

REPUBLIC OF SOUTH AFRICA



**ELECTORAL COURT HELD AT
BLOEMFONTEIN**

CASE NO: 004/2013

- (1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between

**SESING JOHANNES JOHNSON
AARON PASELA MHLOPE
JOHANNA SHONU XABA
NTOMBI BEAUTY DIKUPE
DIKELEDI CATHRINE MOLEFE
VELILELE JAMES ZICINA**

**FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT
FOURTH APPLICANT
FIFTH APPLICANT
SIXTH APPLICANT**

and

**ELECTORAL COMMISSION
DISE JOHN MAKODI
MEMBER OF THE EXECUTIVE COUNCIL
FOR CO-OPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS FOR THE
NORTH WEST PROVINCE**

**FIRST RESPONDENT
SECOND RESPONDENT

THIRD RESPONDENT**

Summary

Election Law – Municipal by-elections – Duties of Electoral Commission – Commission required to assist not only voters but also prospective candidates who intend registering as candidates in elections – Official of Electoral Commission failing to advise prospective candidates of non-compliance with the requirements of the Local Government: Municipal Electoral Act when candidates submitted their documents to register as such – Such conduct caused unfair exclusion of candidates from election process – election would not be free and fair.

J U D G M E N T

WEPENER J: (MTHIYANE AP AND MOSHIDI J CONCURRING)

[1] On the 17th of September 2013 this court made an order in the following 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-election to be held on 18 September 2013 in Wards 1, 4, 11, 12 and 20 of the Tlokwe Municipality, North West Province.
2. The First Respondent is ordered to lodge a full investigation into the conduct of the Second Respondent, Dise John Makodi, for the period between 8 August 2013 and 27 August 2013 pertaining to the registration of the Applicants as candidates for the municipal by-elections which were due to take place on 18 September 2013.
3. The 2nd, 3rd, 4th, 5th and 6th Applicants are allowed to register as candidates in their respective wards in the postponed by-election.’

[2] Due to the urgency of the matter we did not give reasons for the order which was made. We indicated that the reasons for it would be handed down in due course. This judgment is the embodiment of those reasons.

[3] The applicants are all individuals who intended registering as independent candidates in the municipal by-elections to be held in several wards in the Tlokwe Municipality, North West Province.

[4] The first respondent is the Electoral Commission (the Commission), a body established pursuant to the Constitution, with its objects set out in s 4 of the Electoral Commission Act 51 of 1996 (Electoral Commission Act) as being to 'strengthen constitutional democracy and promote democratic electoral processes'. The Constitution obliges the Commission to manage elections in accordance with national legislation, in this case the Local Government: Municipal Electoral Act 27 of 2000 ('the Municipal Electoral Act').

[5] The second respondent is a project co-ordinator in the employ of the Commission who, in his official capacity, at all material times dealt with the applicants at the Commission's local office in Potchefstroom.

[6] The third respondent is the Member of the Executive Council for Co-operative Governance and Traditional Affairs for the North West Province (MEC), joined in the application in her official capacity by virtue of the powers vested in her in terms of s 8 of the Municipal Electoral Act.

[7] The applicants sought an order directing that the holding of the by-elections in several wards of the Tlokwe Municipality on 18 September 2013 be postponed as contemplated in s 8 of the Municipal Electoral Act. The section provides:

'Postponement of elections

8(1) The Commission may request the Minister or, in the case of a by-election, the MEC, to postpone the voting day determined for an election if the Commission is satisfied that it is not reasonably possible to conduct a free and fair election on that day.

(2) On receipt of such a request, the Minister by notice in the Government Gazette, or the MEC by notice in the Provincial Gazette, must postpone the voting day for the election to a day determined in the notice, but that day must fall within a period of 90 days of the applicable date mentioned in section 24(2) or 25(3) of the Municipal Structures Act.'

The result is that, if the Commission requests the MEC to postpone the voting day, the MEC is obliged to postpone the voting day by notice as prescribed.

[8] The applicants also sought an order that they be allowed to register as candidates in the postponed by-elections and an order directing the Commission to investigate the conduct of the second respondent.

