CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 106/24

In the matter between:

AFRICAN CONGRESS FOR TRANSFORMATION Applicant

and

ELECTORAL COMMISSION OF SOUTH AFRICA Respondent

Case CCT 113/24

In the matter between:

LABOUR PARTY OF SOUTH AFRICA Applicant

and

ELECTORAL COMMISSION OF SOUTH AFRICA First Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Second Respondent

REGISTERED POLITICAL PARTIES WHOSE PARTICULARS APPEAR IN ANNEXURE "A" OF THE NOTICE OF MOTION Third and Further Respondents

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Case CCT 114/24

In the matter between:

AFRIKAN ALLIANCE OF SOCIAL DEMOCRATS Applicant

and

ELECTORAL COMMISSION OF SOUTH AFRICA Respondent

Neutral citation: *African Congress for Transformation v Electoral Commission of South Africa; Labour Party of South Africa v Electoral Commission of South Africa and Others; Afrikan Alliance of Social Democrats v Electoral Commission of South Africa* [2024] ZACC 7

Coram: Maya DCJ, Bilchitz AJ, Gamble AJ, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J

Judgments: Majiedt J (majority): [1] to [116]
Bilchitz AJ (dissenting): [117] to [193]

Heard on: 8 May 2024

Decided on: 20 May 2024

Summary: Electoral Act 73 of 1998 — compliance with election timetable — free and fair elections — section 19 of the Constitution — direct access — leave to appeal — *Plascon-Evans* test

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REASONS FOR ORDERS

MAJIEDT J (Maya DCJ, Gamble AJ, Madlanga J, Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring):

Introduction

[1] On 10 May 2024, this Court issued the following orders in these three cases:

(a) *CCT 106/24 African Congress for Transformation v Electoral Commission of South Africa*:

"1. The application by the respondent to lead new evidence is dismissed.

2. The application for leave to appeal is dismissed."

(b) *CCT 113/24 Labour Party of South Africa v Electoral Commission of South Africa*:

"1. The further affidavit, styled "replying affidavit" filed by the applicant is regarded as *pro non scripto* (as if never written) and is disregarded by this Court.

2. The affidavits filed by the co-respondents, variously styled "supporting" or "answering" affidavits are regarded as *pro non scripto* and are disregarded by this Court.

3. The application for direct access is dismissed."

(c) *CCT 114/24 Afrikan Alliance of Social Democrats v Electoral Commission of South Africa*:

"1. The application by the respondent to lead new evidence is dismissed.

2. The application for leave to appeal is dismissed."

[2] The Court indicated that reasons for these orders would be given at a later stage. These are the reasons.

[3] "Technology is a useful servant but a dangerous master."[1] These cases concern the efficacy of an online portal provided by the respondent in all three cases, the Electoral Commission of South Africa (Commission),[2] for the submission of documents in terms of section 27 of the Electoral Act[3] in respect of National Assembly and Provincial Legislature elections. The submissions in issue in the three applications concerned the elections scheduled for 29 May 2024. Two of the applications brought by the African Congress for Transformation (ACT) and the Afrikan Alliance of Social Democrats (AASD) are for leave to appeal an order of the Electoral Court directly to this Court. One application brought by the Labour Party of South Africa (Labour Party) is for direct access. All three applications are brought as a matter of urgency. The three applicants are newly established, registered,[4] and as yet unrepresented political parties.[5] As had happened in the Electoral Court, the applications were heard together in this Court, given the commonality of issues. The Electoral Court had in a single judgment dismissed applications challenging the Commission's decision to refuse the applicants' late submission of their full candidate list for the 2024 elections.[6]

[4] Section 20 of the Electoral Act provides for election timetables. It requires the Commission to compile an election timetable for each election. It also entitles the Commission to amend the election timetable in only two instances. That is, if it considers it necessary for a free and fair election, or if the election is postponed in terms of section 21(1) of the Electoral Act. The Commission promulgated the Election Timetable for the Election of the National Assembly and the Election of Provincial Legislatures for the 2024 elections[7] (Election Timetable) in terms of section 20 of the Electoral Act. Item 9 of the Election Timetable, promulgated in terms

[1] Christian Lous Lange, an eminent Norwegian historian and political scientist.

[2] The Electoral Commission owes its existence to Chapter 9 of the Constitution.

[3] 73 of 1998.

[4] Political parties are registered in terms of Chapter 4 of the Electoral Commission Act 51 of 1996.

[5] That is, unrepresented in the National Assembly and Provincial Legislatures.

[6] The order was issued on 15 April 2024 and the reasons for the order on 26 April 2024.

[7] Election Timetable for the Election of the National Assembly and the Election of Provincial Legislatures, GN 2340 *GG* 50185, 24 February 2024.

of section 27(1) of the Electoral Act, outlines the requirements for submitting candidate lists. It requires that new parties submit minimum supporter lists and nominated candidate lists onto the Commission's Online Candidate Nomination System[8] (OCNS or online portal) before 17h00 on 8 March 2024. While the Commission's preference was for these submissions to be made online, they could also be made physically at the Commission's head office in Centurion, Gauteng.

[5] Having failed to meet the item 9 deadline, the three applicants raised complaints with the Commission, mainly relating to the alleged dysfunctionality of the OCNS, which they claimed had resulted in their non-compliance. These complaints of an objective impossibility to comply with the item 9 deadline formed the basis of their cases in the Electoral Court (and in this Court too). The Commission refused to make ad hoc arrangements as an indulgence to allow the applicants to submit their full candidate lists after the deadline. It explained that it had no power to condone non-compliance with the Election Timetable. According to the Commission the applicants only had themselves to blame for their failures to comply with the requirements to nominate candidates and submit their candidate lists by the deadline. The Commission claimed that the vast majority of political parties and independent candidates had no difficulty using the OCNS and were able to meet the deadline.

[6] The three applicants then brought separate applications before the Electoral Court with another unrepresented registered political party, the All African Allied Congress, and an independent candidate, Dr Sipho Pienaar Malapane, challenging that decision. They contended that, amongst others, their inability to complete their submissions prejudiced their right to freedom of association in

[8] Regulations concerning the Submission of List of Candidates, GN R14 *GG* 25894, 7 January 2004 defines the OCNS as—

> "a secure online application located on the official website, to be used for the electronic submission of the information and documents contemplated in section 27 and accessed through a pin code allocated by the chief electoral officer on written request by a party."

section 18[9] and political rights in section 19[10] of the Constitution. As stated, the applications were heard together and were all dismissed in a single judgment. The other two applicants' cases in the Electoral Court stood on a somewhat different footing and are not before us.

