

**IN THE ELECTORAL COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**



CASE NUMBER: 001/2016 EC

In the application of:

AARON PASELA MHLOPE	First Applicant
JOHANNA XABA	Second Applicant
JOHN MATONG SELEKE	Third Applicant
MAMOGADI ALETTA MATLOU	Fourth Applicant
JOHANNES KGANG RABOTSHO	Fifth Applicant
MAMOSEBI LENAHL MAHLATSI	Sixth Applicant

And

THE INDEPENDENT ELECTORAL COMMISSION OF SOUTH AFRICA	First Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL DEPARTMENT OF LOCAL GOVERNMENT & HUMAN SETTLEMENTS, NORTH WEST PROVINCIAL GOVERNMENT	Second Respondent
THE AFRICAN NATIONAL CONGRESS	Third Respondent
THE DEMOCRATIC ALLIANCE	Fourth Respondent
MR TSHEPO CHEMPE	Fifth Respondent
THE TLOKWE LOCAL MUNICIPALITY	Sixth Respondent

Coram: SHONGWE JA ET MOSHIDI ET WEPENER JJ ET S PATHER – MEMBER)

Heard: 23 February 2016

Delivered: 10 March 2016

JUDGMENT

WEPENER J (WITH SHONGWE JA, MOSHIDI J, S PATHER – MEMBER
CONCURRING):

Introduction

[1] The seven applicants sought an order declaring the certification of the voters' roll for by-elections that were to be held in the Tlokwe Local Municipality on 24 February 2016, to be set aside and the by-elections called for that day to be postponed. The matter was heard on an urgent basis on 23 February 2016 and the following order was issued:

[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, Northwest 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.

[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.

[4] The question of costs is reserved. Having regard to the decision in *Inkatha Freedom Party v Electoral Commission* 2006 (3) SA 396 (EC), the parties are directed to file heads of argument, if they so wish, regarding an appropriate costs order in this matter on or before 4 March 2016 with the secretary of the Electoral Court.'

What follows are the reasons for the order issued on 23 February 2016.

[2] The applicants describe themselves as politicians and community representatives who reside in the Potchefstroom (Tlokwe) area. They were all nominated independent candidates who were to stand for election in the wards referred to in paragraph 1 of the order issued by this Court on 23 February 2016 (the February by-elections).

[3] The first respondent is the Electoral Commission (the Commission) established in terms of the Electoral Commission Act¹ and tasked with the powers and duties therein set out, which include 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 Act² (the Municipal Electoral Act).

[4] The second respondent is the Member of the Executive Council: Department of Local Government and Human Settlements, Northwest Provincial Government. The member of the executive council (MEC) was joined in the application in her official capacity by virtue of the powers vested in her in terms of s 58 of the Municipal Electoral Act and was represented by the acting MEC.

[5] The third and fourth respondents are political parties (the African National Congress (ANC) and the Democratic Alliance (DA)) and the fifth respondent an independent candidate in ward 18 for the February by-elections with the sixth respondent, the Tlokwe Municipality. The DA took no part in the proceedings, nor did the fifth respondent.

Background

¹ Act 51 of 1996.

² Act 27 of 2000.

[6] The factual background of this matter is well documented in two judgments³ and I do not intend to repeat it herein, save in so far as reference to particular facts may be necessary.

[7] Pursuant to the judgment and orders of the Constitutional Court in *Kham*, the February by-elections were called and scheduled for, inter alia, five of the municipal wards in Tlokwe that were affected by the order of Constitutional Court and also ward 18 and others but only the wards mentioned in the order of this Court formed the subject matter of the application.

The Complaint

[8] The applicants alleged that the forthcoming February by-elections would not be free and fair as the voters' roll, which the Commission produced, did not comply with the provisions of s 16(3) of the Electoral Act⁴. The applicants asserted that, as a result of the decision of the Constitutional Court in *Kham*, which declared that previous by-elections which were held in Tlokwe were not free and fair and that the orders which were issued by the Constitutional Court in paras 5(c), 5(d) and 6⁵ were wrongly applied by the Commission, the February by-elections would, similarly, not be free and fair.

