



**IN THE ELECTORAL COURT OF SOUTH AFRICA
HELD AT BLOEMFONTEIN**

Not Reportable

Case no: 0039/24 EC

In the matter between:

UMKHONTO WESIZWE PARTY

APPLICANT

and

**THE 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

**POLITICAL PARTIES WITH DESIGNATED
REPRESENTATIVES IN THE NATIONAL
ASSEMBLY**

FIFTH TO TWENTY-FIRST RESPONDENTS

**POLITICAL PARTIES WITHOUT DESIGNATED
REPRESENTATIVES IN THE NATIONAL
ASSEMBLY TWENTY-SECOND TO FURTHER RESPONDENTS**

Neutral citation: *Umkhonto WeSizwe Party v Electoral Commission of South Africa and Others* (0039/2024) [2024] ZAEC3 (24 June 2025)

Coram: MODIBA and ADAMS JJ and MHLAMBI AJ, PROFESSOR NTLAMA-MAKHANYA and PROFESSOR PHOOKO (Additional Members)

Heard: Determined on the papers on 29 May 2025

Delivered: 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 11:00 on 24 June 2025.

Summary: Uniform rule 35(12) - application - compel compliance with request for information in terms of uniform rule (rule) 35(12) - further and alternative relief in terms of rule 30(A)(2). Failure to show non-compliance with rule 35(12) – substantial compliance with requested information to extent it exists and capable of reproduction - failure to inform the Electoral Commission of South Africa that information in compressed format has not been accessed- failure to exercise available options to access compressed information. Case to compel compliance not established - request for computer algorithms for electoral result system not made in rule 35(12) - accordingly cannot validly ground application to compel - case for further and alternative relief in terms of rule 30(A)(2) also not established.

ORDER

1 The application to compel compliance with the applicant's notice in terms of Rule 35(12) of the Uniform Rules of Court dated 25 November 2024 is dismissed.

2 Reasons for this order will be set out in the judgment in respect of the main application.

3 The costs of the application stand over for determination in the main application.

REASONS

Modiba J (concurring Adams J and Mhlambi AJ, Professor Ntlama-Makhanya and Professor Phooko (Additional Members))

[1] At the heart of this interlocutory application is whether the Electoral Commission of South Africa (the Commission) as the first respondent and its Chief Electoral Officer, Mr Simon Mamabolo (Mr Mamabolo), as the second respondent have complied with the applicant's, Umkhonto Wesizwe Party's (MK Party) notice in terms of Uniform rule 35(12)¹ (the rule 35(12) notice),

¹ Rule 35(12) of the Uniform rules of court provides as follows:

‘(12)(a) Any party to any proceeding may at any time before the hearing thereof deliver a notice in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to—

(i) produce such document or tape recording for inspection and to permit the party requesting production to make a copy or transcription thereof; or

(ii) state in writing within 10 days whether the party receiving the notice objects to the production of the document or tape recording and the grounds therefor; or

delivered on 25 November 2024. The MK Party contends that it has not. The Commission contends that it has furnished the MK Party with all the requested documents and recordings which exist and are capable of being produced. I conveniently refer to this application as the application to compel.

[2] This dispute arises in the MK Party's application for an order declaring that the national and provincial elections held on 29 May 2024 (NPE2024) were not free and fair as required by s 19(3)² of the Constitution of the Republic of South Africa, 1996 (the Constitution), as well as an order reviewing and setting aside the NPE2024 results (the main application).

[3] It is common cause that on Friday, 31 May 2024 from 06h00 to 09h00, the leaderboards at the Commission's National Results Operations Centre (NROC) and online results dashboards crashed and displayed elections results for all political parties as zero. I conveniently refer to this period as the downtime period. This event mainly grounds the MK Party's challenge to the NPE2024 results in the main application. It impugns the integrity of the election vote capturing and reporting system, as well as the Commission's decision to upgrade the system at the peak of vote counting - several hours before the counting would conclude. It also alleges various irregularities in the vote capturing and reporting and questions the Commission's competency to manage elections. The Commission opposes the main application and denies all these allegations.

(iii) state on oath, within 10 days, that such document or tape recording is not in such party's possession and in such event to state its whereabouts, if known.

(b) Any party failing to comply with the notice referred to in paragraph (a) shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.'

