CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 55/16

In the matter between:

ELECTORAL COMMISSION	Applicant
and	
AARON PASELA MHLOPE	First Respondent
JOHANNA XABA	Second Respondent
JOHN MATONG SELEKE	Third Respondent
MAMOGADI ALETTA MATLOU	Fourth Respondent
JOHANNES KGANG RABOTSHO	Fifth Respondent
MAMOSEBI LENAH MAHLATSI	Sixth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT AND HUMAN SETTLEMENTS, NORTH WEST	Seventh Respondent
AFRICAN NATIONAL CONGRESS	Eighth Respondent
DEMOCRATIC ALLIANCE	Ninth Respondent
TSHEPO CHEMPE	Tenth Respondent
TLOKWE LOCAL MUNICIPALITY	Eleventh Respondent
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Twelfth Respondent
MINISTER OF HOME AFFAIRS	Thirteenth Respondent

INKATHA FREEDOM PARTY Fourteenth Respondent

NATIONAL HOUSE OF TRADITIONAL LEADERS Fifteenth Respondent

Neutral citation: *Electoral Commission v Mhlope and Others* [2016] ZACC 15

Coram: Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J

Judgments: Madlanga J (first): [1] to [102]
Mogoeng CJ (majority): [103] to [138]
Jafta J (minority): [139] to [211]

Heard on: 9 May 2016

Decided on: 14 June 2016

ORDER

On appeal from the Electoral Court, and alternative access for direct access:

The following order is made:

1. The applications for condonation by the Electoral Commission, the Minister of Co-operative Governance and Traditional Affairs and the Inkatha Freedom Party are granted.
2. Leave to appeal is granted.
3. The appeal is dismissed.
4. The Electoral Commission is granted direct access.
5. The Electoral Commission's failure to record all available voters' addresses on the national common voters' roll is inconsistent with its rule of law obligations imposed by section 1(c) of the Constitution and invalid.
6. The declaration of invalidity in paragraph 5 is suspended and:

6.1. The duty of the Electoral Commission to record all the available addresses of voters on the national common voters' roll for the purpose of the August 2016 local government elections is, except for the Tlokwe Local Municipality, suspended.

6.2. The Electoral Commission must by 30 June 2018 have obtained and recorded on the national common voters' roll all addresses that were reasonably available as at 17 December 2003.

7. The order in paragraph 6 does not apply to local government by-elections.

8. At six-monthly intervals calculated from the date of this order, the Electoral Commission must file a report with this Court, setting out:

8.1. The number of outstanding post-December 2003 addresses it has since obtained and recorded on the national common voters' roll;

8.2. The number of post-December 2003 addresses still outstanding;

8.3. The steps taken and to be taken to obtain outstanding post-December 2003 addresses;

8.4. Any other matter it may consider necessary to report on.

9. The Electoral Commission must pay the costs of appeal and application for direct access of the independent candidates, the Democratic Alliance and the Inkatha Freedom Party, including the costs of two counsel.

JUDGMENT

MADLANGA J (Khampepe J, Mhlantla J concurring):

Introduction

[1] The right to vote and the right to free, fair and regular elections form part of the bedrock of our democracy. Universal adult suffrage, a national common voters' roll,

and regular elections are recognised by our Constitution as founding values;[1] and with good reason. Universal adult suffrage is essential to democratic self-government: it guarantees every adult South African the right to vote, irrespective of race, gender, or status. Our collective exercise of the right to vote determines who governs us. A related right, which is also important, is the right to stand for public office and, if elected, to hold office.[2] Key to the exercise of both rights is a national common voters' roll.[3] It is this voters' roll that is at the centre of these proceedings. To be exact, the matter concerns the obligation of the Electoral Commission, commonly known as the Independent Electoral Commission (IEC), to provide copies of the voters' roll in terms of section 16(3) of the Electoral Act.[4]

[2] The IEC is applying for leave to appeal against an order made by the Electoral Court on 23 February 2016 postponing by-elections that were scheduled to occur on the following day, 24 February 2016, in Tlokwe Local Municipality (Tlokwe). Those by-elections were to have been held in terms of this Court's order in *Kham*.[5] Should the appeal fail, the IEC seeks direct access to this Court, and asks for certain relief pertaining to its obligation to record the addresses of registered voters.[6]

[3] It has joined as respondents: six people who were to have been independent candidates in the Tlokwe by-elections (independent candidates);[7] the Member of the Executive Council for Local Government and Human Settlements, North West Province;[8] the African National Congress (ANC);[9] the Democratic Alliance (DA);[10]

[1] This is contained in section 1 of the Constitution, which is quoted in full at [66] below.

[2] See below n 25.

[3] Above n 1.

[4] 73 of 1998 (Electoral Act).

[5] *Kham and Others v Electoral Commission and Another* [2015] ZACC 37; 2016 (2) SA 338 (CC); 2016 (2) BCLR 157 (CC).

[6] I say more about this relief later.

[7] First to sixth respondents.

[8] Seventh respondent.

[9] Eighth respondent. It is a political party registered in terms of section 26(a) of the Electoral Act, holding the majority in the National and Provincial legislatures and governing the majority of municipalities throughout South Africa.

Mr Tshepo Chempe, another independent candidate who is apparently not associated with the other six;[11] Tlokwe;[12] the Minister of Co-operative Governance and Traditional Affairs (Minister);[13] and the Minister of Home Affairs.[14] Pursuant to applications by them, the Inkatha Freedom Party (IFP)[15] and National House of Traditional Leaders[16] were joined as the fourteenth and fifteenth respondents, respectively.

[4] The seventh, tenth, eleventh and thirteenth respondents have not entered the fray before this Court.

Background

[5] The present dispute stems from this Court's decision in *Kham*. The applicants in that matter challenged the validity of the 2013 Tlokwe by-elections. The contest centred on the fact that the segment of the voters' roll they had received from the IEC did not reflect any voters' addresses. This Court delivered judgment on 30 November 2015. It set aside the by-elections and ordered that fresh by-elections be held in terms of section 25 of the Local Government: Municipal Structures Act[17] (Municipal Structures Act). Paragraphs 5(c) and 5(d) of the order provided:

> "(c) It is declared that when registering a voter to vote in a particular voting district after the date of this order the [IEC] 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.

[10] Ninth respondent. It is also a registered political party, and the largest opposition party in Parliament, and governs a few municipalities in the country.

[11] Tenth respondent.

[12] Eleventh respondent.

[13] Twelfth respondent.

[14] Thirteenth respondent.

[15] It is another registered political party with a particular presence in KwaZulu-Natal.

[16] The National House of Traditional Leaders is an institution established pursuant to section 212 of the Constitution to deal with matters relating to customary law and traditional leadership.

[17] 117 of 1998.

(d) It is declared that in all future municipal elections or by-elections the [IEC] is obliged in terms of section 16(3) of the [Electoral Act] 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."[18]

[6] Following *Kham*, the IEC took various steps to implement the order and prepare for the fresh by-elections. In the light of paragraph 5(c) of the order, the IEC trained its 52 000 electoral staff nationwide on how to obtain sufficient particularity of voters' addresses for the purpose specified in paragraph 5(c) of the order. IEC staff would now be required to obtain and record an address whenever a voter registered for

[18] *Kham* above n 5 at para 127. The full order reads:

"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."

the first time or re-registered in a new voting district. Where no address existed, IEC staff would obtain a written affirmation from the voter to satisfy the IEC that registration was in respect of the correct voting district. The IEC developed a new form[19] to complement the existing registration form, as well as a new training manual for its electoral staff.

[7] Alongside these efforts, the IEC prepared for the fresh Tlokwe by-elections scheduled for 24 February 2016. Its investigation had found that just over 1 000 people were registered in incorrect segments of the voters' roll. It gave them notice of its intention to remove them from the affected segments. In the end, it removed 749 of them. It identified approximately 4 500 people whose addresses potentially fell outside the voting districts in which they were registered. It sent out notices of intended removal. Of these, it ultimately removed some 1 600 from the affected segments of the voters' roll.

[8] On 16 February 2016, eight days before the Tlokwe by-elections that were to be held in terms of the *Kham* order, the independent candidates lodged an official complaint with the IEC. The crux of their complaint was that, contrary to *Kham*, the voters' roll omitted the physical addresses of 4 160 voters. On 18 February 2016, the IEC met with representatives of the independent candidates. It explained that it understood the effect of the *Kham* order to be prospective. In other words, it was obliged to provide the addresses of voters who had registered or re-registered *after* the date of that order, 30 November 2015. For voters who had registered or re-registered before this date, the IEC was only obliged to provide addresses that were already recorded on its system, as these were the only addresses "available" to it. It had no obligation to obtain addresses of which it had no record.

[9] Dissatisfied with this stance, the independent candidates launched urgent proceedings in the Electoral Court on 22 February 2016.

[19] This is called the REC AS Form which, when completed by an aspirant voter, is the written affirmation describing in detail their place of residence.

[10] Before the Electoral Court, the independent candidates argued that the only category of voters in respect of which the IEC was not obliged to provide "physical" addresses was those whose addresses were not available. This – they submitted – was in accordance with paragraph 5(d) of the order in *Kham* and section 16(3) of the Electoral Act.[20] In respect of all other voters, the IEC was obliged to provide addresses. The substance of the argument was that the omission of the 4 160 addresses from the voters' roll was an impermissible irregularity.

[11] In the main, the IEC's rejoinder was twofold. First, the order in *Kham* was purely prospective. Second, in respect of registrations and re-registrations made before the amendment that introduced section 16(3), the IEC did not always record or retain addresses. Addresses that had not been recorded or retained were not "available"; and – in terms of section 16(3) – the IEC was not obliged to provide them.

[12] The Electoral Court rejected both arguments. On 23 February 2016, the day before the by-elections, it issued an order setting aside the IEC's certification of the voters' roll, postponing the by-elections for six weeks, and directing the IEC "to provide all candidates in the Tlokwe municipal by-elections with a copy or a segment of the voters' roll to be used in their respective wards in the municipal by-elections, including the addresses of all voters, where these addresses are available".[21] In reasons delivered subsequent to its order,[22] that Court held that "[the IEC]'s stance would lead to the anomaly that the Constitutional Court set aside by-elections on the basis of a flawed voters' roll but that it would condone a by-election based on the very

[20] Section 16(3) provides:

> "[T]he chief electoral officer must, on payment of the prescribed fee, provide copies of the voters' roll, or a segment thereof, which includes the addresses of voters, where such addresses are available, to all registered political parties contesting the elections."

[21] *Mhlophe and Others v Independent Electoral Commission of South Africa and Others* [2016] ZAEC 1 (*Mhlope*) at para 1, quoting para 3 of the order.

[22] The reasons were handed down on 10 March 2016.

same flaw which still existed in the voters' roll".[23] It is against the Electoral Court's order referred to here that the IEC now seeks to appeal.

[13] Very crisply, the appeal concerns the question whether the IEC is obliged to provide the 4 160 addresses, where available. Strictly speaking that has nothing to do with addresses that are not reflected on segments of the voters' roll that are applicable outside of Tlokwe. But the IEC has told us that countrywide the voters' roll lacks a total of 12 246 571 (12.2 million) addresses. And it makes the point that, if its appeal does not succeed, it is equally obliged to provide all 12.2 million addresses, where available, in respect of the upcoming municipal elections to be held throughout the country.[24] As will become clearer later, that is why the issues are much wider than the crisp issue to which the appeal relates.

Issues

[14] Here are the issues—

(a) whether leave to appeal should be granted;

(b) whether section 16(3) enjoins the IEC to provide addresses even in respect of pre-December 2003 registrations;

(c) the prospective nature of the *Kham* order;

(d) the meaning of "available" in section 16(3) of the Electoral Act;

(e) whether section 16(3) of the Electoral Act applies to municipal elections;

(f) the basis for providing the voters' roll to independent candidates;

(g) the true nature of the independent candidates' cause of action before the Electoral Court;

(h) if the appeal fails, whether direct access must be granted; and

(i) whether there should be an exception to the suspension of the obligation in relation to addresses in regard to the Tlokwe elections.

[23] *Mhlope* above n 21 at para 19.

[24] I say more about these elections later.

With the exception of the question of leave to appeal whose relevance is obvious, how each arises will become apparent as I deal with them in turn.

Leave to appeal

[15] As the introduction says, at the heart of this application is the right to vote and stand for and hold public office contained in section 19 of the Constitution.[25] As I will show later, even section 190 of the Constitution bears relevance to the issues to be determined.[26] These are constitutional issues of great import. Also, the debate that follows demonstrates that the issues raised by the IEC are arguable and thus have reasonable prospects of success.[27] Leave to appeal must be granted.

Pre-December 2003 addresses

[16] Section 16(3) and (4) of the Electoral Act was introduced by section 5 of the Electoral Laws Amendment Act,[28] which came into effect on 17 December 2003.[29] The IEC pointed out that these provisions were enacted pursuant to repeated requests for voter addresses on the voters' roll by political parties. A question arises as to

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[25] Section 19(3) states:

> "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."

[26] Section 190 states:

> "(1) The [IEC] must—
>
> (a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;
>
> (b) ensure that those elections are free and fair; and
>
> (c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.
>
> (2) The [IEC] has the additional powers and functions prescribed by national legislation."

[27] Compare *SATAWU and Another v Garvas and Others* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at para 33.

[28] 34 of 2003.

[29] Proc R78 GG 25860 of 17 December 2003. References to "pre-December 2003" and "post-December 2003" in this judgment refer to pre- and post-17 December 2003.

whether the obligation – imposed by section 16(3) – to provide a voters' roll which includes addresses of voters applies even in respect of voters registered before December 2003. To answer this question, it is crucial to establish the purpose served by the provision of addresses. The purpose is at least two-pronged and of great functional value. First, a voters' roll with addresses facilitates visiting and canvassing voters. In *Kham* Wallis AJ said that "[w]ithout voters' addresses the ability of candidates to canvass voters is significantly impaired".[30] The addresses increase efficiency and make canvassing cost-effective as they assist in focussing campaigns only at registered voters. This is highly beneficial to contestants with modest resources to fund their campaigns. This enhances the accessibility of the right to stand for public office.

[17] Second, the inclusion of addresses on the voters' roll enables those contesting elections to verify whether voters are registered in the correct voting districts. In peremptory terms, section 8(3) of the Electoral Act provides that "[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". The importance of accurate registration cannot be overstated. In *Kham* the Court explained:

> "If voters can be brought from outside, into a ward where the political balance is unclear, their votes may influence the outcome of the election at a ward level and even the outcome of an entire municipal election. We cannot shut our eyes to the reality that there are municipalities that are finely balanced electorally, where the result in a single ward may affect the balance of power in the municipality. That being so, it is right that particular attention is paid by the IEC to securing that, where

[30] *Kham* above n 5 at para 77. The full quote is:

> "Without voters' addresses the ability of candidates to canvass voters is significantly impaired. In these wards, in addition to residences of a conventional type as reflected on the plans and photographs, where street names or numbers and house numbers should be available, there are areas of informal settlement. Candidates given a voters' roll that merely reflects names and ID numbers are faced with an enormous task in trying to identify which residents are registered to vote. Even in areas where there are formal dwellings many of the residents may not have telephones and be capable of identification by reference to the telephone directory. The ubiquitous mobile phone is not to be found in conventional directories. How then does a candidate convert the list of names into identifiable voters whom they will want to contact and persuade to give them their votes?"

> there are elections and by-elections in wards, the people who are registered as voters and permitted to vote should be limited to those who are legitimately entitled to vote in that ward."[31]

[18] Without addresses on the voters' roll, the task of verifying registrations would be a lot more difficult. And yet the voters' roll is not immune to irregular registrations. The Tlokwe saga shows us as much. And so do registrations in Jozini, KwaZulu-Natal, which the IEC admits had been fraudulently sought.[32]

[19] With this twin-purpose in mind, surely then the availability of addresses on the voters' roll enhances the fairness of elections. The absence of addresses might – not will – result in elections being unfair. The IEC argued that the lack of addresses on the voters' roll does not bear relevance to the fairness of elections. The argument went so far as to say if it did, that would mean all previous elections where the voters' roll did not include addresses were unfair. This ignores one fundamental distinction. It is one thing for the IEC to take all necessary steps to exclude or minimise the possibility of unfairness in elections. It is quite another to say unfairness actually eventuated as a result of a failure by the IEC to take all necessary steps. Section 190(1)(b) of the Constitution enjoins the IEC to ensure that elections are free and fair. If the IEC were to fail to take precautionary measures where – looked at objectively – that failure might lead to elections being unfair, it would be failing in its duty under section 190(1)(b). It does not follow, however, that just because there has been that lapse, elections will necessarily be unfair. So, I cannot agree with the IEC's argument. The fairness of all previous elections where political parties and independent candidates were not furnished with voters' addresses would have to be challenged and the unfairness proved.[33]

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[31] Id at para 63.