³ *Kham v Electoral Commission* 2015 JDR 0683 (EC); *Kham v Electoral Commission of South Africa* 2015 JDR 2588 (CC); 2016 (2) BCLR 157 (CC) (referred to as *Kham*).

⁴ Act 73 of 1998.

'16 Publication and copies of voters' roll

...

(3) 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.'

⁵ '5(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.

5(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.'

[9] The applicants engaged the Commission and complained that 4146 voters that had been registered to vote in the February by-elections and of whom no physical addresses appear on the voters' roll, remained on the certified voters' roll. The complaint was that these voters were not scrutinised pursuant to order 5(c) of the Constitutional Court; that the voters' roll which was supplied subsequent to the order of the Constitutional Court and thus for a future municipal election as envisaged in order 5(d) of the Constitutional Court order, did not comply with the requirement that the roll had to include the addresses of all voters where these addresses were available.

The Constitutional Court

[10] When dealing with the question of addresses on the voters' roll the Constitutional Court found that a failure to comply with this duty resulted in a breach of its obligations by the Commission, which resulted in the elections not being free and fair⁶.

[11] The Commission asserts that it has no duty to verify addresses of voters. This issue does not arise. The Constitutional Court, in no uncertain terms, held that there is no duty of verification. But the Court said⁷:

'[64] For that reason section 8(3) of the Electoral Act requires the chief electoral officer when registering a voter on the voters' roll to register that voter in the voting district in which they are ordinarily resident. That ensures that, when the segment of the national voters' roll to be used in the conduct of an election or a by-election in a particular ward is prepared, it will include only voters qualified to vote in that ward. And it is as important to ensure that those who are not qualified to vote are excluded, as it is to enable those who are qualified to vote to do so.

[65] In order to enable the IEC to discharge the obligation imposed by section 8(3), the prescribed form that must be completed by every aspirant voter when registering to vote requires them to provide the address at which they ordinarily reside. The IEC contended that it was not part of its function to ascertain whether that address was correct. I would reserve any decision on that point, because it is not germane to the problem in the present case. As section 8(3) makes clear, what the IEC's chief administrator, the chief electoral officer, was obliged to do was to register the voters in the voting district in which they were ordinarily resident when

⁶ *Kham* paras 94-95.

⁷ *Kham* paras 64-66.

they applied for registration. That obligation may not have required the chief electoral officer to undertake an investigation of the accuracy of the address given (although, in a society where one cannot lawfully acquire a mobile phone without providing such proof, one wonders why not), but it certainly required that the information given in regard to the voter's ordinary place of residence had to be sufficiently clear to ensure that the voter could be accurately placed in the correct voting district. A generic address, whether that of an informal settlement, such as Crossroads in Cape Town or Bester's Camp in Durban, or that of an upmarket suburb, such as Constantia in Cape Town or Morningside in Durban, is simply insufficient for this purpose.

[66] Voting districts are not, as the argument on behalf of the IEC would have it, areas the demarcation of which is in some way doubtful or debatable. They are established by the IEC itself in terms of section 60 of the Electoral Act. The IEC determines the boundaries of each voting district and must prepare a map showing those boundaries. When a voter comes to register as such, it is for the IEC and its officials to procure as much information from that voter as is necessary to enable it to perform its statutory obligation and ensure that the voter is registered in the correct voting district and hence, for the purpose of municipal elections, in the correct ward. In almost all cases this will be relatively easy but in some instances it will present challenges. It is the IEC's responsibility to resolve those challenges.' (Footnotes omitted).

The February by-elections

[12] 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.

Disenfranchisement

[13] It was submitted that the removal of voters from the voters' roll would have the effect of disenfranchising them. The argument cannot be sustained. If a voter was wrongly included on the voters' roll, the removal of that voter would not disenfranchise him or her as he or she should not have been included in that particular voters' roll in the first place⁸. This Court has held that where there is a large scale unlawful

⁸ *Kham* paras 61 and 89.

registration of voters, it is for the Commission itself to act when the unlawful conduct is brought to its attention. In this regard this Court held in *Lötter v Electoral Commission and Others*⁹ as follows:

[36] The provisions of s 15 of the Electoral Act may not be entirely suitable for the situation described by the applicant where there was a large scale registration of persons who are unknown to the applicant. When there is such large scale unlawful registration of voters it is for the Commission itself to act when the unlawful conduct is brought to its attention, the latter which the applicant did do when he visited the Commission's' head office in Centurion.