² Section 19(3) of the Constitution of the Republic of South Africa, 1996, provides as follows:

'Every adult citizen has the right-

(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and

(b) to stand for public office and, if elected, to hold office.'

[4] The other cited respondents, namely the President of the Republic of South Africa as the third respondent, the Speaker of the National Assembly as the fourth respondent, Political parties with designated representatives in the National Assembly as the fifth to twenty first respondent and Political parties without designated representatives in the National Assembly as the twenty second and further respondents, did not enter the fray in both the main application and they also do not feature at all in the application to compel.

[5] It is convenient to simply refer to the Commission and Mr Mamabolo as the Commission, unless the context requires that I distinguish between the two parties, in which case I use their respective names. Unless otherwise specified, all references to rules are to the Uniform Rules of Court.³

[6] The application to compel originates from the delivery on 25 November 2024 by the MK Party of the rule 35(12) notice, calling on the Commission, to produce for inspection and permit the MK Party to obtain copies of evidentiary material listed in the said notice, within three days. On 29 November 2024, the Commission replied to the rule 35(12) notice. On or about 7 April 2025, the MK Party launched the application to compel.

[7] In the same application, the MK Party also seeks an order directing that oral evidence be heard in respect of the reliability of the digital votes capturing and reporting system that was employed by the Commission to manage the

³ These are rules regulating the conduct of the proceedings of the divisions of the High Court of South Africa made on 15th January 1965 and as amended (Government Notice R5560 of 22 November 2024).

NPE2024 in terms of rule 6(5)(g),⁴ read with rule 11(2)(b)⁵ of the rules of the Electoral Court⁶ (the oral evidence application). As directed by the Chairman of this Court, the application to compel was determined on the papers filed. The application for oral evidence will be determined with the main application. It bears mentioning that the parties address the application for referral to oral evidence as well as the application to compel in the same affidavits and written submissions. This is to be expected as the MK Party brought a merged application as described earlier. Averments and submissions that relate to the application for referral to oral evidence are only considered to the extent they bear relevance to the application to compel. Otherwise, they will be fully considered when the application to which they directly relate is determined.

[8] On 26 May 2025, this Court granted an order dismissing the application to compel (the compelling order). We undertook to determine the costs of the application and furnish reasons for the compelling order in the judgment in the main application. The main application was enrolled for hearing on 3 June 2025. On 30 May 2025, the MK Party filed its notice of application for leave to appeal the compelling order. On 1 June 2025, the MK Party delivered an application for the postponement of the main application *sine die*, pending its appeal against the compelling order.

⁴ Rule 6(5)(g) of the Uniform rules, provides as follows:

‘Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.’

⁵ Rule 11(2)(b) of the rules of the Electoral Court, provides as follows:

‘(2) In conducting its business the Court may, whenever it deems appropriate, inter alia –
(b) allow oral argument by a party or by a person duly authorised by such a party.’

⁶ Rules regulating the conduct of the proceedings of the Electoral Court, made in terms of s 20(3) of the Electoral Commission Act 51 of 1996 (Government Gazette No.18908 of 15 May 1998).

[9] The postponement application was not conventionally supported by an affidavit, setting out the basis for the postponement request. It was supported by the notice of application for leave to appeal, in which the MK Party relies on several grounds of appeal. The following are relevant for present purposes: the Court failed to consider that the documents sought under the rule 35(12) notice are both necessary and relevant to enable the MK Party to assess its position and to determine whether the documents might assist in asserting the constitutional rights it seeks to vindicate; and that without the documents sought, the MK Party is not in a position to properly advance its case in the main application.

[10] The Commission sensibly agreed to the postponement, resulting in this Court postponing the main application by agreement between the parties, and deferring the costs occasioned by the postponement for determination at a later stage. The MK Party's notice of application for leave to appeal prompted this Court to hand down reasons for the compelling order earlier than undertaken. The reasons are set out below.

[11] In its rule 35(12) notice, the MK Party sought the following:

- (a) the results of the Online Transaction Processing System (OLTP system), NPE Results System and NROC databases referenced under paragraph 53 of the Commission's answering affidavit in the main application, during the downtime period;
- (b) an audit trail of all political party results on the National and Regional ballot referred to in paragraph 66 of the Commission's answering affidavit, over the downtime period;
- (c) the management result reports as referenced under paragraph 67 of the Commission's answering affidavit, over the downtime period;

- (d) the external audit results for all voting districts on the National and Regional ballot as referenced in paragraph 79 of the Commission's answering affidavit;
- (e) the full audit trail and audit reports of the NPE Results System as referenced in paragraph 80 of the Commission's answering affidavit;
- (f) the complete election data including:
 - (i) scanned and captured results slips;
 - (ii) detailed ballot results; and
 - (iii) voter turnout result reports for the National and Regional ballot referenced in paragraph 98 of the Commission's answering affidavit.