[32] This is by no means a suggestion of fraud on the part of the IEC. The admitted fraud appears to have been committed by those who sought and obtained the registrations.

[33] In *Kham* above n 5 at para 94, the Court left open the question whether, "in order for an election to be fairly conducted it is necessary that the participants have available to them not simply a list of voters' names and identity numbers but also some means of identifying and contacting them, of which the voters' addresses is the most obvious." I do not read paragraph 6 of the order in that matter to pronounce – one way or the other – on the validity of previous elections.

[20] Returning to the question under discussion: does section 16(3) require the IEC to provide even addresses of voters who were registered before December 2003? It does. To suggest otherwise would defeat the very purpose of furnishing addresses. It would mean that all voters whose registrations pre-date December 2003 and whose addresses were never captured or retained on the IEC's database cannot be canvassed in the direct and focussed manner referred to above. Nor can the validity of their registrations be verified with relative ease.

[21] On a proper reading of section 16(3), the obligation to provide a voters' roll with addresses is ongoing. Ongoing in the sense that each time political parties and independent candidates require a voters' roll with addresses for election purposes, the IEC must provide it in terms of the section. It cannot be an answer that the addresses of pre-December 2003 voters were never captured. The IEC must take reasonable steps to get them in order to comply with the continuing obligation. That is a purposive answer that not only gives meaning to the purpose of the obligation, but accords with the IEC's obligation in terms of section 190(1)(b) of the Constitution. This finds support in *Kham* where the Court said *even in the absence of section 16(3)*, it would arguably be wrong for the IEC to say it was under no obligation to do more than it had done.[34]

[22] This interpretation of the obligation is consonant with a wholesome exercise of the right in section 19 of the Constitution. And – in accordance with section 39(2) of the Constitution – it must prevail.[35] An interpretation that requires the recording of

[34] *Kham* above n 5 at para 93. There the Court was addressing the late delivery of the relevant segments of the voters' roll and the absence of addresses.

[35] Section 39(2) of the Constitution provides:

> "When interpreting any legislation . . ., every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC), Langa DP said at para 21:

> "[Section 39(2)] means that all statutes must be interpreted through the prism of the Bill of Rights."

even pre-December 2003 addresses better protects the rights to vote in,[36] and contest,[37] free and fair elections.[38]

[23] The subject under discussion is one of the few issues on which Mogoeng CJ and I differ. I have had the pleasure of reading his punchy and succinct judgment (majority judgment). I propose to deal with only some of the points on which we diverge. With regard to the rest, it will be apparent from my judgment why we do not agree. I have also had the privilege of reading the judgment penned by my colleague, Jafta J. There is some agreement between my colleagues' judgments. To the extent that the judgments converge, my rejoinder to the majority judgment also addresses the judgment of Jafta J.

[24] Paragraph 6 of the majority judgment suggests that the *Kham* order sheds light on the applicability of section 16(3) to pre-December 2003 registrations. On my reading, nowhere does *Kham* purport to deal with this debate. There can be no question then that its order could help resolve the debate one way or the other. On the contrary, paragraph 93 of *Kham* suggests the opposite.[39]

[25] In part, the majority judgment bases its concerns about the imposition of the obligation to record pre-December 2003 addresses on policy-laden, budgetary or polycentric considerations.[40] This begs the question. If the correct interpretation of the section is the one that I proffer, we would be perfectly entitled to assume that Parliament took all these concerns into account when introducing section 16(3). So, this takes us back to the question: what then is the correct interpretation? And the concerns expressed by the majority judgment cannot be of assistance in answering it. I think it is dangerous to speculate about these concerns.

[36] Section 19(3)(a) of the Constitution.

[37] Section 19(3)(b) of the Constitution.

[38] Section 19(2) of the Constitution.

[39] That paragraph is dealt with at [21] above.

[40] Majority judgment at [109].

[26] The majority judgment states – correctly – that we must base our determination of the IEC's obligation in relation to the voters' roll on the real or stated purpose as opposed to our preference.[41] The majority judgment has not suggested a purpose that is at variance with the twin-purpose of section 16(3) that I have proffered. The obligation that I suggest rests on the IEC accords with the purpose served by the section; and this purpose is real, and not merely preferred. And, crucially, the majority judgment and I seem not to disagree on the purpose.

[27] According to the majority judgment, the IEC argued persuasively that the circumstances surrounding the introduction of section 16(3) indicate that the section was intended to apply thenceforth only.[42] I am aware of only one trigger which - on the IEC's assertion – led to the introduction of section 16(3). It is that section 16(3) was enacted pursuant to requests by political parties for a voters' roll that includes addresses. I am aware of no other circumstances. If it be worth anything at all in the interpretative process, that trigger actually supports an interpretation that the obligation imposed by section 16(3) does apply to pre-December 2003 registrations. Let us posit this. Leading up to the 2004 national and provincial elections – and post-December 2003 – political parties ask for a voters' roll with addresses. Based on the information we have, the likelihood is that the voters' roll would be having very few addresses, if any. A voters' roll of that nature would be totally useless for the twin-purpose that I have discussed above. On the approach of the majority judgment, political parties would have to be content with that kind of roll. And that situation would endure not only in respect of the 2004 elections, but for many more subsequent elections. The situation would improve gradually as new voters got registered and some old ones re-registered. All the while, political parties and – in the case of municipal elections – independent candidates as well would be saddled with a useless or partially useful voters' roll, depending on the stage of gradual improvement. That cannot be consonant with the object of section 16(3). It cannot be that political parties

[41] Id.

[42] Majority judgment at [110]. I have paraphrased this to relate only to the subject of the debate, and not the 2003 amendments as a whole.

were meant only ever to derive a real benefit from the section after the voters' roll had self-corrected, as it were; and that, after a considerable length of time. As we now know, well after a decade, there are pre-December 2003 addresses that are still outstanding.

[28] I am not unmindful of the fact that on the scenario I posit, it would most likely have been impossible for the IEC to provide all available addresses for the 2004 elections. This is so because by the time those elections were held, section 16(3) had been in operation for just under four months.[43] That is a different issue altogether. It goes to the question of availability of the addresses. On the meaning that I give "available" in section 16(3),[44] the IEC would have been able to escape the obligation to provide the addresses for the 2004 elections on the basis that they were not reasonably available. This dispels the suggestion in the majority judgment that my approach imposes unbearable or near-impossible obligations.[45] That said, the IEC had to obtain all outstanding addresses within a reasonable time. And that time is definitely not the 12 years that has since elapsed. Otherwise the roll would continue not serving the section 16(3) purpose. Why? Only to afford the IEC the comfort of not having to go back and obtain the addresses.

[29] The presumption against retrospectivity is rebuttable;[46] it is not a magic wand that must trump a discernible purpose of a legislative instrument.[47] In the instant matter, the primacy of the presumption against retrospectivity renders section 16(3) nugatory not only for the period immediately after 17 December 2003, but for a

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[43] Those elections were held on 14 April 2004.

[44] See [39] to [42] below.

[45] Majority judgment at [117].

[46] At [109], the majority judgment says:

> "There is in my view nothing about the ordinary grammatical language of section 16(3), not even with its apparent purpose, to suggest that it applies retrospectively."

[47] See *Workmen's Compensation Commissioner v Jooste* [1997] ZASCA 58; 1997 (4) SA 418 (SCA) at 424G-H where the Court held:

> "The presumption against retrospectivity arising from this rule may be rebutted, either expressly or by necessary implication, by provisions or indications to the contrary in the enactment under consideration."

considerable length of time thereafter. That cannot be. The oft stated rationale for the presumption is to avert the obliteration of existing rights.[48] I should not be understood to say that the presumption applies only in circumstances involving the extinguishing of rights. But – quite understandably – it is certainly in this context that it is frequently called in aid. My interpretation commends itself because, rather than extinguish existing rights, it actually vindicates the rights to vote and stand for office. On the other hand, the approach by the majority seeks to save the IEC from what is seen as an unbearable or near-impossible obligation. It is not about the rights of anybody. Surely, in that case what appeal the applicability of the presumption might have is greatly attenuated. This is especially so because – as I indicate in paragraphs 39 to 42 below – the onerousness of the obligation is significantly tempered by the reasonableness standard on the meaning of "available" in section 16(3).

[30] Lastly, the majority judgment raises a question that relates to what the situation should be if voters with no addresses had registered pre-December 2003 but now have addresses. That question is whether the IEC has a continuing obligation to enquire whether these voters have since acquired addresses in order to update the voters' roll.[49] A number of other questions that flow from this are also asked rhetorically. The clear implication is that the IEC does not have the obligation. In my view, this does not advance the debate because the same questions may be raised about the post-December 2003 addresses. If there isn't an obligation on the IEC to keep enquiring from all voters who registered without addresses post-December 2003

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[48] See *Curtis v Johannesburg Municipality* 1906 TS 308 where Innes CJ held at 311:

> "The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation. . . . [T]he courts will not find that [Parliament] intended so inequitable a result as the destruction of existing rights unless forced to do so by language so clear as to admit of no other conclusion."

This was referred to with approval by Mokgoro J in *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* [2005] ZACC 22; 2007 (3) SA 210 (CC); 2007 (9) BCLR 929 (CC) at para 26, where she added:

> That legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution."

[49] Majority judgment at [115].

whether they have since acquired addresses, that should be true of pre-December 2003 registrations as well. And if the obligation is there, that must be so in respect of both periods. If anything, the implication of the rhetorical questions is neutral insofar as the debate at issue is concerned.

[31] A related issue – and one that bears direct relevance to the appeal – is the exact nature of the prospective effect of paragraphs 5(c) and (d) of the *Kham* order.[50]

Prospective nature of Kham order

[32] Paragraph 6 of the *Kham* order says "[t]he 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". This led to an argument before the Electoral Court – and now before us on appeal – that the IEC has no obligation to provide addresses in respect of registrations made before the *Kham* order. If correct, the effect of this would have been that the IEC had no obligation to provide those contesting the Tlokwe by-elections with the missing 4 160 addresses.[51] The Electoral Court would have none of it and insisted on the provision of the addresses, where available, hence its order postponing the by-elections of the following day, 24 February 2016. In persisting in the argument before us, the IEC suggests that the Electoral Court and independent candidates misinterpreted paragraphs 5(c) and (d) of the *Kham* order.

[33] On interpreting court orders, authority tells us:

> "The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. . . . [A]s in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its

[50] These paragraphs are quoted at [5] above.

[51] About these addresses, see [8] above.

> intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it."[52]

This approach has been endorsed by this Court.[53] Kriegler J in *Ex Parte Women's Legal Centre* added that the interpretation of a court order "entails determining the legal context in which the words in the order were used".[54]

[34] Reading it conjointly with paragraph 6 of the order, paragraph 5(c) relates to applications – post the *Kham* order – by voters for re-registrations where they have moved to different voting districts or for new registrations. That – for me – is the textual and grammatical reading of this part of the order.

[35] All that paragraph 6 adds to paragraph 5(d) is that the obligation to provide addresses does not apply to past elections. A pointer to this is that part of paragraph 6 which says "and do not affect the validity of any election or by-election held prior to the date of this order". Crucially, a lot was wrong with the certified segments of the voters' roll that were to be utilised in the Tlokwe by-elections.[55] Those problems had to be corrected. Indeed, on the IEC's say so, a serious attempt was made in this regard.[56] After correction, the relevant segments of the voters' roll would have had to be certified yet again.[57] Needless to say, the certification could have taken place only after the *Kham* order. And we know it took place on 28 January 2016, just under two

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[52] *Firestone South Africa (Pty) Ltd v Genticuro A.G.* 1977 (4) SA 298 (A) at 304 D-F. See also *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) at para 13.

[53] See *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 29.

[54] *Ex Parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* [2001] ZACC 2; 2001 (4) SA 1288 (CC); 2001 (8) BCLR 765 (CC) (*Ex Parte Women's Legal Centre*) at para 11.

[55] *Kham* above n 5 at paras 68-72.

[56] See [6] to [7] above.

[57] Section 6 of the Local Government: Municipal Electoral Act 27 of 2000 (Municipal Electoral Act) provides:

> "(2) By not later than a date stated in the timetable for an election, the chief electoral officer must—
>
> (a) certify the segments of the voters' roll for the voting districts to be used in the election."

months after the order in *Kham*. I see no reason in logic why the certification referred to in paragraph 5(d) of the order should not include certification of the segments of the voters' roll relevant to the Tlokwe by-elections. Even in a prospective sense, that certification took place after the order as envisaged in paragraph 6 of the order. Likewise, the Tlokwe by-elections fell under the category of "all future municipal elections or by-elections" in respect of which paragraph 5(d) of the order required the IEC to provide addresses "in terms of section 16(3)".

[36] Also, if – as this Court says in *Ex Parte Women's Legal Centre*[58] – the legal context in which an order was made may shed light on its meaning, this interpretation of paragraph 5(d) read with paragraph 6 is consonant with the purpose of section 16(3).[59] The absence of addresses in respect of 4 160 voters would have[60] made it difficult for the contestants in the by-elections to canvass the affected voters or verify the correctness of their registrations.

[37] In sum, I cannot accept the IEC's argument on the question of the prospective nature of paragraphs 5(c) and (d) of the *Kham* order. I agree with the Electoral Court that the IEC was to provide all 4 160 addresses, where available.

[38] This links with the next argument raised by the IEC; and that is: "available" – as envisaged in section 16(3) – means no more than addresses that the IEC had obtained and recorded on its database. If, for whatever underlying reason, the IEC does not have addresses on its system, they are not "available"; and it has no obligation to provide them. I next deal with this.

[58] *Ex Parte Women's Legal Centre* above n 54.

[59] See [16] to [19] above.

[60] I say "would have" because the parties now accept that it has become practically impossible to hold the Tlokwe by-elections.

Meaning of "available"

[39] The question of availability of addresses under section 16(3) must be approached sensibly. Contrary to the IEC's argument, the criterion to determine availability must be objective. And reasonableness, as in other spheres of law, is that objective criterion. It is flexible and context- and fact-specific.

[40] The parties are in agreement that certain places where some voters reside defy description in the "conventional" sense. For example, this is the case with most rural areas under traditional leaders where there will only be the name of the rural village with no street names, numbers or other identifiers denoting individual homes. More accurately, in some – if not most – instances, there are no streets at all. This is also true of some informal settlements in the urban areas. The best one can do to shed light on where one lives would be to give the name of the rural village or informal settlement and a description referencing an identifiable landmark. But in some instances there may be a sea of homes with no distinctive landmark in close proximity. In that case, beyond the name of the village or settlement, not even the description just referred to would be possible. For convenience, I refer to these two categories as the first category. Examples of addresses that fall under what the parties call "conventional addresses" would be something like: 22 Makhelwane Street, Ikhwezi Township, Mthatha; Lot 9000, Munro Avenue, Margate; or Ekuphumleni Farm, Sterkspruit, District of Herschel[61] (second category).

[41] The independents and the DA argue that in respect of the second category, the IEC must provide all addresses. And that it is only in the case of the first category that the addresses are not available for purposes of section 16(3). They take issue with the IEC's contention. Subject to the reasonableness standard, I agree with them. It must be in rare instances that the IEC would have an acceptable excuse for not capturing addresses that fall under the second category. These are ordinarily available. The IEC must obtain, record and retain them. But one may well conceive

[61] These are fictional examples.

of situations where it would be unreasonable to expect the IEC to have recorded even addresses falling under the second category. An example is where the IEC's entire database were to be lost due to no fault of its own.[62]

[42] On the other hand, it may be difficult if not impossible for it – despite reasonable efforts – to obtain and record addresses falling under the first category. It makes sense that these addresses may be said not to be reasonably available for purposes of section 16(3). If the IEC's interpretation were to carry the day, any addresses falling under the second category that the IEC obtained but lost through the negligence of its officials or discarded for fraudulent reasons would never get onto the voters' roll. And the IEC would then be able to say that those addresses were not available. That cannot be. This is not about casting aspersions on the IEC. It is about interpretation. Indeed, I am not aware that the integrity of the IEC – as an institution - has ever been held to be wanting.