[37] Although I will not attempt to suggest all the suitable measures which the Commission could and should take in order to avoid large scale unlawful voter registration, some steps do come to mind.

[38] The Commission is able to determine the pattern of registration of any individual voter by having regard to that particular voter's past registration as a voter. If there were large numbers of voters who suddenly registered in Ward 22 but who were previously registered in surrounding wards, it would be an indication that something was amiss. Unfortunately the information as to such voter migration was not made available to us. The Commission should take the information regarding each voter who registered in Ward 22 since March 2013 and utilise its officials to see if such persons were indeed residing at their former addresses and not within Ward 22. If such persons are still so resident at their former addresses and found to reside outside Ward 22, the Commission must take steps to have such persons removed from the voters' roll of Ward 22. The Commission is entitled to acquire the necessary staff to do such an exercise, even on an urgent and wide scale basis, as is envisaged in s 5(2) of the Electoral Commission Act which provides:

'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) ...

⁹ *Lötter v Electoral Commission and Others* (001/13 EC); [2013] ZAEC 1(7 May 2013); [2013] 4 All SA 152 (Elect Ct) (*Lötter 1*).

(c) ...

(d) ...

that is necessary for or conducive to that.’

The Act is a broad guideline and the Commission is entitled to take steps in order to promote free and fair elections.

[39] The Commission could then *mero motu* apply the provisions of s 15 (3) of the Electoral Act to correct the unlawful position. If s 15(3) is found to confer insufficient machinery the Commission is hampered in that it does not have the necessary legal machinery to correct the voters’ roll, it should act in order to avoid such a situation in the future. It has the duty to strengthen the constitutional democracy and promote the electoral processes without any prescription or curtailment of its powers (see s 4 of the Electoral Commission Act). It can further make recommendations in connection with the electoral legislation as is provided for in s 5 (1)(j) of the Electoral Commission Act.

[40] If it is found that there are a large number of unlawful registered voters in Ward 22 these voters must be removed from that voters’ roll pursuant to s 5 (1)(e) of the Electoral Commission Act. The Commission is to “compile and maintain voters’ rolls by means of a system of registering of eligible voters by utilising data available from government services and information furnished by voters”. Each unlawfully registered voter can be removed from the voters’ roll pursuant to an application to court, if necessary.

[41] It is because of this view that the order in 2 above was issued. Unlawfully registered voters must be removed from the voters’ roll as such a situation, un-remedied, is not conducive to a free and fair election in a democratic society.¹⁰

[14] After this was said in the *Lötter 1* case the applicant in that matter approached the Constitutional Court who directed this Court to consider the applicant’s later contention that the Commission failed to comply with the order issued by this Court.

¹⁰ This was said in 2013 with no apparent dissent by the Commission.

During that hearing the Commission filed reports in which it set out its actions pursuant to the aforesaid orders. This Court found¹¹:

[17] In the result the Commission complied with paragraph 2 of the order made by this Court on 7 May 2013. Similarly, the issues referred to this Court by the Constitutional Court have been satisfactorily dealt with by the Commission. The contention to the contrary advanced by the applicant is without merit and falls to be rejected.

[18] Accordingly, the following order is made:

The Electoral Commission has complied with paragraph 2 of the order made by this Court on 7 May 2013.’

[15] This Court, relying on the Commission’s report, said¹²:

‘THE REPORTS ON THE INVESTIGATION INTO ELECTORAL FRAUD IN WARD 22

... .

27 From 11 – 13 September 2013, a team of trained electoral project co-ordinators visited each of the addresses given as part of the REC1 application for registration form. At the given addresses, investigators enquired whether the person concerned was ordinarily resident at that address or not. If the answer was in the affirmative, that applicant was recommended for retention on the segment of the voters’ roll for Ward 22. If the person was not resident at that address, he/she was identified as a candidate to be removed from the segment of the voters’ roll for Ward 22.