[9] During August 2013 it became necessary to call municipal by-elections in the Tlokwe Municipality as a result of vacancies which occurred in several wards of that municipality. The process adopted by the Commission pursuant to the provisions of s 11 of the Municipal Electoral Act resulted in it issuing a draft timetable, setting out the dates by when steps had to be taken regarding the by-elections. According to the timetable, a notice calling the by-election was to be given on or before 19 August 2013; the certification of the voters' roll and making certified segments available for inspection was to occur on 22 August 2013; the cut-off date and time for submission of the nomination of candidates was 17h00 on 26 August 2013; the cut-off date to notify a party or independent nominees of non-compliance of outstanding documents was 27 August 2013; the cut-off date and time for parties and independent candidates to submit outstanding ward candidate documents was 17h00 on 30 August 2013. A number of further dates, including the date when the by-elections were to be held on 18 September 2013, are provided for.

[10] The applicants are all part of a group of persons without affiliation to any political party who decided to contest the by-elections as independent candidates. As such they were subject to the same rights and obligations as candidates who were nominated by political parties in order to contest the by-elections, save that they were, in addition, required to be nominated as candidates by at least fifty voters registered in the ward in which each candidate intended to contest the election.

[11] The common cause facts before this court show that the first to third applicants, in the company of others, approached the second respondent, an official in the employ of the Commission, on 8 August 2013. The purpose of the visit was to ensure that they were not 'caught off guard at the proverbial eleventh hour due to some discrepancy or deficiency in [their] application to be registered' as candidates for the by-elections. One of the requirements that a prospective candidate in a by-election should comply with is the submission of a form, referred to as Appendix 8, which should contain particulars and signatures of fifty voters concerning the nomination of an independent ward candidate as enacted in s 17(2)(a) of the Municipal Electoral Act. Although there are references to other requirements which independent candidates should comply with, it was common cause in this court that the applicants complied with all other requirements. It is only the issue of Appendix 8 which is in dispute.

[12] Although it was argued, on behalf of the Commission, that this court should apply the principles laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) and that the version of the Commission should be accepted where there are disputes of fact and that, accordingly, the fourth, fifth and sixth applicants did not form part of the group of persons who visited the second respondent on 8 August 2013, this submission, although legally sound, does not find application in this matter.

[13] All of the applicants allege that they were part of a group of persons who visited the second respondent in his official capacity as employee of the first respondent on 8 August 2013 in order to get their nominations in order. There are two affidavits filed on behalf of the respondents. The first attested to by the Chief Electoral Officer of the Commission and the second attested to by the second respondent. The first respondent's affidavit does not deal with the allegations of the persons who state that they visited the second respondent on 8 August 2013. The second respondent avers that he was approached by 5 persons on 8 August 2013. He supplies their names as including first, second and third applicants. The documents of the fourth to sixth applicants were indeed in possession of the Commission. It is common cause that the officials of the Commission looked at their documents and rejected them as candidates. It does not explain how and where the Commission received these documents. In the circumstances there can be no real or genuine factual dispute regarding the submission of the documents of these three applicants to the second respondent even if the rules of the *Plascon-Evans* case should find application. By virtue of the conclusion reached herein regarding the duties of the officials of the Commission, it is not important whether the fourth to sixth applicants handed in their forms for registration as candidates to the respondents on 8 August or on any other later date. It is not in dispute that this group of applicants handed in their forms prior to the cut-off time on 26 August 2013.

[14] The next issue raised by the Commission was that the applicants were seeking to prevent the by-elections from continuing in all the wards where elections were to be held the following day and not only in those wards where the applicants were prospective candidates. This issue can be dealt with briefly. Counsel on behalf of the applicants could advance no ground as to why the elections in the wards that were not affected by the prospective candidature of the applicants should not proceed as planned. Counsel argued that it would be more expedient to postpone the elections in all the wards so that the elections in all the wards could take place on the same day. The

argument has not basis in law and it cannot be sustained. By-elections properly called and where there are no allegations or proof of any untoward conduct, cannot be postponed as a matter of convenience to persons who have no interest in the by-elections in those particular wards. The applicants, in their replying affidavit, did not persist with the relief sought regarding wards 18 and 26. In the circumstances the relief sought regarding the postponement of the elections in wards 18 and 26, cannot be granted. The result is that those elections should continue to be held in accordance with the timetable as laid down by the Commission.