Does section 16(3) apply to municipal elections?

[43] Section 5(1) of the Municipal Electoral Act makes the voters' roll "compiled and maintained in terms of the Electoral Act" applicable to municipal elections. Likewise, the Municipal Electoral Act defines a voters' roll as "the national common voters' roll compiled and maintained in terms of the Electoral Act".

[44] On a textual reading of section 16(3) of the Electoral Act,[63] addresses are part of the voters' roll. The "which" before "includes" refers back to "voters' roll". This suggests that a voters' roll is expected to have addresses as part of it. This is buttressed by the use of "with" in conjunction with "voters' roll" in section 16(4).[64]

[62] I make no holding as to the legal position if the loss of the database were due to the IEC's own fault.

[63] See above n 20.

[64] Section 16(4) provides:

> "The voters' roll with addresses referred to in subsection (3) may only be used by political parties for election purposes and anyone using such voters' roll for other purposes is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding one year or to both a fine and such imprisonment."

This too tends to show that addresses are an integral part of the voters' roll. It is this type of voters' roll (one with available addresses), then, that is used in municipal elections in terms of section 5(1) of the Municipal Electoral Act.

[45] In addition, the IEC conceded – quite correctly – that section 16(1) applies to municipal elections. Section 16(1) provides that "the provincial and municipal segments of the voters' roll must be available for inspection at the times and venues mentioned in a notice published by the chief electoral officer in the *Government Gazette*". There is no reason why "segment" in this section – which includes the municipal segment – is not used in exactly the same sense in section 16(3). In *Ermelo*, Moseneke DCJ explained that "there is 'a reasonable supposition, if not a presumption' that 'the same words in the same statute bear the same meaning' throughout the statute".[65]

[46] The argument in the opposite direction goes further and says the fact that section 16(3), in terms, says a voters' roll with addresses must be provided to registered political parties, with no mention of independent candidates, is an indication that the section does not apply to municipal elections. This is an attractive argument; attractive because in terms of our electoral system, there are no independent candidates in national and provincial elections. These elections follow a party-list system.[66] We find independent candidates only in municipal elections. But beyond attractive, the argument gains no traction. Section 16(3) provides that the roll must be provided to political parties contesting "elections". Section 1 of the Electoral Act defines "election" as including "an election of a municipal council or a by-election for

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[65] *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Ermelo*) at para 70.

[66] Section 46(1) of the Constitution provides:

> "The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that—
>
> . . .
>
> (d) results, in general, in proportional representation."

The corresponding provision in respect of proportional representation in the Provincial Legislatures is section 105(1)(d).

a municipal council". All definitions in the section are subject to the context. I see nothing in the context in which "elections" is used in section 16(3) and the Electoral Act as a whole that would exclude municipal elections.

Independent candidates' entitlement to voters' roll with addresses

[47] All that is established by the discussion under the preceding heading is that it is the voters' roll with addresses that is used in municipal elections. That does not answer the related but separate question whether and on what basis that roll must be made available to independent candidates contesting municipal elections. Again, this has everything to do with the fact that section 16(3) says this voters' roll must be provided to political parties. We need not ponder this question. *Kham* has answered it:

> "[S]ection 16(3) of the Electoral Act explicitly requires the IEC to provide a voters' roll with the addresses of voters to all registered parties contesting the election. It was wisely not suggested that political parties would be treated more favourably than independent or unaffiliated candidates. That would be a clear and unjustified breach of the constitutional right of such candidates to stand for public office in free and fair elections. The drafting of the section may have overlooked independent and unaffiliated candidates, but it must clearly be construed as referring to all candidates participating in an election."[67]

[48] Section 16(4) gives the purpose of providing a voters' roll with addresses as "election purposes". This underscores the unfairness to which independent candidates would be exposed if they were denied a voters' roll with addresses. They would be denied an equal opportunity; the opportunity to use it for the same purpose as candidates contesting elections under the banner of political parties.

[67] *Kham* above n 5 at para 76.

Cause of action

[49] The IEC submitted that the independent candidates' cause of action in the Electoral Court was not what they argued before us in the application for leave to appeal. According to the IEC, the independent candidates challenged the voters' roll that was to be used in the Tlokwe by-elections on the basis that it did not have addresses in respect of 4 160 of the registered voters. For that, they relied on *Kham*. The IEC drew our attention to the fact that before the Electoral Court it pleaded that the independent candidates' reliance on *Kham* was misplaced. And it did not address the point of substance because – according to what we were told in oral argument – the IEC did not have time. The IEC also argued before us that, in any event, the independent candidates' complaint before the Electoral Court did not suggest that it was against only the failure to provide second category addresses;[68] it was about the IEC's alleged failure to provide all 4 160 addresses, whether available or not.

[50] I see nothing wrong at all with how the independent candidates' case was pleaded. It was up to the IEC to raise a defence that some or all 4 160 addresses were not available.

[51] On my assessment, the independent candidates' cause of action was – in context – about the issues debated above.[69] Because on all of them I reach conclusions that differ from the IEC's submissions, the appeal must fail. The upshot of this is that the IEC has acted unlawfully in that it provided a voters' roll on which there were no addresses against 4 160 registrations in circumstances where some of those addresses may well have been available.[70]

[68] On the category of addresses, see [40] above.

[69] See [16] to [48] above.

[70] See [11] above. The IEC admits that it "did not always record or retain addresses" before the enactment of section 16(3). It is possible that some of the missing 4 160 addresses fall in this group – that is, they are physically verifiable, but were simply not recorded on the IEC's system following registration.

Application for direct access

[52] At the time of oral argument, there were approximately 12.2 million registered voters whose addresses were either not captured at all on the voters' roll, or were incomplete or recorded in vague terms.[71] The IEC explains that when the affected registrations were made, the addresses were either not kept, or the forms on which they were recorded subsequently got lost or were destroyed.[72]

[53] The implication of paragraph 5(d) of the *Kham* order and what we have held on the appeal now before us is that prior to the upcoming municipal elections that are to take place countrywide this year, the IEC must provide addresses, where available, in respect of the 12.2 million registrations. It is not an option for it to remove any of these voters from the voters' roll.[73] Once registered, it must be so – in terms of section 19 of the Constitution and section 7(1) of the Municipal Electoral Act – that a voter has an untrammelled right to vote.[74] Now here is the problem. In terms of section 16(3) of the Electoral Act, the 12.2 million addresses must be provided, where available. But the IEC says, it is practically impossible for it to provide them in the available time. In law – aside from what has actually been proclaimed as the date of elections by the Minister – the next municipal elections had to take place at the latest

[71] The exact figure is 12 246 571. Out of this, no addresses were captured in respect of 5 553 953 registered voters, and in respect of the remaining 6 692 618 voters, the IEC had "incomplete" or "generic" addresses in its possession. Any reference to voters with missing addresses in this judgment includes both categories.

[72] In oral argument the IEC stated that some of the records of addresses were destroyed by flood and fire.

[73] There is provision for the removal of registered voters from the voters' roll. Section 11(1) of the Electoral Act provides:

> "The chief electoral officer must—
>
> . . .
>
> (b) deregister a voter, if the chief electoral officer is satisfied that that voter does not qualify or no longer qualifies for registration."

[74] There is a relationship between section 8(3) and 16(3). It is not that a registration with no address recorded against it is invalid. Once a registration satisfies the requirements of section 8, it is valid. For purposes of section 8(3), an address is important to the extent that it helps the IEC ensure that the registration is in respect of the correct voting district. The obligation in section 16(3) to provide addresses is of practical relevance to the performance of the section 8(3) function: it makes practical sense for the IEC to record addresses at the stage of registration exactly because they are going to be required under section 16(3). But a registration that perfectly satisfies the requirements of section 8 cannot be invalid just because, for example, an IEC official who was given an address failed to record it.

on 16 August 2016.[75] At the time of argument, that left the IEC with very little time to get all available addresses in respect of the 12.2 million registrations with missing addresses. It is that dilemma that has forced the IEC to apply for direct access, effectively seeking a moratorium on its obligation to provide the addresses of voters registered before *Kham* until *after* the 2019 provincial and national elections. It is also asking for an order that it be directed to take steps to acquire the addresses by no later than 30 June 2020.[76] It avers that the four years, which – on its calculation – is conservative, is the minimum time required to source and record the addresses.

Parties' contentions

[54] The IEC says that in its experience it requires at least 75 calendar days before an election to perform the necessary tasks to ensure its smooth running. Therefore,

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[75] Section 159 of the Constitution stipulates:

> "(1) The term of a Municipal Council may be no more than five years, as determined by national legislation.
>
> (2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired."

Section 24 of the Municipal Structures Act provides:

> "(1) The term of municipal councils is five years, calculated from the day following the date set for the previous election of all municipal councils in terms of subsection (2).
>
> (2) Whenever necessary, the Minister, after consulting the Electoral Commission, must, by notice in the *Government Gazette*, call and set a date for an election of all municipal councils, which must be held within 90 days of the date of the expiry of the term of municipal councils. The notice may be published either before or after the term of municipal councils expires in terms of subsection (1)."

As the last general local government election was held on 18 May 2011, the last possible date in terms of the Constitution to hold the elections is 16 August 2016. We are told that the President has announced that the elections will take place on 3 August 2016, and the Minister has indeed gazetted that date (see Local Government: Municipal Structures Act (117/1998): Calling and Setting a Date for Local Government Elections, GN 562, *GG* 40007, 23 May 2016).

[76] Paragraph 6 of the IEC's notice of motion in this Court provides:

> "It is declared that:
>
> 6.1 In conducting the 2016 local government elections and 2019 national and provincial government elections, the [IEC] is not obliged to be in possession of addresses for those voters who have been registered in a particular voting district prior to 30 November 2015 and who do not seek re-registration in another voting district; and
>
> 6.2 The [IEC] must take reasonable measures by 30 June 2020 to obtain addresses for the voters referred to in paragraph 6.1 above, save where such addresses are not available."

the upcoming elections had to be proclaimed by the latest at the end of May or in early June this year. In terms of section 6(1) of the Municipal Electoral Act, the voters' roll would have to be finalised by that time;[77] by that date all available addresses would have to be part of the voters' roll.

[55] The IEC tells us that this is an impossible task. It points out that in terms of the legislative scheme, for a voter's details – including his or her address – to be altered, the voter must present her- or himself in person before the IEC.[78] The IEC claims that, in any event, it would be a difficult, impractical, and unreliable task for it to contact affected voters and update its records,[79] or to use the addresses from various governmental and private databases to create a voters' roll that is compliant with section 16(3).[80] This is because it does not have the required addresses. Moreover, the registration drives conducted by the IEC in March and April this year have been successful only to a limited extent in obtaining the missing addresses[81] and were costly.[82]

[56] The one option which would readily clean up the roll is, as I indicate, not legally available. That is, simply removing the voters with no addresses from the voters' roll. The IEC argues – correctly – that this would amount to a mass disenfranchisement. That, in circumstances where the defect in the registration is not of the affected voters' own doing. At a pragmatic level, the legal prescripts pertaining

[77] Section 6(1) provides:

> "A municipality's segment of the voters' roll existing on the day on which the notice calling an election is published in terms of the Municipal Structures Act, is the segment that must be used in that election."

[78] Section 9(1) of the Electoral Act read with regulation 3(a) of the Regulations Concerning the Registration of Voters, GN R1340, *GG* 19388, 16 October 1998 (Electoral Regulations).

[79] The IEC alleges that it is not in possession of the contact details of these voters.

[80] It explains that governmental databases such as those kept by the South African Post Office and the South African Social Security Agency, or those kept by private companies, such as cell-phone network operators, are inconsistent and unreliable and may not even set out a residential address.

[81] At the time the application was launched in this Court there were 16.2 million registered voters whose addresses were not in the possession of the IEC, this after the March 2016 registration weekend. At the time of filing its written submissions and after the April 2016 registration weekend, this number had dropped to 12.2 million.

[82] One registration weekend alone cost in the region of R225 million.

to the removal of voters from the voters' roll would render it impossible to remove all these voters in the available time.[83] On the other hand, if the voters' roll were to be certified with the addresses of the 12.2 million voters not reflected, there might be Tlokwe-type challenges based on the lack of those addresses.[84]

[57] The IEC then contends that the relief sought will allow it an opportunity to right its wrongs and collect the addresses through an elaborate eight stage process that is to last some four years.[85] That is how this will take us, not only beyond the upcoming municipal elections, but also past the 2019 national and provincial elections. It argues that this eight stage process is the only possible way for it to collect all 12.2 million addresses.

[58] The IEC argues that it is open to us to grant the relief it seeks in terms of the wide remedial power we have in terms of section 172(1)(b) of the Constitution.[86]

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[83] The Electoral Act provides for a formal process of de-registering a voter, which includes giving her or him notice, and affording her or him the possibility of an appeal. Section 11(1)(b) of the Electoral Act provides that the chief electoral officer must de-register a voter if she or him is satisfied that such voter no longer qualifies for registration. Section 12(1)(c) and (2) stipulates that notice together with reasons for de-registration must be given to the voter concerned, and regulation 5 of the Electoral Regulations provides that this notification must either be given: (a) by registered post to the voter's last available postal address; (b) by hand to the voter's last known residential address; (c) by publishing notice in a newspaper circulating in the area where the voter's last known ordinary residence is situated; or (d) by displaying the notification on notice boards in the offices of both the provincial and municipal electoral officers in the area of that voter's last known ordinary residence. I should pause here to point out that, because in the case of the 12.2 million voters, addresses are either not there or incomplete, the only options that may be available are (c) and (d). Section 13(1) of the Electoral Act allows an aggrieved voter to appeal against the decision of the chief electoral officer to the IEC in the prescribed manner, and regulation 6 of the Electoral Regulations sets out a procedure on appeal, which includes the possibility of a referral to oral evidence.

[84] Here I have in mind challenges that there has been a breach of section 16(3) for a failure to provide addresses that are available.

[85] In summary, this process entails the following: Phase 1: creating a database of addresses utilising voters' identity numbers and government and commercial databases lasting from 25 February 2016 – 31 March 2017; Phase 2: analysing the data and cross-checking where multiple addresses exist for one identity number lasting from 1 April 2017 – 30 September 2017; Phase 3: a notification process carried out to ensure the details collected are correct lasting from 1 October 2017 – 31 March 2018; Phase 4: capturing the sourced addresses, and correcting voter registrations on the roll lasting from 1 April 2018 – 30 June 2018; Phase 5: appeals to be made and considered lasting from 1 July 2018 – 31 July 2018; Phase 6: a first general voters' roll inspection and an addresses furnishing weekend during October and November 2018; Phase 7: a second general voters' roll inspection and an address-furnishing weekend during February and March 2019; and Phase 8: a communication campaign targeted at any remaining voters without addresses and field work lasting from 1 September 2019 – 30 November 2019. The IEC requests this Court to grant a further indulgence of seven months in case it encounters difficulties in financing the process with Treasury, or in its implementation.

[86] Section 172(1)(b) is quoted at [82] below.

[59] Some of the other parties before us argue that the relief sought should be refused. And they come up with a few proposals on how to address the problem.

[60] The independent candidates are opposed to the idea of the upcoming municipal elections going ahead without addresses in respect of the 12.2 million voters. They argue that a voters' roll without addresses lacks transparency, accountability and integrity, and dispute the IEC's averment that it is practically impossible for it to obtain the addresses timeously.