[7] It is useful to understand the legislative framework in order to place the factual matrix in proper context – that is what will be discussed next.

Legislative framework

[8] Section 190 of the Constitution outlines the powers, duties and functions of the Commission:

> "(1) The Electoral Commission must—
>
> (a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;
>
> (b) ensure that those elections are free and fair; and
>
> (c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.
>
> (2) The Electoral Commission has the additional powers and functions prescribed by national legislation."

[9] Section 18 of the Constitution provides that "[e]veryone has the right to freedom of association".

[10] Section 19 of the Constitution provides:

> "(1) Every citizen is free to make political choices, which includes the right–
>
> (a) to form a political party;
>
> (b) to participate in the activities of, or recruit members for, a political party; and
>
> (c) to campaign for a political party or cause.
>
> (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
>
> (3) Every adult citizen has the right–
>
> (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
>
> (b) to stand for public office and, if elected, to hold office."

[9] The national legislation referred to in section 190(1) is the Electoral Act and in section 190(2) it is the Electoral Commission Act.

[10] The preamble of the Electoral Act makes plain that it regulates the elections of the National Assembly, the Provincial Legislatures and municipal councils. Section 20 of the Electoral Act provides—

> "20. Election timetables
> (1) The Commission must after consultation with the party national liaison committee–
> (a) compile an election timetable for each election substantially in accordance with Schedule 1; and
> (b) publish the election timetable in the Government Gazette.
> …
> (2) The Commission may amend the election timetable by notice in the Government Gazette–
> (a) if it considers it necessary for a free and fair election; or
> (b) if the voting day is postponed in terms of section 21."

[11] Section 27 of the Electoral Act outlines the requirements for submitting candidate lists.[11] It reads—

> "27. Submission of lists of candidates
> (1) A registered party intending to contest an election must nominate candidates and submit a list or lists of those candidates for that election to the chief electoral officer in the prescribed manner by not later than the relevant date stated in the election timetable.
> (2) The list or lists must be accompanied by a prescribed–
> (a) undertaking, signed by the duly authorised representative of the party, binding the party, persons holding political office in the party, and its representatives and members, to the Code;

[11] This Court has previously declined to hear a challenge to section 27(2)(cB) of the Electoral Act in CCT 353/23 *Rivonia Circle NPC v President of the Republic of South Africa*. That section requires a registered, unrepresented party to submit to the chief electoral officer in the prescribed manner by not later than the deadline stated in the Election Timetable the names, identity numbers and signatures of its supporters.

(b) declaration, signed by the duly authorised representative of the party, that each candidate on the list is qualified to stand for election in terms of the Constitution or national or provincial legislation under Chapter 7 of the Constitution and has signed the prescribed acceptance of nomination;

. . .

(cA) declaration, signed by the duly authorised representative of the party confirming that each candidate appearing on the party's provincial list of candidates referred to in Schedule 1A is registered to vote within the province in which the election will take place;

*(c*B*)* form, in the case of a registered party not represented in the National Assembly or any provincial legislature, confirming that the party has submitted, in the prescribed manner, the names, identity numbers and signatures of voters whose names appear–

(i) in the case of an election of the National Assembly in respect of regional seats, on the national segment of the voters' roll and who support the party–

(aa) totalling 15 per cent of the quota for that region in the preceding election, when nominating candidates for one region; or

(bb) totalling 15 per cent of the highest of the regional quotas in the preceding election, when nominating candidates for more than one region provided that where 15 per cent of the highest of the quotas is not achieved, that the party may only nominate candidates for the region or regions as determined by the next highest quota; or

(ii) in the case of an election of a provincial legislature, on the segment of the voters' roll for the province and who support the party, totalling at least 15 per cent of the quota of that province in the preceding election, for which the party intends to nominate candidates;

(d) undertaking signed by each candidate, that that candidate will be bound by the Code; and

(e) deposit.

(3)

(a) The Commission may prescribe the amount to be deposited in terms of subsection (2)(e);

(b) The amount to be deposited by a registered party contesting an election of a provincial legislature, must be less than the amount for contesting an election of the National Assembly; and

(4) Upon request by the Commission, a party must, in the prescribed manner and form, submit an acceptance of nomination signed by a candidate appearing on a party list submitted by that party."

[12] Section 27 of the Electoral Act thus requires a registered, unrepresented party to submit four kinds of documents to the Commission, "in the prescribed manner", before it can contest a national or provincial election, namely—

(a) the names and identity numbers of its supporters;[12]

(b) the signatures of those supporters;[13]

(c) lists of candidates to compete in elections and their supporting documentation;[14] and

(d) proof of payment of the required deposit.[15]

[13] The Commission has, in the Regulations,[16] prescribed the manner for the submission of these documents. It provides that—

(a) candidate lists and candidate forms must be submitted either to the Commission's head office in Centurion or through the OCNS;[17]

(b) supporter information and supporter signatures must be submitted through the OCNS;[18] and

[12] Section 27(2)*(c*B*)* of the Electoral Act.

[13] Id.

[14] Section 27(2)(a) and (b) of the Electoral Act.

[15] Section 27(2)(e) of the Electoral Act.

[16] Regulations above n 8.

[17] Id at Regulation 2(1) and (1A). The same requirement applies to the nomination of an independent candidate (Regulation 2A).

[18] Id at Regulation 2(1)(e).

(c) the deposit must be paid either by electronic funds transfer using a payment reference number generated for that purpose by the OCNS, or "by using the internet payment gateway functionality available for that purpose on the OCNS system."[19]

[14] Item 9 of the Election Timetable provides—

> "(a) Registered parties that intend to contest this election must nominate and submit a list of their candidates for the election to the chief electoral officer in the prescribed manner by 08 March 2024.
>
> (b) Nominators of independent candidates that intend to contest this election must submit their nominations to the chief electoral officer in the prescribed manner by 08 March 2024."

[15] Section 31(1)(b) of the Electoral Act makes provision for the compilation of registered parties' candidate lists. It reads—

> "(1) By not later than the relevant date stated in the election timetable, the chief electoral officer must–
>
> . . .
>
> (b) compile a list of the registered parties entitled to contest the election concerned and have the final list of candidates for each of those parties available."