[15] Counsel for the applicants also advised that the independent candidate for ward 6 had withdrawn his candidature with the result that the by-election in that ward should similarly continue unhindered on the planned election day.

[16] At the outset of the hearing the parties advised the court that the Commission had mistakenly rejected the first applicant as a candidate for ward 13. It was further agreed that the first applicant was indeed duly nominated to contest the election in ward 13. It was also agreed between the first applicant and the Commission that the by-election in ward 13 would not proceed on 18 September 2013 as the Commission would request the MEC to postpone the election in that ward in order to allow the first applicant to also canvas voters and prepare for the election, something he was not able to do as he was incorrectly disqualified by the Commission to be a candidate in the election.

[17] After the launching of the application to this court, the Commission wrote a letter to the first applicant in which it advised that it was discovered that:

'Due to a clerical error in the capturing of names contained in your completed Appendix 8, an erroneous conclusion was reached that your Appendix 8 contained less than the 50 signatures of voters validly registered to vote in ward 13...'

It continued to offer, inter alia, the postponement of the ward 13 by-election and said that:

'The Commission sincerely regrets the error that occurred in respect to your completed Appendix 8 and will file a supplementary affidavit in the Electoral Court by tomorrow morning indicating how the error came about'.

[18] One searches in vain to find such an explanation in the affidavits which were filed. All what is said is that the 'Commission has discovered that a clerical error at its local office in Potchefstroom resulted in the incorrect capturing of the names on Appendix 8 of the first applicant's application'. There is a measure of disquiet that such an important matter as the disqualification of a prospective candidate in an election can be said to be occasioned by a clerical error without any explanation of how such clerical error could possibly occur. This is more so if regard is had to the allegations contained in the founding affidavit that the second respondent's attitude towards the independent candidates changed from helpful to hostile and that he acted with a deliberate bias towards the independent candidates. I make nothing of this factual dispute as it is not necessary to resolve it and it forms the subject matter of the conduct of the second respondent which is being investigated by the Commission. However, this issue resulted in the inclusion of the order that the conduct of the second respondent be investigated.

[19] Counsel for the Commission advised the Court that second respondent, who appeared to be responsible for this 'clerical error' has been placed on special precautionary leave pending a full investigation by the Commission into his conduct. This investigation is on-going and has not been completed and the question whether there was any misconduct on behalf of the second respondent remained unanswered at the time of the hearing of this matter. This is a factor which we took into account in coming to the final conclusion reached herein. If the second respondent is found to have acted in

an untoward manner it would support the applicants' contention that he deliberately failed to assist them. It is, however, not necessary to make a finding whether the second respondent acted deliberately in order to determine whether the second respondent acted to prejudice the applicants in their quest to be nominated as candidates in the forthcoming elections.

[20] What remains to be determined is the complaint by the remaining five applicants regarding the rejection of their nominations, with particular reference to Appendix 8, disallowing them to contest the elections in wards 1, 4, 11, 12 and 20. The applicants who wished to contest the elections are: ward 1 – fifth applicant, ward 4 – third applicant, ward 11 – fourth applicant ward 12 – sixth applicant and ward 20 – second applicant. These applicants continue to seek the relief in relation to each of the wards where they intended registering as candidates.

[21] Before dealing with the candidature of the remaining five applicants in the by-elections it is necessary to deal with a further point in limine raised by counsel for the Commission. It was argued that the application should fail as a result of the non-joinder of all the other candidates who were registered for the elections in the relevant wards as they would have an interest in the outcome of the application. The Commission alleged in its affidavit that such other candidates have a 'direct interest' and may be able to supply 'relevant evidence'.