[61] The independent candidates' proposal on how to correct the defect amounts to this. The IEC must – when finalising the voters' roll – remove all the affected voters from the voters' roll and then certify it. The removed voters should be placed on an uncertified roll. On the date of elections, these voters may cast their ballots in accordance with the mechanism contained in section 7(2) and (3) of the Municipal Electoral Act.[87] They argue that this will serve a dual purpose: allowing voters to

[87] Section 7(2) and (3) provides:

> "(2) A person whose name does not appear on the certified segment of the voters' roll for a voting district and who claims to have applied for registration as a voter in that voting district before or on the date of publication of the notice in terms of which the election was called, may submit to the [IEC], at the address of the [IEC's] local representative, or to the presiding officer of the voting station for that voting district—
>
> (a) a sworn or solemnly affirmed statement on a prescribed form containing the following particulars:
>
> (i) The full name, identity number and date of birth of that person;
>
> (ii) that person's finger print;
>
> (iii) the address where that person ordinarily resides;
>
> (iv) a declaration that the address is situated within the area of that voting district;
>
> (v) a declaration that that person applied for registration as a voter in that voting district before or on the date of publication of the notice; and
>
> (vi) a request that that person's name should be included in the certified segment of the voters' roll for that voting district; and
>
> (b) proof that that person applied for registration as a voter in that voting district before or on the date of publication of the notice.
>
> (3) If the [IEC] or the presiding officer, as the case may be, has no reason to doubt the correctness of the contents of the statement—

exercise their right to vote, whilst at the same time the IEC will be able to obtain and record the addresses received from the voters.

[62] The IFP proposes a provisional balloting system. The suggestion appears to be that the voters' roll will be certified containing the names of the 12.2 million voters without addresses. On election day, the affected voters will be required to complete a voter registration form and cast a provisional ballot. The voter will place the provisional ballot in an unmarked envelope, which will be sealed so as to be tamper-proof. The unmarked envelope will be placed inside a larger envelope upon which the voter's name and identity number will be written.[88] The larger envelope and its contents will be placed in a provisional ballot box which, on my understanding of what the IFP intended to say, will then be sealed.[89]

[63] Immediately following the election, the IEC must publish a list of the names of voters who cast provisional ballots. Within two weeks of the publication, interested people must lodge objections to the counting of any of those ballots.[90] Votes not objected to, or those in respect of which objections will have failed, must be counted.

[64] The IFP finds support for its suggestion in a statute of the United States of America, the Help America Vote Act.[91] Stated briefly, the provisions of this Act are to the effect that a voter who believes her- or himself to be registered in the jurisdiction in which she or he desires to vote, but whose name does not appear on the official list of eligible voters, may cast a provisional ballot. In order to do so, she or he must first make a written affirmation before an election official at the polling place

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> (a) the [IEC] or the presiding officer must make an endorsement to that effect on the statement; and
>
> (b) that person must be regarded as having been registered as a voter on the certified segment of the voters' roll for the voting district referred to in subsection (2)(a)(iv)."

[88] The form will reflect the voter's name and identity number.

[89] The IFP says that "[a]ll provisional ballots will be collected separately and placed in a sealed provisional ballot box".

[90] Section 15 of the Electoral Act regulates this process.

[91] Help America Vote Act of 2002. See 42 United States Code (2009) at § 15482.

stating that she or he is registered in the jurisdiction in which she or he desires to vote, and is also eligible to vote in that election. She or he then casts a provisional ballot. The election official at the polling place must then convey the ballot, or the voter information contained in the written affirmation, to an appropriate election official for prompt verification. If the latter election official determines that the individual is legally eligible to vote, then the ballot will be counted among the ordinary votes in that election.

[65] In their written submissions, the independent candidates endorse the IFP's proposal enthusiastically and modify it.[92]

[66] The suggestions by the independent candidates and IFP are tempting. But that is as far as they go. Section 1 of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> . . .
>
> (d) Universal adult suffrage, *a national common voters roll*, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness." (Emphasis added.)

From this, we see that our supreme law only contemplates the existence of one voters' roll. The creation of two voters' rolls – one certified and the other not – cannot be reconciled with this stipulation.

[92] According to the independent candidates' proposed procedure, any voter not on the certified voters' roll would have to satisfy the election officer that he or she was previously registered, either by presenting his or her ID book containing an original registration sticker or by appearing on the uncertified voters' roll. Assuming the election officer was satisfied that the voter had been previously registered, the voter would cast a ballot and seal the ballot in an envelope. The sealed ballot would then be placed in a second larger envelope, together with a written affirmation of the voter's address and registration particulars. Each larger envelope would be placed in a separate ballot box delivered to the counting station. At the counting station, the presiding officer would open each larger envelope and verify that the address particulars in the written affirmation fell within his or her ward. If they did, then the voter's sealed ballot would be placed in a fresh ballot box and counted among the ordinary votes.

[67] The removal of a voter from the voters' roll may be effected only in terms of a statutorily set process.[93] That process gets its authority from the Constitution, which provides that the IEC "must manage elections in accordance . . . with national legislation".[94] The removal process suggested by the independent candidates is at variance with the procedure contained in sections 11 and 12 of the Electoral Act. Therefore, it is unlawful.

[68] Another problem is that, because of the lack of a legal basis to effect the removals in the manner suggested, the removals would be violative of the principle of legality. *Fedsure* says of this principle, "the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law".[95] And in *SARFU*, this Court held that the principle of legality applies "to all power exercised in terms of the Constitution".[96]

[69] Absent proper compliance with the removal process, a registered voter's right to vote is untrammelled. There can be no basis to treat her or him differently from other registered voters. The removal would be even more outrageous in these circumstances; that is, where it is as a result of a lapse in the IEC's conduct, and not the fault of the voter.

[70] The IFP's proposal makes the voter's right conditional. The ballot will be counted on condition that there is no objection or an objection is resolved in the voter's favour. This is to happen to a voter who has not even been removed from the voters' roll. Surely, in this instance as well, the voter's right to cast a ballot should be untrammelled and not subject to any condition. And this too raises issues of legality.

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[93] See above n 83.

[94] Section 190(1)(a) of the Constitution.

[95] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 58.

[96] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 34.

On what legal basis is a voter who is on the voters' roll caused to vote subject to a condition?

[71] Rather than assist the IFP, the Help America Vote Act underscores the difficulty it is facing. That Act is the legal basis on which the United States is able to conduct elections in the manner stipulated in that Act. South Africa has no statutory equivalent.

[72] At a factual level, the IEC has highlighted some problems. The filling in of forms and other details that will have to be followed on election day in accordance with the proposals by the independent candidates and the IFP are likely to result in very long queues. That – in turn – may cause some voters to leave voting stations without voting. Also, the notice, objection and appeal processes[97] that are envisaged to take place will delay the finalisation of the counting of ballots. That may affect the announcement of the results, which – subject to the possibility of extension – must be done not later than one week after the date of elections.[98] The IEC also says the longer the delays after the election, the greater the risk that the integrity of the separately kept ballots may be compromised.

[73] It seems to me that there is some merit in the IEC's concerns.

[74] The ANC, the Minister, and the National House of Traditional Leaders support the application for direct access. So does the DA, but it suggests that the moratorium should come to an end well ahead of the 2019 national and provincial elections, and should not apply to by-elections.

[97] The IFP proposes the following notice, objection and appeal process. As soon as possible following the election, the IEC will publish a list of all voters who have cast provisional ballots and two weeks will be allotted for political parties and other interested persons to lodge objections, if any, against the registration of any provisional voters in the district in which their vote was cast. If no objections are lodged in respect of a provisional ballot, that ballot is counted together with the ordinary votes. If an objection is received, section 15 of the Electoral Act applies. In terms of section 15(3), the IEC must make a decision on any objection within 14 days after the objection was made. In terms of section 15(4), the chief electoral officer must give effect to the IEC's decision within three days thereafter.

[98] See section 190(1)(c) of the Constitution read with section 57(2) of the Electoral Act and section 5(1)(n) of the Electoral Commission Act 51 of 1996 (Electoral Commission Act).

Must direct access be granted?

[75] This Court is slow to grant direct access. In *Bruce* Chaskalson P explained:

> "It is . . . not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment."[99]

[76] Direct access may be granted only where the interests of justice permit. For this requirement to be met, exceptional circumstances must be demonstrated to the Court.[100] In addition to the prospects of success, other factors in establishing exceptional circumstances include: the nature of the constitutional issues raised; the need for an urgent decision from the Court;[101] whether the Court requires the views of lower courts,[102] and, relatedly, if it is desirable for it to sit as a court of first and final instance;[103] whether similar issues are pending before the Court;[104] whether prejudice to the public good or good governance may occur;[105] and whether the issue to be decided has a "grave bearing on the soundness of our constitutional democracy".[106] This does not purport to be a closed list. And the relevance and relative weight of each factor will depend on the circumstances of each case.

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[99] *Bruce and Another v Fleecytex Johannesburg CC and Others* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 8.

[100] See *Mazibuko NO v Sisulu and Others NNO* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) (*Mazibuko*) at paras 34-5; and *AParty and Another v The Minister for Home Affairs and Others, Moloko and Others v The Minister for Home Affairs and Another* (*AParty*) [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC) at para 29.

[101] *Mazibuko* above n 100 at para 25; *Bruce* above n 99 at para 19.

[102] *Bruce* above n 99 at para 8.

[103] *AParty* above n 100 at para 30.

[104] Id at para 33.

[105] *Mazibuko* above n 100 at para 35.

[106] Id para 36.

[77] In law, the elections have to take place not later than 16 August 2016. Every second, every hour, every day, the clock is ticking for the IEC. There are certain administrative tasks that must take place before the elections. An approach to another court at this late stage may make it impossible for these administrative tasks to be performed in time for the elections. This is exacerbated by the possibility of an appeal. An urgent resolution of this matter by this Court is clamant.

[78] At the centre of this dispute is the important constitutional right to vote; so important that – besides being enshrined in the Bill of Rights[107] – it is also foreshadowed in the founding values of the Constitution.[108] Axiomatically then, any delay in the finalisation of this application that may imperil the upcoming municipal elections has serious implications for the exercise of this right. This is a weighty consideration in favour of the grant of direct access.

[79] As will appear shortly, prospects of success are good.

[80] All this leads to the conclusion that direct access must be granted. What remains is whether the IEC must be granted the moratorium it is asking for; if so, for how long.

What now?

[81] Substantively, what we have to grapple with is unique. The IEC – by its own doing – faces a quintessential Catch-22. At the time of argument, the certification of the voters' roll for purposes of the August 2016 municipal elections was imminent. For purposes of certification, the IEC had to either use a voters' roll that would be defective for containing names of voters without corresponding addresses, or remove those names from the roll without following the due process of law; an inimical limitation of the affected voters' right to vote. Because of time constraints – and I

[107] Section 19(3). See above n 25.

[108] See [66] above.

accept its assertion in this regard – getting the missing addresses and including them on the voters' roll in time for its certification had become impossible. That explains the approach to us to rescue it from this seemingly intractable problem. At the risk of repetition, the IEC wants us to suspend the operation of section 16(3) of the Electoral Act. Is that within our remit?

[82] The relief sought is truly extraordinary. Effectively, it is requesting this Court to suspend an obligation imposed on it by a statute. It is placing reliance on the wide remedial power we have under section 172(1), which reads:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[83] The statement of the law in *Ermelo* to the effect that there does not have to be a declaration of constitutional invalidity for a court to be able to exercise the section 172(1)(b) power[109] spells out how expansive the remedy may be. Kriegler J held in *Fose* that what constitutes an appropriate order is determined by the facts.[110] The outer limits of a remedy are bounded only by considerations of justice and equity. That indeed is very wide. It may come in different shapes and forms dictated by the many and varied manifestations in respect of which the remedy may be called for. The odd instance may require a singularly creative remedy. In that case, the court

[109] *Ermelo* above n 65 at para 97. This was adopted by Mogoeng CJ in *Minister of Safety and Security v Van Der Merwe and Others* [2011] ZACC 19; 2011 (5) SA 61 (CC); 2011 (9) BCLR 961 (CC) at para 59.

[110] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 97.

should be wary not to self-censor. Instead, it should do justice and afford an equitable remedy to those before it as it is empowered to.

[84] I have spelt out the difficult position in which the IEC finds itself. Ordinarily, it would be easy to dismiss its request on the basis that the situation in which it finds itself is of its own making. But the reality is that – unlike litigation between private individuals where a party's fault would affect it and it alone – here if something were to go wrong, the implications are serious and likely consequences dire. To put it bluntly, the IEC would not be able to certify the voters' roll for want of the 12.2 million addresses. Without a certified voters' roll, there can be no elections. In terms of section 159(2) of the Constitution it is obligatory that the elections must take place, and must do so not later than 16 August 2016.[111] Indeed, the need for the regularity of elections in the Constitution's founding values[112] underscores the importance of this obligation. Unsurprisingly, section 19(2) provides that "[e]very citizen has the right to free, fair and *regular* elections for any legislative body established in terms of the Constitution".[113]

[85] A threat of a possibility of the elections not taking place is a threat to our democracy itself. An order that does not extricate the IEC from the impossible situation it is in may create a constitutional crisis affecting the rights to vote and stand for political office protected by section 19 of the Bill of Rights. As we are also bound by the Bill of Rights,[114] we must be careful – as far as possible – to prevent that from happening. We cannot – in a Pilatian manner – throw our hands up in the air and say, "If the crisis happens, so be it; the root cause is the IEC, not us". The reality is facing us. What may we do, if anything?

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[111] See above n 75.

[112] Section 1 quoted at [66] above.

[113] Emphasis added.

[114] Section 8(1) of the Bill of Rights reads:

> "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

[86] During argument, the possibility of a referral of the matter to Parliament to resolve it by, for example, passing legislation that may suspend the applicability of section 16(3) was raised. I see at least two problems with this. First, Parliament is not a party before us. One has no idea what its reaction might be to an *expectation* that it should do something. The operative word is "expectation", not "order", because I do not see how – in these circumstances – we can make an order against a non-party.[115] Second, it is just too late in the day to expect that Parliament will enact that legislation in time for the conduct of the elections within the constitutionally set deadline. This is complicated by the fact that after Parliament, the legislation will have to be presented to the President for him to play his role in terms of section 79 of the Constitution.[116] To my mind, the parliamentary route does not remove the looming risk.

[87] All these circumstances cry out for a remedy in terms of section 172(1)(b) of the Constitution. But a moratorium on compliance with section 16(3) of the Electoral Act would effectively mean that we would be suspending an obligation imposed by a statutory provision whose validity is not in question. Is there a basis for us to do that?

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[115] Compare *Mabaso v Law Society of the Northern Provinces* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) where, in para 13, this Court held:

> "In a constitutional democracy, a Court should not declare the acts of another arm of government to be inconsistent with the Constitution without ensuring that that arm of government is given a proper opportunity to consider the constitutional challenge and to make such representations to the Court as it considers fit."

See also para 5 of *Parbhoo and Others v Getz NO and Another* [1997] ZACC 9; 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC), where this Court stated that—

> "it appears undesirable for any court to make an order [concerning the invalidity of legislation] where a relevant organ of State is not a party to the proceedings, unless that organ has had an opportunity to intervene in such proceedings".

It is so that these are about declarations of invalidity, but the point is generally true about orders that impose an obligation on a non-party.

[116] Section 79(1) of the Constitution provides:

> "The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration."

Section 81 of the Constitution provides:

> "A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act."

[88] I take the view that the Electoral Act, of which section 16(3) is a part, is legislation envisaged in section 190(1)(a) of the Constitution. This section provides that "[t]he [IEC] must . . . manage elections of national, provincial and municipal legislative bodies in accordance with national legislation". Support for this view is to be found in the long title of the Electoral Act. It reads, "[t]o regulate elections of the National Assembly, the provincial legislatures and municipal councils". If there is this connection between section 190(1)(a) of the Constitution and the Electoral Act and thus section 16(3) as well, section 16(3) and the obligation it imposes should not be divorced from the Constitution.

[89] This obligation links up with the IEC's obligation in terms of section 190(1)(b) of the Constitution to ensure that elections are free and fair.[117] Surely, the entire exercise of powers and performance of functions by the IEC must be about the freeness and fairness of elections. That must be the focus of the "management" of elections in terms of an Act passed pursuant to section 190(1)(a). Indeed, I think it would be fair to say the IEC exists to deliver free and fair elections to South Africa. So, one cannot split the provisions of section 190(1)(a) and (b) of the Constitution and section 16(3) of the Electoral Act. It is not surprising that the Electoral Commission Act, which must be legislation envisaged in section 190(2) of the Constitution, provides – in section 5(1)(b) – that one of the functions of the IEC is to "ensure that any election is free and fair".