[12] The Commission replied to the MK Party's request as follows:

- (a) paragraph 53 of its answering affidavit explains the diagram depicting the components of the NPE Results System and how the system operates. No reference was made to the documents or tape recordings sought by the MK Party. In any event, such documents or recordings do not exist and could not be produced;
- (b) there is no 'OLTP system' that is distinct from the NPE Results Systems as assumed in paragraph 1 of the MK Party's rule 35(12) notice. OLTP refers to the 'Online Transaction Processing' system that is used to operate the NPE Results System;
- (c) the Commission does not have in its possession, and could not extract, results reports from the NPE Results or the NROC database over the downtime period;
- (d) the Commission does not object to the production of:
 - (i) an audit trail of all the political party results on the National and Regional ballot as referenced in paragraph 66 of its answering affidavit, over the downtime period;

- (ii) the external audit results for all VDs on the National and Regional ballot as referenced in paragraph 79 of its answering affidavit;
- (iii) the entire audit trail of the NPE Results System;
- (e) it has already produced the management results reports for the National and Regional ballot. These were annexed to its answering affidavit.
- (f) the rest of the documents sought –
- (i) are available through the WeTransfer link the Commission made available to the MK Party’s attorneys on 12 July 2024 and resent on 28 August 2024. The link is still active;
- (ii) the Commission also created VPN party accounts and provided the MK Party access to the 2024 NPE Virtual NROC where these documents can still be accessed.

[13] The applicable procedure when non-compliance with court rules is alleged is set out in rule 30A.⁷ Whether there has been compliance with a court rule as contemplated in rule 30A(1), involves an objective enquiry. The court has no discretion when making such a determination. It must find that a party has failed to comply with a rule as alleged if such a finding is supported by the facts and/or the law.⁸

[14] The MK Party has prayed for four remedies in the alternative. It seeks an order compelling full compliance with rule 35(12), alternatively, an order striking out the Commission’s opposition, alternatively an order directing the Commission to share with it its computer algorithms for the vote capturing and

⁷ Rule 30A(1) of the Uniform rules, provides as follows:

‘Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order—

(a) that such rule, notice, request, order or direction be complied with; or

(b) that the claim or defence be struck out.’

⁸ *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) para 79.

reporting system and further alternatively, an order which this court deems fit in terms of rule 30A(2).⁹ To be granted any of these remedial orders, the MK Party must establish that the Commission failed to comply with its rule 35(12) notice.¹⁰ Failure to make out such a case is fatal to the MK Party's application to compel.

[15] A striking out order is drastic as it has the effect of non-suiting the Commission. Accordingly, to grant such an order, the Court must be appraised of sufficient facts on the basis of which it could exercise its discretion in favour of such an order. Relevant factors will include the reasons for non-compliance with the rule 35(12) notice, whether the Commission has recklessly disregarded its obligations; whether the Commission's case appears to be hopeless; and whether the Commission does not seriously intend to proceed.¹¹ Prejudice to the MK Party is also a relevant factor.¹² An order in terms of rule 30(A)(2) is discretionary in nature. The discretion must be exercised judicially on a proper consideration of all the relevant circumstances.

[16] The MK Party has not gainsaid the Commission's contention that the material described in paragraphs 12 (a) to 12 (c) above were not referred to in paragraph its answering affidavit and/or that, the relevant documents and recordings do not exist, are not in the Commission's possession and cannot be reproduced. Seeking information that has not been referred to in an affidavit or does not exist or if it exists, is incapable of reproduction, does not sustain an application to compel.¹³ Therefore, the highwater mark of the MK Party's case

⁹ Rule 30A(2) of the Uniform rules, provides as follows:

'(2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.'

¹⁰ Op cit fn 6 para 79.

¹¹ *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954 (3) SA 352 (O) at 353.

¹² Ibid.

