systemic problems that raised its head in this matter. A candidate and voter advises the Commission of incorrectly registered voters; the Commission appoints an attorney that does a most basic investigation of the complaint - if it can be called an investigation – by telephoning the applicant; nevertheless that attorney recommends to the Commission that a further investigation should be embarked upon; this is not done and the applicant’s objection is dismissed. Had a proper investigation been conducted when the complaint was made, the seriousness of the problem would have been discovered as the applicant had the evidence available but he was not interviewed in order to establish the facts. After the first hearing of this matter an investigation was embarked upon, its results tend to support the applicant but if the applicant is correct the second investigation is still lacking and its results cannot be relied upon.

[15] The Commission averred that sixty addresses listed by the applicant could not be verified during its second investigation. The Commission stated that it used a map referred to as geocode or geographic analysis which seems to be an aerial photograph of the area. The map used by the applicant is a map issued by the municipality on which house numbers are indicated and where he avers all addresses can be located. The second investigation conducted by the Commission is consequently also flawed despite the Commission averring that a thorough investigation was conducted.

[16] Based on the common cause facts I am called upon to make a value judgment.¹⁵ Having regard to the large number of incorrect registrations of voters in ward 23, I conclude that the elections were not free and fair¹⁶ and the constitutional right to participate in and contest the election lawfully was infringed as the number of irregular votes is not the sole determination of just and equitable relief.¹⁷ The Commission's initial finding that the incorrect registrations were not material to the outcome of the elections is incorrect and falls to be reviewed¹⁸ and set aside.

[17] The order of this court will be issued shortly before the annual December holiday period. It will consequently be impractical for the order to take immediate effect as the Municipal Structures Act¹⁹ provides in s 25(3) that a by-election must be held within ninety days after the date on which the election is set aside by the court. In order to correct the voters' roll the Commission is obliged to follow due process.²⁰ It will be impractical for the ninety days to commence running shortly before the holiday period and, I am of the view that it will expedient for the order to be effective from a date after the holiday period. The applicant agreed with such an approach. Pursuant to the provisions of s 65(10) this court is empowered to make 'any appropriate order'. In my view, it would be appropriate to defer the effect of the order in order to overcome the practical difficulties associated with the upcoming annual holiday period.

[18] After 18 November 2016 my registrar enquired from counsel for the ANC regarding the submissions which were to be filed by 18 November 2016. Counsel for the ANC advised my registrar that he could not get hold of his attorney and could not obtain instructions regarding the filing of any submissions. Counsel advised my registrar further that he was uncertain whether he still held a brief on behalf on the ANC. In the circumstances, it is necessary to finalise the matter without any input from the ANC.

¹⁵ *Kham* paras 84,85 and 90.

¹⁶ *Kham* para 92.

¹⁷ *Kham* para 100.

¹⁸ *Kham* para 56.

¹⁹ Local Government: Municipal Structures Act 117 of 1998.

²⁰ *Mhlope* para 56.

[19] In all the circumstances, the following order is issued:

1. The decision of the Commission to reject the objection of the applicant is reviewed and set aside.
2. The appeal is upheld.
3. The result of the local government elections held on 3 August 2016 for ward 52502023, Newcastle Municipality (KZN 252), Kwazulu-Natal (ward 23) is set aside.
4. The order in 3. above shall be with effect from 16 January 2017.
5. The Commission is directed to hold a by-election for ward 23 in terms of s 25(1)(b) of the Local Government: Municipal Structures Act 117 of 1998.
6. There is no order as to costs.



W.L. Wepener

Judge of the Electoral Court

For the Applicant: In person

Counsel for First Respondent: N. Luthuli

Attorneys for First Respondent: Gildenhuys Malatji

Counsel for Second Respondent: W. Nicholson