28 The investigation also revealed (as is clear from the section of the table on page 2 of the second report, marked “Voters found during Feb TCR”) new residents in the area who had not registered for Ward 22.

29 In total, 343 applicants were not found or known to reside at the given addresses. Accordingly, notices of intention to correct the registration details for the 343 applicants identified were issued. These were delivered to the given addresses by the Sheriff. Moreover, advertisements were taken out in a local newspaper, notices were placed in the municipal

¹¹ *Lötter v Electoral Commission and Others* 9001/13 IEC [2013] ZAEC 3 (6 December 2013) (*Lötter 2*) at paras 17-18.

¹² *Lötter 2* para 8.

offices in Vryheid and at the local offices of the Commission and an attorney was placed at the local offices of the Commission to assist and evaluate any representations which were made. Ultimately, only 6 persons actually made representations and all 6 of those were retained on the segment of the voters' roll for Ward 22.

30 Accordingly:

30.1 337 persons were removed from the segment of the voters' roll for Ward 22 and placed back on the segment of the roll for the voting districts in which they were originally registered. This was done in terms of section 11(1)(a) of the Electoral Act.

30.2 Where no previous registration was evident, that person was placed on a section of the voters' roll under a new category called "registered in an incorrect voting district." This was done in terms of section 11(1)(b) of the Electoral Act.

30.3 Twenty-eight (28) applicants whose REC1 forms could not be located were retained on the segment of the voters' roll in Ward 22.'

[16] 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.

Prospective Nature of the Order of the Constitutional Court

[17] The Commission took the view that the order of the Constitutional Court was prospective in its operation and did not apply to the voters' roll that was certified for the February by-elections. I am, however, of the view that the order of the Constitutional Court is not open to doubt or speculation. The difficulty with the approach of the Commission is that the elections will be held with a flawed voters' roll despite the Constitutional Court having held that elections based on a flawed voters' roll not being free and fair.

[18] The reasoning of the Commission ignores that the purpose of paragraph 6 of the Constitutional Court order was not to affect the validity of other elections which had been held prior to the date of the order. The prospectiveness of the order does not

impact on subsequent elections (future municipal elections)¹³, which fact is made clear in order 5(d) and which applies to all future municipal elections, namely, elections after the date of the issue of the Constitutional Court order, which would include the February by-elections.

[19] The Commission'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 same flaw which still existed in the voters' roll for the February by-elections.

[20] The Commission alleges that the addresses of those 4146 voters were not available to it and thus the Commission satisfied the requirements of s 16(3) of the Electoral Act. The Commission relied on the fact that these voters were historically registered, even if such registrations are in contravention of the findings of the Constitutional Court and that they can simply be referred to as persons whose addresses are not available. The Constitutional Court made it clear: a person may be included in the voters' roll even if such person's address is not available, on condition of compliance with provisions of s 8(3) of the Electoral Act, which requires that the Commission's chief administrator is obliged to register the voters in the voting district in which they were ordinarily resident¹⁴. There is nothing in the Commission's affidavit to indicate that it did anything to ensure that those voters could be accurately placed within the correct voting districts. Without this basic exercise as required and explained by the

¹³ Order 5(d).

¹⁴ *Kham* para 65:

'[65] In order to enable the IEC to discharge the obligation imposed by section 8(3), the prescribed form that must be completed by every aspirant voter when registering to vote requires them to provide the address at which they ordinarily reside. The IEC contended that it was not part of its function to ascertain whether that address was correct. I would reserve any decision on that point, because it is not germane to the problem in the present case. As section 8(3) makes clear, what the IEC's chief administrator, the chief electoral officer, was obliged to do was to register the voters in the voting district in which they were ordinarily resident when they applied for registration. That obligation may not have required the chief electoral officer to undertake an investigation of the accuracy of the address given (although, in a society where one cannot lawfully acquire a mobile phone without providing such proof, one wonders why not), but it certainly required that the information given in regard to the voter's ordinary place of residence had to be sufficiently clear to ensure that the voter could be accurately placed in the correct voting district. A generic address, whether that of an informal settlement, such as Crossroads in Cape Town or Bester's Camp in Durban, or that of an upmarket suburb, such as Constantia in Cape Town or Morningside in Durban, is simply insufficient for this purpose.'

