CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 55/16

In the matter between:

ELECTORAL COMMISSION OF SOUTH AFRICA	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Respondent
AFRICAN NATIONAL CONGRESS	Third Respondent
DEMOCRATIC ALLIANCE	Fourth Respondent
ECONOMIC FREEDOM FIGHTERS	Fifth Respondent
INKATHA FREEDOM PARTY	Sixth Respondent
NATIONAL FREEDOM PARTY	Seventh Respondent
UNITED DEMOCRATIC MOVEMENT	Eighth Respondent
FREEDOM FRONT PLUS	Ninth Respondent
CONGRESS OF THE PEOPLE	Tenth Respondent
AFRICAN CHRISTIAN DEMOCRATIC PARTY	Eleventh Respondent
AFRICAN INDEPENDENT CONGRESS	Twelfth Respondent
AGANG SA	Thirteenth Respondent
PAN AFRICANIST CONGRESS OF AZANIA	Fourteenth Respondent

AFRICAN PEOPLE'S CONVENTION Fifteenth Respondent

MINISTER OF HOME AFFAIRS Sixteenth Respondent

MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS Seventeenth Respondent

NATIONAL HOUSE OF TRADITIONAL LEADERS Eighteenth Respondent

AARON PASELA MHLOPE Nineteenth Respondent

JOHANNA XABA Twentieth Respondent

Neutral citation: *Electoral Commission of South Africa v Speaker of the National Assembly and Others* [2018] ZACC 46

Coram: Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J

Judgments: Cameron J (majority): [1] to [66]
Theron J (minority): [67] to [132]

Heard on: 29 August 2018

Decided on: 22 November 2018

Summary: urgent application for extension of a suspension of invalidity — appropriate remedy, and just and equitable order — extension granted

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ORDER

The following order is made:

1. The declaration of invalidity in paragraph 5 of *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC) is further suspended until 30 November 2019.
2. The suspension is subject to the following conditions:

(a) The Electoral Commission must by 30 November 2019 have obtained and recorded on the national common voters' roll all addresses that were reasonably available as at 17 December 2003;

(b) The Electoral Commission must furnish reports to this Court on 31 January 2019, 31 March 2019, 31 May 2019, 31 July 2019 and 30 September 2019 setting out:

  (i) the number of outstanding post-December 2003 addresses of registered voters it has obtained since its previous report and recorded on the national common voters' roll;

  (ii) the number of post-December 2003 addresses still outstanding;

  (iii) the steps taken and to be taken to obtain these addresses; and

  (iv) any other matter it may consider necessary to report on.

(c) In these reports, the Electoral Commission must set out a means by which it proposes to—

  (i) indicate clearly on the voters' roll which voters have incomplete, inadequate or no addresses;

  (ii) require voters with incomplete, inadequate or no addresses who wish to vote to supply their addresses before voting on voting day; and

  (iii) enable political parties to access and scrutinise the addresses and any other details supplied in this way.

(d) Any party or person is afforded leave to approach the Court on new or supplemented papers to set this matter down on good cause for further argument.

(e) The Electoral Commission is ordered to pay the costs incurred in these proceedings by the Democratic Alliance, the Inkatha Freedom Party and Mr Aaron Pasela Mhlope and Ms Johanna Xaba, including the costs of two counsel.

JUDGMENT

CAMERON J (Basson AJ, Dlodlo AJ, Goliath AJ, Froneman J, Khampepe J and Mhlantla J concurring)

Introduction and background

[1] This is an urgent application in which the Electoral Commission (Commission)[1] seeks to protract an order suspending a declaration of invalidity this Court issued in 2016 in *Mhlope*.[2] There, the Court declared that the Commission's

[1] An independent state institution supporting constitutional democracy under Chapter 9 of the Constitution, established under section 181(1)(f) and sections 190-1 of the Constitution, and functioning in terms of the Electoral Act 73 of 1998 (Electoral Act). Section 190(1) provides that the Commission must manage local, provincial and national elections, ensure that the elections are free and fair, and declare election results. The Commission's further powers and functions are prescribed in the Electoral Commission Act 51 of 1996 (Commission Act), which is legislation required by section 190(2) of the Constitution.

[2] *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) (*Mhlope*). So far relevant now, the *Mhlope* order read:

> "5. The Electoral Commission's failure to record all available voters' addresses on the national common voters' roll is inconsistent with its rule of law obligations imposed by section 1(c) of the Constitution and invalid.
>
> 6. The declaration of invalidity in paragraph 5 is suspended and:
>
> 6.1. The duty of the Electoral Commission to record all the available addresses of voters on the national common voters' roll for the purpose of the August 2016 local government elections is, except for the Tlokwe Local Municipality, suspended.
>
> 6.2. The Electoral Commission must by 30 June 2018 have obtained and recorded on the national common voters' roll all addresses that were reasonably available as at 17 December 2003.
>
> 7. The order in paragraph 6 does not apply to local government by-elections.
>
> 8. At six-monthly intervals calculated from the date of this order, the Electoral Commission must file a report with this Court, setting out:
>
> 8.1. The number of outstanding post-December 2003 addresses it has since obtained and recorded on the national common voters' roll;
>
> 8.2. The number of post-December 2003 addresses still outstanding;
>
> 8.3. The steps taken and to be taken to obtain outstanding post-December 2003 addresses;

failure to record all available voters' addresses on the national common voters' roll was inconsistent with its rule of law obligations under section 1(c) of the Constitution and invalid.[3]

[2] The Court however gave the Commission a breather. It suspended this declaration until 30 June 2018. It declared that by that date the Commission must have obtained and recorded on the national common voters' roll all addresses that were reasonably available as at 17 December 2003. That was the date on which the Electoral Laws Amendment Act[4] brought into effect new requirements for the voters' roll. *Mhlope* held that the effect of the 2003 amendments was that, from that date, the Commission was obliged to include all available addresses in the voters' roll.[5]

[3] *Mhlope* ordered the Commission to report to this Court six-monthly on its progress in garnering addresses to fulfil this obligation. The Commission did.[6] It has made substantial progress, but a significant shortfall remains. It now seeks an urgent extension of the suspension exempting it temporarily from the address obligation. After the Commission lodged this application, on 21 May 2018, the Court on 30 June 2018 ordered an interim extension until 30 November 2018 and set the matter down for hearing to determine the further extension.

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

[3] Section 1 of the Constitution, which is in Chapter 1 (Founding Provisions) reads:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the [C]onstitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[4] 34 of 2003. Section 5 of this statute introduced two new subsections, section 16(3) and (4), into the Electoral Act.

[5] See *Mhlope* above n 2 at paras 117 and 134.

[6] See [24] to [27] below.

[4] The question is whether it is just and equitable to grant the extension. This Court pointed out in *Zondi*,[7] following *Ntuli*,[8] that an application to extend a suspension of a declaration of invalidity invokes the Court's power under section 172(1)(b) of the Constitution to make an "order that is just and equitable".[9] *Zondi* noted that the just and equitable power is rooted in the interests of justice and involves similar considerations.[10] And what is just and equitable "depends on the facts of each case".[11]

[5] The issue does not involve grand jurisprudence but a practical and just exercise of this Court's powers in managing the Commission's duties. Whether the facts make it just and equitable to grant the extension brings into focus what the Commission has done since *Mhlope* and the consequences, for the impending 2019 national and provincial elections, of granting or refusing the extension sought.

[6] Behind the complexities of precedent and the intricate statutory machinery, lies a question of importance for every South African. How can this Court best ensure that the 2019 elections fulfil the promises the Bill of Rights makes about the franchise?[12]

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[7] *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) at paras 45-6.

[8] *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) (*Ntuli*) para 31.

[9] Section 172(1) provides:

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

[10] *Zondi* above n 7.

[11] Id at para 47.

[12] Section 19 of the Bill of Rights provides:

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

These are, first, that every citizen is "free to make political choices",[13] and second, that every citizen "has the right to free, fair and regular elections".[14]

[7] These lofty promises are secured through rigorously enforced and scrutinised practical arrangements, including addresses. Linking every registered voter to a geographical location through a place of residence helps ensure the integrity of the voters' roll and hence bolsters the sanctity of these promises. Tying voters to addresses is critical for two reasons. First, they enable parties, especially in close contests, to track down individual voters to canvass them. Second, they enable a check on voter fraud by allowing candidates and parties to scrutinise the roll, voter by voter, location by location, to guard against bogus registrations, phantom voters and bussing-in – which is the large-scale transportation into a voting area, for vote-rigging purposes, of voters resident elsewhere.

[8] The fraud-prevention capacity of checking the roll is complemented by the message-enhancing power of reaching actual voters. The fact that many voters, rural and urban, nowadays rely on smart phones and social media for their news and to communicate does not negate the continuing importance of these practical checks and canvassing opportunities. No-one contended otherwise.

(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."

[13] Section 19(1).

[14] Section 19(2).

[9] Behind the practical utilities lies the burden of an enormous administrative task: registering every voter and ensuring that every voter, once registered, is conjoined with a place of residence. That is the task *Mhlope* set the Commission. In this application, the Commission confesses it has been unable to fully realise it. In oral argument the Commission told the Court that it was "very close" to having complied with the order, but did not claim success in doing so. What the Commission said was that it had taken the necessary steps to enable it to attempt to attain reasonable compliance with the *Mhlope* order.[15] But it has not implemented all these steps.

Who is before us?

[10] In seeking the extension, the Commission[16] cited the Speaker of the National Assembly (NA) and Chairperson of the National Council of Provinces (NCOP) as first and second respondents. The Commission cited political parties represented in the NA and the NCOP as the third to fifteenth respondents.[17] And the sixteenth to eighteenth respondents are representatives of state institutions with an interest in the proceedings.[18]

[11] In 2016, Mr Aaron Pasela Mhlope and Ms Johanna Xaba were the first and second respondents in *Mhlope* ("the *Mhlope* respondents"). At first the Commission in seeking the extension did not cite them as parties. They protested strenuously at

[15] See [25] to [28], [30] to [31], [33] to [35], [38] and [48] below.

[16] The Commission is still popularly known, and cited in litigation, as the Independent Electoral Commission or IEC. That was the title of the Commission established under the Independent Electoral Commission Act 150 of 1993 to manage South Africa's first democratic elections on 27 April 1994. In 1996, the IEC was superseded by the Commission and its functions embodied in the Commission Act. Judgments of this and other courts still however refer to the Commission as "the IEC".