[22] I am to determine whether the rights of other candidates will be prejudicially affected by any order of this Court. If such candidates are properly registered as candidates they will be able to fully participate in any by-election, albeit on a later date, as their candidacy is not sought to be impugned in any manner. In addition it is doubtful whether any such candidates could contribute to the resolution of the dispute before us and

supply relevant evidence as no party has alleged they were present during any of the discussions with the second respondent. In *Wholesale Provisions Supply CC v Exim International CC* 1995 (1) SA 150 (T) former Chief Justice Mahomed, as a puisne judge, held at 158D:

'These observations clearly show, in my view, that the rule which seeks to avoid orders which might affect third parties in proceedings between other parties is not simply a mechanical or technical rule which must ritualistically be applied, regardless of the circumstances of the case.'

Brandt JA said, regarding non-joinder, in *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) at para 12:

'[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see e.g. *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one (see e.g. *Burger v Rand Water Board and Another* 2007 (1) SA 30 (SCA) para 7; and Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* 5 ed vol 1 at 239 and the cases there cited).'

[23] The argument of the Commission fails to take into account that the Commission itself decided to postpone the by-election in ward 13 – there is no explanation as to how it sees the rights of other candidates in that ward being infringed or prejudicially affected. Such postponement of the by-election would, in my view, rightly not be regarded as prejudicially affecting the interests of those candidates registered to contest the election in ward 13.

[24] The dispute does not relate to the candidature of the other candidates – it relates to the administrative action of the respondent vis-à-vis the applicants.

[25] In my view the other candidates will not be prejudicially affected in their right to fully participate in the by-elections should it be postponed and I find that they are not necessary parties with the result that the point of non-joinder falls to be dismissed.

[26] It becomes necessary to deal with the complaint of the remaining five applicants regarding their disqualification as candidates in the by-elections that were to be held on 18 September 2013.

[27] The Republic of South Africa ('Republic') is favoured with a Constitution¹ which has worldwide recognition. Chapter 9 thereof provides for the establishment of 'State Institutions Supporting Constitutional Democracy'. These pillars of democracy, enacted to strengthen² constitutional democracy in the Republic, include the Commission³. Pursuant to s 181(2) of the Constitution 'these institutions are independent, and subject to the Constitution and the law, and they must be impartial and exercise their powers and perform their functions without fear, favour or prejudice'.

[28] Section 190 of the Constitution provides:

'190. Functions of Electoral Commission.—

- (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.'

¹ Constitution of the Republic of South Africa Act 108 of 1996

² Section 181(1) of the Constitution

³ Section 181(1)(f) of the Constitution

[29] There are several enactments which were promulgated and which deal with the functions and duties of the Commission. One such act is the Electoral Commission Act which provides in section 5 for the powers, duties and functions of Commission in the following terms:

'5. Powers, duties and functions of Commission

- (1) The functions of the Commission include to—
- (a) manage any election;
 - (b) ensure that any election is free and fair;
 - (c) promote conditions conducive to free and fair elections;
 - (d) promote knowledge of sound and democratic electoral processes;
 - (e) compile and maintain voters' rolls by means of a system of registering of eligible voters by utilising data available from government sources and information furnished by voters;
 - (f) compile and maintain a register of parties;
 - (g) establish and maintain liaison and cooperation with parties;
 - (h) undertake and promote research into electoral matters;
 - (i) develop and promote the development of electoral expertise and technology in all spheres of government;
 - (j) continuously review electoral legislation and proposed electoral legislation, and to make recommendations in connection therewith;
 - (k) promote voter education;
 - (l) promote cooperation with and between persons, institutions, governments and administrations for the achievement of its objects;
 - (m) (deleted)
 - (n) declare the results of elections for national, provincial and municipal legislative bodies within seven days after such elections;
 - (o) adjudicate disputes which may arise from the organisation, administration or conducting of elections and which are of an administrative nature; and
 - (p) appoint appropriate public administrations in any sphere of government to conduct elections when necessary.
- (2) The Commission shall, for the purposes of the achievement of its objects and the performance of its functions—
- (a) acquire the necessary staff, whether by employment, secondment, appointment on contract or otherwise;
 - (b) establish and maintain the necessary facilities for collecting and disseminating information regarding electoral matters;
 - (c) cooperate with educational or other bodies or institutions with a view to the provision of instruction to or the training of persons in electoral and related matters;'

