

AN INTRODUCTION TO THE ELECTORAL SYSTEM OF THE REPUBLIC OF SOUTH AFRICA AND THE ELECTORAL COURT

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Introduction

The history of South Africa is characterized by themes of colonialism, oppression, violence, discrimination and exploitation. Up until the advent of democracy in 1994 after decades under the Apartheid regime, Black people in South Africa were denied citizenship rights including most civil, economic and political rights². This included the all-important and all-encompassing Right to Vote.

Permission to vote in South Africa was restricted largely to white men; however, each Province within the country imposed restrictions on different groups. In the provinces of the Orange Free State and the Transvaal, all Blacks were denied the right to vote. In the Natal province, nearly all Blacks were not allowed to vote while in the Cape Province, an important number of Black and Coloured men were allowed to vote under a "color-blind" permission based on property requirements. In addition to this, it was only White men who could be elected to Parliament.

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² Worden, N *The Making of Modern South Africa: Conquest, Segregation and Apartheid* (1994); Walker C *Women and Resistance in South Africa* (1991)

Later, Blacks were allowed to vote in elections, but only within the Homelands. However, even these elections were stopped in the 1980s when the homelands were re-incorporated into new South Africa. In 1993, South Africa transitioned out of Apartheid and into democracy, a feat which has been hailed as one of the Great Stories of the twentieth century³. In 1994 South Africa held its first ever all-race inclusive national elections which took place under conditions that were conducive to best electoral practice⁴.

South Africa's Electoral System

South Africa's national and provincial elections take place once every five years. In these elections, voters vote for a political party, not individuals. The political party then gets a share of seats in Parliament in direct proportion to the number of votes it got in the election. Each party then decides on members to fill the seats it has won. This is called a proportional representation (PR) voting system⁵. The South African electoral system has been a national list proportional representation system since 1994. Political parties play a crucial role in the

³ Mangcu X "The State of Race Relations in Post-Apartheid South Africa" in Habib et al (eds) *The State of the Nation 2003-2004* (2003) at 105

⁴ Letsholo S "Democratic Local Government Elections in South Africa: A Critical Review" *EISA Occasional Paper Number 42* (2006)

⁵ The rationale underpinning all Proportional Representation voting systems is to consciously reduce the disparity between a party's share of the national vote and its share of the parliamentary seats; if a major party wins 40 per cent of the votes, it should win approximately 40 per cent of the seats, and a minor party with 10 per cent of the votes should also gain 10 per cent of the legislative seats. This congruity between a party's share of the vote and its share of the seats provides an incentive for all parties to support and participate in the system.

<http://aceproject.org/ace-en/topics/es/esd/esd02/default> (visited 01-10-2017)

consolidation and institutionalization of democracy as sustainable democracy is dependent upon well-functioning, effective political parties⁶.

The Independent Electoral Commission

As alluded before, South Africa's first democratic national elections were held in 1994 and since then, elections in the country are held once every five years. All the elections are conducted by the Independent Electoral Commission of South Africa, a permanent and independent body established by Chapter 9⁷ of the Constitution of the Republic of South Africa to manage free and fair elections at all levels of government.

Section 190 of the Constitution sets out the function of the Electoral Commission as follows:

The Electoral Commission must manage elections of national, provincial and municipal legislative bodies in accordance with national legislation; ensure that those elections are free and fair; and declare the

⁶ Lodge T & Scheidegger U "Political Parties and Democratic Governance In South Africa" *EISA Research Report* (2006)

⁷ Section 181(1) and (2) of Chapter 9 of the Constitution pertains to the establishment and governing principles of certain institutions, including the Electoral Commission and reads as follows:

- (1) The following state institutions strengthen constitutional democracy in the Republic:

The Public Protector.

The South African Human Rights Commission.

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

The Commission for Gender Equality.

The Auditor-General.

The Electoral Commission.

- (2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.