Constitutional Court the conclusion that these addresses were not available to it has no substance.

[21] In so far as s 16(3) of the Electoral Act places an obligation on the Commission to ensure that voters must be accurately placed in the correct voting district¹⁵, such obligation is not a new requirement. Section 16(3) was in place all along and its provisions were not declared to be operative or applicable prospectively only. It is not a new obligation but an existing obligation which was restated by the Constitutional Court. A failure to comply with s 16(3) by including voters who were not accurately placed in the correct voting district places the voters' roll in conflict with the duties imposed on the Commission.

[22] Having regard to the foregoing, 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.

General

[23] 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.

[24] Counsel for the Commission further submitted that the remedy for the complainants was to 'object at the ballot box'. This is a reference to the allegation in the Commission's affidavit that the applicants may object at the voting station when the fraudulently registered voters present themselves to vote.¹⁶

¹⁵ *Kham* para 65.

¹⁶ Although the Commissions' affidavit referred to s 51 of the Electoral Act, no such section exists and the reference is presumably to section 51 of the Municipal Electoral Act:

'51 Objections concerning voting

(1) At any time before a voter has been handed a ballot paper, an agent or ward candidate may object to that voter being allowed to vote or to vote at the voting station concerned.

(2) An agent or ward candidate, or the voter concerned, may object if the voter is refused a ballot paper.

(3) An agent or ward candidate, or a voter, may object to any conduct, other than that mentioned in subsection (1) or (2), of an officer, an agent, or any other person present at a voting station.

(4) An objection in terms of subsection (1), (2) or (3) must be made in writing on a prescribed form and handed to the presiding officer concerned.

[25] This approach, when such large scale fraudulent registration of voters occurred, has been decisively dealt with in *Lötter 1*¹⁷.

[26] In *Kham* the Constitutional Court said¹⁸:

[51] Section 15 does indeed provide a mechanism for lodging objections to the voters' roll. The question is whether it is the only one. Importantly, it does not say that its use is exclusive. In order to lodge an objection, the objector first has to identify the voters who are wrongly registered, and serve notice of their objection on the people to whose registration they object. It is unclear how the applicants were supposed to comply with this requirement and the IEC does not suggest that it was practically feasible for them to do so.

[52] To recapitulate, they received their free copies of their segments of the voters' rolls on the afternoon of 4 December 2013 and the election was held on 11 December 2013. The copies they received contained no addresses. In order to lodge an objection under section 15, they had to identify from this unhelpful document the voters to whose registration they objected; formulate their objection and support it with documentary evidence;^[48] serve the objection on the voters concerned and then wait for up to fourteen days for the IEC to make a decision. That would have taken them well past the election. To construe section 15 in the restrictive fashion suggested by the IEC might advance bureaucratic interests, but it is not consistent with its broader obligation to create an environment in which free and fair elections can take place in which all qualified citizens may participate either as candidates or voters.

[53] Section 15 is simply not structured to deal with objections of the type that the applicants were making in sufficient time to enable by-elections to be held on a corrected voters' roll. It may well provide a workable procedure for adoption by large and well-resourced political parties, who can monitor the roll throughout the year as voters are added to it or removed from it. They have their own records regarding voters and other means to enable them to cross-check against the voters' roll any registration that they regard as doubtful. In addition, they are

(5) The presiding officer must summarily investigate the factual circumstances underlying the objection, and may for that purpose also direct verbal enquiries to anyone that may be able to assist.

(6) After having investigated the objection, the presiding officer must-

(a) decide the objection;

(b) record the decision on the written objection; and

(c) verbally inform the objector and any other parties involved in the objection of the decision.

(7) The presiding officer must keep a written record of each objection and decision taken in terms of this section.'

¹⁷ See para 13 supra and *Lötter 1* at paras 39 and 40.

