



CONSTITUTIONAL COURT OF SOUTH AFRICA

Electoral Commission v Aaron Pasela Mhlope and Others

CCT 55/16

Date of hearing: 9 May 2016

Date of judgment: 14 June 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment on whether the Electoral Commission (IEC) is required to have a national common voters' roll that has the addresses of registered voters for the purposes of the August 2016 local government elections. If so, from when are they to be recorded? And if they are unable to correct the voters' roll before the elections are held, should the elections be postponed or proceeded with even if the voters' roll is defective?

Independent candidates that had lost by-elections held in the Tlokwe Local Municipality in 2013 challenged the freeness and fairness of those elections on the basis that voters' addresses were not recorded and many people were registered in wrong voting districts. On 30 November 2015, the Constitutional Court found that electoral irregularities had been committed in Tlokwe and set aside the outcome of the by-elections. It effectively ordered the IEC to compile a voters' roll that had available voters' addresses, for purposes of future elections and by-elections.

The Tlokwe by-elections were re-scheduled for 24 February 2016. When the independent candidates examined the voters' roll, they discovered that some voters' addresses were still not recorded. On this ground, they successfully challenged the validity of the voters' roll and sought the postponement of the impending by-elections in the Electoral Court. That Court insisted on the recordal of voters' addresses, where available, and postponed the by-elections for six weeks. Aggrieved by the outcome, the IEC approached the Constitutional Court. It sought to have the Electoral Court's decision

set aside on the basis that the IEC was not obliged to record voters' addresses and that the elections must be proceeded with on the voters' roll as it currently stands without addresses. In the alternative, and in the event that the appeal failed, the IEC sought direct access to the Constitutional Court asking that it be absolved from the obligation to provide voters' addresses.

Three judgments were produced by the Constitutional Court: the first written by Madlanga J (with Khampepe J and Mhlantla J concurring), the majority written by Mogoeng CJ (with Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J and Zondo J concurring) and the minority written by Jafta J (with Nkabinde J concurring).

The majority judgment decided that the IEC's appeal had to fail. However, direct access was granted. It concluded that (i) "where such addresses are available" does not mean those addresses that the IEC chose to record, but rather addresses that are objectively available or ascertainable; (ii) section 16(3) of the Electoral Act imposes an obligation on the IEC to record objectively available voters' addresses with effect from 17 December 2003; (iii) the failure to compile a voters' roll with available addresses is inconsistent with section 1(c) of the Constitution and invalid, but the declaration of invalidity is suspended until 30 June 2018; (iv) the Tlokwe segment of the voters' roll must reflect all the voters' addresses that are at present objectively ascertainable; (v) considerations of desirability and utility would encourage the IEC to record objectively available addresses that pre-date 17 December 2003; (vi) the August 2016 elections, except in Tlokwe, may be held without the recordal of available addresses; (vii) all available addresses must be recorded in the voters' roll by 30 June 2018; and (viii) six-monthly progress reports on the recordal of available addresses must be submitted to this Court by the IEC.

The first judgment differed from the majority judgment only in two respects: first, that section 16(3) of the Electoral Act obliges the IEC to record all addresses that are objectively available, even for voters who registered before 17 December 2003; and second, that the IEC's failure to record the addresses on the voters' roll, where available, was in breach of section 190 of the Constitution.

The minority judgment agreed that the appeal must be dismissed and that direct access must be granted, but differed on the order proposed in relation to the application for direct access. It held that section 16(3) requires the Commission to furnish addresses that are available to it, and that an address would be available if it was obtained at the time of registration. In this context, the minority held that "available" does not mean "exist", but instead means "in the IEC's possession". Further, the minority judgment expressed reservations on this Court's power to suspend the operation of an Act of Parliament, especially in circumstances where the Constitution does not expressly empower it to do so. It held that this Court should not grant an order that allows the IEC to use a flawed voters' roll in the by-elections as this would result in unfair elections.