



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 64/15

In the matter between:

XOLILE DAVID KHAM First Applicant

JOHANNES SESING JOHNSON Second Applicant

AARON PASELA MHLOPE Third Applicant

JOHANNA SHONU XABA Fourth Applicant

NTOMBI BEAUTY DIKUPE Fifth Applicant

DIKELEDI CATHRINE MOLEFE Sixth Applicant

VELILELE JAMES ZICINA Seventh Applicant

KHOTSO RATIKOANE Eighth Applicant

and

**ELECTORAL COMMISSION
OF SOUTH AFRICA** First Respondent

**MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF LOCAL GOVERNMENT
AND HUMAN SETTLEMENTS,
NORTH WEST PROVINCIAL GOVERNMENT** Second Respondent

Neutral citation: *Kham and Others v Electoral Commission and Another* [2015]
ZACC 37

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J

Judgment: Wallis AJ (unanimous)

Heard on: 10 September 2015

Decided on: 30 November 2015

Summary: Municipal elections — whether free and fair — obligations of the Electoral Commission — duty to register voters in correct voting district — duty to show addresses on voters roll — adherence to election timetable — non-compliance resulting in by-elections not being free and fair — just and equitable relief — outcome of by-elections set aside — fresh by-elections ordered — procedure to be followed in accordance with Local Government: Municipal Structures Act 117 of 1998

ORDER

On appeal from the Electoral Court:

1. Condonation for the late filing of the complete record is granted.
2. The Electoral Commission is to pay the costs of the application for condonation.
3. Leave to appeal is granted to the first to seventh applicants and refused in respect of the eighth applicant.
4. The appeal is upheld with costs, including those consequent upon the employment of two counsel.
5. The order of the Electoral Court delivered on 19 March 2015 is set aside and replaced by the following order:
 - (a) It is declared that the by-elections conducted in the Tlokwe Local Municipality on 12 September 2013 in ward 18 and on 10

December 2013 in wards 1, 4, 11, 12, 13 and 20, were not free and fair.

- (b) The outcome of those by-elections is set aside and fresh by-elections are to be held in terms of section 25 of the Local Government: Municipal Structures Act 117 of 1998.
 - (c) It is declared that when registering a voter to vote in a particular voting district after the date of this order the Electoral Commission is obliged to obtain sufficient particularity of the voter's address to enable it to ensure that the voter is at the time of registration ordinarily resident in that voting district.
 - (d) It is declared that in all future municipal elections or by-elections the Electoral Commission is obliged in terms of section 16(3) of the Electoral Act 73 of 1998 to provide all candidates in municipal elections, on the date on which they are certified, with a copy of the segment of the national voters' roll to be used in that ward in that election including the addresses of all voters, where these addresses are available.
 - (e) The Electoral Commission is directed to pay the applicants' costs, save for any additional costs occasioned by the joinder of the eighth applicant.
6. The orders in 5(c) and (d) are prospective in their operation from the date of this order and do not affect the validity of any election or by-election held prior to the date of this order.

JUDGMENT

WALLIS AJ (Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, and Zondo J concurring):

voting district and correct ward. This should not be unduly difficult as according to the affidavit of Mr Maduna, delivered by the applicants in their response to the directions, the only ward in which there are no verifiable addresses is ward 20 and that relates only to 10% of the ward area.

[118] If the voter does not have an address – and, even in informal settlements, very often sites or the dwellings are numbered or identified in some way – the IEC is not obliged to refuse them registration. Nor is the segment of the voters' roll relating to that voter invalidated by the absence of an address. Section 16(3) makes it clear that their inclusion is dependent on the addresses being available. That means that the IEC must endeavour to ascertain from the person coming to register an address, where they have a physical address, or some detail that will serve as an address for the purposes of the roll. But if there is none then, provided they are registered in the correct ward, they must be registered and the absence of an address does not affect the validity of the voters' roll.

[119] After dealing with the alleged difficulties in regard to registration of voters in these areas the chief electoral officer said that it would add three weeks to the election timetable. But that still leaves it well within the statutory 90 day period. The applicants say in their affidavit in response to the directions that there has been little movement in these wards since the national elections in 2014 so that compiling a roll for by-elections should be a matter of removing people whose names should not be there and updating the roll. The only other problem mentioned by the IEC is that we are approaching the Christmas holiday period and people may go away. But it rejected that as a ground for postponing the December by-elections in 2013, so it should not be able to rely on it now.

[120] In relation to paragraph 2 of the directions addressed to the MEC for Local Government and Human Settlements, the acting MEC and the Speaker of the Tlokwe Local Municipality delivered affidavits. The MEC pointed out that in order for council business to be undertaken it is necessary in terms of section 30 of the

Structures Act for a majority of councillors to be present. On the assumption that this means a majority in number of all possible councillors, ignoring any vacancies, she expressed concern that in view of the relatively close balance between major parties in the council⁸⁸ setting aside the election of these councillors would lead to a situation where either of the major parties could, by simply not attending council meetings, bring the work of the council to a standstill. She indicated that this had occurred in the period prior to the December 2013 by-elections. The Speaker shared this view. Both said they were concerned that the council would be rendered dysfunctional as a result of such tactics by one of the major parties.

[121] This concern is misplaced. Section 1 of the Structures Act defines “councillor” as being a “member of a municipal council”. The applicants correctly point out that the determination of a quorum is thus dependent on the number of elected councillors not the total number of wards and proportional representation seats on the council. This is reflected in the council’s standing rules of order. The effect of declaring the seven seats involved in these by-elections vacant would be to reduce the number of elected councillors to 45. A majority would then be 23 councillors, and there are 23 councillors who are not members of the majority party. Taken together with the Speaker, who is obliged under section 37 of the Structures Act to convene quarterly meetings of the council and preside over such meetings, there is a majority of elected councillors available to ensure that the council remains quorate even if the majority party chose to boycott meetings. Conversely, if the principal minority party were to boycott meetings there would be sufficient councillors from other parties to constitute a quorum.

[122] But if either major party in the council were to boycott its proceedings in order to prevent it from operating that would be gravely irresponsible. We should not assume that the governing party and the official opposition at national and most other

⁸⁸ The ANC currently has 29 members of whom seven would be unseated leaving it with 22; the DA has 19; the Freedom Front has 1; COPE has 1 and there are 2 independents.