Factual background

[16] As stated, the applicants' complaints generally relate to the alleged dysfunctionality of the OCNS on 8 March 2024 as well as the inadequacy of the training and guidance offered by the Commission – which they alleged consisted of a single virtual workshop six days prior to the 8 March 2024 submission deadline. Despite overlaps in the applicants' narratives on these background facts, it is convenient to adumbrate the facts separately in respect of each applicant.

[19] Id at Regulation 3(2).

African Congress for Transformation

[17] ACT submitted its supporter lists together with the accompanying deposit payment. However, due to the alleged ad hoc malfunction of the OCNS, it could not submit its full list of candidates in compliance with section 27 of the Electoral Act. Faced with these challenges, ACT says it was only able to capture, upload, and submit 54 of its 524 candidates (15 for the national elections and 39 for the provincial elections), resulting in the exclusion of at least 470 of ACT's candidates from the national, provincial, and regional election ballot lists. This translates into it being able to upload only 10.3% of its candidates.

[18] According to ACT, the following problems were encountered with the OCNS:

(a) it randomly removed users from the system and they had to log in again;

(b) it randomly, unilaterally and consistently refreshed, reverting the user to the website's home page – resulting in all the progress made prior to the website refreshing being lost;

(c) it frequently stalled, hung, glitched and froze whilst ACT's representatives were in the process of capturing and uploading the relevant nominated candidate lists information;

(d) it operated slowly, was difficult to use, unstable, unreliable, and required frequent logging off and on;

(e) it randomly rejected identification numbers with no ascertainable or provided reasons;

(f) it was difficult to use during the period close to the deadline;

(g) unreclaimable wasted hours were spent uploading details when compared to those times when the portal was working optimally; and

(h) it made it difficult and frustrating for ACT to upload proof of its deposit payments, a precursor for candidate list submission (eating up precious time, which should ordinarily have been available for the uploading of ACT's candidate lists).

[19] ACT states that its representatives contacted the Commission's helpdesk to seek assistance in uploading the candidate lists and information and made some calls for assistance in uploading candidate lists. Troubleshooting attempts suggested by the Commission's call centre proved to be ineffective and caused further delays. After the deadline, ACT sent a letter to the Commission's Chief Electoral Officer highlighting the OCNS's malfunction and requesting acceptance of the affected candidates. On 12 March 2024, the Commission responded that it had no discretion to condone non-compliance with the Election Timetable. It could not make ad hoc decisions relating to requests from candidates, and it was unaware of any technical issues with the OCNS which prejudiced any political parties or independent candidates and, accordingly, denied ACT's allegations. On the same day, ACT addressed a letter to the Commission recording that its non-compliance was a result of the OCNS's malfunction and indicating that it would seek legal relief if the matter was not resolved. On 14 March 2024, the Commission responded to the letter reaffirming its previous response of 12 March 2024.

[20] On 18 March 2024, ACT instituted proceedings in the Electoral Court with a challenge under section 20(1) of the Electoral Act or, in the alternative, section 20(2)(a) of the Electoral Act. The aim of these proceedings was to review and set aside what ACT contended was the Commission's irrational and incorrect failure and/or refusal to consider and invoke its powers under section 20(2)(a) of the Electoral Act to amend the Election Timetable in circumstances where it was allegedly responsible for its online portal malfunction and not being fit for purpose on 8 March 2024.

Labour Party of South Africa

[21] On the morning of 7 March 2024, 25 volunteers of the Labour Party gathered at a conference centre to capture and upload the necessary information and supporting documents to the OCNS. There were also five senior administrators, overseen by the Labour Party's Secretary. Seven more persons joined the team at around 14h30 on 7 March 2024, after a press conference the Labour Party had called that morning. The whole team worked a full day until 02h00 on the morning of 8 March 2024. After a

short break they all returned to the task at 08h00 until the OCNS closed at 17h00. At this point, the Labour Party claims to have already gathered 51 542 supporters' signatures, which was more than the required number of 33 245 to enable it to contest the elections nationally and in four provinces.

[22] During the two days set aside by the Labour Party to upload and capture the required information, it alleges that it experienced the following difficulties:

(a) from early morning on 8 March 2024, the OCNS was slow, requiring the Labour Party to log on and off the OCNS;

(b) it was unable to upload the Excel spreadsheets with signatures onto the OCNS as it would frequently hang, freeze or crash; and

(c) after contacting the Commission, the difficulty uploading bulk uploads persisted and online deposits were not accepted.

[23] The Labour Party says that the Commission had not picked up the Labour Party's payment for a period of 10 days, despite the fact that proof of payment was eventually uploaded onto the OCNS. Additionally, although it appeared that some of the signatures had been uploaded onto the OCNS, there was no way to verify this, since the system does not provide the user with any feedback, confirmation, or the time of the report once the deadline is reached. Moreover, where identity document numbers were rejected, the reasons given were not clear and there was no facility for the Labour Party's Online Portal Administrator (OPA) to dispute or rectify individual cases.

[24] By the time the OCNS closed, the Labour Party had not yet completed uploading all the required 33 245 signatures and the supporting documents. It had all the hard copies available for uploading. In respect of the candidate lists, it was able to upload the details of 12 national office-bearers, but not the supporting documents, and it was also unable to upload the details of any provincial or regional office-bearers. The Labour Party was able to upload sufficient supporter information enabling it to participate in the ballots nationally, in all nine regions of the National Assembly elections and in the North West Provincial Legislature. It was only able to upload

candidates for the national ballot. Fifteen minutes after the OCNS closed, the Labour Party emailed its complaints to the Commission which responded that "the system is closed and reports are not available".

[25] The Labour Party approached the Electoral Court with an application to have the Commission's decision not to amend the deadline fixed in item 9 of the Election Timetable reviewed and set aside. It also sought an order directing the Commission to amend item 9 by re-opening the OCNS for four days or such other period as the Electoral Court deemed just and equitable to enable the Labour Party and other affected and newly registered, unrepresented parties to upload the outstanding information. In the main, its case was that the Commission's dysfunctional online portal had made it impossible to comply with the requirements for the submission of candidates lists, outlined in section 27 of the Electoral Act. The Labour Party made plain that its grievance was not with the Election Timetable itself, but rather with the prescribed manner of compliance. The Party claims that compliance could not be achieved by the deadline in item 9 of the timetable because the prescribed manner of compliance was too onerous. It further argued that the Commission's decision to not amend the Election Timetable was not rationally connected to the purpose for which the Commission was given the power to make amendments to election timetables under section 20(2)(a) of the Electoral Act, read with section 5(1)(a), (b) and (c) of the Electoral Act.

