IN THE ELECTORAL COURT OF SOUTH AFRICA

HELD AT BLOEMFONTEIN

Case No: 006/2021/EC

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: Yes	
(2) OF INTEREST TO OTHER JUDGES: Yes	
(3) REVISED: Yes	
_____	_____
DATE	SIGNATURE

In the matter between:

Action SA **APPLICANT**

and

THE ELECTORAL COMMISSION
OF SOUTH AFRICA **RESPONDENT**

Neutral Citation: *Action SA v The Electoral Commission of South Africa* (Case no 006/2021 EC) [2022] ZAEC 2 (18 January 2022)

Coram: Mbha JA, Shongwe AJ, Moshidi AJ and Ms Pather, member

Summary: Local Government Elections (LGE); preparation of the ballot papers by the Electoral Commission – whether to include the Political Party's name; or abbreviated name; political party not having chosen and registered an abbreviated name on initial registration in terms of s 15 of the Electoral Commission Act 51

of 1996 (Commission Act); the proper interpretation and meaning of the provisions of s 23 of the Local Government: Municipal Electoral Act 27 of 2000 as amended, (Municipal Act) read with the provisions of ss 19 and 190 of the Constitution; the duties, functions and objects of the Electoral Commission as defined in s 5 of the Commission Act; and s 23 of the Municipal Act in preparing the ballot papers for elections. Applicant's application dismissed with no order as to costs.

JUDGMENT

Moshidi AJ (Mbha JA, Ms Pather member, concurring):

Introduction

[1] This matter was heard on accepted urgent basis by this Court on Thursday 21 October 2021. The matter pertinently raises and brings into complete focus, the statutory and constitutional role, obligations and functions of the Independent Electoral Commission (IEC), where necessary, in relation to registered political parties, and now the increasing phenomenon of individual or independent candidates and newly registered political parties.

Order issued

[2] At the conclusion of the hearing the Court (majority) made the following order:

1. The application is dismissed;
2. There is no order as to costs;
3. The reasons will follow in due course.

The reasons for judgment

[3] What follows hereafter are the reasons for the above order. The applicant is ActionSA, a political party formed recently in 2020 and duly registered and headed by Mr. Herman Mashaba, a former mayor of Johannesburg. The Electoral Commission of South Africa (the Commission) is the only respondent in these proceedings.

The registration of the applicant

[4] The registration of the applicant as a political party was effected by the respondent in terms of the provisions of s 15 of the Electoral Commission Act 51 of 1996 (the Commission Act) as well as the Regulations framed thereunder, and more significantly, by completing the requisite form in terms of s 15 (1) of the Commission Act, read with the Regulations for the Registration of Political Parties, 2004 (the Regulations). In the context of the present matter, it is instructive to revert later to the above and other statutory provisions, as well as certain applicable provisions of the Constitution of the Republic of South Africa Act 108 of 1996 (The Constitution). Indeed, this matter also brings into direct focus at least two important aspects involving elections. Those are firstly, the manner in which the Commission exercises its powers in terms of the various statutory provisions applicable in elections. Secondly, and on the other hand, the Commission's constitutional obligations in the exercise of powers, functions and duties, with regards to ss 19 and 190 of the Constitution. More about this later. The Commission is a statutory body established by s 3 of the Commission Act.

The objects, powers and duties of the Commission

[5] Indeed, the objects, powers, duties and functions of the Commission, in terms of ss 4 and 5 of the Commission Act, properly interpreted, play an important role in the present matter, as described by the Constitutional Court and other High

Courts in several case law in our developing democracy. For present purposes, and reasons of brevity, the preamble to the Commission Act, provides that it 'makes provision for the establishment and composition of an Electoral Commission to manage elections for national, provincial and local legislative bodies and referenda; and to make provision for the establishment and composition and the powers, duties and functions of an Electoral Court; and provide for matters in connection therewith'.[1] In the same breath, s 3 of the Electoral Commission Act, in establishing the Commission, provides that it *shall be independent and subject only to the Constitution and the law*.[2] (Emphasis added.)

The applicant's complaint

[6] I must hasten to set out as fully as I possibly can, the nature of the applicant's complaint and case in the present matter. This as contains in the founding papers as amended; the replying papers; the heads of argument; and the arguments advanced at the hearing. In the process, I shall not derogate from the substance of the applicant's contentions, by any means.

The salient complaint

[7] If cut to the bone, the applicant's assertions come to this:[3] The deponent to the founding affidavit, Mr. Michael Eric Beaumont, the National Chairperson of the applicant (Mr Beaumont), asserts that: (Some of the allegations are common cause) the applicant seeks to review the decision of the Commission to refuse to include the applicant's name on the ward ballot paper for the 2021 local government elections (LGE 2021) to be held on 1 November 2021 (LGE 2021); the Commission's reason for the refusal which is that the ballot only allows for

[1] See Preamble of the Electoral Commission Act.
[2] See applicant's complaint – p 116, para 71.
[3] See FA and Heads of Argument, the exchanged correspondence, and alleged newspaper outbursts.

abbreviated names (abbreviations for the name of political parties), and that since the applicant does not have an abbreviation, its name could not be included on the ballot paper, was incorrect and wrong.