[17] They are the African National Congress (third respondent), Democratic Alliance (fourth respondent), Economic Freedom Fighters (fifth respondent), Inkatha Freedom Party (sixth respondent), National Freedom Party (seventh respondent), United Democratic Movement (eighth respondent), Freedom Front Plus (ninth respondent), Congress of the People (tenth respondent), African Christian Democratic Party (eleventh respondent), African Independent Congress (twelfth respondent), Agang SA (thirteenth respondent), Pan Africanist Congress of Azania (fourteenth respondent) and African People's Convention (fifteenth respondent).

[18] Minister of Home Affairs (sixteenth respondent), Minister of Cooperative Governance and Traditional Affairs (seventeenth respondent) and National House of Traditional Leaders (eighteenth respondent).

this as an indignity and an injustice. The Commission smartly apologised for not alerting them.[19] For all practical purposes they have since then been respondents, opposing the extension.

Statutory framework

[12] As appears from *Mhlope*, in requiring registration of voters on the voters' roll, the Electoral Act[20] links registration to place of residence. It specifies that a voter's "name must be entered in the voters' roll only for the voting district in which that person is ordinarily resident and for no other voting district".[21] Section 16(3) obliges the chief electoral officer to "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". These are the statutory duties that impel this application.

History

Kham

[13] Between August and December 2013, eight by-elections were held in the Tlokwe Local Municipality. A group of unsuccessful candidates ("*Kham* applicants") challenged the outcome in the Electoral Court[22] because the voters' roll was incorrect and unreliable.[23] They complained that a large number of out-of-district voters were bussed-in.[24] They sought an investigation into the registration process, including the

[19] Though the Commission conceded Mr Mhlope and Ms Xaba should have been informed of the new proceedings, it protested that they need not have been cited. In truth, Mr Mhlope and Ms Xaba were entitled to be cited only because the Commission brought this extension application under the same case number as *Mhlope*. Nothing stopped it from bringing these proceedings as fresh process, to which the Court would have assigned a new case number.

[20] 73 of 1998.

[21] Section 8(3) of the Electoral Act.

[22] *Kham v Electoral Commission* [2015] ZAEC 2 (Electoral Court judgment).

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

[24] *Kham* Electoral Court judgment above n 22 at para 1.

names and addresses of the voters in the by-election – and asked for the results to be nullified.[25]

[14] The Electoral Court by a majority found against the *Kham* applicants.[26] It held that they failed to present sufficient evidence of irregularities to prove their materiality or to properly invoke mechanisms the Electoral Act offered them to trigger investigations by the Commission.[27] The Electoral Court concluded that it did not have jurisdiction itself to order an investigation. So it dismissed the application in its entirety.[28]

[15] This Court reversed the outcome. It found that the irregular registrations skewed the voters' roll and breached the principle that only those entitled to do so should vote.[29] The key fact was that the voters' rolls did not include the addresses.[30] The Commission's case was that including addresses was not necessary.[31] This Court disagreed. It said section 16(3) of the Electoral Act explicitly required the Commission to provide a voters' roll that includes voters' addresses to all registered political parties contesting the election, plus to independent candidates.[32] The *Kham* by-elections were set aside as irregular and not free or fair.[33] This Court ordered that they be held afresh.

[16] The Court further 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

[25] Id at para 2.

[26] Id at para 78.

[27] Id at paras 67-8.

[28] Id at para 79.

[29] *Kham* above n 23 at para 72.

[30] Id at para 73.

[31] Id at para 75.

[32] Id at para 76.

[33] Id at para 94-5.

is at the time of registration ordinarily resident in that voting district."[34] In this lies the genesis of the present application.

Mhlope

[17] The Commission took steps to implement *Kham*. It prepared for the fresh Tlokwe by-elections. Nationwide, it trained its 52 000 electoral staff on how to obtain sufficient particularity of voters' addresses. In particular, it developed a new form, the REC AS. This complemented the existing registration form, the REC 1. REC 1 captures formal or conventional addresses. REC AS is designed to capture non-formal or non-conventional addresses. In addition, the Commission developed a new staff training manual.[35]

[18] On 16 February 2016, eight days before the fresh Tlokwe by-elections, the independent candidates pressed the alarm button. Their complaint was that, contrary to *Kham*, the voters' roll omitted the physical addresses of no fewer than 4 160 voters. The Commission's stance was that the *Kham* order was prospective – in other words, its duty was to provide the addresses only of voters who had registered or re-registered after *Kham* was handed down on 30 November 2015. For voters who had registered or re-registered before this date, it was obliged only to provide addresses that were already recorded on its system. This was because these were the only addresses "available" to it. It had no obligation to obtain addresses of which it had no record.

[19] The independent candidates were dissatisfied. They launched urgent proceedings in the Electoral Court. They contended that the only voters in respect of whom the Commission was not obliged to provide "physical" addresses were those whose addresses were not available. The Electoral Court intervened in their favour. It set aside the Commission's certification of the voters' roll, postponed the by-elections

[34] Para 5(c) of the *Kham* order above n 23.

[35] The training encompassed that staff would now be required to obtain and record an address whenever a voter registered for the first time or re-registered in a new voting district. Where no address existed, staff would obtain a written affirmation from the voter that registration was in respect of the correct voting district.

for six weeks and directed the Commission "to provide all candidates in the Tlokwe municipal by-elections with a copy 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 [were] available".[36]

[20] The Commission sought to appeal to this Court.[37] The question was: did the address registration requirement apply post-*Kham*, post-December 2003, or entirely retrospectively? The Court's answer was to choose the middle path. The Commission disclosed that, nationally, the voters' roll was missing more than 12.2 million addresses. Its point was that, if it was wrong, and the *Mhlope* applicants were right, it would have to provide all 12.2 million addresses, where available, for the upcoming country-wide municipal elections of 2016.[38] In effect, the Commission sought a moratorium until *after* the 2019 provincial and national elections in respect of the duty to provide the addresses of voters registered before *Kham*. It asked for time to acquire these by no later than 30 June 2020.[39]

[21] *Mhlope* denied the Commission the leeway it sought.[40] It rejected the Commission's argument that the address-registration requirement applied only

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[36] *Mhlope v Independent Electoral Commission of South Africa* [2016] ZAEC 1 at para 1, quoting para 3 of the order.

[37] *Mhlope* above n 2 under which the Commission brought the present proceedings, evoking the ire of Mr Mhlope and Ms Xaba.

[38] *Mhlope* above n 2 was argued in this Court on 10 September 2015 and judgment delivered on 30 November 2015.

[39] The relief this Court refused the Commission in *Mhlope* above n 2 appears from what it sought in its notice of motion:

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

[40] The minority judgment written by Madlanga J (Khampepe J and Mhlantla J concurring) held that section 16(3) requires the Commission to provide addresses even of voters who were registered before December 2003. Paragraph 20 states:

> "To suggest otherwise would defeat the very purpose of furnishing addresses. It would mean that all voters whose registrations pre-date December 2003 and whose addresses were never captured or

post-*Kham*. The majority[41] held, however, that section 16(3) had introduced an obligation for future registrations only.[42] These had to include a recordal of the available addresses in the national common voters' roll. But the provision did not apply retrospectively. The Commission was not obliged to go back to correct its registration records to include reasonably or objectively available addresses of voters already registered in 2003.[43] On the contrary, the 2003 amendment did not cast a shadow backwards or create obligations for the Commission in relation to voters who had already been registered.[44]

[22] The Court thus declined to direct the Commission to record available addresses of voters registered before the 2003 statutory amendments.[45] But it declared the Commission's failure to record all post-2003 available addresses on the voters' roll inconsistent with its rule of law obligations and thus invalid.

[23] The *Mhlope* Court however suspended this declaration. It also suspended the duty of the Commission "to record all the available addresses of voters on the national common voters' roll for the purpose of the August 2016 local government elections . . . except for the Tlokwe Local Municipality". The Court refused the Commission leave to appeal. It ordered the Commission to report on a six-monthly basis on progress.[46]

> retained on the [Commission's] database cannot be canvassed in [a] direct and focussed manner. . . . Nor can the validity of their registrations be verified with relative ease."

At paragraph 21, the minority held that the obligation to provide a voters' roll with addresses is ongoing in that each time political parties and independent candidates require a voters' roll with addresses for election purposes, the Commission is required by section 16(3) to provide it. "It cannot be an answer that the addresses of pre-December 2003 voters were never captured". The Commission, the minority said, must take reasonable steps to get all addresses to comply with their continuing obligation.

[41] Mogoeng CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J and Zondo J concurring).

[42] *Mhlope* above n 2 at paras 115-7, differing from the reading propounded in the judgment of Madlanga J.

[43] Id at para 110.

[44] Id.

[45] Id at para 108.

[46] Id at para 8 of the order.

Commission's reports under the Mhlope order

[24] The Commission timeously filed reports. The first, dated 13 December 2016, was after the 2016 local government elections. This showed dramatic gains. Since March 2016, the percentage of registered voters with complete addresses had more than doubled. From 34%, the proportion had grown to no less than 72%.

[25] By contrast, the Commission's second report six months later was flat. It recorded "minimal further progress".[47] The Commission explained that there had been no general voter-harvesting weekend between January and June 2017. The problem was money. It set out its proposals to National Treasury (Treasury) for more funding. And it signalled that it might not be able to meet the June 2018 deadline.[48] However, it said that by December 2017 it would be better placed to say whether it was likely to have to ask for an extension of the 30 June 2018 deadline.[49]

[26] On 24 August 2017, this Court issued directions. These required the Commission to provide additional details of its funding requests to Treasury, and any geographically targeted efforts to increase address-recording, plus details of contingency plans. The Commission filed two supplementary reports, on 14 September and 30 November 2017, respectively. These recorded its ongoing engagements with Treasury and Cabinet. The Commission had asked for R300 million but had managed to get a preliminary allocation of R180 million. This would fund one harvesting weekend, scheduled for 10 and 11 March 2018, which the Commission considered workable. Significantly for the present proceedings, it noted that targeted registration focussing on specific areas had not generally resulted in a high turnout.

[47] 13 June 2017 Report of the Electoral Commission (Report) at para 1.3.

[48] Id at para 1.6.

[49] Id at para 1.9.

[27] On 14 December 2017, the Commission filed its third six-monthly report. The proportion of registered voters with addresses had increased only marginally, from 74%–75%. It had launched a new online registration system. It had also received final confirmation of Treasury's R180 million allocation. With this, it would open 22 612 voting stations for voter registration on 10 and 11 March 2018. It anticipated that, after that voter registration weekend, the voters' roll would be close to complete.

[28] When its papers in this application were lodged in May 2018, the Commission was still working through the data gathered from the 10 and 11 March 2018 voter registration weekend. It projects that there are 26 212 476 registered voters on the common voters' roll. Of these, 3 409 183 (13%) will have an incomplete or generic address and 2 204 246 (8%) will have none; meaning that a total of 21% of registered voters will still have incomplete, generic or no address (address-less voters).