Afrikan Alliance of Social Democrats

[26] AASD also elected to make use of the OCNS to upload its names of supporters and list of candidates. AASD pointed out that, unlike in the past where physical submissions could be made at any office of the Commission, the Commission allowed for physical submissions to be made only to its head office in Centurion. Prior to the date for the uploading, AASD had conducted a trial run on 2 March 2024 with live submissions training for its data capturers. AASD began uploading supporter names from 4 March 2024 and completed that uploading process on 7 March 2024. It was in the process of uploading candidate lists on 8 March 2024, when the OCNS locked it out

at 17h00. By that point, only one candidate had been captured. AASD claims that it had experienced two and a half hours of loadshedding in the morning, which had slowed down its submission of candidates. The result was that AASD had failed to submit its candidate list in the prescribed manner by the deadline after which the OCNS did not allow the further uploading of documents.

[27] After the deadline had passed, AASD attempted to contact the Commission telephonically and then sent a letter to the Commission requesting an extension to submit the required documents. This request was turned down, with the Commission responding on 11 March 2024 that it had no discretion to condone non-compliance with the Election Timetable and that fairness to everyone required the Commission to enforce strict compliance with it. AASD claims that various problems with the OCNS partly led to its failure to comply with the requirement to submit its candidate lists timeously. According to AASD, the OCNS is designed so as to first require an uploading of supporter lists before one can upload candidate lists (this was denied by the Commission). It also contends that the OCNS was slow, which thwarted its uploading of the candidate lists. AASD points out that, previously, in other election cycles, the Commission had allowed for online submissions to close at 21h00.

[28] On 16 March 2024, aggrieved by the Commission's decision, AASD brought an urgent interdict in the Electoral Court. It sought an order to have the OCNS re-opened for the submission of its outstanding lists. Before the Electoral Court, AASD submitted that its non-compliance with the 8 March 2024 deadline was not due to its negligence, intention or oversight, but to the Commission's dysfunctional online system and the contributing factor of loadshedding.

The Commission's response in the Electoral Court

The Commission's response in the Electoral Court

[29] The Commission's answers to the averments of the three applicants in the Electoral Court were generally uniform, but in certain instances they varied to address

allegations uniquely made by a particular applicant. The overarching answer was that, instead of blaming the OCNS and other extraneous factors like loadshedding, these parties only had themselves to blame for leaving compliance with the legislative requirements to the last possible moment, using inefficient methods and then failing to meet the deadline. Thus, contended the Commission, poor time management and the applicants' decision to use inefficient submission methods are solely to blame for the non-compliance.

[30] The Commission denied that the OCNS had malfunctioned on 8 March 2024. According to the Commission, the OCNS worked satisfactorily and was user-friendly, as was demonstrated by the fact that several unrepresented political parties used it to submit the details of their supporters, nominate candidates and make payments. Dozens of represented political parties also used the OCNS to nominate candidates and make payments – about 87 parties (76 of which are unrepresented parties) and 24 independent candidates were able to comply with the requirements by using the OCNS. The Commission emphasised that an election timetable and its deadlines are essential for the timely conduct of free and fair elections. The Commission submitted that, to ensure its neutrality and for it to be seen to be neutral and even-handed, it could not afford some parties ad hoc indulgences not afforded to other parties.

[31] The Commission explained in some detail that all three applicants had been able to use the OCNS to various significant degrees. In some instances, the applicants were able to upload the data of thousands of their supporters. According to the Commission, on their own versions, the applicants concede that the OCNS was fit for purpose, otherwise they would not have been able to upload all the information that they were able to. The fact that they were unable to upload all the information was due to their own tardiness. The Commission gave an example of another unrepresented party which was only formally registered after 6 March 2024, two days before the deadline, and yet was ready and able to upload all its documents – the signatures of supporters, candidate nominations and payment of the required deposit. According to the Commission, this persuasively demonstrated that, if a party or independent candidate had prepared

properly and had undergone the training and guidance offered by the Commission, it would have experienced no difficulty in complying timeously with the submission requirements. The Commission also averred that the training it had offered was adequate and timeous.[20]

Electoral Court

[32] In the Electoral Court all five applications were dismissed in a single judgment. The three applications before us were dismissed by a narrow majority of three members of that Court.[21] The minority of two members of the Court would have upheld the three applicants' challenges.[22] The Court was, however, unanimous in its dismissal of the other two applications.

[33] The Electoral Court identified the core issues to be first, whether the deadlines in item 9 were unlawfully prescribed and, second, whether the elections would still be considered free and fair if the applicants did not partake in them.[23] It found that the Commission's insistence on strict compliance with the Election Timetable's time limits was not unlawful or irrational.[24] Consequently, it held that the applicants' failure to meet the deadlines was a result of the applicants' unpreparedness and dilatoriness and not any deficiencies in the OCNS or the Election Timetable itself.

[34] The majority highlighted that the Election Timetable serves as the cornerstone for regulating and ensuring the exercise of political rights such as voting, standing for public office, and the conduct of free and fair elections. Altering the Election Timetable to accommodate one party's failure to comply would inherently disadvantage parties

[20] There were two training sessions on 22 January 2024 and 28 February 2024.

[21] *Labour Party of South Africa v Electoral Commission* [2024] ZAEC 4 (Electoral Court Judgment). The majority judgment was authored by Adams AJ, with Zondi JA and Professor Ntlama-Makhanya concurring.

[22] Professor Phooko, Shongwe AJ concurring.

[23] Electoral Court Judgment above n 21 at para 6.

[24] Id at para 14.

and candidates who adhered to the deadlines.[25] Citing *Inkatha Freedom Party*,[26] the Electoral Court rejected the notion that the Election Timetable could be amended due to the non-compliance of a single party, emphasising that such an amendment is unnecessary for free and fair elections and could, in fact, prejudice other parties.[27] The majority agreed with a submission by the Commission that fairness cannot be assessed on a subjective basis by considering only the circumstances of a small number of non-compliant political parties and independent candidates. It would be inherently unfair to other parties and candidates who had complied with a deadline to permit the change of that deadline, particularly where the alteration is purely for the convenience of a party that had failed to comply with the deadline simply due to subjective factors like dilatoriness, unpreparedness and inefficiency.