The Commission's response and some common cause facts

[8] It is common cause that: the original notice of motion was amended, subsequently without any objection, that the matter was urgent, that the applicant, in the amended notice of motion, specifically alleged, and re-emphasised that, the decision of the Commission to exclude its name from the LGE 2021 ward ballot paper is unconstitutional and unlawful; that the determination of the ballot paper under s 23 of the Local Government: Municipal Electoral Act 27 of 2000 (the Municipal Act), as amended, to include only a registered abbreviation is unlawful; that the eight letter name of a political party, (like that of the applicant), are to be read in next to the word 'abbreviation' on the 'ballot paper'; that the Commission to immediately include the name of the applicant on the LGE 2021 ward ballot paper; that the Commission, in those wards where the ward ballot papers have been published without the name of the applicant, to destroy all copies of same, and re-issue and/or reprint such ward ballot papers, including the full name of the applicant; that the Commission print stickers bearing the name 'ActionSA', and distribute the stickers to polling stations (stations) to be affixed in the relevant blank space on each ward ballot paper that is handed to voters by polling officials, or the Commission produce rubber stamps bearing the name of 'ActionSA' and distribute the stamps to stations to be stamped in the relevant blank space on each ballot paper that is handed to the voters by the station officials; and finally, that the Commission pay the costs of this application.[4]

[4] See amended Notice of Motion, p7, paras 5 and 6.

The Commission's contentions

[9] In the answering papers, supported by various annexures, and the heads of argument, and closing arguments, the Commission denied vehemently the applicant's assertions as entirely contrived and self-created, in several respects. The denial has to be summarised.[5]

[10] In the first place, the Commission contends that, it exercised its powers under s 23 of the Municipal Act, as amended, and in compliance with the stipulated requirements and processes involved in the registration of political parties. If ActionSA wanted to submit their abbreviated name for registration, they were obliged to have done so at registration point. Any amendments could only be made by the applicant in terms of s 16 (A) of the Commission Act.[6] If the applicant had submitted its abbreviated name, it would have been included. The Commission therefore contends that, the reason the abbreviated name was excluded by the Commission is not because of malice on its part, but simply because the applicant elected consciously, not to register an abbreviated name. The Commission further asserts that the reason why the applicant does not have a registered abbreviated name or acronym has nothing to do with the Commission but a self-created problem by the applicant.[7] Further that, the Commission, has included all the names of the political parties who submitted their abbreviated names in the ballot paper. However, the applicant and other parties opted not to do so voluntarily.[8]

[5] See AA, pp 89 – 187.
[6] See provision section 16 A of Commission Act.
[7] See AA, p 91, para 6 – consolidated bundle.
[8] See AA, p 91, para 6 - consolidated bundle.

[11] In addition, the Commission contends in the answering papers that, the relief sought by the applicant is untenable as there are 13 other political parties, who are in the same position as the applicant. Twelve of the thirteen parties have names that are more than the required eight characters long. Neither the Court nor the Commission can abbreviate unilaterally the names of those political parties for them. If they were to choose to have abbreviated names or acronyms, they will have to follow the stipulated registration process and be subject to the normal objection process. Significantly, none of the other 13 political parties have been joined in the present proceedings. More about this later below.

The essence of the applicant's complaint

[12] It is common cause that the applicant's main gripe is the exclusion of its name from the LGE 2021 ballot papers. In particular, in paragraph five of the amended notice of motion, the applicant seeks an order compelling the Commission to, in those wards where the ward ballot have been published without the name of the applicant, destroy all copies of same, and issue and/or reprint such ward ballot papers, including the full name of the applicant .[9] The Commission counters the suggested remedy by pointing out that, there are two ballot paper types to be used in the LGE 2021. The first is a ward ballot paper where the applicant's ward candidate's name appears together with the applicant's registered distinguishing mark or symbol (logo), but without an abbreviated name or acronym, as none was registered. The second ballot paper is the Proportional Representation (PR) ballot paper where applicant's name appears together with its logo, but without an abbreviated name or acronym, as the applicant had not registered one. In the replying papers, the applicant, however, does clarify its proposed remedy. It contends that the reason it is seeking an order compelling the Commission to reprint only the ward ballot papers is

[9] See amended Notice of Motion, para 5 (2), p7 – bundle.

because, unlike the ward ballot papers, the PR ballot papers have at least its name on it.[10]