[29] A significant proportion of address-less voters are those who registered before 17 December 2003. *Mhlope* made clear it is only post-December 2003 registrations for which the Commission is obliged to have addresses.[50] But the Court expressed the hope that "desirability and utility" would "nudge the [Commission] to also record the objectively available addresses of all the pre-December 2003 voters, while it prioritises the post-December 2003 voters for compliance".[51] Of the 2.2 million address-less voters, only 1.3 million are post-December 2003 registrations.

This application for extension

[30] In its present application, the Commission set out in detail everything it did in seeking to comply with *Mhlope*. It nowhere claimed that it had fulfilled the *Mhlope* order. That was not its case. Instead, it acknowledged that there were registered voters' addresses "available" to it, which it had not yet recorded. These represented a corps of voters whose addresses were in fact, on the objective test *Mhlope*

[50] *Mhlope* above n 2 at paras 105-12, 117 and 134.

[51] Id at para 134.

propounded,[52] "reasonably available" to it, but whom its efforts thus far had been inadequate to reach. This meant that the Commission accepted that it had been unable to comply with the *Mhlope* order.

[31] What the Commission did ask for was an extension of the breather *Mhlope* afforded it. It contended that extending the *Mhlope* suspension for a further 17 months, to November 2019, after the 2019 elections, would allow it to take further steps to fulfil *Mhlope* fully. By seeking this relief, the Commission conceded that it had not fulfilled *Mhlope*. It sought the extension to have leeway to achieve a number of further steps towards that goal. First, it sought to further reduce the number of address-less voters; second, it wished Parliament to consider and enact amendments to regulate the issue; and third it wanted to ensure that the 2019 elections are not imperilled by anyone seeking to only rely on missing addresses to challenge the results. In oral argument the Commission said the extension was designed to avert "spoiling tactics" in 2019.

Outstanding addresses

[32] The Commission projects that, once the capturing process is complete, there will be a total of 1 299 263 post-December 2003 registered voters without any recorded addresses. This represents 4.9% of all registered voters as at 8 May 2018. The provinces with the highest number of address-less voters are Gauteng (369 451), KwaZulu-Natal (213 025) and Eastern Cape (164 622). Proportionately to registered voters in the province, the Free State (8%), Mpumalanga (6%) and Gauteng (5.9%) show the highest percentages. The Western Cape (2.9%), KwaZulu-Natal (3.9%) and North West (4.3%) show the lowest proportion.

[33] The Commission contends that the high number of informal settlements explains the large number of address-less voters – and that predominantly rural provinces have a backlog because it could not collect meaningful descriptive

[52] Id at paras 105 and 112-3.

information before it introduced the REC AS form in 2016. The Commission notes measures it has taken to urge address-less voters to provide addresses. It has advertised across a wide range of media, including radio advertisements, and sent out nearly 11 million Short Message Service (SMS) messages to address-less voters, as well as distributing information pamphlets to specific households through fieldworkers. All this was backed up by a public contact centre, and digital communications, such as the voting station finder application on the Commission's website, Unstructured Supplementary Service Data (USSD) by dialling *120*432#, SMSing an identity number to 32810, and posts issued on social media platforms (Twitter and Facebook). The total cost was about R78 million. This included the launch of its online address-harvesting portal. Before the 10 and 11 March 2018 registration weekend, the Commission gave political parties detailed lists of address-less voters, per voting district, for them to help with outstanding addresses.

[34] In addition, the Commission tried to create a database of addresses linked to identity numbers from government and commercial data sources. The Commission has received address data from Telkom South Africa (SOC) Limited, Statistics South Africa, Department of Home Affairs and the South African Social Security Agency, Eskom Holdings (SOC) Limited and South African Post Office (SOC) Limited. These can be used only if they accord with or confirm the voters' registration in relation to the boundaries of the voting district in question. This requires geo-coded addresses with corresponding global positions service (GPS) co-ordinates. The Commission says that it needs more time to carry out this analysis.

[35] The Commission also invoked the assistance of municipalities. From them it requested databases of residents in order to extract missing addresses.[53] This did not achieve much.

[53] In September 2017, the Commission instructed all its Provincial Electoral Officers (PEOs) to ask municipalities to provide residents' databases with addresses.

Legislative amendments

[36] The Commission says it is preparing amendments to the Electoral Act to propose to Parliament. These will seek to provide certainty on how to manage address-less voters. The extension will allow this to happen. The Commission is considering: (a) a mechanism for voters on the voters' roll who arrive to vote but without an address; (b) closing registration at an earlier date in the voters' roll timetable; (c) requiring certification of the voters' roll at the elections as opposed to their proclamation; (d) obliging its chief executive officer to make available a pre-certification voters' roll to contestants, thus allowing objections before the roll is certified (and excluding them later) and (e) permitting differential treatment of voters and votes in respect of whom objections are raised and which cannot be ruled upon immediately by the presiding officer.

[37] At the end of all this, the Commission warns that, by the time of the 2019 elections, its addresses problem will not be resolved. The impending end of the suspension entails that the guillotine of the full address recording obligation will fall onto the Commission. The Commission is apprehensive of this, because it means that those dissatisfied with the outcome of the 2019 elections may seek to challenge it by relying on the address shortfall. Even if challenges of this kind ultimately fail, they could imperil the public credibility of the results. This, the Commission said, should be avoided.

[38] By contrast, granting the extension to November 2019 would allow the Commission to collect further addresses during the run-up to the 2019 elections and the elections themselves. Registration drives shortly before elections and on voting days themselves, the Commission emphasises, are the most effective way to get missing addresses. The Commission could also activate its new registration technology which will help with collecting and retaining addresses. And new legislation could be put in place to regulate whatever missing addresses remain. The 2019 elections could then take place smoothly and credibly, without allowing missing address-based challenges.

[39] Moreover, the Commission says, the extension will not cause material prejudice to any person or party. This is because the extension will cover only national and provincial elections but not local elections. Having addresses is important only to local government elections, where the ward boundaries make the residential location of voters crucial. This is not so in national or provincial elections. The collection of addresses is likely to be complete by the time of the next local government elections, in 2021.

Respondents' opposition

[40] Though the African National Congress and the Economic Freedom Fighters abide by the Court's decision, the *Mhlope* respondents oppose. They say the Commission employed conventional methods and failed – but these are not the only way to overcome its difficulties. They dispute the reliability of the Commission's reports. Like the Inkatha Freedom Party (IFP), they cast the Commission as the author of its own predicament. The Democratic Alliance (DA) noted that even though the Commission knew as early as 2017 that progress was modest, it brought these proceedings barely six weeks before the deadline.

[41] The independent candidates point out that without addresses, it would be impossible for them to conduct door to door campaigns. They add that there is a real risk that identity theft could be used in an orchestrated manner, allowing phantom voters to cast illegal votes. Granting the extension will pose a serious threat to free and fair elections. They therefore propounded a two-envelope solution. This would entitle registered voters without addresses to vote, but place their votes in a separate envelope in case of challenge to the outcome.

[42] The IFP and the DA also oppose. During oral argument the stance of these parties developed somewhat in nuance and substance from that in their opposing affidavits. The IFP emphasised that no voter should be refused the right to vote purely because they do not have an address recorded on the voters' roll. However, where no

addresses are recorded, opportunity for fraud and manipulation arises. It rejected the Commission's claim that addresses are less important for national elections and that there will be minimal harm if the suspension spans the 2019 national and provincial elections. The DA agrees. It disputes that there will be no material prejudice, since a party may win a majority in a particular province by only a handful of votes. There, incorrectly registered voters would be highly material.

[43] The DA complains that the Commission has not implemented all its suggestions. The Commission responds that it has indeed embraced the DA's suggestion of a call centre, for outbound "cold calling". In addition, it points to its efforts to communicate by email. It says its funds are limited and best spent elsewhere.

[44] In oral argument, the IFP strongly pressed the point that there is no basis for believing that the Commission will have greater success in collecting addresses in the next 17 months than it has had over the last two years. This led the IFP to propound a solution, on which it elaborated in oral argument. The Commission should receive the extension it sought – but only on an express condition. This was that elaborate special provision be made in the 2019 elections to highlight all voters on the roll who do not have adequate addresses.

[45] First, the voters' roll should clearly indicate those without addresses. This could be done by asterisking their names. Second, those voters should be required, before voting, to supply their addresses. This, the IFP said, would enable opposition parties and independent candidates to follow up these addresses to locate bogus registrations as well as registrations in the wrong district or province. That, in turn, would enable properly mounted and soundly based challenges to the elections to proceed without being stifled by a blanket unqualified extension until November 2019.

[46] The DA continued to urge that any extension should not go beyond 22 March 2019, which is two months before 22 May 2019. The latter is the date on which the 90-day period within which the election must be called starts to run.[54] 22 March 2019 is thus the date on which the statutory clock starts ticking for certifying the voters' roll in advance of that date. This, the DA urged, would enable elections and electioneering to take place according to the prescribed statutory timetable.

[47] The Commission admits that it reported modest progress early on but claims that the most important aspect of its third report was the national voter registration weekend of March 2018. Only when it saw the relatively modest results from this weekend could it have known that an extension was needed. It would have been premature to come to court earlier.

[48] The core of the Commission's case is that, despite its extensive efforts and expenditure of resources, the harsh lesson is that voter registration weekends without upcoming elections do not work very well. This is because voters are not incentivised to register or confirm their registration details. The Commission has also improved the analysis and management of existing and historic registered voters' addresses data. This has resulted in the more accurate storage and classification of recorded addresses. Granting the extension will allow the Commission to continue collecting outstanding addresses, while also granting Parliament space to amend the legislation.

[49] Merely having no registered address, the Commission insists, makes it no easier for a voter to be bussed from one province to another. There are adequate safeguards; and even should a voter with a missing address be registered in the wrong province (which is unlikely given that the voters with missing addresses have been

[54] Section 49(2) of the Constitution provides:

> "If the National Assembly is dissolved in terms of section 50, or when its term expires, the President, by proclamation must call and set dates for an election, which must be held within 90 days of the date the Assembly was dissolved or its term expired. A proclamation calling and setting dates for an election may be issued before or after the expiry of the term of the National Assembly."

registered in their existing provinces for a number of years already) there are, here too, adequate safeguards. The threat of bussing, the Commission says, is more imagined than real.

[50] The Commission strongly disputes that the extension order will "immunise" it against challenges to the outcome of the 2019 elections and in particular whether those results will be free and fair. The only real prejudice would be to local government elections – but the extension will expire well before these.