[35] The majority further cited *Liberal Party*,[28] where this Court held that the alteration of an election timetable because a party had failed to comply with it is not necessary for a free and fair election; it would in fact have the converse effect, as it could prejudice other parties' election preparations and, indeed, the freeness and fairness of the elections. It could also open the door for other parties to seek further changes in the Election Timetable.[29]

[36] In respect of ACT, the majority noted that the OCNS did not malfunction on the specified date, and ACT itself was able, by using the OCNS, to successfully upload supporter information and paid deposits on time.[30] As was the case with all three parties, the Court attributed fault in respect of the non-compliance to ACT's lack of preparation and failure to familiarise itself with the OCNS.[31] It held that ACT's

[25] Id at paras 18-9.

[26] *Electoral Commission v Inkatha Freedom Party* [2011] ZACC 16; 2011 JDR 0421 (CC); 2011 (9) BCLR 943 (CC) at para 55.

[27] Electoral Court Judgment above n 21 at paras 17 and 19.

[28] *Liberal Party v Electoral Commission* [2004] ZACC 1; 2004 (8) BCLR 810 (CC).

[29] Id at para 27.

[30] Electoral Court Judgment above n 21 at para 26.

[31] Id.

last-minute approach to submitting documentation and its ineffective use of the OCNS directly contributed to its failure to meet the requirements set out in the Electoral Act.

[37] The majority noted that, despite having sufficient time to fulfil the requirements, the Labour Party procrastinated until the last minute, resulting in its failure to meet the deadline.[32] Consequently, the Commission's decision to adhere to the Election Timetable was deemed rational, especially considering that the vast majority of parties successfully utilised the OCNS to compete in the upcoming elections. And in respect of AASD, the Electoral Court found that the relief sought by AASD, being an exemption from compliance, was not competent.[33] The Court found that AASD failed to comply with the deadline, not due to the Commission's fault, but because of its own ineptitude. The Electoral Court held that AASD did not initiate its process in time to ensure compliant document uploads.

[38] The minority judgment alluded to the reality of the digital divide in the country and disagreed with the majority view that the applicants' non-compliance was of their own making.[34] The digital divide was explained as "the gap between individuals with, inter alia, skills to use technology, and, on the other hand, those without/limited expertise".[35] According to the minority, there was a need for more "to be done to achieve digital literacy to realise the right to political participation in the digital era".[36]

[39] Having regard to the evidence adduced by the three political parties, the minority judgment questioned the efficacy of the OCNS even at its maximum functionality and noted that several dysfunctionalities still presented even then. The minority judgment also questioned why usage of the OCNS was rushed through by the Commission and was made the only option for candidate submissions, instead of having other avenues

[32] Id at paras 22-3.

[33] Id at para 28.

[34] Id at para 52.

[35] Id.

[36] Id.

available.[37] Lastly, the minority judgment stressed the importance of electoral justice throughout the entire electoral process and suggested that the challenges faced by the applicants could cast doubt on the fairness of the elections.[38]

In this Court

General submissions of the three applicants

[40] Before dealing with the parties' submissions, it is necessary to record that the Labour Party filed a further affidavit of some 43 pages in this Court, styled "replying affidavit". It submits that it would be in the interests of justice to admit this affidavit. Furthermore, a large number of affidavits, styled "supporting" and "answering" affidavits, were filed by some of the co-respondents, purportedly to bolster the Labour Party's case. Both these interlocutory matters will be discussed later before dealing with the merits.

[41] It is convenient to provide a consolidated summation of the three applicants' submissions due to their substantial imbrication. In respect of jurisdiction, ACT and AASD submit that urgent, direct appeals to this Court are self-evidently warranted as the elections are looming on 29 May 2024 and there are several preparatory steps required in terms of the Election Timetable.[39] They contend that the exclusion of their candidates would disenfranchise a significant portion of their supporters and disrupt the electoral process. This implicates their section 18 and 19 constitutional rights and would jeopardise the fairness of the elections. Lastly they submit that there are good prospects of success, given the substantial constitutional issues at hand, the compelling force of the minority judgment, and the three to two split in the Electoral Court.[40]

[37] Id at para 53.

[38] Id at para 56.

[39] This is how ACT and AASD pleaded jurisdiction. But these are facts that relate not to jurisdiction, but to the interests of justice criterion as part of the enquiry whether leave to appeal directly should be granted.

[40] This, too, is mistakenly pleaded in relation to jurisdiction and the same applies here – this relates to interests of justice and leave to appeal directly, not jurisdiction.

[42] The Labour Party, who brings its application as one of direct access, cites *August*[41] in contending that this matter "concerns the possible disenfranchisement of many citizens and consequently impacts political rights in terms of section 19 of the Constitution". It contends further that the matter is of significant importance and largely in the public interest. The Labour Party argues that several other rights are also implicated, like the rights to freedom of association, freedom of conscience and dignity. The Labour Party challenges the concern that a direct access application deprives this Court of the benefit of the views of other courts does not apply, by noting that the Labour Party has already approached the Electoral Court for a review of the decision of the Commission not to amend the deadline for the submission of lists of candidates, and that review has been dismissed.

[43] Cognisant of the factual disputes regarding the efficacy of the OCNS and the adequacy of the prior training provided by the Commission, ACT and AASD, who seek leave to appeal, submit that these can be resolved by having regard to the evidence presented and by applying the well-established principles applicable to resolving factual disputes on the papers. They submit that this Court is called upon to adjudicate the appeal arising from a specialist court and that it has the benefit of the majority and minority judgments from the Electoral Court.

Submissions on the merits by African Congress for Transformation

[44] ACT contends that the Electoral Court erred in grouping all five applications together and determining them on the same footing. This, ACT submits, was an incorrect approach as its complaints were narrower and supported by objective evidence. Moreover, ACT argues that the Electoral Court's findings were misplaced and are indicative of the majority judgment's misconception of the application. ACT contends that the only impediment that it had to uploading everything onto the OCNS was the portal's malfunction and not because it did not have enough time as was held

[41] *August v Electoral Commission* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC).

by the Electoral Court. The fact that other parties were able to upload information should not be used to disqualify potential candidates.