The Commission's specific response

[13] The Commission in response to the applicant's claim to seek review, that is, the declaration of invalidity and setting aside the Commission's decision to exclude the applicant's name from the LGE 2021 ballot papers, advances various grounds why the application should be refused by this Court. These include that, the present application is an abuse of court processes; that the relief sought is not just and equitable; the relief sought is confusing; the relief sought is impracticable under present circumstances; the relief sought will impact negatively on the majority of other political parties; and that the relief sought ignores completely the context in which the Commission operates.[11] Various reasons are advanced by the Commission for its assertions which is unnecessary to recall wholly for present purposes, in particular in the nature of the applicant's case. In addition, the Commission makes the rather compelling assertion that, in deciding to exclude the applicant's name from the LGE 2021, it exercised correctly and properly its powers in determining the design of the ballot papers in terms of s 23 of the Municipal Act. In doing so, it determined to use political parties 'registered abbreviated names or acronyms in a section of the ballot papers'. As a factual consequence of the applicant not having a registered abbreviation or acronym, the space on the ballot papers where its registered abbreviation or acronym would have been inserted, is left blank. As mentioned elsewhere in this judgment, the Commission asserts that neither this Court nor the Commission unilaterally can select for the applicant an abbreviation or acronym. This is incontrovertible. This

[10] See the Commission's specific response, p 32 para 13 and RA, para 70 of 209 – bundle.
[11] See AA, pp 91 to 130 – consolidated bundle.

would attract unfairness. For present purposes, I have deliberately, elected not to deal with the Commission's assertions dealing with, 'Mr. Mashaba's unfortunate public outbursts against the Commission'.[12] It is irrelevant. However, in the replying papers, the applicant contends that the said press statements were of public interest and of events that have taken place.[13] The fact of matter, in my view, remains that the press outbursts are irrelevant, and unhelpful in resolving constructively the impasse between the parties.

The crisp issue for determination

[14] The crisp, narrow and pertinent issue to be decided in this matter is this: whether the Commission in deciding to exclude the name of the applicant from the ward ballot papers for the LGE 2021, was correct, it being common cause that: on original registration, the applicant did not register an abbreviated name or acronym; on realising that its name was not on the published ballot papers, the applicant duly lodged objections on various levels, which objections were rejected by the Commission.

[15] There are indeed several sections of the Commission Act, all in elaboration of the preamble, which come into play in this application. The main one is s 3 which establishes the Commission, and that it must be independent and subject only to the Constitution and the law. Further that the Commission shall be impartial and shall exercise its powers and perform its functions without fear, favour or prejudice. In addition, and relevant and important here, is that the objects of the Commission are to strengthen constitutional democracy and promote democratic electoral processes.[14] More relevant here, are the provisions of s 5 of the Commission Act which set out the powers, duties, and functions of

[12] See AA, p 194, para 14 – consolidated bundle.
[13] See RA, p 207, para 63 - bundle.
[14] See chapter 2, sections 3 and 4 of Commission Act.

the Commission. In this matter, the Commission has been severely criticized for not performing its powers correctly, but unfairly, narrowly, dogmatically, improperly, and even unconstitutionally. Sections 3 and 4 and 5, in chapter 2 of the Commission Act, provide as follows:[15]

'3. Establishment of Commission.

(1) There is an Electoral Commission for the Republic, which is independent and subject only to the Constitution and the law.

(2) The Commission shall be impartial and shall exercise its powers and perform its sanctions without fear, favour or prejudice.

4. Objects of Commission.

The objects of the Commission are to strengthen constitutional democracy and promote democratic electoral processes.

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 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 co-operation 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 co-operation with and between persons, institutions, governments and administrations for the achievement of its objects;

[15] See section 5 of Commission Act and see later section 23 of the Municipal Act.

(m) ……

(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) co-operate 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; and

(d) generally, perform any act that is necessary for or conducive to that.'

[16] It is clear from the provisions of s 5 above, and for what is relevant here, that the Commission's powers, duties, and functions include, the management of any election; ensure that any election is free and fair; promote conditions conducive to free and fair elections; promote knowledge of sound and democratic electoral processes: compile and maintain a register of parties; establish and maintain liaison and co-operation with parties; undertake and promote research into electoral matters; and develop and promote the development of electoral expertise and technology in all spheres of government. To the extent necessary, the above provisions are applicable since the Commission has been variously accused of having treated the applicant unfairly, unjustifiably, unreasonably, and indeed unconstitutionally, when it excluded the applicant's name from the ballot paper.

[17] Equally plain from the provisions of ss 15, 15 A and 16 of the Commission Act, referred to above, is that whilst s 15 deals with the registration of political parties, and the requirements of such registration, s 15 A deals with the registration of political parties for municipal elections, and s 16(1) gives the chief electoral officer the power not to register a party in terms of s 15 or 15 A under certain circumstances. These circumstances include the failure of the applicant to, before a period of 14 days has elapsed, after the submission of the registration, provide proof of publication of the prescribed notice of application in the Gazette, in the case of an application referred to in s 15 or in a newspaper circulating in the municipal area concerned in the case of an application referred to in s 15 A; and the proposed name, abbreviated name, distinguishing mark or symbol mentioned in the application resembles the name, abbreviated name, distinguishing mark or symbol, as the case may be, of any other registered party to such an extent that it may deceive or confuse voters.