[90] In that context, failure to comply with an obligation imposed by section 16(3) translates to failure to comply with section 190(1)(b) of the Constitution. The interconnectedness is such that section 16(3) cannot be dissociated from section 190(1)(b). Thus the problem of condoning non-compliance with an extant statutory provision does not arise: for purposes of a declaration of constitutional invalidity in terms of section 172(1)(b), section 16(3) should not be looked at separately from section 190(1)(b) of the Constitution. In short, one should not be

[117] See [16] to [19] above.

troubled by a separately existing extant statutory provision imposing an obligation all on its own.

[91] Based on what I have said about the purpose of section 16(3),[118] from which we are able to make a direct link between this section and section 190(1)(b) of the Constitution, the IEC's failure to record addresses on the voters' roll is inconsistent with section 190(1)(b) and section 1(d) of the Constitution and falls to be declared invalid. But to enable the IEC to conduct the upcoming August elections, this declaration of invalidity obviously has to be suspended.

[92] Let me emphasise a point I made earlier.[119] It is that elections do not of necessity become unfair purely because there has not been compliance with each and every step required under section 190(1)(b). Unfairness would have to be proved.

Tlokwe exception

[93] Does the fact that the independent candidates have prevailed in the appeal mean that the omitted addresses for the 4 160 voters must be provided in Tlokwe? There is a possible basis for answering this question in the negative. The IEC was required to provide the addresses in the context of by-elections. It has become impractical for those by-elections to take place. The next local government elections in Tlokwe will be part of the nationwide elections. In the circumstances, it may be argued that there is no reason why Tlokwe should be treated any differently from other municipalities. But the matter is more complex than that. In *Kham*, this Court ordered that by-elections should take place in Tlokwe before the end of February 2016. They never did. We now know that was as a result of a failure by the IEC to provide the 4 160 addresses in accordance with the law. The effect of this conduct by the IEC is that an order of this Court was not complied with. Even if the by-elections can no longer be held, the closest to compliance that this Court can now

[118] Id.

[119] See [19] above.

order is to require the IEC to provide the 4 160 addresses, where available. Of importance, in *Kham* this Court ordered by-elections after it had found – as a matter of fact – that there were irregularities with the relevant segments of the Tlokwe voters' roll.

[94] What remains is whether the moratorium requested by the IEC should be about four years. The time requested by the IEC is unduly long. It is true that we have no measure for this. But we cannot ignore that, with a drive whose primary focus was registration, the IEC was able to reduce outstanding addresses by four million within a period of only two weekends. I say "primary" because efforts were also made to obtain outstanding addresses. With a drive whose focus is obtaining all addresses, I think the end point may be reached earlier than the deadline suggested by the IEC. That end point must be a year earlier than the 2019 national and provincial elections. The IEC cannot be allowed to act at its own pace when the predicament in which we find ourselves is of its own making.

[95] In order to avoid uncertainty and difficulties of computation, a specific date must be fixed. A point of reference for fixing a date a year before the elections is the date of the previous national and provincial elections. They were held on 7 May 2014. Instead of the exact anniversary of those elections, I consider 30 June 2018 to be a suitable date by which the IEC should have finalised obtaining and recording all 12.2 million addresses, where available. This will allow the IEC an opportunity to correct its blunder, whilst affording all registered voters an opportunity to vote.

[96] I see no reason why the moratorium should apply to municipal by-elections. By-elections affect limited areas and fewer voters. When vacancies occur in municipal councils, the IEC must just find a way to allocate resources – human, financial and otherwise – to obtain and record addresses in respect of segments of the voters' roll to be used in the by-elections.

[97] Also, the moratorium is limited to non-compliance with section 16(3). It does not preclude challenges based on other electoral irregularities. For example, if some of the affected 12.2 million voters are registered in areas other than the districts in which they ordinarily reside, this judgment is no bar to challenges that seek to prevent those voters from voting.

[98] I would be failing in my duty if I did not express this Court's displeasure at the IEC's continued failure to comply with an obligation imposed on it by Parliament for well over a decade. Of particular discomfort is its nonchalant attitude towards this obligation. Additionally, our order in *Kham* was rendered ineffectual as a result of the IEC's attitude to its obligation under section 16(3). To ensure strict compliance with the timeframe set in paragraph 92 above, a supervisory order is called for.[120] Our courts have issued supervisory orders in circumstances where, for example, there is doubt that complete compliance with a legal obligation will be forthcoming.[121]

[99] An appropriate supervisory order will be to compel the IEC to lodge with this Court an affidavit six-monthly, detailing how many addresses it has collected during the period for which it is reporting, how many are still outstanding and the steps to be taken to obtain the outstanding addresses.

Condonation

[100] The IEC filed the record late. And the IFP's written submissions and Minister's answering affidavit were out of time. Satisfactory explanations have been given for these lapses. In each instance, condonation is granted. That said, the frequency of condonation applications continues to trouble this Court. Despite words

[120] See *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at paras 104-7; and *August and Another v Electoral Commission and Others* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) (*August*) at para 39.

[121] See for example *Sibiya and Others v Director of Public Prosecutions, Johannesburg and Others* [2005] ZACC 6; 2005 (5) SA 315 (CC); 2005 (8) BCLR 812 (CC). In that case Yacoob J held that there was non-compliance with *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) insofar as the death sentence of various convicted people imposed before that judgment had not yet been set aside and altered. In addition to an order compelling various state organs to ensure that this was done, they were ordered to file affidavits setting out the steps taken in doing so.

of caution in a few judgments,[122] it is not abating. Also, this Court will only be able to deal with and determine urgent applications – which this one was – timeously if all papers, including written submissions, are filed on time. The rather lackadaisical approach by some litigants to the filing of papers in this court is disturbing and will not be countenanced.

Costs

[101] The IEC conceded – correctly in my view – that if its appeal fails, it must bear the costs of all the parties that were not supportive of its case, but not those of parties like the ANC, Minister, and National House of Traditional Leaders that supported it. The appeal has failed. Parties that stood at opposite ends from the IEC were the independent candidates, the IFP, and the DA. Although the IEC enjoys a measure of success in the direct access application, we cannot lose sight of the fact that even that application was necessitated by the IEC's wrongdoing. And what it was asking for has been significantly curtailed. For example, it has been denied the four year moratorium it was asking for. In addition, the moratorium is not to apply to municipal by-elections. To the extent that the IEC enjoys some success, one may either say the success is not substantial or this case is more akin to those where a party seeking an indulgence may have to bear the costs of a party who has been unsuccessful in resisting the grant of the indulgence.[123]

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[122] *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport and Others* [2015] ZACC 15; 2015 (10) BCLR 1158 (CC) at para 39; and *Kham* above n 5 at paras 24-9. At para 28 of *Kham*, the Court held:

> "This Court has on previous occasions deprecated the practice of many parties, including those represented by experienced legal practitioners, of submitting documents late, or not in proper form, or producing fresh documents at a very late stage of the proceedings, sometimes only a day or two prior to a hearing. This cannot be permitted to continue. The workload of this Court is rapidly expanding and the demands being made on judicial time are ever increasing. In order to cope with this challenging environment it is essential that practitioners observe the rules and comply with time limits. Applications for condonation of a failure to do so are not to be had for the asking." (Footnote omitted.)

[123] *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) at paras 14-5; *Berkowitz v Berkowitz* 1956 (3) SA 522 (SR) at 527B-C; and *Mahomed v Nagdee* 1952 (1) SA 410 (A) at 420H-421A.

Order

[102] Had I commanded the majority, which I don't, I would have made the following order:

1. The applications for condonation by the Electoral Commission, the Minister of Co-operative Governance and Traditional Affairs and the Inkatha Freedom Party are granted.
2. Leave to appeal is granted.
3. The appeal is dismissed.
4. The Electoral Commission is granted direct access.
5. The Electoral Commission's failure to record all available voters' addresses on the national common voters' roll is inconsistent with section 190 of the Constitution and invalid.
6. The declaration of invalidity in paragraph 5 is suspended and:
    6.1 The Electoral Commission is, except for the Tlokwe Local Municipality, not required to record all the available addresses of voters on the voters' roll for the purpose of the August 2016 local government elections.
    6.2 The Electoral Commission must have obtained and recorded on the national common voters' roll all addresses that are available by 30 June 2018.
7. The order in paragraph 6 does not apply to local government by-elections.
8. At six-monthly intervals calculated from the date of this order, the Electoral Commission must file a report with this Court, setting out—
    8.1 the number of outstanding addresses it has since obtained and recorded on the national common voters' roll;
    8.2 the number of addresses still outstanding;
    8.3 the steps taken and to be taken to obtain outstanding addresses; and
    8.4 any other matter it may consider necessary to report on.

9. The Electoral Commission must pay the costs of appeal and application for direct access of the independent candidates, the Democratic Alliance and the Inkatha Freedom Party, including the costs of two counsel.

MOGOENG CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J and Zondo J concurring):

Introduction

[103] I read the first judgment by Madlanga J with much appreciation, considering the extraordinary speed with which it had to be produced, because of the semi-urgency of the matter. My deep appreciation also stems from the fact that the remedy part of the judgment is particularly challenging, yet he addressed all the issues with commendable dexterity and persuasive force. But, it is in the sphere of remedy where our points of difference lie. The difference lies not so much with the remedy as it does with the navigation of the way to that destination. The extension of our order to the pre-2003 era and the bases for the fate of the *Kham*[124] order are just as problematic. Apart from these few, yet undoubtedly important, points of difference the judgment and proposed order enjoys my support.

[104] A reading of Jafta J's judgment was just as pleasurable. Sadly, we differ on what we each consider to be the correct meaning of "available" in section 16(3) of the Electoral Act and, as with Madlanga J, on the correct application of section 172(1)(b) of the Constitution.

The 2003 amendment

[105] Parliament introduced a new requirement by amending the Electoral Act. That amendment came into operation on 17 December 2003. The part of it that is relevant to these proceedings is section 16(3). It provides in relevant part-

[124] *Kham* above n 5.

> ". . . the chief electoral officer must, on payment of the prescribed fee, provide copies of the voters' roll, or a segment thereof, which includes the addresses of voters, where such addresses are available, to all registered political parties contesting the elections."

"Available" addresses within the context of this section does not mean those that the IEC chooses to make available or that happen to have been recorded by the IEC and are thus available to be produced together with the voters' roll, when it is required by those contesting the elections. It is about much more than what the IEC has in its records. In sum, "available" means "objectively available" or "reasonably available". This section therefore requires the IEC to record all objectively or reasonably available addresses in the voters' roll. And it is significant that there was no requirement that the addresses of voters be recorded on the voters' roll or be made available to any person or political party before this amendment. No problem or irregularity was pointed out in relation to those voters whose addresses were not recorded before December 2003. Similarly, there is no suggestion that any of the previous elections were not free and fair because of the non-recordal of those addresses.

[106] And section 190(1)(b) of the Constitution imposes an overarching mandate on the IEC to ensure that our elections are free and fair. The concept of the freeness and fairness of the elections is an embodiment of much more than the availability or otherwise of voters' addresses. That is why our elections have in the past been correctly declared to be free and fair despite the fact that millions of voters in villages and informal settlements did not and still do not have recordable addresses available. This concept entails curbing intimidatory and unacceptable conduct and language by political parties and their supporters. It also extends to building fire-walls against election-rigging occasioned or facilitated by any lapse or sloppiness on the part of the IEC or violations of the electoral code of conduct by candidates or political parties or indirectly by their proxies. It is inappropriate to base a declaration of constitutional invalidity on the link between the possible absence of freeness and fairness of the

elections and the failure to record voters' addresses. To do so would have the unintended consequence of overly magnifying the value of and the role addresses play in an electoral process. I do not think that section 190(1)(b) finds application in the determination of the invalidity of the IEC's conduct.

[107] This Court considered the meaning of section 16(3) in *Kham*. The independent by-election candidates had not been provided with copies of segments of the voters' roll that contained addresses in compliance with section 16(3).[125] There the IEC had asked for guidance on its responsibilities.[126] In response, this Court granted the order which reads in part:

> "5. The order of the Electoral Court delivered on 19 March 2015 is set aside and replaced by the following order:
>
> . . .
>
> (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.
>
> . . .
>
> 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."

[125] Id at para 52.

[126] Id at para 3.

[108] True, we were then grappling with the electoral challenges relating only to Tlokwe. But these particular portions of the order are irreconcilable with the proposition that this Court might well make an order in terms of section 16(3) that directs the IEC to record the pre-December 2003 addresses that are objectively available although they have not been recorded in the national common voters' roll.

[109] A reading of section 16(3) suggests that Parliament identified a lacuna that required an amendment to give political parties access to the voters' addresses, where available. Availing voters' addresses to political parties upon request had until then not been a requirement. All that section 8(3) of the Electoral Act had always required of the IEC to do was to ensure that voters were registered to vote only in the correct voting district and not in more than one voting districts.[127] With the advent of section 16(3) it became obligatory that future registration of voters include a recordal of the available addresses in the national common voters' roll. There is in my view nothing about the ordinary grammatical language of section 16(3), not even with its apparent purpose, to suggest that it applies retrospectively. It is also not apparent why Parliament, knowing that this was a new requirement, chose not to impose an obligation on the IEC to record the available addresses of all the voters including those registered before 17 December 2003. And that choice might well be grounded on policy-laden, budgetary or polycentric considerations that courts are not privy to. It would arguably be a bit adventurous to deduce what the unstipulated bases and implications for introducing section 16(3) are. And it is on the real or stated purpose as opposed to our preferred[128] purpose that we must base our determination of the IEC's obligations in relation to the voters' roll.

[110] It warrants repetition that there is nothing in the provisions of section 16(3) or the *Kham* judgment to suggest that the IEC was, since December 2003, obliged to go

[127] Section 8(3) of the Electoral Act reads as follows:

> "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."

[128] See *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (*ITAC*) at para 39.

back to correct its registration records to include reasonably or objectively available addresses of voters. On the contrary, as the IEC persuasively argued, the circumstances surrounding the 2003 amendment indicate that they were intended to apply thenceforth only - and not to cast a shadow backwards, or create obligations for the IEC in relation to any voters who had already been registered.

[111] This is in keeping with the *Kham* order. Paragraph 5(c) explicitly says 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*". It refers to new registration of voters, either for the first time or when changing to another voting district, not to past or existing voter registrations. Paragraph 5(d) follows upon it by addressing the particular issue that arose in *Kham*, namely that no addresses were furnished to the applicants in that case and directs that addresses be furnished in future municipal elections. That all this is only prospective in nature is put beyond doubt by paragraph 6 of the order. These paragraphs were aimed at the irregularities that surfaced in the Tlokwe by-elections. And to cure those irregularities requires a revisitation and correction of the segment of the voters' roll that applies to Tlokwe.

[112] With the benefit of hindsight and proper reflection, the IEC now accepts that the 2003 amendment obliged it to record the objectively available addresses of voters on registration. As explained in the first judgment, the IEC took various steps to implement the *Kham* order and prepare for fresh by-elections in Tlokwe.[129] It trained its 52 000 electoral staff nationwide on how to obtain voters' addresses with sufficient particularity for the purpose specified in section 16(3). They are now required to obtain and record the addresses of all first time voters or those re-registering in a new voting district. Where no address objectively exists, the IEC staff will obtain a written affirmation from the voter to ensure that registration is in respect of the correct voting

[129] First judgment at [6].

district. A new registration form[130] has been developed as well as a new training manual for its electoral staff to complement the existing one.

[113] Although it is undoubtedly desirable that every objectively available address be recorded on the national common voters' roll, the decision to impose that obligation on the IEC in respect of the pre-December 2003 voters is best left to Parliament. Separation of powers requires that courts should be cautious not to intrude into the otherwise exclusive domain of other arms of the State unless it is constitutionally permissible to do so.[131] This is not such a case. An order directing the IEC to do more than what section 16(3) requires of it amounts to an unintended and unjustifiable usurpation of Parliament's legislative powers.