¹³ *Democratic Alliance and Others v Mkhwebane and Another* [2021] ZASCA 18; [2021] 2 All SA 337 (SCA); 2021 (3) SA 403 paras 40-41.

relates to its inability to access information provided through the WeTransfer link and the VPN party accounts.

[17] The MK Party alleges that all the information the Commission claims to have provided to it through the WeTransfer link is in ‘tar.zst’ format and, is incompatible with any conventional document file readers in its possession or that of its legal team. As a result, it has not been able to access the relevant documents. Practically, the MK Party further contends, this means that the Commission has not provided it with this information. The MK Party also alleges that it has also not been able to access the information the Commission purportedly provided to it through the VPN party accounts as the accounts were deactivated on 29 July 2024.

[18] The MK Party further contends that the Commission’s failure to comply with its rule 35(12) notice as aforesaid leads to the conclusion that it is not interested in having the credibility and reliability of the election results tested and determined objectively by this Court based on all available and relevant information. It also does not seem to appreciate the importance of transparency, which is pivotal for the vindication of the constitutional principle of democracy. For these reasons, the MK Party seeks to invoke this Court’s powers in terms of rule 30A(2) to grant such further and alternative relief it may deem fit, to direct the Commission to share its computer algorithms or codes relating to the digital votes capturing and reporting system with the MK Party.

[19] According to the Commission, the tar.zst format is compatible with conventional document readers and can be accessed using a MS Windows 11 operating system, or the Mac operating system, which the MK Party’s attorney, Mr Xulu uses or using a downloadable app such as the ‘Keka application’ (Keka

app). The Keka app can be purchased for R119 on the Apple Store. It can also be downloaded for free from the Keka website.

[20] In reply, the MK Party contends that to access the compressed documents, it would need to either procure decompression software, request the Commission to provide the files in a CSV or other accessible format or physically inspect the record. It notably provides no explanation as to why it did not exercise any of these options. It also does not dispute the paltry cost of procuring the Keka app as suggested by the Commission.

[21] To the extent any facts relied on by the MK Party are common cause, it stands to fail on its own version. To the extent that there is a factual dispute between the parties, this being an application, the seminal *Plascon Evans*¹⁴ rule applies. This rule impels this Court to resolve factual disputes on the Commission's version, unless that version is so untenable that no court can reasonably rely on it.¹⁵ It is not the MK Party's case that the Commission's version is untenable. This Court also has no reason to find that it is. Therefore, this Court accepts the Commission's version on the disputed facts. For reasons set out below, I find that the MK Party has failed to establish that the Commission has not complied with its rule 35(12) notice.

[22] First, as correctly pointed out by the Commission, the MK Party has resorted to none of the options it had to access the information the Commission provided through the WeTransfer link, as described in paragraph 19 of this judgment. In correspondence exchanged with the Commission since the MK Party filed a condonation application in December 2024 for the late filing of its replying affidavit in the main application, it failed to mention that it has not been

¹⁴ *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

¹⁵ *Ibid* 635C.

able to assess the compressed documents. It raised the issue for the first time in this application. Attributing blame on the Commission for failing to make alternative arrangements to ensure that it has access to the information is unreasonable, particularly under circumstances where the MK Party never informed the Commission that it could not access the information. It was for the MK Party to proactively inform the Commission that it is battling to access the information but more importantly, to make alternative arrangements by exercising any of the three options which on its own version it had.

[23] Second, in May 2024, the MK Party representatives were given access to completed result slips on the NROC database. This is recorded in the Commission's attorney's letter dated 12 July 2024. Third, when VPN Accounts for NPE20204 were deactivated on 29 July 2024, new accounts were created for the MK Party members to secure their continued access to the links. In correspondence dated 12 July 2024, 28 August 2024 and 10 September 2024, the Commission shared a link with the MK Party and its attorney to facilitate access to the NPE2024 result records. The Commission's contention that when the MK Party filed the main application on 3 October 2024, it consistently had access to the manually captured result slips on the NROC database is unassailable. The MK Party's persistence with the allegation that it does not have access to this information is therefore incomprehensible. Its insistence that the access codes given to it and its attorney are not working is baseless.

[24] The MK Party's quest for computer algorithms for the Commission's digital votes capturing and reporting system amounts to goal-shifting. It did not form part of its request in terms of R35(12). Therefore, it does not validly ground the MK Party's application to compel. Further, since the MK Party has not established that the Commission failed to comply with its rule 35(12) notice, there is no basis for this Court to exercise its discretion in terms of rule 30A(2).