[18] Rather significantly in the context of the present matter, the registration of a political party under s 15, commands (instructs) the Commission, on application for registration to effect such registration presented on the prescribed form, on condition certain items (information) are provided. The information includes the name of the party; the distinguishing name or symbol of the party in colour, and the abbreviation, if any, of the name of the party consisting of not more than eight letters. Once these and others have been complied with, the chief electoral officer is obliged to issue that party with a registration certificate, in the prescribed form and publish the prescribed particulars of such registration in the Gazette. Such party must also be registered in respect of a particular municipality.[16] It is not in dispute that ss 15 and 15 A of the Commission Act were applicable in respect of the registration of political parties for elections. However, s 15 A was only

[16] See section 15 A (1) of the Commission Act.

repealed with effect from 27 August 2021. In other words, s 15 A was still applicable in respect of political parties who applied for registration before 27 August 2021. It is not in dispute that the applicant only registered in 2019/2020 as a political party.

Section 23 of the Municipal Act

[19] In addition to the above statutory and electoral provisions, the Municipal Act also finds application in the present matter. The primary object of the Municipal Act, as described in the preamble, is to regulate municipal elections, whilst s 3 thereof provides that it applies to all municipal elections held after the date determined in terms of s 93 (3) of the Local Government: Municipal Structures Act 117 of 1998 (Structures Act).

[20] In its amended founding papers, the applicant alleges inter alia, that the Commission in determining the ballot paper design under s 23 of the Municipal Act to include only a registered abbreviation, acted unlawfully, and that the words 'eight (8) letter name of political party' are to be read in next to the word 'abbreviation' on the 2021 'ward ballot paper'.

The exercise of Commission's powers under section 23

[21] In addition, the applicant complains that the Commission, in the exercise of its powers under s 23 of the Municipal Act, was too rigid and inflexible, thereby infringing on the rights of the applicant or its members and renders the conduct of the LGE 2021 in the affected municipalities to be not free and fair, and places form over substance.

[22] The applicant is challenging both the Commission's exercise of powers under s 23 of the Municipal Act, and its interpretation thereof. The basis of the

challenge is vague and generalised. In this regard, the applicant alleges that the exercise of power is unlawful as the ballot paper makes provision for only a registered abbreviated name whilst the Act does not require a political party to register an abbreviated name. However, as mentioned before, the Commission rejects out of hand the contentions of the applicant as being completely bereft of merit and misguided.

The provisions of section 23

[23] Section 23 of the Municipal Act provides that: 'The Commission must determine the design of the ballot paper or ballot papers to be used in an election'.[17] Section 1 of the Act proceeds to define the word 'ballot', 'in relation to- *(a)* an election where a voter in terms of item 8 (1) or 9 (2) of Schedule 1 or item 3 (a) of Schedule 2 to the Structures Act is entitled to cast one vote only, means a ballot conducted at a voting station to enable voters to cast that vote in the election; or *(b)* an election where a voter in terms of item 9 (1) of Schedule 1 or item 3 (b) of Schedule 2 to the Structures Act is entitled to cast more than one vote, means each of the separate ballots conducted at a voting station to enable voters to cast those votes in the election.'[18]. It is interesting that the Concise Oxford Dictionary defines the word 'ballot' as a procedure by which people 'vote secretly on an issue'. The word 'design' is defined as 'a plan or drawing produced to show the look and function or workings of something before it is built or made'.

[24] From the above provisions of s 23, it is plain that the Commission has the requisite power, and is in fact, obliged to determine the design of the ballot paper or ballot papers for use in an election. No one else has such power, and clearly two types of ballot papers are envisaged. There are clearly no other restrictions, directions, conditions or guidelines, or discretionary instructions accompanying

[17] See section 23, part 5 – voting material.
[18] See section 1, under chapter 1 of Act.

the Commission's exercise of its powers in this regard. This, for obvious reasons too. One of these is that the Commission may not, in the exercise of its powers to design the ballot paper or ballot papers, consult any of the registered political parties privately, or independently on its own initiative, as to how to design the ballot paper or papers. Admittedly, there are numerous other political parties involved here, not cited in this application. In any event, such eventuality would, undoubtedly, violate the trite principles of natural justice principle of *audi alteram partem* (hear the other side).

The instances where the Commission's powers are challenged

[25] Indeed, there are numerous instances where the exercise of the Commission's powers, duties and functions were called into question. These include circumstances of act/s of omission. For example, in *Electoral Commission v Inkatha Freedom Party*[19] the facts were briefly as follows: the Inkatha Freedom Party (respondent), wished to take part in the May 2011 local government elections that were due to be held country wide. It accordingly set about complying with all the formalities prescribed by ss 14 (4) and 17 of the Municipal Act and the Local Government Electoral Act. However, it centralised its preparation at its Durban office. In terms of the election timetable promulgated by the Commission (applicant), the necessary documents were to be lodged at the local offices of the applicant by 17h00 on 25 March 2011. All the respondent's sets of documents were made up into batches for delivery at the various offices of the applicant. Regrettably, the respondent missed the deadline for various logistical reasons, and further unfortunately, the documents for the Umzumbe (Umzumbe) local government election were sent up to Gauteng in error. All the requests made by the respondent to the applicant to accept the documentation later, were turned down. Litigation ensued in the Electoral Court. The latter Court