[51] During oral argument, the Commission accommodated itself to the IFP suggestion for a longer conditional extension (subject to an obligation on its part to flag address-less voters and to require them to supply addresses on voting day so as to enable checks by participating parties). The Commission conceded that embracing the IFP proposal did not exclude its being subjected to the shorter deadline the DA proposed.

Assessment

[52] Is it just and equitable to grant the Commission the extension it seeks until November 2019? The main effect of that extension, and the Commission's main objective in seeking it, would be to bar pure address-based challenges to the 2019 elections. The Commission strenuously contested the imputation that it wanted to immunise the 2019 elections against free-and-fair type challenges deriving in general from absent addresses. It emphasised that only challenges based on the *mere absence* of addresses would be precluded. Yet it is undeniable that granting the extension it seeks would have just that effect.

[53] Counsel for the IFP rightly pointed out that it is impossible to anticipate the precise nature of an address-based challenge. It might be based on a particular locality, or have a far wider ambit. The nature of the shadow absent addresses may cast on whether an election was free and fair could also vary. Bussing is one instance. Another is the possibility of voter fraud by duplicate or multiple registration. It is

correct that the Commission has controls in place, through identity numbers and other mechanisms, to preclude this.

[54] Nevertheless, the national identification number system is known not to be fail-proof. A substantial number of address-less voters – still nearly one-fifth of those on the roll – undoubtedly conduces to these spectres. That is why tying each registered voter, by residence, to a precise location reduces this danger.

[55] What is more, the Commission conceded that it sought the extension for the very purpose of forestalling legitimacy-denting challenges. But, as was rightly pointed out, this rationale boomerangs. For the mere grant of an order that suspends the Commission's duties in address-collection to beyond the 2019 election, and thus bars address-based free-and-fair challenges, would itself have a legitimacy-impairing effect. Muzzling address-based voters' roll challenges – even wrong-headed challenges – would not help convince the public that elections are free and fair.

[56] The Commission accepted during argument that granting only a shorter extension would be seen to impel it to focus its energies. But it flatly asserted that the current 18% shortfall in registered voters' addresses will not be much reduced before the 2019 elections. It insisted that the signal success it had attained after *Mhlope* could not be replicated without another voting day. For this reason, while it embraced the IFP proposal, it was reluctant to accept the DA proposal of a short pre-election extension to before 22 March 2019; although it conceded that the two were not incompatible.

[57] What then is just and equitable, on all the facts, bearing in mind the high values at stake? Should we grant the Commission a short extension – some four months, or less, beyond the date of this judgment, so that we can then reconsider its plea for a further extension? That is feasible. But other considerations counter-indicate so short an extension. Two conclusions seem evident from the Commission's reports. The first is that voter-harvesting weekends are enormously costly and have not yielded

significant improvements in additional address-collection. This is because, as the Commission points out, without an upcoming election, voters who are already registered are not incentivised to update their address details.

[58] The second conclusion is that the big post-*Mhlope* break-through in address-collection came from voting day in the 2016 local government elections. There, the Commission succeeded in doubling the number of voters registered with adequate addresses. Instead of having to entice voters to report at temporary stations for the sole purpose of stumping up their addresses, this is achieved when the voter arrives at a voting station to vote. The exercise of the franchise provides the inducement to the voter to arrive and provide address details. This eliminates the separate cost and effort of a massive national address-garnering apparatus.

[59] This is not to say that from the point of view of address-collecting the voter registration weekend the Commission envisages for March 2019 will be pointless.[55] On the contrary, the impending 2019 elections will sweeten trips to the Commission's registration stations, which may entice those already registered without addresses to pony up their addresses. So, while the Commission continues to register unregistered voters, particularly young first-time voters, it must be recognised that the additional objective of garnering addresses or better addresses from already-registered voters is, on the evidence before us, much harder to achieve. This points away from a short pre-election extension.

[60] At the hearing, counsel for the Commission referred to updated figures on addresses. This evoked the ire of the independent candidates. They complained that this was not the proper way to tender evidence. The Commission then agreed to prepare and file an affidavit, which it did. Consistent with the theme of the updates filed after the Commission's second report to this Court, the new affidavit shows that

[55] Since the hearing, media reports indicate that the Commission has fixed the dates of the planned voter registration weekend as Saturday, 26 January and Sunday, 27 January 2019.

there has been only incremental improvement in the updating of the addresses. It does not, therefore, affect the crux of the present debate before this Court.

[61] A further consideration, though not determinative, is the burden and cost of a further hearing. The oral hearing of this application involved eight counsel representing the parties, together with their instructing attorneys, party office-bearers, individual supporters and Commission officials. Preparation for the hearing produced a substantial mass of affidavits and multiple sets of written argument. In short, a lawyers' fest. The hearing proved helpful. But will the re-elaboration of the entire process in four or five months be warranted? It may be questioned.

[62] A means to avoid the disadvantages of a short deadline while reducing the perils of a longer extension appears to lie in the IFP's proposal. This is to leave the door open to a pre-election hearing, while granting a longer extension that spans the 2019 elections, but to subject that extension to conditions. This will (a) minimise the risk of fraud on voting day; and (b) leave the door open for election challenges arising from fraudulent or fake addresses.

[63] The critical day is 22 March 2019. Any party or person should be able to apply to set the matter down, before or after that, on supplemented or new papers. In addition, the Commission should be ordered to file reports two-monthly, on 31 January 2019, 31 March 2019 and thereafter. This will, if need be, enable the Court of its own initiative to set the matter down.

[64] The Commission in argument accommodated itself to the IFP's proposal. The conditions superimposed on that proposal will ensure that continuing urgency is demanded of the Commission in its statutory task of address-collection. Scrutiny of its methods and their results will continue unabated. And the door is left open, should the need arise, for these parties, or any others, to come earlier to this Court, for variation or revocation of the conditions set out in the order.

Costs

[65] The Commission asked the Court not to order costs against it, on the premise that it has not behaved unreasonably.[56] Its premise is correct, but there seems to be no reason on the facts here why reasonable behaviour on its part should leave the parties who participated in the proceedings out of pocket. This is particularly so since all those represented contributed materially to the just and equitable solution of the predicament in which the Commission finds itself.

Order

[66] The following order is made:

1. The declaration of invalidity in paragraph 5 of *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC) is further suspended until 30 November 2019.
2. The suspension is subject to the following conditions:
    (a) The Electoral Commission must by 30 November 2019 have obtained and recorded on the national common voters' roll all addresses that were reasonably available as at 17 December 2003;
    (b) The Electoral Commission must furnish reports to this Court on 31 January 2019, 31 March 2019, 31 May 2019, 31 July 2019 and 30 September 2019 setting out:
        (i) the number of outstanding post-December 2003 addresses of registered voters it has obtained since its previous report and recorded on the national common voters' roll;
        (ii) the number of post-December 2003 addresses still outstanding;
        (iii) the steps taken and to be taken to obtain these addresses; and

[56] Invoking *Competition Commission of South Africa v Pioneer Hi-Bred International Inc* [2013] ZACC 50; 2014 (2) SA 480 (CC); 2014 (3) BCLR 251 (CC).

(iv) any other matter it may consider necessary to report on.

(c) In these reports, the Electoral Commission must set out a means by which it proposes to—

(i) indicate clearly on the voters' roll which voters have incomplete, inadequate or no addresses;

(ii) require voters with incomplete, inadequate or no addresses who wish to vote to supply their addresses before voting on voting day; and

(iii) enable political parties to access and scrutinise the addresses and any other details supplied in this way.

(d) Any party or person is afforded leave to approach the Court on new or supplemented papers to set this matter down on good cause for further argument.

(e) The Electoral Commission is ordered to pay the costs incurred in these proceedings by the Democratic Alliance, the Inkatha Freedom Party and Mr Aaron Pasela Mhlope and Ms Johanna Xaba, including the costs of two counsel.

THERON J (Petse AJ concurring):

Introduction

[67] I have read the first judgment by Cameron J and cannot agree that this Court's power, under section 172(1)(b)(ii) of the Constitution, to make a just and equitable order (in this case a further suspension of the declaration of invalidity) is invoked. The Commission has, during the period of suspension (14 June 2016 until 30 June 2018) acted reasonably in its attempts to obtain and record all reasonably available addresses. The unlawful conduct which formed the basis of this Court's declaration of invalidity has been remedied.

[68] The background to this application has been eloquently set out in the first judgment and bears no repeating. The relief sought by the Commission is extraordinary.[57] At its core, the question that arises is whether this Court should grant the Commission this extension. This is not a novel question but one this Court has had to deal with repeatedly in the past. This Court has, in its jurisprudence, established principles which guide the exercise of our just and equitable powers under section 167 of the Constitution.[58]

Principles

[69] The power to extend the suspension of an order of invalidity flows from this Court's broader power to make an order that is just and equitable.[59] Though the overarching consideration in exercising this power is the interests of justice, this Court has repeatedly stated that extensions should be granted with great caution and "not be granted simply as a matter of course or at the last minute".[60]

[70] There are certain factors that must be considered in determining whether to grant an extension. These are—

(a) the sufficiency of the explanation provided for failing to comply with the original (or extended) period of suspension;

(b) the potential prejudice that is likely to follow if an extension is or is not granted;

[57] *Mhlope* above n 2 at para 82. See also *South African Social Security Agency v Minister of Social Development* [2018] ZACC 26; 2018 JDR 1451 (CC); 2018 (10) BCLR 1291 (CC) at paras 21-2.

[58] See *Minister of Agriculture, Forestry and Fisheries v National Society for the Prevention of Cruelty to Animals* [2016] ZACC 26; 2016 JDR 1560 (CC); 2016 (11) BCLR 1419 (CC) (*NSPCA*); *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children* [2015] ZACC 16; 2015 JDR 1198 (CC); 2015 (10) BCLR 1129 (CC) (*Teddy Bear Clinic*); *Minister for Justice and Constitutional Development v Nyathi* [2009] ZACC 29; 2010 (4) SA 567 (CC); 2010 (4) BCLR 293 (CC) (*Nyathi*); *Zondi* above n 7.

[59] *Zondi* above n 7 at paras 44-6.

[60] *NSPCA* above n 58 at para 23.

(c) the prospects of curing the constitutional defects within the new deadline or, more generally, the prospects of complying with the deadline;
(d) the need to bring finality to litigation; and
(e) the need to promote the constitutional project and ensure effective state administration.[61]

These factors must be weighed and balanced to craft an order which is "just and equitable".