[30] It may be apposite to summarise what these functions and duties of the Commission entail in practice in the words of a former Chief Justice⁴:

⁴ Langa CJ in *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) at para 76

'...the Constitution describe[s] two of the main functions of the Commission as being to manage the elections at all three legislative levels, that is, national, provincial and municipal and to ensure that those elections are free and fair. Section 5(1) of the Commission Act details the functions of the Commission, the first being to 'manage any election'. It is quite apparent, however, when regard is had to the other functions listed in s 5(1)(b) - (p) that this role was never intended to be a merely supervisory or monitoring one. The functions relate to an active, involved and detailed management obligation over a wide terrain. The Commission must, among other things, "ensure that any election is free and fair" and "promote conditions conducive to free and fair elections". In addition, it must also "continuously review electoral legislation and proposed electoral legislation, and . . . make recommendations in connection therewith". The Commission also has the power to "appoint appropriate public administrations in any sphere of government to conduct elections when necessary.'

(My underlining).

At para 78 the former Chief Justice said:

'[78] The establishment of the Commission and the other institutions under chapter 9 of the Constitution are a new development on the South African scene. They are a product of the new constitutionalism and their advent inevitably has important implications for other organs of State which must understand and recognise their respective roles in the new constitutional arrangement. The Constitution places a constitutional obligation on those organs of State to assist and protect the Commission in order to ensure its independence, impartiality, dignity and effectiveness. If this means that old legislative and policy arrangements, public administration practices and budgetary conventions must be adjusted to be brought in line with the new constitutional prescripts, so be it.'

[31] I am of the view that the learned Chief Justice conveyed that the duties of the Commission do not end by mechanically implementing the letter of the law; it is not only to act as a verifying agent insofar as strict compliance with the legislation is concerned. Its duties include a duty to assist voters and candidates; such assistance should not be limited to ensuring that participants have sufficient knowledge of the electoral process; it should promote a culture of helpfulness to all involved in elections; it should display willingness to assist those members of the public who wish to participate in elections – such assistance not being restricted to voters alone but also to candidates.

[32] After setting out the value of the universal adult suffrage, O'Regan J said in *African Christian Democratic Party*⁵ at para 23:

'These foundational values require a court of law, and the Electoral Commission, when interpreting provisions in electoral statutes to seek to promote enfranchisement rather than disenfranchisement and participation rather than exclusion. The exercise, however, remains one of interpretation.'

[33] It is against this background that the complaint in this matter has to be approached.

[34] The applicants alleged that when they first approached the second respondent they found him to be helpful and willing to assist as one would expect of officers of the Commission. The second respondent relies on these assertions of the applicants. The second respondent states 'this is recognised by the applicants when they describe me in the founding affidavit as being helpful with a willingness to assist' and 'to this end I have always attempted to be of service to the communities in which the Commission performs its functions and to assist any member of such community in a nonpartisan and a-political manner'. He further states that 'my intention throughout all my interactions with the applicants was to be of assistance to them within the boundaries required of an independent institution such as the Commission'. During argument, counsel for the Commission, conceded that the Commission and its officials have a duty to assist members of the public – although the concession was initially restricted to a duty to assist candidates by allowing them to correct the documents referred to in s 17(2A)⁶ of the Municipal Electoral Act. It was, however, also conceded that the officials of the Commission 'may well have a duty' to assist prospective candidates to get

⁵ *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC)

⁶ 17. Requirements for ward candidates to contest election

(2A) If any document mentioned in paragraphs (b) and (c) of subsection (2) were not attached to the nomination, the Commission must—

(a) notify the nominating party or person in writing by no later than the date stated in the election timetable; and

(b) allow the nominating party or person to submit the outstanding document

their paperwork in order. In my view, the concession was fairly made if regard is had to the duties and functions of the Commission as set out herein.