[19] See [2011] ZACC 16; 2011 (9) BCLR 943 (CC).

issued an order setting aside the applicant's decision, and ordering the applicant to allow the respondent to forthwith file all its relevant documentation with applicant: put the respondent's name on the list of registered parties entitled to contest the Umzumbe local government elections; place the names of the respondent's candidates for the various wards on the final list of candidates of the Umzumbe local government elections; and ensure that all ballot papers were prepared in accordance with the Court's decision. The applicant in that case, the Commission, thereafter applied for leave to appeal directly to the Constitutional Court which was granted, and the Electoral Court's judgment was upheld subsequently.

[26] What is of importance and of relevance for current purposes is what Chief Justice Ngcobo, writing for the Court, said in the course of the judgment. At paragraph 25 of the judgment he said the following: 'Reduced to its essence, the debate between the parties turns upon the interrelated questions. The first is whether the present case is distinguishable from ACDP. The Electoral Court held, and the IFP maintains, that it is not. However, the Commission asserts it is. The second question, the answer to which depends upon the answer to the first, is whether submitting at the Durban office of the Commission instead of at its Umzumbe office constitutes compliance with the filing requirements of ss 14 and 17 of the Act, read in the light of their legislative purpose. The IFP maintains it does and the Commission maintains that it does not'.

[27] More profoundly, Ngcobo CJ proceeds at paragraph 31 of the judgment as follows:

"The Commission is the constitutionally designated authority to manage elections in the Republic and to ensure that elections are free and fair. . . ."

At paragraph 55:

"It is necessary that the integrity of the electoral process be maintained. Indeed, the acceptance of the elections as being free and fair depends upon this integrity. Elections must not only be free and fair but they must be perceived as being free and fair. Even-handedness in dealing with all political parties and candidates is crucial to the integrity and its perception by voters. *The Commission must not be placed in a situation where it has to make ad hoc decisions about political parties and candidates who have not complied with the Act.* The requirement that documents must be submitted to the local offices of the Commission does not undermine the right to vote and stand for election. It simply gives effect to that right and underscores the decentralised and local nature of municipal elections" (Own emphasis.).

And finally, Ngcobo CJ went on in paragraph 57 of the judgment to say that: "This Court does not have the power to grant relief that amounts to allowing the IFP's participation in the election when it has not fulfilled the requirements of the Act. It further cannot be just and equitable for a court to penalise the successful party for making contingency plans to comply with the order of a court in the event that such order is confirmed on appeal. To do otherwise would not only be contrary to the law, but it would also undermine the efficiency of the Commission, which may be reluctant, in the future to make contingency plans".

From the above, it is plain that a strong message was sent out to political parties and candidates, who do not comply with statutory requirements that, non-compliance will not be condoned willy-nilly, and that a court will not, without more, grant relief where there has been such non-compliance.

[28] In this matter, heavy weather is made, and generous criticism was levelled against the Commission for the manner in which it interpreted, applied and used its discretionary powers, functions and duties in deciding to exclude from the ward ballot papers the applicant's name in the context of circumstances of this application. Sections 5, 15, 15A and 16 of the Commission Act, and in particular s 23 of the Electoral Act come into play. Significantly, the applicant does not challenge at all the provisions of s 23 of the Electoral Act, but only the Commission's exercise of the powers conferred by the section. Neither does the applicant contest with the political party identifiers that the Commission has used in assigning ward ballot papers, and furthermore, the applicant is not disputing

the rationale that informed the design of the ballot papers. As a consequence, the reasonableness of s 23 of the Municipal Electoral Act which would ordinarily be the case, does not come into equation here. The yardstick for rationality is by now trite. It was succinctly put thus:

'It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given. Otherwise, they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutionality scrutiny the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.'[20]

[29] It is clear that s 16A of the Commission Act, which deals with the applications for change of parties' names does not apply in this case, since the applicant did not apply for such a change pursuant to its initial registration application in terms of s 15 of the Act.

[30] The impugned provisions of s 23 are undoubtedly brief, clear and concise. These powers must be read with the provisions of the Commission Act. This is conceded in the replying affidavit. It can equally not be argued against the proposition that the Commission is unable in law to be allowed to design a ballot paper that in essence requires the applicant to have a registered acronym, under circumstances that is not a registration requirement under Chapter 4 of the Commission Act, as a party. This too, is conceded in the replying papers.[21]

[31] Although the powers of the Commission under s 23 of the Municipal Act are admittedly wide, these must still be exercised correctly, judiciously and properly, taking into account all relevant factors and circumstances. The powers

[20] See *Pharmaceutical Manufacturers Association of SA and others: in re: Ex parte application of President of the RSA and Another* 2000 (2) SA 674 (CC) 2000 (3) BCLR 241.
[21] See RA, para 19 of 196.