[71] In this matter, the following factors are of particular importance:
(a) The prospects of complying with the deadline.
(b) The potential prejudice that is likely to follow if an extension is or is not granted.
(c) The need to promote the constitutional project.

I will deal with each in turn.

Prospects of compliance

[72] It is necessary to assess first the extent of the Commission's compliance with the *Mhlope* order before determining whether there are prospects of reaching compliance if an extension is granted.

[73] In *Mhlope* it was held that "the Electoral Commission's failure to record all available voters' addresses on the national common voters' roll is inconsistent with its rule of law obligations imposed by section 1(c) of the Constitution and invalid". Mogoeng CJ, for the majority, elaborated on the specific invalidity that was being suspended as "[t]he invalidation of the unlawful conduct, which is essentially the production of the national common voters' roll that does not comply with

[61] See *Teddy Bear Clinic* above n 58 at para 12; *Nyathi* above n 58 at para 26; *Zondi* above n 7 at para 47.

section 16(3) of the Electoral Act".[62] The purpose of the suspension was to allow the August 2016 local government elections to proceed and to afford the Commission an opportunity to comply with its obligation to obtain and record all reasonably available addresses as at 17 December 2003.[63] The question is whether the Commission has now met this obligation to obtain all reasonably available addresses and complied with the *Mhlope* order. If it has not, the question is how far it is from doing so.

Available addresses

[74] In terms of section 16(3) of the Electoral Act, the Commission is obliged to include in the voters' roll, "the addresses of voters, where such addresses are available". The obligation to include addresses is limited to addresses that are available. The criterion to determine availability is objective and "reasonableness, as in other spheres of law, is that objective criterion".[64] Mogoeng CJ, in *Mhlope*, concluded that "available" in the context of section 16(3) means addresses that are objectively or reasonably available.[65]

[62] *Mhlope* above n 2 at para 133.

[63] The relevant portions of the *Mhlope* order read:

> "5. The Electoral Commission's failure to record all available voters' addresses on the national common voters' roll is inconsistent with its rule of law obligations imposed by section 1(c) of the Constitution and invalid.
>
> 6. The declaration of invalidity in paragraph 5 is suspended and:
>
> 6.1. The duty of the Electoral Commission to record all the available addresses of voters on the national common voters' roll for the purpose of the August 2016 local government elections is, except for the Tlokwe Local Municipality, suspended.
>
> 6.2. The Electoral Commission must by 30 June 2018 have obtained and recorded on the national common voters' roll all addresses that were reasonably available as at 17 December 2003."

[64] *Mhlope* above n 2 at para 39.

[65] Id at para 105 where it is stated:

> "'Available' addresses within the context of this section does not mean those that the IEC chooses to make available or that happen to have been recorded by the IEC and are thus available to be produced together with the voters' roll, when it is required by those contesting the elections. It is about much more than what the IEC has in its records. In sum, 'available' means 'objectively available' or 'reasonably available'. This section therefore requires the IEC to record all objectively or reasonably available addresses in the voters' roll."

[75] The duty imposed on the Commission in terms of section 16(3) of the Electoral Act is a limited one. It must obtain and record *available* addresses. The duty is not to record existing addresses.[66] It is necessary to limit the obligation in this way because in the South African context, rural and informal living conditions mean that millions of voters do not have recordable addresses.[67] An unqualified obligation to record the addresses of every voter would not be capable of being fulfilled. Mogoeng CJ, in *Mhlope*, cautioned that near-impossible obligations should not be imposed on organs of state and other institutions:

> "Courts ought not to impose unbearable or near-impossible obligations on organs of State and other institutions. To saddle the IEC with the ongoing obligation to update the voters' roll, as opposed to alerting it to the desirability and utility of doing whatever it can to have all objectively available addresses sourced and recorded, is a power we do not have and a duty probably too onerous for the IEC to bear."[68]

[76] Jafta J neatly sets out why Parliament limited the obligation on the Commission to available addresses as opposed to existing addresses. Jafta J put the matter thus:

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[66] Id at para 153.

[67] Id at para 40 where Madlanga J stated:

> "[T]his is the case with most rural areas under traditional leaders where there will only be the name of the rural village with no street names, numbers or other identifiers denoting individual homes. More accurately, in some – if not most – instances, there are no streets at all. This is also true of some informal settlements in the urban areas. The best one can do to shed light on where one lives would be to give the name of the rural village or informal settlement and a description referencing an identifiable landmark. But in some instances there may be a sea of homes with no distinctive landmark in close proximity. In that case, beyond the name of the village or settlement, not even the description just referred to would be possible."

See also the statement per Mogoeng CJ at para 106 where it is stated that "millions of voters in villages and informal settlements did not and still do not have recordable addresses available".

See also the statements per Jafta J at para 149:

> "Parliament was also aware of the reality of circumstances prevailing in this country as a result of the discriminatory land-use development which resulted in informal settlements in both urban and rural areas. The lack of land use planning in those areas has resulted in the absence of residential addresses commonly available in urban areas where there was proper town planning."

[68] Id at para 117.

> "To ameliorate these challenges, Parliament added a rider to section 16(3). It qualified the obligation by adding that a voters' roll with addresses must be furnished if the addresses are available. The term 'available' is not defined in the Electoral Act and therefore it must be accorded its ordinary meaning. In terms of the Compact Oxford English Dictionary 'available' means 'able to be used, obtained or free to do something'.
>
> . . .
>
> With regard to the voters' roll that was in existence when section 16(3) came into operation, it would be impossible for the Commission to provide a roll that contains addresses if the addresses were not furnished to the Commission upon registration or were not kept by the Commission, as this was not a requirement before December 2003. To overcome this difficulty, section 16(3) requires the Commission to furnish addresses that are available to it. An address would be available if it was obtained at the time of registration. *In this context 'available' does not mean 'exist'. To construe the section as meaning that the Commission is required to furnish addresses where they exist would render the section unworkable. The Commission could not be expected to go to every corner of the country to establish whether addresses of the 18 million voters, who were already on the roll when section 16(3) came into operation, exist. Indeed that would have been an impossible task to perform.*"[69] (Emphasis added.)

[77] Addresses that are difficult, if not impossible, despite reasonable efforts, to obtain (like addresses of voters in some villages and informal settlements or voters who have passed away after 2003, or even those who do not wish to vote or furnish their addresses to the Commission),[70] would not be available for the purpose of section 16(3).[71] It is in these circumstances that paragraph 6.2 of the *Mhlope* order deliberately limited the obligation on the Commission, by stipulating that it must, by

[69] Id at paras 150 and 153.

[70] According to the Commission's website, as at 4 October 2018, there were 26 094 478 registered voters. See Independent Electoral Commission, "Registration Statistics" available at http://www.elections.org.za/content/Voters-Roll/Registration-statistics/. In the 2014 national and provincial elections, the IEC had over 25 million registered voters on the voters' roll and just over 18.6 million votes were cast. The voter turnout that year was 73.48%. In comparison, voter turnout in the 2009, 2004 and 1999 elections was 77.3%, 76.73% and 89.3% respectively. See Electoral Commission, *National and Provincial Elections Report 2014* available at http://www.elections.org.za/content/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=3291, at page 43 table 14.

[71] *Mhlope* above n 2 at para 42.

30 June 2018, obtain and record all addresses that were *reasonably* available at 17 December 2003. It is against this legal background that the Commission's compliance with that order must be measured.

Has the Commission complied with the Mhlope order?

[78] Has the Commission, within the allocated time frame (14 June 2016 to 30 June 2018), taken all reasonable steps to obtain and record all addresses that were available at 17 December 2003? The first judgment's assertion that the Commission accepted that it had not been able to comply with the *Mhlope* order is not, strictly speaking correct but little turns on this.[72]

[79] Ordinarily, a court accepts legal concessions made by parties, but only to the extent that it is satisfied that the concession was properly made.[73] It is trite that no court is bound by concessions which are wrong in law.[74] Parties regularly make concessions before this Court but that does not bar a court from interrogating the correctness of those concessions. A court must bring its own assessment to bear on a legal issue.[75] In *Matatiele*, Ngcobo J, writing for the majority, said that if this Court was bound to accept concessions which are wrong in law it would lead to the

[72] See [30] above.

[73] *Kruger v President of the Republic of South Africa* [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC) at para 103. See also *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 112; *S v Thunzi* [2010] ZACC 27; 2010 JDR 1472 (CC) at para 5; *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) (*Matatiele*) at para 67; *Azanian Peoples Organisation v President of the Republic of South Africa* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) (*Azapo*) at para 16; *S v DD* 2015 (1) SACR 165 (NCK) at para 72 and *Maqhunyana v Minister of Safety and Security* 2012 (1) SACR 630 (ECM) at para 19.

[74] *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC); 2017 (6) BCLR 730 (CC) at para 34 and *Azapo* id at para 16. See also *Matatiele* id at para 67 where it was stated:

> "It is trite that this Court is not bound by a legal concession if it considers the concession to be wrong in law. Indeed, in *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*, this Court firmly rejected the proposition that it is bound by an incorrect legal concession, holding that 'if that concession was wrong in law [it] would have no hesitation whatsoever in rejecting it'. Were it to be otherwise, this could lead to an intolerable situation where this Court would be bound by a mistake of law on the part of a litigant."

[75] *Botha v Minister of Justice and Constitutional Development* 2014 (1) SACR 479 (NCK) at para 7. See also *Klub Lekkerrus/Libertas v Troye Villa (Pty) Ltd* [2011] ZASCA 101; [2011] 3 All SA 597 (SCA) at para 24.

intolerable situation where it would be bound by a mistake of law on the part of a litigant and precluded from giving the right decision merely as a result of an error of law on the part of a party.[76] He explained the consequence of this:

> "The result would be the certification of law or conduct as consistent with the Constitution when the law or conduct in fact is inconsistent with the Constitution. This would be contrary to the provisions of section 2 of the Constitution which provides that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid.'"[77]

[80] In *Gwadiso*, Petse ADJP relied on *Matatiele* to find that:

> "Although this dictum has more to do with a legal concession it seems to me that by parity of reasoning it applies with equal force in a situation such as the present in which counsel made a concession as a consequence of his erroneous view in relation to the facts of the matter."[78]

The erroneous view which the Commission appears to have been labouring under in this matter is discussed in detail in paras 84 to 85 below.

[81] A court can, in certain circumstances, disregard concessions made on behalf of a party during a hearing.[79] In *Saayman*, the Supreme Court of Appeal explained that

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[76] *Matatiele* above n 73 at para 67. Similar sentiments were expressed by the Supreme Court of Appeal in *Government of the Republic of South Africa v Von Abo* [2011] ZASCA 65; 2011 (5) SA 262 (SCA) at para 19, where it held that the court could not be bound by what was legally untenable:

> "It would be similarly intolerable if, in the current situation, this court would be precluded from investigating the legal soundness of the first order, as a result of the incorrect advice followed by the appellants or an incorrect concession made by them."