In keeping with this, the Electoral Commission Act 51 of 1996 was enacted 'to make provision for the establishment and composition of an Electoral Commission to manage elections for national, provincial and local legislative bodies and referenda; and to make provision for the establishment and composition and the powers, duties and functions of an Electoral Court and to provide for matters in connection therewith'.

The Electoral Court

The Electoral Court is thus established in terms of s 18 of the Electoral Commission Act and it enjoys the status of a supreme court⁸. In accordance with s 19 of the same Act, the Electoral Court comprises a judge of the Supreme Court of Appeal, two High Court judges, plus two other members that are all appointed by the President of the Republic⁹.

The powers, duties and functions of the Electoral Court are extensive and are comprehensively set out in s 20 of the Electoral Commission Act as follows:

⁸ Section 18 of the Electoral Commission Act 51 of 1996: "There is an Electoral Court for the Republic, with the status of the Supreme Court."

⁹ 19. (1) The Electoral Court shall consist of the following members appointed by the President upon the recommendation of the Judicial Service Commission:

(a) A chairperson, who is a judge of the Appellate Division of the Supreme Court, and two other judges of the Supreme Court; and

(b) two other members who are South African citizens.

(1) (a) The Electoral Court may review any decision of the Commission relating to an electoral matter.

(b) Any such review shall be conducted on an urgent basis and be disposed of as expeditiously as possible.

(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.

(c) Such an appeal shall be heard, considered and summarily determined upon written submissions submitted within three days after leave to appeal was granted in terms of paragraph (b).

(3) The Electoral Court may determine its own practice and procedures and make its own rules.

(4) The Electoral Court shall-

(a) make rules in terms of which electoral disputes and complaints about infringements of the Electoral Code of Conduct as defined in section I of the Electoral Act, 1993 (Act No. 202 of 1993), and appeals against decisions thereon may be brought before courts of law; and

(b) determine which courts of law shall have jurisdiction to hear particular disputes and complaints about infringements, and appeals against decisions arising from such hearings.

(5) The hearings and appeals referred to in subsection (4) shall enjoy precedence in the courts of law determined in accordance with that subsection.

(6) The Electoral Court may hear and determine any matter that relates to the interpretation of any law referred to it by the Commission.

(7) The Electoral Court may investigate any allegation of misconduct, incapacity or incompetence of a member of the Commission and make any recommendation to a committee of the National Assembly referred to in section 7(3) (a)(ii).

The powers of the Electoral Court have also been recognized and confirmed by various decisions in the Constitutional Court, most notably the case of *Kham & others v Electoral Commission & another*¹⁰ wherein the Constitutional Court stated the following in at para 42:

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

¹⁰ *Kham & others v Electoral Commission & another* (CCT64/15) [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC) (30 November 2015)

Conclusion

As with all matters within the realm of national affairs, the business of ensuring elections that are free, fair and transparent is not an easy one nor is it one without its fair share of challenges. However, the Electoral Commission of South Africa remains an institution that adheres to and fulfills its constitutional mandate and serves the South African public efficiently. In the same breath, the responsibility of dispute resolution and oversight over electoral processes is never an easy one, but it is one that crucial to the nation as it underpins the very fiber of democracy.

As Nelson Mandela¹¹ famously stated at his inauguration in 1994:

Democracy is based on the majority principle. This is especially true in a country such as ours where the vast majority have been systematically denied their rights. At the same time, democracy also requires that the rights of political and other minorities be safeguarded.

In the political order we have established there will regular, open and free elections, at all levels of government central, provincial and municipal. There shall also be a social order which respects completely the culture, language and religious rights of all sections of our society and the fundamental rights of the individual.

¹¹ Inauguration Speech, Cape Town. 9 May 1994 <http://www.news24.com/NelsonMandela/Speeches/FULL-TEXT-Cape-Town-Inauguration-Speech-20110124> (visited on 01-10-2017)