[25] It is important that I deal with the Commission's complaint in respect of the conduct of the MK Party in this application. The MK Party accuses Mr Mamabolo of attempting to explain technical issues and criticising the MK Party's expert without the necessary expertise. The MK Party through its attorney Mr Xulu who deposed to its affidavits in this application also accuses Mr Mamabolo of unsuccessfully trying to mystify the Commission's systems and processes, attempting to redirect focus on critical factual issues relating to the NPE2024 results by concealing information that should be made accessible and that he has not been fully transparent about the Commission's systems and processes.

[26] MK Party has filed an expert report in support of the allegations that ground the relief it seeks in the main application. The Commission's version is that captured votes were not deleted and votes continued to be captured during the down time. The Commission relies on the reconciliation of captured votes and transactional voting records, conducted by Deloitte and Touche's (Deloitte). Its technical explanation of the functionality of the NPE2024 system, the leaderboards and its website as offered by Mr Mamabolo is confirmed in an confirmatory affidavits by the Commission' Manager: ICT Business Systems. This evidence, as well as the MK Party's expert evidence will be dealt with in the main application.

[27] The accusations referenced above are baseless and atmospheric. It is not true that Mamabolo places sole reliance on his knowledge. He places specific reliance on the audit of the NPE2024 results and the reconciliation of the captured votes with transactional votes records conducted by Deloitte. Deloitte's findings are an issue for the merits in the main application. To its answering affidavit, the Commission attached the confirmatory affidavit of Deloitte's director of risk and audit advisory services who confirms the Commission's version. The MK Party

does not deny Deloitte's reconciliation findings. It has deferred addressing these findings when its expert has considered them. It had not done so when this application was determined on 26 May 2025, least when these reasons were furnished on 24 June 2025.

[28] Mr Mamabolo's explanation of the technical design and functioning of the NPE2024 system is also confirmed by its Manager: ICT Business Systems in a confirmatory affidavit. The merits of her explanation will be determined in the main application. An audit trail of the MK Party's results over the down time and management reports of the NPE results system are attached to the Commission's answering affidavit in the main application as annexures 'AA1', 'AA2' and 'AA3'.

[29] The remarks I make here should not be construed to constitute acceptance of Deloitte's findings or the Commission's technical explanation by this Court. As stated above, issues that arise from this evidentiary material are for the main application.

[30] For reasons set out in this judgment, the allegations referred to above are inconsistent with the Commission's and indeed Mr Mamabolo's conduct in these proceedings. I agree with the Commission's contention that the allegations are scandalous, vague and designed to unjustifiably tarnish the Commission's and Mamabolo's reputation and credibility and to erode public trust in South Africa's electoral system.

[31] Disturbingly in paragraphs 3, 4 and 19 and the sentence starting with '[T]he approach of Mr Mamabolo' in paragraph 40 to the end of that paragraph in the MK Party's replying affidavit, Mr Xulu retorts to the Commission's request that paragraphs 8 to 10 of MK Party's answering affidavit be struck out by accusing

Mr Mamabolo of responding to his allegations with insults, failing to embrace the constitutional ethos of accountability, and transparency that guides its engagement with its people, lacking tolerance that is required of his office by exercising restraint and respect towards those who call him to account. These allegations are equally baseless and scandalous. However, the Commission did not seek their striking out. I cannot allow paragraphs 8 to 10 of the MK Party's founding affidavit to stand particularly given the potential damage they may unduly cause to Mr Mamabolo and the Commission's reputation and credibility. I therefore, strike out these paragraphs as requested by the Commission.

[32] The below order granted on 29 May 2024 is confirmed:

1 The application to compel compliance with the applicant's notice in terms of Rule 35(12) of the Uniform Rules of Court dated 25 November 2024 is dismissed.

2 Reasons for this order will be set out in the judgment in respect of the main application.

3 The costs of the application stand over for determination in the main application.

L T MODIBA
JUDGE OF THE ELECTORAL COURT

Appearances

For the applicant:	T Masuku SC with M Simelane and N Mjiyako
Instructed by:	JG & Xulu Incorporated, Johannesburg
For the first and second respondents:	T Ngcukaitobi SC with Ms J Bleazard
Instructed by:	Moeti Kanyane Attorneys, Pretoria.