See also *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); [1976] 3 All SA 332 (A) at 23F where the court held:

> "[I]t would create an intolerable position if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part."

[77] *Matatiele* above n 73 at para 67.

[78] *Gwadiso v Member of the Executive Council* [2008] ZAECHC 181 at para 32.

[79] *Botha* above n 75 at para 7. See also *Klub Lekkerrus/Libertas* above n 75 at para 24.

legal representatives may make concessions for a variety of reasons and possibly without intending to commit the client or limit the issues:

> "The statement [or concession] in question may, for example, be used as an assumption on which to found an argument or be made in a bona fide spirit of fairness intending to convey to the court counsel's candid view of the way the court should proceed. In the absence of formality the context must necessarily be decisive of whether an admission has been made."[80]

[82] In this matter, regard must be had to the context in which the submission was made by counsel for the Commission that the Commission was "very close" to complying with the *Mhlope* order. First, the additional measures which the Commission seeks to take will only be available to it after the expiry of the period of suspension. Second, the Commission has done all it reasonably can, during the period of suspension, to comply with the order.

[83] In any event, this Court is, by virtue of its duty to uphold the rule of law, obliged to assess whether the Commission has complied with its obligations in terms of the *Mhlope* order.[81] In conducting this assessment, this Court must be cautious to

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[80] *Saayman v Road Accident Fund* [2010] ZASCA 123; 2011 (1) SA 106 (SCA) at para 29.

[81] In *SS v VV-S* [2018] ZACC 5; 2018 JDR 0275 (CC); 2018 (6) BCLR 671 (CC), Kollapen AJ stated at paras 21-3:

> "A court's role is more than that of a mere umpire of technical rules, it is 'an administrator of justice . . . [it] has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done'. A further factor which fortifies the conclusion that this Court was not only entitled but obliged to have raised and dealt with the non-compliance with the Order by the applicant, lies in the nature of the obligations that the Order and the settlement agreement which accompanied it evidenced. All court orders must be complied with diligently, both in form and spirit, to honour the judicial authority of courts. There is a further and heightened obligation where court orders touch interests lying much closer to the heart of the kind of society we seek to establish and may activate greater diligence on the part of all." (Footnotes omitted.)

See also *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) at para 22 where, in respect of suspensions of declarations of invalidity, it is stated:

> "The court that makes the declaration of invalidity is the court that is best placed to determine what is just and equitable in the circumstances and whether an order suspending the declaration of invalidity should be made pending the appeal or any other event or period of time, and, if an order of suspension should be made, on what conditions, if any."

avoid directing the Commission to do more than what section 16(3) actually required. This was noted by Mogoeng CJ in *Mhlope*:

> "Separation of powers requires that courts should be cautious not to intrude into the otherwise exclusive domain of other arms of the State unless it is constitutionally permissible to do so. This is not such a case. An order directing the IEC to do more than what section 16(3) requires of it amounts to an unintended and unjustifiable usurpation of Parliament's legislative powers."[82] (Footnotes omitted.)

[84] It is of some significance that in its founding affidavit, the Commission sets out the details of the *Mhlope* order and immediately thereafter avers that "[t]he Commission duly complied with the orders". It would appear that, to some extent, the Commission has misconceived its obligations in terms of the *Mhlope* order. The Commission's founding affidavit is replete with references to "missing addresses" as opposed to "reasonably available" addresses (the terminology used in the *Mhlope* order). A greater emphasis has been placed on the missing addresses. It can reasonably be inferred from the following extracts of its founding affidavit that any number of missing addresses would be of concern to the Commission:

> "The purpose of this application. . . [is to] allow the Commission to take further steps to seek to further reduce the number of voters for whom it has missing, generic or incomplete addresses."
>
> "The Commission therefore needs more time … to see if the number of registered voters without addresses cannot be significantly reduced."
>
> "The Commission has made great strides in its efforts to improve the number and quality of the addresses on the common voters' roll. However . . . the Commission requires more time so that it can do more in this regard."
>
> "While the significant improvements in the position are welcome, what is clear is that, when the suspension of invalidity granted by this Court comes to an end on 30 June 2018, there will still be a material number of registered voters for whom the

[82] *Mhlope* above n 2 at para 113.

> Commission will not yet have addresses in compliance with sections 8(3) and 16(3) of the Electoral Act."
>
> "[E]ven if the number of missing addresses were reduced to 1% of the registered voters, this would still mean over 250 000 voters were affected. The question which then arises is what steps the Commission should take in relation to those voters without addresses on the national common voters' roll."

[85] It is clear from these passages that the Commission's application for an extension of the suspension of invalidity is predicated on a desire to significantly reduce the number of registered voters without addresses. It seems to be labouring under the misapprehension that as long as there are missing addresses, it has not fully complied with the *Mhlope* order and should be allowed more time to fulfil its obligations under the Electoral Act and the *Mhlope* order.

[86] In a similar vein, the Commission alleged that granting the extension would effectively enable the Commission "to collect and record further addresses during the run up to the 2019 national and provincial elections and the elections themselves." The Commission has further alleged that there is nothing more it can do until 2019, to reduce the number of missing or incomplete addresses.

[87] At the hearing the main submissions made on behalf of the Commission were that-

(a) the Commission had implemented a host of endeavours, at great cost, in order to comply with the *Mhlope* order;

(b) the most effective yield of addresses are general registration weekends held ahead of elections and the elections themselves;

(c) the Commission had done all it could, within the period of suspension, to collect all reasonably available addresses. There is more it can do, in the event that the period of suspension is extended; and

(d) in approaching this Court for an extension the Commission had

> adopted a cautious approach and would be satisfied with a finding that it has complied with the *Mhlope* order.

[88] In response to a question from the presiding judge as to whether there was a dispute of fact about the allegation made by the Commission that it has done all it could to collect available addresses during the period of suspension, counsel for the Commission replied in the negative. There was no dispute of fact about the various steps taken by the Commission, but there was instead a dispute as to whether the Commission has behaved reasonably. Put differently, he submitted that there was no dispute of fact, but a dispute about the conclusion to be reached from the facts.

[89] The submission was advanced that the bold contention by the DA and the IFP that the Commission had not behaved reasonably, could not, in the absence of clear examples as to what it could and should have done differently, be sustained. In support of the contention that it had behaved reasonably, the Commission placed reliance on this Court's decision in *Rail Commuters Action Group* where it was stated:

> "The standard of reasonableness requires the conduct . . . to fall within the range of possible conduct that a reasonable decision-maker in the circumstances would have adopted. In assessing the reasonableness of conduct, therefore, the context within which decisions are made is of fundamental importance. Furthermore, a court must be careful not to usurp the proper role of the decision-maker."[83] (Footnotes omitted.)

The steps taken by the Commission have had varying degrees of success. What is abundantly clear is that the Commission has made extensive efforts and spent substantial resources to comply with this Court's order.

[90] While certain of the political parties take a different view as to what precise steps the Commission should or should not have taken, it emerged that those

[83] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 86.

suggested steps had already been taken. The DA initially contended that the Commission could have taken steps such as setting up call centres, however, it became apparent that the Commission has already taken these steps. The IFP's suggestion of a two envelope system and collecting addresses on voting day has previously been adopted by the Commission but in any event these are steps that can only be taken next year.

[91] In the written submissions filed on behalf of the Commission it is recorded:

> "The regrettable reality is that, to a large extent, the Commission's ability to obtain the outstanding addresses is dependent on voters coming forward to provide or verify their registration details."

In light of this, there is no question that the Commission has taken reasonable steps to comply with this Court's order.

[92] The *Mhlope* order obliges the Commission to obtain and record all "reasonably available" addresses. It does not mean, as the Commission believes, that it must obtain and record 100% of the addresses of registered voters in preparation of the voter's roll. Nor does it mean the Commission's obligation is to obtain all existing addresses. Neither does it mean that the addresses must be captured with sufficient specificity to, for example, be geo-coded or digitally mapped.[84] The Commission's

[84] The Founding Affidavit states:

> "The critical dependency on the usability of addresses from an external source is whether it accords or confirms the voters' registration in relation to the boundaries of the voting district. This exercise, however, requires an address that has corresponding GPS co-ordinates (geo-coded). This is important to fulfil the CEO's obligation in terms of section 8(3) of the Electoral Act. The underlying analysis of this data therefore requires additional time."

In the Commission's Fourth Report at para 2.9, it indicates:

> "Several measures are planned to improve the record of addresses of registered voters on the national common voters' roll:
>
> . . .
>
> Address data from external sources will be cleaned (to ensure format compatibility), linked to Identity numbers of registered voters, geo-coded (to determine and assign longitude and

compliance with the *Mhlope* order is not attached or measured by a magic number of addresses being obtained but rather by whether the Commission has taken sufficient steps to obtain all those addresses that are "reasonably available".

[93] The Commission's misconception about the extent of its obligations under the *Mhlope* order has crept into the first judgment. The first judgment begins with the premise that the *Mhlope* order requires the Commission to obtain addresses for *every* voter, stating: "registering every voter and ensuring that every voter, once registered, is conjoined with a place of residence. That is the task *Mhlope* set the Commission". The first judgment states that there are addresses "available" to the Commission but the Commission's efforts thus far have been inadequate to obtain them.[85] However, none of the "efforts" the Commission intends to undertake in the event that the suspension is granted, could have been undertaken during the period of suspension. This much is recognised in the first judgment's arguments against a pre-election extension.[86]

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latitude co-ordinates to addresses), and analysed (to determine which addresses are located in voting districts and wards where voters are registered)."

See also para 2.9.3-4 where it is stated:

> "Ahead of the general voter registration weekend planned for February 2019 ahead of NPE 2019, the Commission plans to procure new voter registration technology, which is premised on improving the accuracy and quality of information provided by voters when applying to register to vote, such as address details. The new registration technology has been specified with a view to mitigating the key risks present in the current registration value chain, including: immediately recording onto a digital device voter registration details, including address, at the point of application to register – thus rendering paper registration forms superfluous; the use of digital mapping capabilities to more accurately place the address of the voter in the correct voting district and ward . . . the use of the new registration technology in places without formal conventional addresses, such as informal settlements and former homelands, is imperative to a sustained improvement of addresses of registered voters."

[85] See [30].