are not without restrictions and must be read and interpreted together with the provisions of s 5 of the Commission Act, also as observed by applicant, with reference to well-known cases, such as *Ruta v. Minister of Home Affairs*.[22] Indeed, the approach is most succinctly set out in *Affordable Medicine Trust v Minister of Health*.[23] In *Maxrae Estates v. Minister of Agriculture, Forestry and Fisheries and Another*[24] the Court said:

'… the wide ministerial discretion essentially entailed the consideration by him of the factors that were relevant to the decision he was required to make. The exercise of a wide discretion was no licence for disregarding those factors and making an arbitrary decision and the Minister could not use the doctrine of separation of powers to shield such arbitrary decision from reviews by the Court. Mere mention that the Ministerial discretion has been exercised for the given purpose was not sufficient. *The court was constrained to intervene when the decisionmaker had ignored the relevant factors and taken into account irrelevant consideration.*' (Own emphasis.)

(See also *Natal Joint Municipal Decision Fund v. Endumeni Municipality*[25] and *Cool Ideas 1186 CC. v. Hubbard and another*,[26] relied upon by the Commission, for the proper approach to the interpretation of statutory provisions, such as the provisions under discussion here.)

[32] Prior to dealing with the applicant's constitutional challenge based on ss 19 and 190 of the Constitution, it is convenient, for the sake of expediency, to draw conclusionary observations in regard to the contents of the preceding paragraphs of the judgment. This I do immediately hereunder.

[33] Based on the nature of the provisions of s 5 and 15 and 15A of the Commission Act, as well as s 23 of the Municipal Act, firstly, the ballot paper

[22] 2019 (2) SA 329 (CC).
[23] [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).
[24] [2021] ZASCA 73 para 17.
[25] [2012] ZASCA 13; [2012] 2 All SA 262 (SCA) para 18.
[26] 2014 (4) SA 474 (CC).

design does not preclude the inclusion of applicant's name, and the applicant contends that both its name and 'abbreviation' is deliberately 8 digits long without spaces. It did not register an abbreviation for this reason. In the process, the applicant does not challenge the provisions of s 23, only the exercise of power and interpretation thereof by the Commission.

[34] In addition, for the words 'ActionSA' to also constitute the applicant's abbreviated name for purposes related to the statutory provisions governing elections, the applicant ought to have registered it in terms of s 15 (2)(c) of the Commission Act. It did not do so. It does not have an abbreviated name or acronym. The argument of the applicant now advanced that it chose not to register an abbreviated name since it was not required to do so, is a belated and afterthought innovation. It has no merit at all. The same applies to the applicant's suggestion that its full name, namely 'ActionSA', should be used as its abbreviated name until it is registered as such, cannot also serve as its registered abbreviated name or acronym. The applicant's own Constitution provides that its name is ActionSA, notably, without any abbreviation.

[35] Furthermore, the Commission says that, in the exercise of its powers, duties and functions, it designed the ward ballot papers, using the other political parties' identifiers as set out in paragraph 58.1 of the answering papers.[27] Once more, the applicant does not complain against the determination to use the other political parties' identifiers used in the ward ballot papers.[28]

[36] Once the Commission has determined to use the registered abbreviated name in the particular section of the ballot papers, it could not use full registered

[27] See AA, pp 109 to 110, para 58.1 – consolidated bundle.
[28] See RA, pp 218 and 219, paras 107 and 108 - bundle.

names in the particular section of the ballot papers, on its own volitation, and arbitrarily, do so. The credible rationale for this stance, is fully set out in the answering papers. However again, the applicant does not complain about this.

[37] In essence, the applicant's attitude in this regard, is clearly revealed in the replying papers, where it suggests that the Commission could have and should have used the applicant's full name 'ActionSA', in the space where for other parties it used the acronym because its full name is 8 characters long, and therefore meets the requirements of an acronym. This argument is, and has already been discounted as untenable, and unfair for credible and obvious reasons. There is no evidence at all that the other registered parties received such generous and liberal treatment from the Commission. It is inherent, implicit, and indeed, constitutionally mandatory, for the Commission, in performing its objectives, duties and functions, to be fair to all registered political parties, and practices, rules and guidelines must of necessity, be of general application. The right to equality before the law, as entrenched in our Constitution,[29] comes strongly to the fore, particularly in fiercely contested elections, such as the LGE 2021. In this application, the applicant is plainly seeking for an indulgence under circumstances created by itself and its leadership. The proverbial saying that, it made its bed, and now must 'lie in it,' is applicable in these circumstances, in spite of the applicant's assertions to the contrary. In this respect, it is rather concerning to this Court that political party leadership, their parties, independent candidates and their supporters, still do not see it as necessary to acquaint themselves fully with the statutory provisions applicable to elections, including the applicable provisions of the Constitution. Voter education, membership and supporters will continue to be important and indispensable in our developing constitutional democracy. This begs the question, how will such leaders govern

[29] See section 9 of Constitutional Bill of Rights.

successfully, the various government institutions into which they want to be elected? This, let alone, governing the whole country.