[35] The duty, which has become the focus of this hearing, is the duty to assist candidates to ensure that the documents which the candidates submit are in order so that they qualify as candidates. It became the focus point in this matter as a result of what happened at the meeting on the 8th of August 2013 when the applicants submitted their documents to the second respondent. I need not refer to the disputed facts. I have shown why the officials of the first respondent have a duty to assist candidates.

[36] The undisputed evidence of the applicants was that they wished to register as independent candidates in the election in certain of the wards. They were aware of the timetable for the by-elections issued by the Commission, which was issued pursuant to the provisions of s 17(1) of the Municipal Electoral Act. I also quote s 17(2) and (3) of this Act as they too are relevant in this matter:

'Requirements for ward candidates to contest election

17(1) A person may contest an election as a ward candidate only if that person is nominated on a prescribed form and that form is submitted to the office of the Commission's local representative by not later than a date stated in the timetable for the election.

(2) The following must be attached to a nomination when the nomination is submitted:

- (a) In the case of an independent ward candidate, a prescribed form with the signatures of at least 50 voters whose names appear on the municipality's segment of the voters' roll for any voting district in the contested ward;*
- (b) a prescribed acceptance of nomination signed by the candidate;*
- (c) a copy of the page of the candidate's identity document on which the candidate's photo, name and identity number appear;*
- (d) a deposit equal to a prescribed amount, if any, payable by means of a bank guaranteed cheque in favour of the Commission.*

(3) The Commission must accept a nomination submitted to it and allow the nominated person to stand as a candidate in the ward if:-

- (a) the provisions of section 16 and this section have been complied with'*

[37] The biggest challenge facing the applicants was to identify at least 50 registered voters in their respective wards in support of their candidacy. They required certainty that the persons whose signatures appear on Appendix 8 were indeed all correctly registered as voters in the wards where the applicants intended contesting the by-elections.

[38] In this matter the conduct of the second respondent strengthens the view that such a duty exists. When the applicants submitted their documents the second respondent advised them that he would 'check the documents later...' Although he denies that he undertook to advise the applicants whether the documents were compliant or not, there can be no doubt that the undertaking to check the documents of the applicants for compliance includes a duty to revert to them to advise them whether such documents were indeed in order. As it turned out, the Appendix 8 forms of the remaining five applicants did not contain the names of 50 voters registered on the voters roll in the wards in which each of them wished to contest the election. When the applicants submitted the Appendix 8 forms the final voters roll was not available but it became available on 22 August 2013. The second respondent did not check the applicants' documents to see whether they were compliant with the requirements, or, if he did, he only advised the applicants that the Appendix 8 forms were wanting for failure to contain the names of at least 50 voters registered in the respective wards. The second respondent remained silent about the deficiencies until it was too late for the applicants to correct it. In this manner the applicants' nominations were rejected for non-compliance with the requirement. However, had the second respondent made good on his undertaking to check the documents and advised the applicants timeously of the non-compliance as he was duty bound to do, their rejection as candidates would not have occurred. In that duty the second respondent failed and he caused the applicants' attempt not to be caught 'off guard at the proverbial eleventh hour due to some discrepancy or deficiency' in their applications to be registered as candidates in the forthcoming by-election, to fail. Had the second respondent upon receipt of the final voters roll (which was not

available when the applicants first visited the second respondent) checked the applicants' Appendix 8 forms, he should have advised them of the failure – as he did after the cut-off date for the submission of nomination forms.

[39] The attitude of the Commission that the 'Municipal Electoral Act does not impose an obligation on the Commission to notify a candidate in circumstances where Appendix 8, for example, has not been properly completed', is in conflict with its duty not to simply apply rules mechanically or technically but to promote participation rather than exclusion.

[40] The Commission should, in my view, develop a system to verify compliance with legislation when documents are submitted by candidates and to assist prospective candidates to be compliant with the requirements. It should allow candidates to submit their documents well in advance of the cut-off dates in order to render proper assistance to them. This is no more than what is expected of the Commission if one has regard to its overall powers, functions and duties as set out in the Electoral Commission Act, not to mention its Constitutional obligation, to manage the elections and to ensure that it is free and fair.

