



CONSTITUTIONAL COURT OF SOUTH AFRICA

Electoral Commission v Speaker of the National Assembly and Others

CCT 55/16

Date of hearing: 29 August 2018

Date of judgment: 22 November 2018

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.

On Thursday 22 November 2018 at 10h00, the Constitutional Court handed down judgment in an urgent application by the Electoral Commission of South Africa (Commission). In 2016 the Constitutional Court declared that the Commission's failure to obtain and record all reasonably available voters' addresses on the national voters' roll was inconsistent with its obligations in the Constitution and invalid. The Court however suspended the declaration of invalidity until 30 June 2018. The Court ordered that by that date the Commission must have corrected its failures, and obtained and recorded all addresses that were reasonably available as at 17 December 2003 (*Mhlope* order). On 21 May 2018 the Commission urgently applied to the Court to extend the suspension of the *Mhlope* declaration of invalidity until 29 November 2019.

The Commission sought an extension exempting it from having to comply with the *Mhlope* order until November 2019, after the 2019 elections. It argued that this would enable it to take further steps to fulfil the *Mhlope* order entirely: first, to reduce the number of address-less voters; second, to approach Parliament to consider amendments to regulate the collection of addresses; and third, to ensure that the 2019 elections are not endangered by persons wanting to challenge the results solely on the basis of missing addresses.

The Commission cited as respondents the political parties represented in the National Assembly and the National Council of Provinces, the Speaker of the National Assembly, and the Chairperson of the National Council of Provinces. It later added Mr Aaron Pasela Mhlope and Ms Johanna Xaba, who were the first and second respondents in

Mhlope. The Inkatha Freedom Party, the Democratic Alliance, Mr Mhlope and Ms Xaba opposed the granting of the extension.

After the Commission lodged its application, the Court ordered an interim extension until 30 November 2018 to enable it to hear argument.

In its submissions, the Commission argued that granting the extension to November 2019 would allow it to collect further addresses during the run-up to the 2019 elections, and the elections themselves, as registration drives shortly before elections and on election days are the most effective way to get missing addresses. The Commission also asserted that absent addresses were important only for local government elections. Therefore, the extension would not prejudice any party or person because it will only cover national and provincial elections – not local government elections. The Commission also informed the Court that by the time of the 2019 elections, its addresses problem would not be resolved. It was concerned about this because it would mean that those dissatisfied with the outcome of the 2019 elections may seek to challenge the results by solely relying on the address shortfall.

In a majority judgment written by Cameron J (Basson AJ, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J and Mhlantla J concurring), the Court agreed that the Commission had not complied with the order in *Mhlope*. There were, as the Commission acknowledged, registered voters' addresses reasonably available to it which it had not recorded yet. By approaching this Court for an extension, the Commission was conceding that it had not complied with the *Mhlope* order.

Cameron J noted that merely granting the extension would have the effect of barring address-based challenges to the 2019 election results. Cameron J considered the propositions advanced by one of the political parties to the Court: to grant a short extension of five months or less followed by another hearing in March 2019 to assess the Commission's progress, or to grant the extension sought verbatim. Cameron J noted that first, voter-harvesting weekends were costly and did not yield much improvement; second, that the post-*Mhlope* breakthrough in address collection came from the actual voting day in the 2016 local government elections; and third, a further hearing would entail considerable burden and costs.

With this in mind, the majority left the door open for any party or person to approach the Court and apply for a pre-election hearing – but it granted a longer extension that stretches beyond the 2019 elections, subject to the condition that the Commission files two-monthly reports, on 31 January 2019 and 31 March 2019, and thereafter as expedient, informing the Court of its progress. This would enable the Court to set the matter down, of its own initiative, if need be.

Cameron J found no reason on the facts why reasonable behaviour on the Commission's part should leave the parties who were forced to come to the Court financially burdened, especially since the parties contributed materially to the just and equitable order. Consequently, the Commission must bear the costs of the application.

A minority judgment by Theron J (Petse AJ concurring), disagreed with Cameron J and held that, on the factors outlined by this Court in previous cases, the extension should not be granted and found that the Electoral Commission had met its obligations under *Mhlope* to record reasonably available addresses. Theron J applied the factors for granting an extension as set out in previous decisions of this Court and in particular emphasised: (1) the prospects of compliance if an extension was granted, (2) potential prejudice if no extension is granted and (3) the need to promote the constitutional project. Theron J concluded that the *Mhlope* order simply required the Commission to have collected all “reasonably available addresses”. Theron J interpreted this to not require the Commission to gather *every* address, only those that could be obtained within the timeframe given in *Mhlope*. Theron J noted that the Commission had obtained most addresses with only 4.9% of missing addresses outstanding, and that the Commission could do nothing further to obtain addresses until the 2019 elections. On this basis, Theron J concluded that the Commission had complied with the *Mhlope* order and no extension was needed. Theron J also held that there would be no constitutional crisis if the extension was not granted and the elections would proceed as usual. In respect of the final factor, Theron J held that the imposition of conditions by this Court may have a legitimacy-impairing effect on the elections and constrain the Commission’s independence in conducting elections. For these reasons, Theron J would have dismissed the application for extension.