[45] ACT submits further that the Labour Party's evidence of the OCNS malfunction was similar to ACT's experience, indicating broader issues. Correspondence from other parties also raised similar complaints about the online platform. ACT says that it had made preparations, engaged a team, and had all the necessary documents ready for submission via the OCNS, contradicting the Electoral Court's claims that submissions were made at the last minute. ACT states that it made some calls to the Commission for assistance before the cut-off time, seeking assistance with the OCNS's technical issues, which the Commission failed to acknowledge.

[46] According to ACT, the majority judgment overlooked contradictions in the Commission's stance on the functionality of the OCNS, as well as its lack of candour and failure to disclose any details regarding other political parties' complaints and difficulties. It submits that the majority judgment's strict application of the *Plascon-Evans* test (discussed below) neglected to consider whether the evidence tendered by the Commission raised a real, genuine and bona fide dispute of fact especially when measured against the common cause facts presented. It contends that the Electoral Court accepted the Commission's unsubstantiated and unsupported version regarding similarly placed political parties and did not deal with the evidence submitted by ACT.

[47] Further, ACT contends that the Electoral Court erroneously found that it left its compliance with section 27 of the Electoral Act too late, despite evidence from the Commission, demonstrating that there was in fact sufficient time to upload ACT's full list of candidates. It complains that the majority judgment's finding, that attendance at the Commission's training would have ensured compliance, overlooks evidence of the inadequate training provided. ACT submits that leaving these issues uncorrected will erode the rights of ACT members, candidates and supporters as guaranteed by section 19 of the Constitution.

[48] ACT seeks the following relief:

(a) condonation for its non-compliance with this Court's rules on service;

(b) that this Court sets aside the Electoral Court's dismissal of its application for the review of the Commission's decision not to amend the Election Timetable;

(c) that this Court reviews and sets aside the Commission's decision to refuse ACT's submission of its full candidate list; and

(d) costs.

[49] ACT asserts that the relief sought will not unduly disrupt the Election Timetable and refers to the Commission's acknowledgment that there is some flexibility built into the Election Timetable, allowing for minor delays of a day or so. Additionally, ACT's requirement of "not more than an hour or two" for the submission of its full candidate lists, assuming optimal functionality of the OCNS, falls comfortably within this established "leeway". Moreover, ACT notes that the relief sought involves limited access to the OCNS that is strictly controlled and limited to parties with legitimate complaints about the portal's malfunction and can be managed without compromising the overall schedule. Lastly, ACT notes that proceeding with the elections on 29 May 2024 without remedying this issue risks legitimising an unfair electoral process.

Submissions on the merits by the Labour Party

[50] Regarding jurisdiction, the Labour Party contends that its section 19 political rights and those of its members and supporters have been unjustifiably limited by these events. It complains that this will result in the upcoming elections not being free and fair. As a result, it seeks a declaratory order that the Commission's conduct in refusing to amend the Election Timetable to afford the Labour Party an opportunity to meet the submission requirements was inconsistent with the Constitution and thus invalid. To remedy this, it is said that the Election Timetable should be set aside, and the Commission should compile a new election timetable to afford newly registered and/or

unrepresented parties, like the Labour Party, an opportunity to fully comply with the section 27 requirements.

[51] The Labour Party submits that it has been unfairly excluded from participating in the upcoming elections due to its inability to upload the required information on the OCNS by the deadline of 8 March 2024. It refers to the digital divide which divides individuals with the skills to use technology and others without expertise. This digital divide, the Labour Party argues, threatens the democratic process and undermines the fundamental right to a fair and free election.

[52] The Labour Party submits that its exclusion was due to the delayed announcement on 20 February 2024 of the election date by the President, which meant that the Commission had less than 100 days to complete the prescribed processes outlined in the Electoral Act. Thus, the condensed Election Timetable resulted in the Commission issuing rigid timelines to the extent that it did not make allowance for technical difficulties with the OCNS which caused the Labour Party's failure to meet the deadline. The Labour Party points out that section 20(2) of the Electoral Act empowers the Commission to amend the Election Timetable if necessary for a free and fair election.

[53] According to the Labour Party, the Commission had prescribed a manner of compliance with section 27 of the Electoral Act for unrepresented parties that was too onerous to comply with. The OCNS presented technical difficulties that would "kick out" data capturers and the Commission had no mechanisms in place to deal with technical glitches and, despite several attempts to communicate with the Commission, nothing was done to resolve the issue. The timelines were so stringent that the Labour Party could not comply with the requirements in the Election Timetable.

[54] The Labour Party submits that its inability to satisfy the section 27 requirement can no longer be cured by an extension within the existing timeline. It therefore does not seek to appeal the decision of the Electoral Court, as the relief sought to extend the

submission of candidate lists and information has become "academic". The issue is not only related to the judgment of the Electoral Court, but rather to the timing of the imminent elections. Consequently, the Labour Party seeks orders that the Election Timetable be amended and that the Commission approach the President for a postponement of the elections.

Submissions on the merits by the Afrikan Alliance of Social Democrats

[55] AASD seeks leave to appeal against the Electoral Court's order only insofar as it impacts its own position. AASD submits that the following factors point to the Electoral Court's decisions being irrational:

(a) the Electoral Court overlooked various issues with the OCNS such as payment processing and candidate list uploading;

(b) the Electoral Court did not consider the evidence properly with regard to technical glitches affecting the OCNS, which hindered AASD's ability to comply with the Election Timetable;

(c) the Electoral Court neglected to acknowledge the delays and difficulties in payment processing via the OCNS, hindering AASD's ability to complete other necessary tasks;

(d) the Electoral Court failed to consider that inadequate training was provided by the Commission;

(e) the Electoral Court misdirected itself by accepting evidence that other parties used the OCNS successfully as a basis for rejecting AASD's complaints regarding the problems it faced with navigating the OCNS; and

(f) there is a need for legal certainty in determining whether the constitutional right to participate in elections by political parties can be curtailed by the order of the Electoral Court to a point where the very party tasked with managing the elections can limit compliance through their own IT systems.

Commission's submissions

[56] The Commission filed a supplementary affidavit by its attorney objecting to the Labour Party's further affidavit and the "supporting" and "answering" affidavits filed by some of the co-respondents. The Commission generally in respect of all three applications contends that this Court lacks jurisdiction and should refuse leave to appeal, because the applications bear no prospects of success and they all turn exclusively on factual disputes. The Commission submits that the cases turn entirely on two questions of fact: first, did the OCNS malfunction on 8 March 2024 and second, if it did, was that malfunction the reason that the applicants failed to comply with the Election Timetable?