[41] An interpretation of the duties of the Commission:

'...which accepts that the Commission had the power to act in such a manner facilitates the participation in elections and is far more consistent with our constitutional values than reading the section strictly to prohibit such a payment system'. [participation]. 'I conclude therefore that the provisions in sections 14 and 17 which state that payment should be made at the local office of the Commission, properly construed, do not prevent the Commission from establishing a system such as the central payment facility under consideration here. That facility was available to all those who wished to contest the elections and permitted them to make payment at an alternative venue to facilitate participation in the municipal elections. The system was both fair and sensible and facilitated participation in the elections without undermining the obligation of candidates and parties to pay deposits to evidence the seriousness of their intention of contesting the elections.'⁷

⁷ *African Christian Democratic Party* at para 28.

[42] By interpreting the duties of the Commission which 'facilitates the participation in elections as being more consistent with our constitutional values'⁸, I conclude that the Commission failed to facilitate the participation of the applicants in the elections. This would result in the elections not being free and fair.

[43] Having regard to the foregoing, I am of the view that the applicants were severely prejudiced by the failure of the second respondent to properly assist them to submit their documents in compliance with the requirements of the Municipal Electoral Act. The failure to allow the applicants to enter the by-elections as candidates would have negatively affected the free and fair character of the elections which were to commence shortly after the hearing of the application. This is so whether the documents were submitted on 8 or 26 August 2013. In the result the decision of the Commission not to accept the nominations of the applicants falls to be reviewed and set aside.

[44] Counsel for the Commission argued against such a duty. It was submitted that assistance to some candidates (and not others whose documents may be completely in order) would be seen as partiality on the part of the Commission. In my view, the duty to assist candidates cannot advance a perception of partiality. In an article by Struwig, Benjamin, Roberts and Vivier 'A Vote of Confidence: Election Management and Public Perceptions of Electoral Processes in South Africa' published in the journal of Public Administration, 46 (3), at page 1124 it is said:

'The ability to successfully fulfil its supervisory function and to effectively respond to diverse issues and competing concerns validates the independence and impartiality of the [Commission].'

⁸ *African Christian Democratic Party* *ibid.*

I am in agreement with the view that Commission's independence and impartiality will be strengthened if it effectively responds to issues and assists candidates to participate in elections.

[45] The matter was heard on the day before the intended elections. It was not possible to give full reasons for the order which was issued on 17 September 2013. The order included the fact that the applicants should be allowed to register as candidates in the postponed by-elections. That order is obviously subject to the condition that the applicants submit Appendix 8 forms duly signed by at least 50 registered voters in good time for the postponed by-elections.

[46] Having regard to the foregoing reasons the following order was issued on an urgent basis on the evening preceding the by-election in the wards referred to in the order:

- '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-election to be held on 18 September 2013 in Wards 1, 4, 11, 12 and 20 of the Tlokwe Municipality, Northwest Province.
2. The First Respondent is ordered to lodge a full investigation into the conduct of the Second Respondent, Dise John Makodi, for the period between 8 August 2013 and 27 August 2013 pertaining to the registration of the Applicants as candidates for the municipal by-elections which were due to take place on 18 September 2013.
3. The 2nd, 3rd, 4th, 5th and 6th Applicants are allowed to register as candidates in their respective wards in the postponed by-election.'

WEPENER J
JUDGE OF THE
ELECTORAL COURT

APPEARANCES

FIRST TO SIXTH APPLICANTS: G. Ackerman
Instructed by Moolman & Pienaar,
Potchefstroom

FIRST AND SECOND

RESPONDENT: P. Kennedy SC with N Rajab-Budlender
Instructed by Gildenhuis Malatji Inc
Pretoria

DATE OF HEARING: 17 September 2013

DATE OF ORDER: 17 September 2013

DATE OF JUDGMENT: 9 October 2013