[114] Besides, if section 190(1)(b) of the Constitution could justifiably serve as the basis for imposing an obligation on the IEC to record addresses for the pre-December 2003 voters, then we would probably not need section 16(3).

[115] A construction of section 16(3) in a way that imposes an obligation to record pre-December 2003 addresses, that are reasonably available or when they become objectively available, can only result from straining the language of section 16(3). And that obligation would also introduce serious challenges. A reasonable possibility exists that many people who did not have addresses when they first registered as voters between 1994 and December 2003, now have them. Is there an ongoing obligation on the IEC to keep on inquiring from all voters, registered before and after December 2003, whether they have since acquired addresses so as to comply with section 16(3) and update the voters' roll? If so, when then does that obligation to have the addresses recorded arise? In other words, when does that obligation arise in

[130] See above n 19.

[131] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 25; *ITAC* above n 128 at para 39; *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) at paras 22, 27 and 44; and *Economic Freedom Fighters v Speaker of the National Assembly and Others, Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at paras 18 and 43.

relation to those who had no recordable addresses at the time of registration? Is it as soon as they acquire addresses and their addresses thus become available? And how will the IEC know that to be the case? Or does the IEC's ongoing obligation require that it confines itself to those addresses that existed at the time of first registration but were just not recorded? How will anybody, except the voter, be able to tell which address became available when? These rhetorical questions are necessary to highlight the nature of the problems given rise to by an order obliging the IEC to update the voters' roll on an ongoing basis.

[116] If this Court were to order the IEC to record the pre-December 2003 addresses available as at the time of registration, that could easily throw our electoral process into a crisis. Political parties and independent candidates could easily challenge elections on the basis that the voters' roll is defective since the addresses they know to be in existence have not been recorded. And this failure to record could easily have resulted from the fact that, where addresses were previously unavailable they have, unbeknown to the IEC, subsequently become available. This could either be because of the construction of RDP houses[132] or the introduction of street names or house numbers, as it often happens in villages and informal settlements. The IEC's failure to subsequently update the voters' roll by checking whether those who previously did not have now have addresses, could thus be problematic.

[117] Courts ought not to impose unbearable or near-impossible obligations on organs of State and other institutions. To saddle the IEC with the ongoing obligation to update the voters' roll, as opposed to alerting it to the desirability and utility of doing whatever it can to have all objectively available addresses sourced and recorded, is a power we do not have and a duty probably too onerous for the IEC to bear. Whether that obligation should rest on the IEC is a matter best left to Parliament to consider and determine. That said, the IEC would do well to optionally have all the reasonably or objectively available addresses recorded, from time to time.

[132] The "RDP" houses are those built by the State in the furtherance of the Reconstruction and Development Programme that is meant to make housing available for the poorest of our citizens.

[118] It is however always open to political parties and independent candidates to provide the IEC with addresses to help it update the roll and ensure that voters are registered in the correct voting district. The IEC cannot refuse to update the roll in the light of the guidance provided by *Kham*. It will surely record addresses that have been brought to its attention, obviously subject to verification.

Tlokwe

[119] This Court made an order in *Kham* to the effect that the segment of the voters' roll that applies to the Tlokwe be cured of defects in preparation for the by-elections that were to be held before the end of February 2016. There is no reason why that order was not and cannot be complied with, particularly because it was designed to prevent a recurrence of the irregularities previously detected. An order that is in line with this approach, would also give meaning to the dismissal of the IEC's appeal against the order of the Electoral Court. That Court made an order that effectively required of the IEC to compile a segment of the voters' roll for Tlokwe that complies with the *Kham* order. It insisted on the recompilation of the relevant segment of the voters' roll so as to address known defects and irregularities.

[120] For this reason and in line with the dictates of the rule of law, the IEC ought not to escape the obligations imposed on it by this Court in *Kham* for purposes of the August 2016 elections. It bears repetition that a segment of the national common voters' roll that complies with the *Kham* order must thus be available for the August 2016 elections in Tlokwe.

[121] There is nothing to suggest that the challenges and irregularities already identified in relation to the electoral process in Tlokwe cannot be corrected in time for the August elections. The IEC's only concern is that, if *Kham* applied throughout the country, then it would be impossible to update the entire national common voters' roll before the August elections are held. The *Kham* judgment and the dismissal of the IEC's appeal against the Electoral Court's decision constitute sufficient exceptional circumstances to justify the differentiation in our order between the particular and the

general. Both the *Kham* order and the Electoral Court order should stand and be given effect to for the Tlokwe August elections.

Just and equitable order

[122] The IEC now concedes that since 17 December 2003 it failed in its obligation to record addresses when new voters were registered or when voters sought to change voting districts. This failure to ensure that the voters' roll "includes the addresses of voters, where such addresses are available" constitutes unlawful conduct that flows from the IEC's breach of its section 16(3) obligations. Meaning, the IEC compiled a common voters' roll in a manner that is at odds with the strictures not just of the law but also of the rule of law.

[123] The rule of law essentially requires of the IEC to act only in accordance with the law. And section 1(c) of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> . . .
>
> (c) Supremacy of the Constitution and the rule of law."

And section 2 of the Constitution reads:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[124] Unlawful conduct in relation to the compilation of the national common voters' roll contemplated in section 1(d) of the Constitution, amounts to a breach of the rule of law that is embedded in our Constitution by section 1(c), as the nerve-centre of our constitutional democracy. The IEC acted in conflict with constitutionally compliant and unchallenged legislation. In so doing it acted inconsistently with the constitutional prescript of legality and the rule of law, which was necessarily imported to and rooted in our Constitution in terms of section 1(c).

[125] Although a voters' roll that does not have addresses poses a potential threat to the fairness and freeness of the elections, that does not mean that elections held in terms of that roll are without more, not free and fair.[133] Section 190(1)(b) of the Constitution cannot therefore be breached by a distant hypothetical possibility, as correctly acknowledged by the first judgment. And it is necessary to add only that *Kham* is no authority for the proposition that the mere absence of addresses, on its own, renders an election unfair.

[126] Our Constitution limits the term of Municipal Councils to no more than five years.[134] The term of the Municipal Councils now in office ends on 16 August 2016. It is undisputed that addresses of millions of registered voters were not entered into the national common voters' roll even after December 2003. We have no basis to doubt the IEC's assertion that it would be impossible to update the voters' roll before the August 2016 elections are held. Even the respondents conceded this and proposed alternative solutions.

[127] That said, the Constitution does not provide for the extension of this term of five years. Every constitutionally permissible solution must thus be explored to avert a looming constitutional crisis that could result from the unconstitutional elongation of terms of office. Happily, section 172(1)(b) of the Constitution promises that solution. It provides:

> "(1) When deciding a constitutional matter within its power, a court-
>
> . . .
>
> (b) may make any order that is just and equitable, including-
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[133] See section 190(1)(b), quoted in above n 26.

[134] See above n 75.

[128] The power to make a just and equitable order is ordinarily to be preceded by a declaration that conduct or law is inconsistent with the Constitution and invalid. That power is exercisable by a court "when deciding a constitutional matter within its power". Retrospectivity and the suspension of the declaration of invalidity flow from the unconstitutionality of conduct or law. And the power to allow the competent authority time to correct the defect that is at the heart of the declaration of invalidity is dependent on satisfying the above prerequisites.

[129] When conduct is self-evidently inconsistent with a constitutional provision, section 2 of the Constitution, which reinforces its supremacy, declares in unequivocal terms that such conduct is invalid. A declaration of invalidity is thus a consequence of inconsistency of any conduct with our supreme law. It is in this context that the unlawfulness of the IEC's conduct in relation to the registration of voters and the compilation of the national common voters' roll must be viewed. This Court may not do anything to suggest, albeit inadvertently, that conduct that is inconsistent with a constitutional imperative might at times be exempted from being so declared, for fear of any future attempt to take unfair advantage of an otherwise correctly-stated principle. This Court is well-empowered by section 173 of the Constitution to regulate its own process "taking into account the interests of justice." And that is how any illegitimate exploitation of the correct exposition of our constitutional jurisprudence would have to be dealt with.

[130] The rule of law is one of the cornerstones of our constitutional democracy. And it is crucial for the survival and vibrancy of our democracy that the observance of the rule of law be given the prominence it deserves in our constitutional design. To this end, no court should be loath to declare conduct that either has no legal basis or constitutes a disregard for the law, as inconsistent with legality and the foundational value of the rule of law. Courts are obliged to do so. To shy away from this duty would require a sound jurisprudential basis. Since none exists in this matter, it is only proper that we do the inevitable.

[131] The IEC admittedly failed to appreciate the true meaning and import of section 16(3) of the Electoral Act. Consequently, it initially did not consider itself obliged to and did not record the available addresses of voters, as and when voters registered. The result of the current state of the voters' roll is that the addresses of millions of voters have, even after December 2003, not been recorded on the voters' roll. For this reason, the August 2016 local government elections will be held on the basis of a defective voters' roll, since there is seemingly no time to cure the defect before the elections are held. Knowing that the postponement of the elections would create a constitutional crisis since they must be held no later than 16 August 2016, the remedial powers in section 172 thus need to be purposively and creatively employed.

[132] Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy even for exceptional, complex or apparently irresoluble situations. And the operative words in this section are "an order that is just and equitable". This means that whatever considerations of justice and equity point to as the appropriate solution for a particular problem, may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in section 172(1)(b). In this case a just and equitable order is one that would pave the way for the August elections to be held although our voters' roll is the product of unlawful conduct. Failure to do so, could indeed lead to constitutional crisis with far-reaching implications.

[133] The invalidation of the unlawful conduct, which is essentially the production of the national common voters' roll that does not comply with section 16(3) of the Electoral Act, has to be suspended. That suspension will allow the IEC to proceed with the August 2016 elections and correct the defective voters' roll. The suspension of the declaration of invalidity of the IEC's unlawful conduct has the effect of suspending the duty imposed by section 16(3) on the IEC which if carried out, there would have been no invalidity. The non-compliance with section 16(3) is in terms of

our just and equitable remedial powers condoned and the duty imposed by section 16(3) is itself suspended for purposes of the August 2016 elections.

[134] The declaration of the IEC's compilation of the national common voters' roll as unlawful, inconsistent with the Constitution and therefore invalid, will be suspended until 30 June 2018 which is 24 months and 15 days from the date of judgment. This suspension will allow the local government elections scheduled for August 2016, to be proceeded with notwithstanding the defects in the national common voters' roll. And the IEC will have the opportunity to update the voters' roll by capturing reasonably available addresses during the period of suspension. Come 2019, the national common voters' roll would have to be free of defects for the purpose of the national and provincial elections. This obligation relates only to the post-December 2003 voter registration that should have been conducted in keeping with section 16(3). Desirability and utility will hopefully nudge the IEC to also record the objectively available addresses of all the pre-December 2003 voters, while it prioritises the post-December 2003 voters for compliance.

[135] By-elections are ordinarily limited to very few districts in the country. And they do not always take place at the same time. This would thus afford the IEC the opportunity to ensure that the segment of the voters' roll that applies to a particular district is cleaned up of defects before its by-elections are held any time before 30 June 2018, which is a reasonable period of suspension and cut-off date for the correction of the defects in the national common voters' roll. For these reasons, and those stated in the first judgment, all by-elections to be held following the August 2016 local government elections would have to be based on an updated segment of the voters' roll for the affected voters' district.

Order

[136] The first judgment deals quite extensively with the background. It also explains why condonation for non-compliance with the rules of this Court is to be granted to the IEC, the Minister and the IFP. Reasons are advanced for granting leave

to appeal, for dismissing the appeal and for the success of the direct access application. We endorse all of the above and the reasoning in support thereof, save where it is inconsistent with the substance of this judgment. Aspects of the order to be made are in part based on the above whereas others are based on the reasons set out in this judgment. And the latter relate broadly to the bases for the declaration of constitutional invalidity, the decision that the segment of the voters' roll that applies to Tlokwe be compliant with section 16(3) and the *Kham* order for purposes of the August elections and the prospective application of section 16(3).

[137] It bears emphasis that this is an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis which could have grave consequences. It is about the upper guardian of our Constitution responding to its core mandate by preserving the integrity of our constitutional democracy. And that explains the unique or extraordinary remedy we have crafted, of suspending the duty that flows from a constitutionally valid statutory provision.

[138] In the result, the following order is made:

1. The applications for condonation by the Electoral Commission, the Minister of Co-operative Governance and Traditional Affairs and the Inkatha Freedom Party are granted.
2. Leave to appeal is granted.
3. The appeal is dismissed.
4. The Electoral Commission is granted direct access.
5. The Electoral Commission's failure to record all available voters' addresses on the national common voters' roll is inconsistent with its rule of law obligations imposed by section 1(c) of the Constitution and invalid.
6. The declaration of invalidity in paragraph 5 is suspended and:
    6.1. The duty of the Electoral Commission to record all the available addresses of voters on the national common voters' roll for the

purpose of the August 2016 local government elections is, except for the Tlokwe Local Municipality, suspended.

6.2. The Electoral Commission must by 30 June 2018 have obtained and recorded on the national common voters' roll all addresses that were reasonably available as at 17 December 2003.

7. The order in paragraph 6 does not apply to local government by-elections.

8. At six-monthly intervals calculated from the date of this order, the Electoral Commission must file a report with this Court, setting out:

8.1. The number of outstanding post-December 2003 addresses it has since obtained and recorded on the national common voters' roll;

8.2. The number of post-December 2003 addresses still outstanding;

8.3. The steps taken and to be taken to obtain outstanding post-December 2003 addresses;

8.4. Any other matter it may consider necessary to report on.

9. The Electoral Commission must pay the costs of appeal and application for direct access of the independent candidates, the Democratic Alliance and the Inkatha Freedom Party, including the costs of two counsel.

JAFTA J (Nkabinde J concurring):

[139] I have had the benefit of reading the judgments prepared by my colleagues Madlanga J and Mogoeng CJ. I agree that leave to appeal must be granted and that the appeal must be dismissed. I also accept that direct access should be allowed but I do not support the order proposed in relation to the application for direct access.

[140] As the first judgment correctly points out this matter concerns political rights guaranteed by section 19 of the Constitution. It provides:

"(1) Every citizen is free to make political choices, which includes the right—

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) 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."

[141] Of importance to this case are the following rights: the right to free, fair and regular elections for legislative bodies established by the Constitution; the right of every adult citizen to vote in such elections and the right to stand for public office.

[142] These rights constitute a cornerstone of our democratic order and are pivotal to the creation and legitimacy of a government formed after elections. Without them democracy itself cannot exist. This is because they are the lifeblood of a democratic government and therefore a government whose existence does not flow from the exercise of these rights cannot be described as a government of and by the people. It cannot be said that such government is based on the will of the people.

[143] It is therefore not surprising that our Constitution preserves these rights exclusively for citizens of the country. While the right to vote is enjoyed by every adult citizen, the guarantee of free and fair elections is extended to every citizen regardless of age or active participation in voting. That is, even disenfranchised citizens are entitled to demand that elections be free and fair. This is because, following an election must be a government for all and not only those who voted for the ruling party.

[144] In *New National Party of South Africa*, this Court affirmed the significance and interconnectedness between the right to free and fair elections and the right to vote. The Court said:

> "The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised."[135]

[145] In order to protect and promote the rights we are concerned with here, the Constitution established the Electoral Commission, formerly known as the Independent Electoral Commission.[136] The powers and functions of the Commission are set out in section 190 of the Constitution. It provides:

> "(1) The Electoral Commission must—
>
> (a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;
>
> (b) ensure that those elections are free and fair; and
>
> (c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.
>
> (2) The Electoral Commission has the additional powers and functions prescribed by national legislation."

[146] It is plain from a closer examination of the text of this section that the Commission is mandated to manage elections for all legislative bodies in accordance with national legislation. The Commission is also obliged to ensure that those elections are free and fair. In other words the obligation to protect and advance the right to free and fair elections falls squarely on the Commission's shoulders. Having

[135] *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191(CC); 1999 (5) BCLR 489 (CC) (*New National Party of South Africa*) at para 12.

[136] Section 181 of the Constitution lists six institutions, including the Electoral Commission, which are established in order to strengthen constitutional democracy.

managed and ensured that the elections are free and fair, the Commission must declare the results of those elections within a period prescribed by legislation.