¹⁸ At paras 51-54.

likely to have available sophisticated computer programmes that enable them to correlate the contents of the voters' roll with other information and enable them to detect errors.

[54] But resources of this nature are not freely available to independent candidates such as the applicants, or ratepayers' bodies participating in municipal elections, or smaller political parties seeking to make a political breakthrough. To restrict their capacity to object to the voters' roll to a mode of objection suited only to the large and the well-resourced, would be a substantial check on their ability to participate meaningfully in elections and their constitutional right to stand as candidates for public office. It would be a particularly acute problem at the level of local government where one finds the majority of such candidates and groupings. That construction of section 15 would not be in accordance with the spirit, purport and objects of the Bill of Rights as required by section 39(2). The clear and ample rights to participate in the political process protected by section 19 of the Bill of Rights would be unnecessarily constricted by this interpretation. It follows that the applicants were not confined to objections under section 15 of the Electoral Act to pursue their objections to the registration of voters in wards where they were not entitled to be registered.' (Footnotes omitted)

[27] As in the case of s 15 of the Electoral Act and by parity of reasoning, the argument that dissatisfied parties should utilise the provisions of s 51 of the Municipal Electoral Act to object to the registration of voters, should finally be put to rest.

[28] No submissions were advanced that a period of six weeks would not be appropriate for the postponement of the by-elections should this court find that the by-elections, based on the voters' roll as it stands, would not be free and fair.

[29] The argument on behalf of the ANC was that certain difficulties had arisen in the Council due to the conduct of political parties and that further delays were detrimental to its operations. However, nothing convincing has been shown to militate against a further postponement of the by-elections for a period of six weeks from the date of the order of this Court. This matter commenced in December 2013 and although local authority (municipal) elections are to be held during 2016, no date has been announced for these elections.

[30] Counsel for the MEC conceded that the by-elections will be unfair if the voters' roll is not in order. However, counsel for the MEC relied solely on the statements made

by the CEO of the Commission that the addresses of the 4146 voters 'were not available'. I have dealt with that argument, which cannot be sustained.

[31] Having regard to the foregoing, the order as set out at the beginning of this judgment was issued.

Costs

[32] Pursuant to the order of this Court, the applicants and the first respondent filed heads of argument regarding the question of costs.

[33] I am of the view that this is not a matter where a costs order should be issued against any party. In *Competition Commission of South Africa v Pioneer Hi-Bred International Inc and Others*¹⁹ it was said that the granting of a costs order would depend on the facts of each case.²⁰

[34] In this matter the Commission is in the same position as was the Commission in the *Pioneer* matter where it was said²¹:

'To emphasise the point, the Commission is not acting as a mere opposing party in civil litigation, and indeed we require of it, as a public functionary, earnestly and with vigour to pursue its mandate when litigating in the course of its functions. The CAC lost sight of this important factor. Unreasonable, frivolous or vexatious pursuit of a particular stance may, however, justify an order of costs against the Commission.' (Footnotes omitted)

[35] In addition, in *Lötter 1*, this Court said²²:

'It is to be regretted that the Commission, which fulfils one of the most important functions in our democratic society, did not see fit to be represented at the court hearing where its actions were under scrutiny. Questions which arose during the hearing remain unanswered because of such absence and I am of the view that the Commission should in all instances arrange to be represented before this court as its contribution during the hearing of disputes involving it or its officials, can assist to advance the necessary understanding which a court should have so that

¹⁹ 2014 (2) SA 480 (CC).

²⁰ *Pioneer* para 28.

²¹ At para 28.

²² At para 11.

matters which should be taken into account, in particular practical answers to questions that may arise during such hearing, are properly taken into account. The Constitutional Court said in *Electoral Commission of the Republic of South Africa v Inkatha Freedom Party* 2011 (9) BCLR 943 (CC) at para 34 that “[i]t is undesirable that matters involving the conduct of elections should be decided without the benefit of the views of the Commission”.’

[36] Accepting, without deciding the matter, that this Court does have the power to issue a costs order, I am of the view that the circumstances of this matter are such that no order as to costs should be made.

Wepener J

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