Final conclusion

[38] In the conclusion to which I must come after careful consideration of all contradicting views, arguments, and submissions, holistically, I cannot find fault with the manner in which the Commission exercised its powers, duties and functions in relation to this matter, and the applicant in connection with the LGE 2021. In particular, the Commission cannot be faulted in the manner in which it applied, interpreted and understood the provisions of s 23 of the Municipal Act, as contended for by the applicant, and for which the applicant has failed dismally to make out a case. In any event, even if the applicant has made out such a case, it would inevitably result in the impending elections to be postponed, the ballot papers to be changed according to Court's directives, the rest of the political parties, independent candidates, the voters, and indeed the whole of the country, be kept in suspense and put on hold. A declaration of invalidity, if granted by this Court, as sought by the applicant, will have to be suspended. This will not be in the interest of justice, all other parties involved, equity, and the country as a whole. For all the above reasons, and those not specified herein, the application must be refused by this Court. There is simply too much to negate the granting of the relief sought by the applicant. Its reliance on *National People's Party v. Electoral Commission*[30] is clearly misplaced, where the facts are plainly distinguishable from the facts of the present matter.

The Constitutional Challenge

[30] 002/11 EC [2011] ZAEC 3 (21 April 2011).

[39] The challenge launched by the applicant, based on the provisions of the Constitution, is equally misplaced to a large extent, regrettably. Once more, I am constrained to be brief in this regard. Section 19 of the Constitution dealing with political rights, provides that:

'(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.'

[40] The applicant also relies on s 190 of the Constitution, which as indicated above, deals with the functions of the Commission.[31] The argument in regard to the above Constitutional provisions, is that, although s 15 (2) of the Commission Act is clear, it must be interpreted in a manner that gives effect to s 19 of the Constitution, s 39(2) of the Constitution, as well as the foundational values of the Constitution. The argument raised by the applicant, based on the provisions of the Constitution, are trite matters, which have been raised numerous times in the various High Courts, as well as the Constitutional Court, and proper guidance was given in relation thereto. See in this regard, for example, *Steenkamp NO v Provincial Tender Board, Eastern Cape*[32] where the Court dealt with issues such as, improper performance of an administrative function, and its implications on the Constitution; appropriate remedy; and the purpose of public remedy in regard to the party prejudiced thereby i.e. to afford such party administrative justice. In

[31] See section 190 of the Constitution.
[32] 2007 (3) SA 121 (CC).

the present matter, there is plainly no just and equitable remedy that may be granted by the Court to the applicant under s 172 (a) (b) of the Constitution. The reason is that the applicant has simply not made out a case for such remedy. There is no proof at all that the Commission, in carrying out its powers, either based on applicable statutory provisions or the Constitution, breached such provisions.

Conclusion

[41] The inevitable conclusion is that the applicant's challenge based on the provisions of the Constitution must fail. The same applies to the applicant's reliance based on the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The principle of legality, rather than reviews on the grounds of PAJA, was more appropriate.

Costs

[42] The applicant has asked for costs. On the other hand, the Commission does not seek costs against the applicant. It will be just and equitable that no order as to costs should be made.

Order

[43] In the result, the following order is made.

1. The application is dismissed.
2. There is no order as to costs.

D S S Moshidi
Acting Judge
Electoral Court of South Africa

Shongwe AJ (Dissenting)

[44] I have had the opportunity to peruse the draft judgment by Moshidi AJ. I note that he has arrived at a verdict of dismissing the application with no order as to costs. I do concur with some of the findings he has made, however, I part ways with the reasoning, interpretation and resultant conclusion. I must state, at the outset, that I do not agree with the conclusion. I shall briefly state my reasons why I am of the view that the application should have been granted with no order as to costs.

[45] Moshidi AJ has comprehensively reviewed the facts of this case as it was presented in court by both parties. Therefore, it will not be necessary for me to recapitulate them. It suffices to mention that the stark question before this court is whether or not the Commission acted unlawfully and unconstitutionally in deciding to exclude the name of the applicant from the ballot paper. The other alternative reliefs do not take this matter any further. The essence of the relief sought is to set aside the Commission's decision to exclude the applicant's name from the 2021 election Ward ballot paper.

[46] The Commission argued that it took no decision, therefore there is no decision to be reviewed. In my view the Commission did take/make a decision. The decision was, when it exercised its discretion in determining the design of the ballot paper, in terms of section 23 of the Local Government: Municipal Electoral Act 27 of 2000 (Municipal Electoral Act), it decided to use an abbreviated version to appear on the ballot paper instead of the full name of a party. This decision is not provided for in any law. It is common cause that no law directs the Commission to use an abbreviation and no law obliges a political

party to register an abbreviated version of its name. Instead, section 15 (2) of the Electoral Commission Act 51 of 1996 (Commission Act) puts it as an option and not a requirement. The decision to exclude the name of the applicant and use the abbreviation on the ballot paper makes it a requirement which is not provided for in law.