[147] It is also apparent from section 190 that additional powers and functions of the Commission are to be found in relevant legislation. The Electoral Act is legislation that vests additional powers on the Commission and prescribes further functions. For present purposes the relevant function is contained in section 16(3) of the Electoral Act. It reads:

> "Notwithstanding subsection (2), the chief electoral officer must, on payment of the prescribed fee, provide copies of the voters' roll, or a segment thereof, which includes the addresses of voters, where such addresses are available, to all registered political parties contesting the elections."

[148] As rightly pointed out in the other judgments, this provision came into effect in December 2003. It is couched in peremptory language and obliges the Commission to provide copies of the voters' roll or its relevant segment which must include addresses of the voters where those addresses are available. The duty to provide a voters' roll containing addresses arises on every occasion the Commission is called upon to furnish a voters' roll. The Commission bore this duty since December 2003. The fact that political parties did not insist from that date that the voters' roll furnished must contain addresses did not relieve the Commission of its obligation. Purely as a matter of law, as from December 2003, whenever a request for the voters' roll was made and the necessary fee was paid, the Commission was duty-bound to provide a voters' roll that contained addresses, where the addresses were available.

[149] In introducing this requirement, Parliament was quite alive to the fact that before the amendment, elections had been held in this country and that there was a national voters' roll already in existence without addresses. The duty to provide a voters' roll with addresses was impossible to fulfil in respect of voters who were already on the roll at the time the amendment came into force. Parliament was also aware of the reality of circumstances prevailing in this country as a result of the

discriminatory land use development which resulted in informal settlements in both urban and rural areas. The lack of land use planning in those areas has resulted in the absence of residential addresses commonly available in urban areas where there was proper town planning.

[150] To ameliorate these challenges, Parliament added a rider to section 16(3). It qualified the obligation by adding that a voters' roll with addresses must be furnished if the addresses are available. The term "available" is not defined in the Electoral Act and therefore it must be accorded its ordinary meaning. In terms of the Compact Oxford English Dictionary "available" means "able to be used, obtained or free to do something".

[151] The word "available" is also used in our Constitution. Both sections 26[137] and 27[138] of the Constitution impose a positive duty on the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of each right. In *Soobramoney*[139] Chaskalson P construed the words "within its available resources" to mean resources at the disposal of the state for the achievement of a progressive realisation of the rights in question. In that case it was stated:

> "What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already

[137] Section 26(2) provides:

> "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."

[138] Section 27(2) provides:

> "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

[139] *Soobramoney v Minister of Health (KwaZulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).

> been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled."[140]

[152] The reading of both *Soobramoney* and *Grootboom*[141] shows that "available resources" must be taken to mean resources in the state's possession and which were earmarked for realisation of the relevant rights. In section 16(3) the words "available addresses" must be assigned a similar meaning, namely addresses in the Commission's possession.

[153] With regard to the voters' roll that was in existence when section 16(3) came into operation, it would be impossible for the Commission to provide a roll that contains addresses if the addresses were not furnished to the Commission upon registration or were not kept by the Commission, as this was not a requirement before December 2003. To overcome this difficulty, section 16(3) requires the Commission to furnish addresses that are available to it. An address would be available if it was obtained at the time of registration. In this context available does not mean exist. To construe the section as meaning that the Commission is required to furnish addresses where they exist would render the section unworkable. The Commission could not be expected to go to every corner of the country to establish whether addresses of the 18 million voters, who were already on the roll when section 16(3) came into operation, exist. Indeed that would have been an impossible task to perform.

[154] While section 16 applies only prospectively, this does not mean that from the date of coming into force, it did not cover addresses of voters who were registered before 17 December 2003. In other words, the reach of the section is not limited to addresses of voters who were registered after the section came into operation only. The requirement for including addresses in the voters' roll applies to all addresses that are available to the Commission, regardless of whether the voter was registered before or after the section came into effect. Indeed there can be no justification for the

[140] Id at para 11.

[141] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 46.

Commission to refuse to include an address available to it, even if the registration preceded December 2003. What activates the duty, is the availability of the address at the time the request for the voters' roll is made in terms of section 16(3).

[155] To construe the provision as not requiring the Commission to supply addresses in respect of the pre-December 2003 registration would result in an unequal treatment of voters in a matter that impacts on privacy. It would mean that voters who were registered after 17 December 2003 enjoy less privacy than those who fortuitously were registered before that date. This will be dissonant with the values of the Constitution.

[156] What triggers the duty to supply addresses is the request by a candidate contesting the elections. And this request may be made only when the elections are impending. Compliance with every request of this sort made after section 16(3) had come into operation means that the Commission must include all addresses available to it in the voters' roll. The text of the section does not draw a distinction between addresses of voters registered pre-December 2003 and those of voters registered after December 2003. To interpret the section otherwise would amount to reading into it new words. The distinction between these periods relates only to the obligation to supply addresses. Before December 2003, the Commission was not bound to include addresses to the voters' roll.

[157] But as from December 2003, it is implicit from section 16(3) that the Commission had the duty to obtain addresses from prospective voters at the time of registration, regardless of whether it was a first time or repeat registration. Obtaining those addresses is an ancillary obligation to the duty to provide addresses which is triggered when there is an impending election. The requirement that the Commission must obtain addresses enables it to provide a voters' roll with addresses at the relevant time. It is against this backdrop that both the appeal and the application for direct access must be assessed.

The appeal

[158] The proceedings that culminated in the order against which the Commission seeks to appeal were a sequel to the order granted by this Court in *Kham*.[142] In that case judgment was delivered on 30 November 2015. An order in the following terms was granted:

> "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."

[142] *Kham* above n 5.

[159] It is evident from this order that the affected by-elections were set aside and that the Commission was ordered to hold fresh elections. The Commission scheduled those elections for 24 February 2016. In addition the order reaffirmed the duty created by section 16(3) by directing the Commission when registering a voter to obtain her address to ensure that the voter is registered in the voting district in which she resides. Notably, by this part of the order the Court sought to achieve two objectives. First, by ordering the Commission to obtain addresses, the Court sought to facilitate the fulfilment of the duty to provide a voters' roll with addresses. Second, the Court drew a link between that duty and the obligation to ensure that a voter is registered for voting in the district in which she resides.

[160] This was done even though registration is not regulated by section 16(3) but section 8.[143] The requirement that a person be registered only in the segment of the voters' roll for the district in which she resides and for no other voting district gives effect to section 157(5) of the Constitution.[144] This section permits a person to vote in municipal elections only if she is registered on a municipality's segment of the national common voters' roll. This means a person may only vote in the municipality under which she was registered. Section 8(3) of the Electoral Act uses a person's residence as a determining factor for registration. It is the place where one resides which determines the municipality under which one may be registered.

[143] Section 8 in relevant part provides:

> "(1) If satisfied that a person's application for registration complies with this Act, and that the person is a South African citizen and is at least 18 years of age, the chief electoral officer must register that person as a voter by making the requisite entries in the voters' roll.
>
> . . .
>
> (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."

[144] Section 157(5) provides:

> "A person may vote in a municipality only if that person is registered on that municipality's segment of the national common voters roll."

[161] Since, for practical reasons, registration of voters occurs throughout the country and is done by many employees of the Commission, this Court in *Kham* deemed it necessary to declare that addresses obtained by the Commission upon registration would also enable it to ensure that a voter is registered for the district in which they are ordinarily resident. This would constitute objective proof of the fact that a voter is registered for voting in the correct voting district. At present this proof is not available in respect of those voters whose addresses were not obtained. The facts of this case bear this out.

[162] Furthermore, the order in *Kham* also declared that in all future municipal elections or by-elections the Commission is obliged in terms of section 16(3) to provide all candidates in municipal elections with the relevant segment of the voters' roll which included addresses of voters, where the addresses are available. This part of the order plainly obliges the Commission to furnish addresses together with the voters' roll for all future municipal elections and by-elections. This requirement applied to the by-elections which were scheduled for 24 February 2016 as much as it applies to the upcoming municipal elections in August. The effect of the order was that the Commission was required to furnish political parties and other candidates who participated in the February by-elections with a voters' roll containing addresses, where those addresses were available.

[163] But the independent candidates were provided with the relevant voters' roll that omitted addresses of 4 160 voters. The independent candidates complained to the Commission, asserting that the provided voters' roll did not comply with the order of this Court to the extent that it required the Commission to furnish them with a voters' roll that had addresses, if addresses were available. The independent candidates asserted that the voters' roll furnished by the Commission suffered from irregularities.

[164] The Commission responded by a letter dated 19 February 2016 addressed to the independent candidates' attorneys. In it the Commission accepted that *Kham* ordered it to provide candidates in municipal elections and by-elections with a voters'

roll containing addresses, where those addresses were available. The Commission disputed that the *Kham* order required it to verify those addresses. Because the letter was central to the Commission's defence before the Electoral Court, it is necessary to quote directly from it for a proper evaluation of the reasons advanced for the omission of addresses.

[165] In relevant part the letter reads:

> "8.6 To the extent that the complaint in paragraph 4 of your letter relates to the fact that, in respect of some of the voters appearing on the relevant segments of the voters' roll for the affected voting districts, no addresses have been provided, we are instructed that there are two reasons for such lack of addresses:
>
> 8.6.1 [S]ome voters were registered on the relevant segments of the voters' roll prior to the judgment without providing a conventional address. In this regard, the judgment indicates in express terms that it applies only prospectively, with the result that, properly construed, the requirement to obtain an address obtains only from the date of the order. In the result, those voters who were registered prior to 30 November 2015 in the absence of a conventional address having been provided could not simply be removed from the relevant segments of the voters' roll; and
>
> 8.6.2 [S]ome voters were registered on the relevant segments of the voters' roll after 30 November 2015 who were unable to provide a conventional address. In such cases – to your clients' knowledge - the Commission required such persons to complete a written affirmation providing particulars of their respective places of ordinary residence sufficient to enable it to ensure that such voters were at the time of registration ordinarily resident in the relevant voting district." (Footnote omitted.)

[166] With regard to the complaint that some voters were irregularly registered in wards 4, 11, 12, 18 and 20 because they did not reside in these wards, the Commission responded thus:

> "8.10 To your clients' knowledge, the Commission has done everything in its power to comply with the Constitutional Court's order regarding the elimination of persons being registered as voters on segments of the voters' roll for the affected voting districts in which they were not ordinarily resident. In this regard:
>
> 8.10.1 [A]s early as 15 December 2015, the Commission presented a 10 point plan to the Tlokwe Municipal Party Liaison Committee ("MPLC"), of which your clients are part, regarding the envisaged correction of the voters' roll for the affected voting districts;
>
> 8.10.2 The Commission sent notices to the 1 040 persons who had been identified in its investigation in 2014 to have been incorrectly registered on the segments of the voters' roll for the affected voting districts notifying them of its intention to remove their names from those segments of the voters' roll. Of these, 749 persons were removed from the affected segments. 241 were retained, while the identity numbers of 50 people were inadvertently repeated on the list."

[167] Plainly what the Commission says here is that, before the launch of the proceedings and following an investigation undertaken in 2014, it identified that 1 040 voters had been registered for voting in districts other than those in which they resided. Consequently, the Commission sent them notices that it intended to remove their names from the voters' roll. Strangely, and for unexplained reasons, the Commission states that it removed 749 persons only from the roll and retained 241, while the identity numbers of 50 people were inadvertently repeated on the roll.

[168] What is strange in the process followed by the Commission is that it has stated that after an investigation by it, the entire number of 1 040 voters was identified as having been registered for voting districts other than those in which they resided. This was a serious irregularity in respect of a large number of people which occurred in one municipal area. But what is surprising is the fact that 241 voters were retained on the voters' roll despite the irregularity found by the Commission. It is difficult to

appreciate how the repetition of identity numbers justified the retention of 50 voters on the roll. Much worse no explanation was given for retaining 241 of such people.

[169] As if this was not enough, the Commission proceeded to state:

> "8.10.3 [I]n addition, the Commission compared the remaining addresses furnished by voters whose names appeared on the segments of the voters' roll for the affected voting districts against the National Address Database ("NAD") and identified 4 531 persons whose addresses possibly fell outside the voting districts in which they were registered;
>
> 8.10.4 [O]n 22 December 2015, the Commission provided members of the MPLC with a provisional voters' roll for all the persons whose names appeared on the relevant segments of voters' roll for the affected voting districts, as well as separate lists of the 4 531 persons identified for investigation after the NAD comparison, and the 1 040 persons who had been identified in its 2014 investigation. Equipped with this information, members of the MPLC were requested to bring the names of those persons who were possibly incorrectly registered in the affected voting districts to the attention of the Commission;
>
> 8.10.5 [A]fter a thorough investigation, 1 601 of the 4 531 persons were confirmed to be located outside of their voting district based on the addresses provided. Accordingly the Commission sent notices to 1 601 persons notifying them of its intention to remove their names from those segments of the voters' roll and requested them to make representations in respect thereof. Of these, 1 599 persons were removed from the affected segments and 2 re-registered in their correct voting districts."

[170] Again the Commission tells us that after a thorough investigation it confirmed that of the 4 531 voters who were suspected to have been irregularly registered, 1 601 were registered outside the voting districts in which they resided. The Commission notified them of its intention to remove their names from the voters' roll. Once more no explanation was furnished on how such a large number of people were irregularly registered in respect of seven wards in one municipality. What emerges from the Commissioner's letter though is that it relied solely on the addresses obtained from the voters to confirm the irregularity. It is therefore difficult to appreciate how the

Commission could be confident that the 4 160 voters whose addresses were not provided to independent candidates, were not likewise registered in districts other than those in which they resided. The facts show a propensity of registering large numbers of persons for voting in districts other than those in which they resided.

[171] It was in light of these facts that the Electoral Court made the following finding:

> "The fact that the voters' roll contained registered voters without addresses was common cause. Counsel for the Commission advised this court that the Commission had commenced the 'cleaning up' of the voters' roll but that the process had not been completed. This admission implies that there are indeed voters on the roll, as it was before the Constitutional Court, who should not have been included therein."[145]

[172] The Electoral Court proceeded to declare:

> "It has never been the Commission's case that it could not ensure that fraudulently registered voters could not be removed from the voters' roll. On the contrary, counsel for the Commission assured us that such a process was indeed underway in Tlokwe. Nor was disenfranchisement mooted in such cases."[146]

[173] Consequently, the Electoral Court issued an order in these terms:

> "1. The Electoral Commission (first respondent) is ordered to request, as contemplated by section 8 of the Local Government: Municipal Electoral Act 27 of 2000, the Member of the Executive Council to postpone the by-elections to be held on 24 February 2016 in Wards 1, 4, 11, 12, 18, and 20 of the Tlokwe Municipality, North West Province for a period of six weeks.
>
> 2. The certification of the voters' roll which is the subject matter of this case is set aside.

[145] *Mhlope* above n 21 at para 12.

[146] Id at para 16.

> 3. The first respondent is ordered to provide all candidates in the Tlokwe municipal by-elections with a copy or a segment of the voters' roll to be used in their respective wards in the municipal by-elections, including the addresses of all voters, where these addresses are available."

[174] Before us the Commission sought to challenge the order on the ground that the Electoral Court misconstrued the order of this Court in *Kham*. The submission has no merit. On the Commission's own evidence, voters who were registered for voting in districts other than those in which they resided were retained. This was an irregularity that affected the validity of the voters' roll.

[175] The guaranteed right to free and fair elections requires that only those who qualify to vote in a particular ward be allowed to vote. Allowing persons who are not entitled to vote in a specific ward to vote will not only breach the right to free and fair elections but also violates the right of candidates to stand for public office, if one of them wins as a result of votes cast by persons who were not entitled to do so.

[176] Expressing disapproval of the Commission's conduct in *Kham* this Court stated:

> "What is troubling about this is that there is no explanation of how the incorrect registrations were made. Assume that the addresses given by these voters were inadequate, so that it was unclear in which voting district, and hence in which ward, they should be registered. Why then were they placed in the incorrect wards instead of the correct ones? Was that purely random? It would be surprising if it were. The IEC had conducted voter registration drives in the wards where the by-elections took place. Many of these registrations must have occurred during those registration drives. Were voters automatically registered as falling in those wards? If so, the system adopted lent itself to manipulation because a well-organised political party or group would be able to present as new voters for registration, people who were not in fact qualified to be registered in that particular area and thereby strengthen its own cohort of support in that ward."[147]

[147] *Kham* above n 5 at para 69.