[57] The Commission demonstrates the point of the factual dispute with reference to the case advanced by ACT – not only are its grounds of appeal factual in nature, but ACT also conceded the purely factual nature of its appeal when it concludes in its founding affidavit in this Court that the Electoral Court's ruling against ACT cannot be sustained "because the finding is premised on an incorrect and unsustainable *factual finding*" (Emphasis added). The Commission submits that, while the existence of factual disputes may not preclude this Court's jurisdiction where there is a separate constitutional question of law, this Court does not have jurisdiction over applications that entail only disputes of fact. It cites this Court's *dictum* in *Scheepers* where the Court held that "a factual dispute does not become a constitutional issue because it has been clothed as a constitutional issue".[42]

[58] The Commission contends that there is a further important reason why this Court does not have jurisdiction in what is simply a factual dispute – the provisions of section 96(1) of the Electoral Act. That section provides—

[42] *South African Council for Educators v Deon Scheepers* [2023] ZACC 23; [2023] 10 BLLR 981 (CC); 2024 (5) BCLR 663 (CC) at para 39.

> "The Electoral Court has final jurisdiction in respect of all electoral disputes and complaints about infringements of the Code, and no decision or order of the Electoral Court is subject to appeal or review."

[59] According to the Commission, that provision means that "no appeal or review lies against a decision of the Electoral Court concerning an electoral dispute or a complaint about an infringement of the Code, save where the dispute itself concerns a constitutional matter within the jurisdiction of this Court".[43] Thus, submits the Commission, not every electoral matter, even one that solely concerns the facts in the case, can invoke this Court's constitutional jurisdiction. A contrary interpretation would render section 96(1) nugatory. Electoral cases that entail only factual disputes fall in a class where the Electoral Court has the final say.

[60] In respect of the Labour Party's application, the Commission submits that the Labour Party's application before this Court is not in substance an application for leave to appeal, but rather an application for direct access in which it seeks to re-litigate the very same issue that has already been determined by the Electoral Court. It argues that this is impermissible and barred by the principle of issue estoppel. In this regard, the Commission points out that the Labour Party brought an urgent application in the High Court on 6 March 2024, seeking an order that the Commission should confirm whether it would amend the 8 March 2024 deadline in the Election Timetable. In that application, the Labour Party argued that the Election Timetable did not give newly registered or unrepresented parties enough time to comply. The application was dismissed with costs because it should have been brought in the Electoral Court.[44] The Commission points out that the Labour Party then took its case to the Electoral Court.

[61] According to the Commission, in seeking to re-litigate the same facts and issues that were before the Electoral Court, the Labour Party does not make out a case at all

[43] *African National Congress v Chief Electoral Officer of the Independent Electoral Commission* [2009] ZACC 13; 2009 (10) BCLR 971 (CC); 2010 (5) SA 487 (CC) at para 7.

[44] *The Labour Party of South Africa v Electoral Commission*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No: O25251/24 (heard on 6 March 2024).

why issue estoppel should not apply. It submits that where an issue of fact or law was an essential element of a prior final judgment, that issue cannot be revisited in subsequent proceedings before another court, even if a different cause of action is relied upon or different relief is claimed.

[62] Over and above its general submissions on jurisdiction, the Commission submits in respect of AASD's application that it is not in the interests of justice to grant leave to appeal because the application is fundamentally flawed as it seeks a specific exemption for AASD which the law does not permit.

[63] The Commission emphasises that, as this Court held in *Kham*,[45] it is bound to apply the Election Timetable. The same applies to political parties. Absent a challenge to the Election Timetable and the Regulations that prescribed the use of an electronic portal and physical delivery at the Commission's head office, the applicants must comply with them. They cannot circumvent the application of these provisions without challenging them. The requirements in the Electoral Act and the Regulations must be regarded as lawful, as the Election Timetable sets the date for compliance and not the requirements for compliance. Therefore, a challenge to the Election Timetable is ineffectual as far as the constitutionality and lawfulness of the relevant provisions in the Electoral Act and the Regulations are concerned.

[64] The Commission points out that deadlines are of great importance in elections. It says that electoral authorities, like the Commission, can only facilitate a free and fair election, as it is constitutionally required to do, where clear rules exist that regulate the submission and verification of party and candidate information. According to the Commission, consistent and equitable enforcement of those rules is essential to ensure that the elections proceed on schedule and that they are free and fair. It also avoids the risk of the unequal and unfair treatment of parties and candidates. Citing *Inkatha Freedom Party*, the Commission submits that elections must be free and fair and, in

[45] *Kham v Electoral Commission* [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC) at para 78.

order to be seen to be so, all parties must be held to the rules, even if it means that they are excluded from competing.[46]

[65] Regarding the merits, generally, the Commission, after explaining what the OCNS is and what its key features are, contends that the OCNS worked. The Commission submits that it took significant steps to guide and inform parties how to use the OCNS, and that it made the OCNS available for submissions of supporter signatures and candidate nominations as early as 26 January 2024 and 23 February 2024 respectively.[47] The Commission argues that the fact that the OCNS worked is demonstrated by the fact that most parties were able to use it to submit key information to the Commission. According to the Commission, the applicants' failure to comply with the item 9 deadline can be fully explained by their lack of understanding how the OCNS worked, and their failure to commence the submission of the requisite documents and information timeously.

[66] To demonstrate that the OCNS operated smoothly, the Commission applies for leave to introduce new evidence, a confirmatory affidavit of Mr Thirona Suknunan, an employee at Lockdown IT. Mr Suknunan explains that Lockdown IT is a cyber security operations centre that provides round-the-clock comprehensive monitoring services, ensuring uptime and system availability, along with end-to-end process monitoring for critical functions like file uploads. Lockdown IT had been contracted by the Commission to administer the OCNS website. Lockdown IT's report shows that the OCNS webpage had 100% uptime and performed optimally.

[67] The Commission says that if this Court were to hear the appeals, and to grant the relief sought by the applicants, it would amount to a re-opening of the opportunity to submit information in terms of section 27. In that event the Commission will not be in a position to deliver a free and fair election on 29 May 2024. Granting the applicants

[46] *Inkatha Freedom Party* above n 26 at para 55.