[86] See [58]:

> "The second conclusion is that the big post-*Mhlope* break-through in address-collection came from voting day in the 2016 local government elections. There, the Commission succeeded in doubling the number of voters registered with adequate addresses. Instead of having to entice voters to report at temporary stations for the sole purpose of stumping up their addresses, this is achieved when the voter arrives at a voting station to vote. The exercise of the franchise provides the inducement to the voter to arrive and provide address details. This eliminates the separate cost and effort of a massive national address-garnering apparatus."

[94] In my view, the obligation imposed on the Commission in terms of the *Mhlope* order must be interpreted with regard to the purpose of the suspension and the time frame afforded to cure the defect. The purpose of the suspension was twofold: it was to allow the August 2016 local government elections to proceed and to afford the Commission an opportunity to comply with its obligation to obtain and record all reasonably available addresses as at 17 December 2003. The *Mhlope* order compelled the Commission to obtain and record all addresses that were reasonably available. It was afforded a period of slightly in excess of two years, from date of judgment, 14 June 2016 to 30 June 2018, to fulfil this obligation. The concept of reasonableness should be interpreted in light of the time frame stipulated in the order.

[95] The temporal constraints on steps being taken are critical. The thrust of the Commission's case is that it has taken almost every conceivable step it can for the time being. It is not the Commission's case that it has not acted reasonably or that it has not obtained all reasonably available addresses but rather, that there is more it can do in the future. Nowhere did the Commission indicate, either in its written or oral submissions, that there were steps it could have taken, up to 30 June 2018, to obtain and record available addresses, and did not take.

[96] It is common cause that the run up to the 2019 elections – and the election itself – is when the Commission will be able to obtain additional addresses. From the allegations made in the papers and the submissions made at the hearing, there seems to be little more that the Commission can do until March 2019 to obtain these addresses. Put differently, additional addresses will only be available to the Commission in the run up to the 2019 elections. Whilst collecting addresses during future voter registration weekends and on voting days may allow for more addresses to be collected, it cannot be said that those addresses are reasonably available now or were reasonably available at 30 June 2018.

[97] At the time of the hearing of *Mhlope*, 66% of registered voters had incomplete addresses, generic addresses or missing addresses on the voters' roll. By May 2018,

the Commission had succeeded in reducing this figure to 21% of registered voters. The Commission readily conceded in its papers that this figure in fact overstates the remaining extent of the problem.

[98] At the hearing of this matter counsel for the Commission informed the Court that, as at that date, the percentage of voters with missing addresses had been reduced to 18%. On 27 September 2018, following directions issued by the Chief Justice, the Commission filed a supplementary affidavit which confirmed that 82.2% of the addresses on the voters' roll were complete,[87] 0.3% of the addresses were "REC AS" addresses[88] and a further 11% of the addresses were incomplete or generic.[89] In other words, over 93% of all voters on the roll have some address. It is only 6% of registered voters on the roll that are entirely without addresses.

[99] The Commission has in fact erred on the side of caution when calculating the percentage of registered voters with incomplete, generic or missing addresses. The Commission has alleged that a proportion of the addresses counted as incomplete or generic is sufficient to allow the Commission to place the voters concerned in the relevant voting district in terms of section 8(3) of the Electoral Act. The Commission has further explained that a significant proportion of these voters with incomplete / generic / missing addresses are in fact voters that registered prior to 17 December 2003. These pre-December 2003 voters were not required by law to have their addresses recorded.[90] Of the 2.2 million voters on the voters' roll without any address, only 1.3 million are post-December 2003 registrations. It is important to note that according to the Commission, once the capturing process is complete, there

[87] In its supplementary affidavit, the Commission defines a "complete address" as, amongst other things, one which contains a street number, street name, suburb and city.

[88] "REC AS" addresses are obtained using the new "REC AS" form and have sufficient details so as to place the registration applicant in the correct voting district.

[89] An incomplete or generic address is one which contains some of the values required for a complete address but not all of them.

[90] *Mhlope* above n 2 at para 134.

will be a total of 1 299 263 post-December 2003 registered voters without any recorded addresses, which represents 4.9% of all registered voters as at 8 May 2018.

[100] It is useful to recall what the state of affairs was at the time of the *Mhlope* order. The voters' roll that was produced shortly before the 2016 elections was, in no uncertain terms, woefully defective containing a measly 34% of addresses of registered voters. The source of this defect was twofold: first, the Commission's failure to record addresses and second, the Commission's failure to obtain the addresses it was required to in terms of *Kham*. This was not, *per se*, an intentional failure but rather one that arose from the Commission's misunderstanding of which addresses fell within the obligations imposed by section 16(3) of the Electoral Act.

[101] The Appellate Division in *Maharaj* determined the test for substantial compliance. Van Winsen AJA, writing for the Court, stated:

> "The enquiry, I suggest, is not so much whether there has been 'exact', 'adequate' or 'substantial' compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance."[91]

[102] The first question to be answered is whether the Commission has complied with the *Mhlope* order. The failure to achieve exact, complete, ideal or 100%

[91] *Maharaj v Rampersad* 1964 (4) SA 638 (A); [1964] 4 All SA 466 (A). See also *Unlawful Occupiers, School Site v City of Johannesburg* [2005] ZASCA 7; [2005] 2 All SA 108 (SCA) at para 22:

> "Nevertheless, it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved."

compliance does not necessarily mean that there has been non-compliance. The undisputed evidence is that, following the *Mhlope* decision, the Commission has been obtaining and recording the addresses of voters who are both re-registering and registering for the first time. Currently, 82% of registered voters have complete addresses. There was also no serious factual dispute about whether the Commission has, during the period of the suspension of the declaration of invalidity, behaved reasonably in its attempts to comply with the order to obtain all readily available addresses.

[103] In my view, the evidence presented has demonstrated that the Commission has taken all reasonable steps available to it and has, in the process, obtained and recorded all the addresses which were reasonably available as at 30 June 2018. For this reason, I find that the Commission has complied with the *Mhlope* order.

[104] The second question is whether the purpose of the order has been achieved. The obligation imposed on the Commission in terms of the *Mhlope* order must be interpreted with regard to the purpose of the suspension and the time frame afforded to cure the defect. The purpose of the suspension was two-fold: it was to allow the August 2016 local government elections to proceed and to afford the Commission an opportunity to comply with its obligation to obtain and record all reasonably available addresses as at 17 December 2003.[92] The *Mhlope* order compelled the Commission to obtain and record all addresses that were reasonably available.

[105] The purpose of the extension has been met. The August 2016 local government elections were held and the Commission has complied with its obligation to obtain and record all reasonably available addresses.

[106] In light of this, is an extension necessary? In brief, no. There is little point in granting an extension in order for the Commission to comply with its obligations if it

[92] Above n 7.

has already done so. For completeness, I will deal with the two additional factors which militate against granting the extension.

Potential prejudice if extension is not granted

[107] In *Mhlope*, the Chief Justice was at pains to ensure that "[e]very constitutionally permissible solution [is] explored to avert a looming constitutional crisis" of not being able to conduct municipal elections.[93] It was in this context that the Chief Justice concluded that a just and equitable order is one that would allow for the August elections to be held despite the fact that the voters' roll was the product of unlawful conduct.[94]

[108] The Chief Justice justified the suspension of the invalidation of the Commission's unlawful conduct (the production of a voters' roll that does not comply with section 16(3)) in the following terms:

> "That suspension will allow the IEC to proceed with the August 2016 elections and correct the defective voters' roll. The suspension of the declaration of invalidity of the IEC's unlawful conduct has the effect of suspending the duty imposed by section 16(3) on the IEC which, if carried out, there would have been no invalidity.

[93] *Mhlope* above n 2 at para 127. See also at para 85 where it is stated:

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

[94] Id at para 132 which reads:

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

> The non-compliance with section 16(3) is in terms of our just-and-equitable remedial powers condoned and the duty imposed by section 16(3) is itself suspended for purposes of the August 2016 elections."[95]

[109] In *Mhlope,* the suspension of the declaration of invalidity was granted on the basis that it was an exceptional case which required an exceptional solution in order to avoid a constitutional crisis. The constitutional crisis sought to be avoided was the very real likelihood that there would be no elections if the relief sought was not granted. At the time, the Commission would have been unable to certify the voters' roll because of 12.2 million (about 66%) missing addresses. Without a certified voters' roll, there would have been no elections.[96]

[110] What is the looming threat here if the extension of the suspension of declaration of invalidity is not granted? It was not the Commission's case – nor any of the other parties' – that no elections would take place next year if the extension of the suspension was not granted. According to the Commission, the looming danger in this Court not granting the extension is that any party dissatisfied with the outcome of the 2019 electoral results *may* seek to challenge the outcome of the elections and ground this challenge on the missing or incomplete addresses.[97] These, according to the Commission, now amount to about 17%, missing addresses being 6% and incomplete addresses constituting 11%. This is no constitutional crisis of the kind envisaged in *Mhlope*. In fact, it is in real terms, not a crisis at all. The Commission's motive, in approaching this Court for relief, is its wish to play it safe. The Commission's fear of a possible challenge is based on pure speculation.

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[95] Id at para 133.

[96] Id at para 84.

[97] The Founding Affidavit states:

> "Accordingly, if the period of extension is not extended, there is a very real risk that parties dissatisfied with the outcome of 2019 electoral results will seek to challenge the outcome of the elections by relying on the incomplete / generic / missing addresses. Even if such challenges were ultimately to fail, this could imperil the public credibility of the election results. This is self-evidently a prospect that should be avoided if at all possible."

See [52] which states: "[T]he main effect of that extension, and the Commission's main objective in seeking it, would be to bar pure address-based challenges to the 2019 elections".

[111] Furthermore, the argument advanced on behalf of the Commission over-emphasises the value of the missing addresses. The concept of free and fair elections is an embodiment of much more than the availability of addresses in the voters' roll.[98] A voters' roll with missing addresses may potentially pose a threat to the fairness and freeness of an election, but this does not mean that elections held in terms of such a roll are, without more, not free and fair.[99] In *Mhlope*, this Court cautioned against the approach adopted by the Commission:

> "It is inappropriate to base a declaration of constitutional invalidity on the link between the possible absence of freeness and fairness of the elections and the failure to record voters' addresses. To do so would have the unintended consequence of overly magnifying the value of and the role addresses play in an electoral process."[100]

[112] In *Mhlope* the reality that many poor and disenfranchised South Africans are unable to provide addresses specifically because of their socio-economic status and informal living conditions was recognised. The addresses of individuals living in villages and informal settlements – without recordable addresses – will likely never be captured with sufficient specificity. These are, at the core, the addresses not reasonably available.[101]

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[98] *Mhlope* above n 2 at para 106 reads:

> "*The concept of the freeness and fairness of the elections is an embodiment of much more than the availability or otherwise of voters' addresses. That is why our elections have in the past been correctly declared to be free and fair despite the fact that millions of voters in villages and informal settlements did not and still do not have recordable addresses available*. This concept entails curbing intimidatory and unacceptable conduct and language by political parties and their supporters. It also extends to building fire-walls against election-rigging occasioned or facilitated by any lapse or sloppiness on the part of the IEC or violations of the electoral code of conduct by candidates or political parties or indirectly by their proxies." (Emphasis added.)