[177] What compounds the problem here is the fact that voting districts are established by the Commission itself. The voters are also registered by it. Legislation requires the Commission to enter a person's name on the voters' roll "only for the voting district in which that person is ordinarily resident and for no other voting district".[148] It follows that the irregularities outlined here were committed. The Commission's failure to explain how 2 641 voters could be registered for voting in wrong districts is indeed troubling. This figure includes 1 040 and 1 601 voters whose names were removed from the voters' roll.

[178] The Commission's letter quoted here reveals plainly that the Commission's attitude was that it was up to the independent candidates to lodge objection in terms of section 15 of the Electoral Act. In this regard the Commission observed:

> "That notwithstanding, your clients have not sought to raise any objections to persons whose names appear on the relevant segments of the voters' roll for the affected voting districts until your letter, and they now seek a response from the Commission in respect of these allegedly irregular registrations on a day's notice."

[179] Having declined to take action, the Commission informed the independent candidates that they had an additional remedy to an objection. It asserted:

> "8.15. This does not mean that your clients are remediless:
>
> 8.15.1. In terms of section 51(1) of the Municipal Electoral Act, your clients or their agents may, at any time before each of the persons complained of have been handed a ballot paper, object to such persons being allowed to vote at the relevant voting station concerned."

[180] The stance adopted by the Commission is inconsistent with section 190 of the Constitution. This section imposes a duty on the Commission, and on it alone, to ensure that the elections are free and fair. The availability of a statutory objection to

[148] See above n 143.

candidates participating in an election does not relieve the Commission of its constitutional duty. When a complaint of irregularity was submitted to it, the Commission was obliged to investigate it so as to ensure that the elections were free and fair. In view of its duty, the Commission could not be supine and wait for an objection to be lodged.

[181] It follows that the order issued by the Electoral Court is unassailable and the appeal must be dismissed.

Direct access

[182] The Commission sought relief under direct access only if the appeal is dismissed. Since the appeal fails, it is necessary to determine the claim for direct access. The Commission formulated its claim in these terms:

> "6. It is declared that:
>
> 6.1 In conducting the 2016 local government elections and 2019 national and provincial government elections, the Electoral Commission is not obliged to be in possession of addresses for those voters who have been registered in a particular voting district prior to 30 November 2015 and who do not seek re-registration in another voting district; and
>
> 6.2 The Electoral Commission must take reasonable measures by 30 June 2020 to obtain addresses for the voters referred to in paragraph 6.1 above, save where such addresses are not available."

[183] The declaration sought has two components. The first is to the effect that in conducting the 2016 municipal elections and 2019 national and provincial elections, the Commission is not obliged to be in possession of addresses for voters who were registered before 30 November 2015. The cut-off point of 30 November 2015 was informed by the Commission's own, but mistaken, understanding of section 16(3). The Commission held the view that before the order was granted in *Kham*, it did not

have the obligation to obtain addresses when it registered voters so that it could discharge the obligation of providing a voters' roll that included addresses.

[184] In the affidavit deposed to by the chief electoral officer and which was filed in the Electoral Court, the Commission stated:

> "As stated in paragraph 16 above, the Commission has no obligation to verify the addresses of voters when they register.
>
> After 30 November 2015 the Commission has an obligation when registering a voter in a voting district to obtain sufficient particularity of the voter's address to enable the Commission to ensure that the voter is at the time of registration ordinarily resident in that voting district."

[185] This reveals serious flaws in how the Commission had been conducting registration of voters since December 2003 when section 16(3) of the Electoral Act came into operation. The Commission failed to obtain addresses from voters even where those addresses existed. Hence the Commission is now unable to provide a voters' roll that includes addresses. This was a breach of the statute. Of course, the Commission's failure to obtain addresses in respect of registrations that occurred before December 2003 does not constitute a violation of section 16(3) because the section did not apply retrospectively. And before the coming into effect of the provision, the Commission was under no obligation to obtain addresses and provide a voters' roll that included addresses.

[186] By asking this Court to declare that when conducting this year's municipal elections, the Commission was not obliged to be in possession of addresses for voters who were registered before 30 November 2015, effectively the Commission requests this Court to suspend the operation of section 16(3). This, the Commission argues, may be done under the rubric of the Court's remedial powers contained in section 172(1)(b) of the Constitution.

[187] I have reservations on whether section 172(1)(b) confers on this Court the power to suspend the operation of an Act of Parliament. A number of reasons point in the opposite direction. The section does not expressly say that a court may suspend the operation of a constitutionally compliant statute. On the contrary, section 172(1)(a) says a court may declare to be invalid a law or conduct that is inconsistent with the Constitution. The pre-condition for the declaration of invalidity under this section is the affected law's inconsistency with the Constitution.

[188] In order to avoid disruptions and dislocations in state administration, arising from the declaration of invalidity, section 172(1)(b) authorises a court to limit the retrospective effect of the declaration of invalidity or even suspend it. The effect of suspension is that a law that has been declared invalid continues to operate as if it was valid, during the period of suspension.[149]

[189] But the difficulty here is that the Commission does not impugn the validity of section 16(3). On the contrary, it accepts that the section is valid. The reality of the matter is that it is the Commission's failure to comply with the section which is invalid. It is its conduct which may competently be declared invalid. However, to declare that the Commission's conduct was invalid is not necessary because such conduct is already regarded as invalid.

[190] The Constitution confers the judicial authority of the Republic on the courts.[150] This authority is exercised by our courts subject to the Constitution and the law. The legislative authority vests in Parliament, provincial legislatures and municipal councils. The doctrine of separation of powers precludes courts from interfering with

[149] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) at para 73.

[150] Section 165 of the Constitution provides:

> "(1) The judicial authority of the Republic is vested in the courts.
>
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

legislative matters except where authorised to do so by the Constitution.[151] Section 172(1)(b) does not expressly empower courts to suspend the operation of an Act of Parliament. If the section were to be construed to be giving that power under the rubric of justice and equity, it would mean that other courts from the Supreme Court of Appeal to Magistrates' Courts may suspend the operation of an Act of Parliament and that suspension will not be subject to confirmation by this Court. This is because it is the declaration of invalidity of an Act of Parliament, a provincial Act or conduct of the President which must be confirmed by this Court before the declaration may have force and effect.

[191] In any event, even if this Court were to grant the relief sought and declare that the Commission was not obliged to be in possession of addresses where registrations were effected before 30 November 2015, such declaration would not relieve the Commission from the relevant obligation, namely, providing a voters' roll that includes addresses.

[192] Nor does a declaration of invalidity directed at the Commission's conduct solve the perceived problem. Such declaration would be to the effect that the Commission's failure to keep addresses in respect of registrations that took place as from December 2003 was unlawful. The Commission has not asked that it be declared that its failure to provide addresses in respect of the upcoming municipal elections will be invalid because on the present facts no request of that sort has been made and no failure has occurred.

Tlokwe

[193] A failure to provide a voters' roll with addresses has occurred in respect of the Tlokwe by-elections only. And the Electoral Court has already set aside the certification of the voters' roll that was provided in respect of those by-elections. The dismissal of the appeal here means that that order remains in force. With regard to

[151] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at paras 68-9.

Tlokwe, the Commission must now provide a voters' roll that complies with the order of the Electoral Court.

[194] The Commission cannot use the voters' roll, the certification of which was set aside. It must certify the voters' roll afresh and provide all candidates with a segment of the voters' roll that includes addresses where the addresses are available. The order of the Electoral Court was based on these conclusions:

> "Having regard to the aforegoing, this Court concluded that the proposed by-elections of 24 February 2014, which would be based on a flawed voters' roll, would lead to a flawed election.
>
> Counsel for the Commission submitted that the state of affairs is not due to any fault of the Commission. I am of the view that a flawed voters' roll will result in an unfair by-election and that the fault argument cannot overcome such a flaw."[152]

[195] Underlying these conclusions were the irregularities mentioned earlier. Those irregularities were not limited to the failure to furnish a voters' roll that contained addresses. They included a large number of voters who were registered to vote in voting districts in which they did not reside.

[196] In *New National Party of South Africa* this Court proclaimed that permitting persons who are not entitled to vote to do so impacts on the right to free and fair elections. There this Court said:

> "The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised. Two of these implications are material for this case: each citizen entitled to do so must not vote more than once in any election; *any person not entitled to vote must not be permitted to do so*. The extent to which these deviations occur will have an impact on the fairness of the election. This means that the regulation of the exercise of the right to vote is necessary so that these deviations can

[152] *Mhlope* above n 21 at paras 22-3.

> be eliminated or restricted in order to ensure the proper implementation of the right to vote."[153] (Emphasis added.)

[197] In light of the conclusions made by the Electoral Court and its order, the Commission cannot be allowed to use the "flawed voters' roll" for the upcoming municipal elections in Tlokwe. Before that Court, the Commission undertook to remedy the defects in the voters' roll. It did not argue that it was impossible to remove the irregularities complained of. It is therefore inconceivable that this Court, having dismissed the appeal, may grant an order which permits the Commission to use a defective voters' roll which the Electoral Court has already held conclusively that its use would result in unfair elections. To do so would also be in conflict with the order issued by this Court in *Kham*.

[198] The order in *Kham* bears repeating. In relevant part it reads:

> "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."[154]

[199] The fact that this Court added that this part of the order has a prospective operation, and does not affect the validity of past elections, changes nothing. The order obliges the Commission to provide a voters' roll, including addresses in respect of all elections held after 30 November 2015. But the condition that triggers the obligation is the one that sits in section 16(3) itself. That is, the Commission is obliged to furnish addresses where they are available.

[200] On the construction preferred in this judgment "available" means in possession of the Commission. This interpretation renders the declaration sought unnecessary.

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[153] *New National Party of South Africa* above n 135 at para 12.

[154] *Kham* above n 5 at para 127.

The Commission concedes this point in its papers. Apart from Tlokwe, there is no evidence on the record showing that the inability to furnish a voters' roll with addresses in respect of other municipalities would render the elections to be held in August not free and unfair. As this Court observed in *New National Party of South Africa*, it is not the mere presence of deviations which impacts on the fairness and freeness of the elections but the "extent to which these deviations occur".

[201] This interpretation of section 16(3) is not only in line with the context in which the section was introduced but is also consonant with section 39(2) of the Constitution.[155] When section 16(3) was enacted Parliament was aware that a national voters' roll was already in existence and that the roll did not meet the requirements of section 16(3). Nor was the Commission obliged to furnish candidates with a voters' roll that included addresses. In order to avoid a dislocation which the section could have brought if from December 2003 the Commission was suddenly required to provide a voters' roll with all addresses, including those of voters who were registered before the section came into force, a qualification was added to the section. It requires the Commission to furnish only addresses that are available to it.

[202] The condition applies irrespective of whether a voter was registered before or after section 16(3) came into effect. Take for example a case where the Commission loses records of the addresses in a fire that destroys its offices close to conducting elections. In that event it would be impossible for the Commission to furnish addresses because they would no longer be available to it. The section cannot, in my view, be construed as obliging the Commission to do the impossible, solely on the ground that the affected voters were registered after December 2003.

[203] Nor could a voters' roll provided without addresses be declared to be defective to the extent of prohibiting its use at the elections. An interpretation that leads to the

[155] Section 39(2) of the Constitution provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

prohibition would impact adversely on the citizens' right to vote in circumstances where the fairness of the elections is not affected. That approach to interpreting section 16(3) would be inconsistent with the constitutional principle of interpretation that was introduced by section 39(2) of the Constitution. This principle obliges courts, when interpreting legislation, to promote the spirit, purport and objects of the Bill of Rights. Courts achieve this objective by not only avoiding a meaning that conflicts with the Bill of Rights but by adopting, where it is reasonably possible, a meaning that advances the rights in the Bill of Rights.[156] This approach has been followed in countless decisions of this Court.

[204] Here an interpretation that leads to a prohibition described above would strike at the heart of the right to vote and also the values of universal adult suffrage and a national common voters' roll. In *Richter* this Court described the right to vote in these terms:

> "The right to vote is symbolic of our citizenship, as Sachs J declared. In entrenching the right of *every citizen* to vote, section 19 of our Constitution affirms that symbolic value. But the right to vote, and its exercise, has a constitutional importance in addition to this symbolic value. The right to vote, and the exercise of it, is a crucial working part of our democracy. Without voters who want to vote, who will take the trouble to register, and to stand in queues, as millions patiently and unforgettably did in April 1994, democracy itself will be imperilled. Each vote strengthens and invigorates our democracy. In marking their ballots, citizens remind those elected that their position is based on the will of the people and will remain subject to that will. The moment of voting reminds us that both electors and the elected bear civic responsibilities arising out of our democratic Constitution and its values. We should accordingly approach any case concerning the right to vote mindful of the bright, symbolic value of the right to vote as well as the deep, democratic value that lies in a citizenry conscious of its civic responsibilities and willing to take the trouble that exercising the right to vote entails."[157] (Footnote omitted.)

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[156] *Fraser v ABSA Bank Limited* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at paras 43 and 47.

[157] *Richter v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)* [2009] ZACC 3; 2009 (3) SA 615 (CC); 2009 (5) BCLR 448 (CC) (*Richter*) at para 53.

[205] If registered voters were to be denied the opportunity to exercise the right to vote purely on the basis that the Commission is unable to furnish the segment of the voters' roll containing their names and addresses, our democracy would be imperilled. The affected voters would be denied dignity and the message to them would be that their will does not matter in the larger scheme of laying down the foundation for the formation of a democratic government.

[206] This would be discordant with what was proclaimed by this Court in *August*. There this Court observed:

> "Universal adult suffrage on a common voters' roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement."[158] (Footnote omitted.)

[207] It follows that on the construction preferred here, the inability of the Commission to provide a voters' roll that contains addresses will not affect the upcoming municipal elections, except in respect of Tlokwe. Whether in a particular ward the elections will not be free and fair is an inquiry for another day. That inquiry would require facts showing the extent of irregularities and their impact on the particular elections. For a court may make a value judgment and declare that elections are not free and fair, based on the facts underpinning that conclusion.

[158] *August* above n 120 at para 17.

[208] But the fact that municipal elections will be held as scheduled in August does not mean that the Commission should not obtain the addresses it does not have in its possession. The Commission is under a duty to do so, even in respect of voters who were registered before December 2003. The functional value of those addresses is evident from the judgment of this Court in *Kham*. This Court stated that the addresses help candidates in identifying voters to be canvassed. This is crucial for the success of candidates with no support of the machinery and resources of political parties. In the order, this Court also declared that the addresses enable the Commission to ensure that voters are registered to vote in districts where they are ordinarily resident. Indeed the Commission itself has told us that in Tlokwe 1 601 voters were found to have been registered in incorrect districts, through the application of addresses.

[209] Without those addresses, the Commission in many cases would be unable to tell if a voter resides in the district for which she was registered. It is simply not enough for the Commission to merely say its staff is trained to register voters on the roll for districts in which they reside. Tlokwe is a clear illustration of the fact that irregularities occur and not on a small scale. What happened in Tlokwe places some degree of doubt over the Commission's procedures pertaining to registration of voters. The scale of the irregularities suggests that the problem may not be isolated. But without concrete facts, a conclusion cannot be made that those irregularities were widespread throughout the length and breadth of the country.

[210] However it is a matter of concern that the Commission again failed to explain how the irregularities in Tlokwe arose. This concern was expressed in *Kham*. One would have expected that if a plausible explanation existed, the Commission would seize the opportunity here to mention it. In this regard the stance adopted by the Commission is regrettable. It undermines its credibility in the eyes of all parties concerned. It will be difficult to accept that voters whose addresses are not available, have been registered in the correct districts simply on the Commission's mere say-so and without any objective facts to back up the assertion.

Order

[211] In the result I would grant leave to appeal and direct access but dismiss both the appeal and the application with costs.

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For the independent candidates:	A J H Bosman SC, L Van Gass and C J Bosman instructed by Moolman & Pienaar Inc
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