[47] Section 23 of the Municipal Electoral Act empowers the Commission to determine the design of the ballot paper to be used in the election. Nowhere does the act directs the Commission to insist on a registration of an acronym. Clearly the decision is prejudicial to anybody interested in participating in the election, especially political parties. More so, there is or was no warning to anyone to be aware that the Commission will design the ballot paper in such a manner that an abbreviation will be required. When the applicant first applied for registration as a political party, it did register an abbreviation, but for some reason, not really relevant here, when it registered for the second time it elected not to register one, unbeknown to the applicant that the Commission will require registration of the abbreviation when designing the ballot paper. Had the applicant been aware that an abbreviation was a requirement or known the purpose of an abbreviation, surely it should and could have registered one. In my considered view, the Commission neglected and failed to exercise its constitutional duty and obligation to promote its objective to strengthen constitutional democracy and promote the democratic electoral process.

[48] In its answering affidavit, the Commission at para 61, stated that:

‘It is clear therefore that the reason for not including an abbreviated name for ActionSA in the section of the ballot paper where the others’ abbreviated names or acronym appear is because ActionSA chose not to register one. ActionSA criticises this decision as unlawful and irrational because: …….’.

The rest were the reasons stated by ActionSA as being irrational, there is no need to repeat them. The nub of the matter is that the Commission concedes that it did take a decision and the reason why ActionSA' name was excluded is its election not to register an abbreviation. Clearly the applicant is punished for not registering an abbreviation. In my view, that is unlawful and unconstitutional. Considering the Commission's constitutional obligations. The Commission is supposed to manage elections but not to manage by ambush.

[49] In terms of section 5 of the Electoral Commission Act 17 of 1996 (the Commission Act), the functions of the Commission include, inter alia, the promotion of conditions conducive to free and fair elections; to promote knowledge of sound democratic electoral processes; to promote voter education; to cooperate with persons, institutions for the achievement of its objects.

[50] In *Ruta v Minister of Home Affairs*[33] the court said:

'Well established interpretive doctrine enjoins us to read the statutes alongside each other, so as to make sense of their provisions together…'

Section 190 of the Constitution of the RSA, inter alia, provides that the elections must be free and fair. In *Kham and others v Electoral Commission and Another*[34] the court, amongst others, said:

'The court must give full weight to the constitutional commitment to free and fair elections and the safeguard it provides of the right and ability of all who so wish to offer themselves for election to public office. It is essential to hold the IEC to the high standards that its constitutional duties impose upon it.'

[51] The constitutional requirement that elections must be free and fair, was also dealt with in *Kham*,[35] the court stated that:

'This is a single requirement, not a conjunction of two separate and disparate elements. The expression highlights both the freedom to participate in the electoral process and the ability of

[33] 2019 (2) SA 329 (CC) para 42.
[34] (2016) (2) SA 338 (CC) para 91.
[35] Supra, para 86.

the political parties and candidates, both aligned and non-aligned, to compete with one another on relatively on equal terms, so far as that can be achieved by the IEC'.

[52] The constitutional court has on many occasions emphasized the crucial importance of these duties that rest on the Commission. In *New National Party v Government of the Republic of South Africa and Others*,[36] it was stated that:

'The right to vote is, of course indispensable to and empty without, the right to free and fair elections; the latter gives content and meaning to the former. 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'.

[53] I agree that, for the applicant to have asked the Commission to accept its full name as an abbreviation simply because it contained eight letters, without following the correct procedure, was an inappropriate and opportunistic after thought. The Commission was correct in refusing that request. The question of urgency is common cause and needs no further elaboration. The other reliefs sought by the applicant may have been impractical to achieve because of the time frames and preparedness/readiness. My view is, the Commission concentrated on the fact that the applicant had elected not to register an abbreviation instead of dealing with the challenge at hand. It lost focus and concentration and busied itself with non-issues. I am convinced that had the Commission concentrated on the issue at hand a solution could have been found to include the applicant's name in the ballot paper.

[54] *In Johnson and others v Electoral Commission and Others*,[37] that court referred to the former Chief Justice Langa in *New National Party* (supra) where the then Chief Justice described the duties of the Commission as being more than

[36] 1999 (3) SA 191, para 12.
[37] 2013] ZAEC 2, 2014 (1) SA (EC) para 30.

supervisory, but ‘relate to an active, involved and detailed management obligation over a wide terrain’. In my considered view, that the Commission should not act as an umpire only, it should manage and be proactive and transparent in the execution of its duties. It should not behave as an opponent to political parties but to provide an unbiased guide.

[55] In conclusion I would have granted the application with no order as to costs. This begs the question what relief would I have granted, I would have referred the matter back to the Commission to devise a solution. A couple of suggestions were thrown around, a rubber stamp or a sticker but no solution was reached, which I think the Commission should have done.

J B Z Shongwe
Acting Judge
Electoral Court of South Africa

18 January 2021