[99] Id at para 125. See also the statement by Madlanga J at para 92:

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

[100] Id at para 106.

[101] See [74] to [77] above.

[113] It would be remiss not to acknowledge that capturing addresses on the voters' roll allows candidates to canvass more effectively and is a step in preventing fraud. I must however stress that generally, missing addresses are not what determine whether an election is free and fair. To positively state otherwise would be to effectively disenfranchise the democratic agency of the poorest and most vulnerable South Africans, whose rights are in the most need of protection. The over-emphasis of the address requirement and the implementation of systems such as the two envelope system[102] have the potential to make the votes of individuals living in villages and informal settlements more susceptible to challenge than other votes.

[114] It is not insignificant that the Commission had, in *Mhlope*, sought the same relief it is seeking in this matter. It had sought a suspension of the declaration of invalidity until 30 June 2020 and this was refused by this Court. In its papers, the Commission indicated that it required until November 2019 to complete the implementation of an eight phase plan which included, among others, the creation of a database with addresses linked to identity numbers, a notification process in terms of section 12 of the Electoral Act, two "address furnishing weekends" in October 2018 and February 2019 as well as a targeted communication campaign. The reasons for the refusal of a four year suspension appears from the following paragraphs of the judgment of Madlanga J:

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

[102] See [41] above.

> The IEC cannot be allowed to act at its own pace when the predicament in which we find ourselves is of its own making.
>
> In order to avoid uncertainty and difficulties of computation, a specific date must be fixed. A point of reference for fixing a date a year before the elections is the date of the previous national and provincial elections."[103]

[115] The *Mhlope* order was clear in restricting the extension to June 2018, specifically to exclude the 2019 national and provincial elections. Thus, it cannot be said that the purpose of the suspension was to allow the Commission to use the run up to those elections to collect addresses. It follows that this Court in *Mhlope*, did not consider the collection of those addresses which the Commission could only obtain from March next year to be a part of the obligation it had imposed. Had the Court intended that, it would have granted the suspension to include those elections, or at least the run up to the elections.

[116] Once it is found that the *Mhlope* order has been complied with, the unlawful conduct on the part of the Commission which formed the basis of the declaration of invalidity has been "cured". In these circumstances there would be no basis for this Court to further suspend the declaration of invalidity. In *Executive Council*, this Court explained that the effect of an order suspending a declaration of invalidity is akin to a resolutive condition:

> "Section 98(5) permits this Court to put Parliament on terms to correct the defect in an invalid law within a prescribed time. If exercised, this power has the effect of making the declaration of invalidity subject to a resolutive condition. If the matter is rectified, the declaration falls away and what was done in terms of the law is given validity. If not, the declaration of invalidity takes place at the expiry of the prescribed period and the normal consequences attaching to such a declaration ensue."[104]

[103] *Mhlope* above n 2 at paras 94-5. The remedy proposed by the minority judgment was adopted by the majority judgment.

[104] *Executive Council, Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at para 106.

[117] By parity of reasoning, once the obligations imposed by a remedial order coupled to a declaration of invalidity are complied with, the constitutionally invalid conduct is cured and the declaration of invalidity falls away. Thus, the object of the suspension no longer exists and there is no need for a further suspension. The Commission's compliance with the *Mhlope* order has the result that the declaration of invalidity falls away. There is thus no basis upon which the extension of the suspension can be granted.

Imposition of conditions and the constitutional project

[118] One of the factors to be considered in an application for an extension of a declaration of invalidity is the need to promote the constitutional project. How does the imposition of conditions relate to this factor?

[119] The first judgment seeks to grant the extension subject to the imposition of a range of conditions on the Commission in the run up to the elections. In brief, these conditions consist of requiring the Commission to file reports every two months which would outline the details of missing addresses and how the Commission will (i) indicate which voters have addresses missing; (ii) require voters to provide addresses before voting; and (iii) enable political parties to scrutinise the addresses and other details supplied in this matter. The first judgment also leaves the door open for a person to approach this Court and set this matter down, presumably to impose further conditions.

[120] It is unclear why there is a need for this Court to impose any conditions on the Commission and how the conditions proposed do anything further to ameliorate the alleged difficulties that arise with incomplete addresses. In essence, these conditions, save for (ii), codify what the Commission already does and has, among others, undertaken to do in the next election cycle. The condition imposed in para 2(c)(ii) of the first judgment's order is the potential disenfranchisement of the two envelope

system made actual in that it imposes a requirement of address provision prior to voting.

[121] The potential for disenfranchisement that arises from imposing conditions on voting was recognised by Madlanga J in *Mhlope*:

> "The IFP's proposal makes the voter's right conditional. The ballot will be counted on condition that there is no objection or an objection is resolved in the voter's favour. This is to happen to a voter who has not even been removed from the voters' roll. Surely, in this instance as well, the voter's right to cast a ballot should be untrammelled and not subject to any condition. And this too raises issues of legality. On what legal basis is a voter who is on the voters' roll caused to vote subject to a condition?"[105]

[122] Madlanga J went on to highlight further difficulties with compelling collection of addresses on voting day:

> "At a factual level, the IEC has highlighted some problems. The filling-in of forms and other details that will have to be followed on election day in accordance with the proposals by the independent candidates and the IFP are likely to result in very long queues. That – in turn – may cause some voters to leave voting stations without voting. Also, the notice, objection and appeal processes that are envisaged to take place will delay the finalisation of the counting of ballots. That may affect the announcement of the results, which – subject to the possibility of extension – must be done not later than one week after the date of elections. The IEC also says the longer the delays after the election, the greater the risk that the integrity of the separately kept ballots may be compromised."[106]

[123] This Court should be careful about imposing conditions on or prescribing how the Commission should run elections. Whilst well-intended, a condition imposed may have the inadvertent effect of hindering a voter's rights rather than realising them.

[105] *Mhlope* above n 2 at para 70.

[106] Id at para 72.

The Commission has an understanding, based on past elections, of what methods and systems work for the elections. It should be left to use this expertise and knowledge to run the elections as best it knows how.

[124] In his minority judgment, Jafta J highlighted the untenable consequences of making elections contingent upon the completeness of addresses:

> "Nor could a voters' roll provided without addresses be declared to be defective to the extent of prohibiting its use at the elections. An interpretation that leads to the prohibition would impact adversely on the citizens' right to vote in circumstances where the fairness of the elections is not affected.
>
> . . .
>
> Here an interpretation that leads to a prohibition described above would strike at the heart of the right to vote and also the values of universal adult suffrage and a national common voters' roll.
>
> . . .
>
> If registered voters were to be denied the opportunity to exercise the right to vote purely on the basis that the Commission is unable to furnish the segment of the voters' roll containing their names and addresses, our democracy would be imperilled. The affected voters would be denied dignity and the message to them would be that their will does not matter in the larger scheme of laying down the foundation for the formation of a democratic government."[107]

[125] The importance of the electoral process cannot be overstated. The right of every citizen to vote lies at the core of our democracy:

> "The right to vote is symbolic of our citizenship, as Sachs J declared. In entrenching the right of every citizen to vote, section 19 of our Constitution affirms that symbolic value. But the right to vote, and its exercise, has a constitutional importance in addition to this symbolic value. The right to vote, and the exercise of it, is a crucial working part of our democracy. Without voters who want to vote, who will take the trouble to register, and to stand in queues, as millions patiently and unforgettably did

[107] Id at paras 203-5.

> in April 1994, democracy itself will be imperilled. Each vote strengthens and invigorates our democracy. In marking their ballots, citizens remind those elected that their position is based on the will of the people and will remain subject to that will. The moment of voting reminds us that both electors and the elected bear civic responsibilities arising out of our democratic Constitution and its values. We should accordingly approach any case concerning the right to vote mindful of the bright, symbolic value of the right to vote as well as the deep, democratic value that lies in a citizenry conscious of its civic responsibilities and willing to take the trouble that exercising the right to vote entails."[108]

[126] However, a necessary antecedent to the realisation of the right to vote is a legitimate, free and fair election process. The right to vote and the legitimacy of this process lie at the heart of our constitutional project.

[127] As the first judgment correctly notes:

> "What is more, the Commission conceded that it sought the extension for the very purpose of forestalling legitimacy-denting challenges. But, as was rightly pointed out, this rationale boomerangs. For the mere grant of an order that suspends the Commission's duties in address-collection to beyond the 2019 election, and thus bars address-based free-and-fair challenges, would itself have a legitimacy-impairing effect. *Muzzling address-based voters' roll challenges – even wrong-headed challenges – would not help convince the public that the elections were free and fair.*"[109] (Emphasis added.)

[128] Yet, this "legitimacy-impairing effect" is exactly what will result from an extension, more so from an extension which imposes conditions that interfere with and constrain the manner in which the Commission conducts elections. The Commission is required to be independent, not just of the Executive and Legislative arms of government, but wholly independent. For this Court to dictate the manner in

[108] *Richter v Minister for Home Affairs* [2009] ZACC 3; 2009 (3) SA 615 (CC); 2009 (5) BCLR 448 (CC) at para 53.

[109] See [55].

which elections ought to be conducted in the future undermines the Commission's ability to, independently, ensure that elections are free and fair.

[129] That is not to say that elections should occur without any regard for the law and obligations imposed on the Commission by legislation and the courts. Previously, these obligations have resulted from reactive challenges where concrete evidence of material irregularity has been presented. Here, we are exercising our powers in the air without any understanding of what might result. Nothing good can come of such an exercise.

[130] South Africa's democracy and electoral system are robust enough to withstand a challenge to the voters' roll. Where the challenge fails, our electoral system will be invigorated by confirmation that its systems operate to prevent irregularities. Where the challenge succeeds, our electoral system is invigorated by the knowledge that irregularities will come to light and be dealt with in a manner that ensures the integrity of our elections.

Conclusion

[131] The Commission has, during the period of suspension from 14 June 2016 until 30 June 2018, complied with its obligation, in terms of the *Mhlope* order, to obtain and record all reasonably available addresses. There is no justification or need for the extension of suspension sought.

[132] For these reasons, I would dismiss the application.

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