[47] The submission of candidate information had to await a judgment of this Court on the matter, hence the later date.

such an opportunity will inevitably result in new parties competing in the election, which will require the Commission to reprint ballot papers it has already begun printing. The Commission would then have no choice but to seek a postponement of the election. While postponement is possible, it will be very costly – the Commission estimates that it will cost approximately R587 529 034 to do so.

Evaluation

Interlocutory matters

Labour Party's further "replying" affidavit

[68] The Labour Party's application purports to be for direct access. Applications for direct access are governed by rule 18 of the Rules of this Court. After an applicant has lodged an application in terms of rule 18(1), a person or party intending to oppose the application must give notice of that intention to the applicant and the Registrar within 10 days of lodgement of the application.[48] Thereafter the application will be disposed of in terms of directions given by the Chief Justice.[49] Save for two items that rule 18(4) says the directions may include,[50] there is no stipulation on what the directions may contain. So, the content of the directions is at the discretion of the Chief Justice. Ordinarily, this Court affords an applicant for direct access an opportunity to file a replying affidavit in terms of directions issued under rule 18(4). Affording such an opportunity makes sense since a direct access application is an application brought at first instance. It is unlike an application brought at first instance in another court where – by the time it reaches this Court – all sets of affidavits – including replying affidavits – will have been filed.

[69] The directions issued in the Labour Party's application did not afford it an opportunity to file a replying affidavit. In that case, the Labour Party could not file a

[48] Rule 18(3).

[49] Rule 18(4).

[50] Rule 18(4) provides that the directions may include: "a direction calling upon the respondents to make written submissions to the Court within a specified time as to whether or not direct access should be granted" (rule 18(4)(a)); or "a direction indicating that no written submissions or affidavits need be filed" (rule 18(4)(b)).

replying affidavit as of right. If it wanted to file a replying affidavit despite the fact that the Chief Justice had not directed it to do so, it ought to have brought a substantive application to file such affidavit. The Labour Party's attorneys merely enquired from this Court's Registrar whether it would be permitted to file a replying affidavit. It then summarily proceeded to file the affidavit. Absent a direction in terms of rule 18(4) by the Chief Justice for the filing of a replying affidavit or the grant of leave by this Court to file such affidavit, we must disregard the Labour Party's purported replying affidavit completely[51] and that is the position that we adopted in this instance – we had no regard to that further affidavit.

Commission's application for leave to adduce further evidence

[70] As stated, in this Court, the Commission sought leave to lead further evidence by way of what is referred to as a "confirmatory affidavit" of Mr Suknunan. Lockdown IT had been contracted by the Commission to administer the OCNS website.

[71] The Commission submits that it is in the interests of justice to introduce this new evidence because it:

(a) addresses any concern ACT may have regarding hearsay;

(b) is relevant as it affirms that the OCNS did not malfunction;

(c) will be placed before this Court in any event in the Labour Party application which is a direct access application and would thus be before this Court as a court of first instance; and

(d) it confirms the evidence that was before the Electoral Court.[52]

[51] Although the Supreme Court of Appeal judgment in *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA); [2013] 1 All SA 142 (SCA) at para 13 was obviously not about this Court's rule 18, the principle enunciated there bears relevance. That judgment cited with approval *Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) at paras 12-3.

[52] In relation to (a) and (d), mention was made by Mr Walter Ramabela Sheburi, the deponent to the Commission's answering affidavit filed in the Electoral Court, of the facts deposed to by Mr Suknunan in the "confirmatory affidavit" now under discussion. It seems that what Mr Sheburi said was not as detailed as the content of the "confirmatory affidavit". In any event, it is common cause that – in this regard – Mr Sheburi deposed to facts of which he had no personal knowledge and no affidavit was filed before the Electoral Court to confirm those facts. Before that Court, ACT took issue with the admissibility of Mr Sheburi's assertions as they were hearsay. The attempt at introducing Mr Suknunan's evidence in this Court is plainly calculated to close that loophole, i.e. to confirm and expand on what Mr Sheburi had said before the Electoral Court.

[72] The test for the admission of further evidence on appeal is well-established:

(a) an applicant must satisfy the court that it was not remiss or negligent in failing to adduce the new evidence in the court of first instance;

(b) there must be a *prima facie* likelihood of the truth of the new evidence;

(c) the evidence should be of material relevance and must not prejudice the other party.[53]

[73] Rule 31 of this Court's Rules makes provision for the admission in this Court of further evidence not appearing on the record in circumscribed instances. The facts emanating from that further evidence must be relevant, common cause or incontrovertible or of an official, scientific, technical or statistical nature capable of easy verification.

[74] While the evidence from Lockdown IT is relevant, it is neither common cause, incontrovertible or of an official, scientific, technical or statistical nature capable of easy verification. There is significant prejudice to the applicants if the further affidavit were to be admitted. They will be deprived of an opportunity to investigate the facts regarding the first central issue in this case, whether the OCNS had malfunctioned on 8 March 2024 and, to some extent, on 7 March 2024. They will also not be in a position to adduce evidence controverting that of Mr Suknunan about the efficacy of the OCNS. The same holds true for the evidence relating to the cost of the postponement of the elections – there will be no opportunity to interrogate and attempt to controvert that evidence. The prejudice outweighs the countervailing factor of relevance, which has already been found to exist.

[75] The Commission contends that, as it has placed this evidence before this Court in the Labour Party's direct access application as part of its answer, the evidence is in any event already before this Court. But that misses the point – on first principles admissibility in one case does not automatically translate into admissibility in another

[53] *Moor v Tongaat-Hulett Pension Fund* [2018] ZASCA 83; [2018] 3 All SA 326 (SCA); 2019 (3) SA 465 (SCA) at para 36.

case. That is even more so where the first case in which admissibility is established is one of first instance proceedings, and the other case is one on appeal. Self-evidently, completely different considerations apply in the two instances. In the first instance it is original evidence and on appeal it constitutes new evidence in that appeal. Admission on appeal as new evidence faces a much higher hurdle in addition to those of relevance and admissibility required in original evidence. Those additional requirements have already been enumerated and need not be repeated.

[76] For these reasons, the Commission's application to lead new evidence cannot succeed. The final interlocutory matter for discussion is the status of the numerous affidavits filed either as "supporting" or "answering" affidavits by the co-respondents.

Co-respondents' "supporting" / "answering" affidavits

[77] A total of 19 so-called "supporting" or "answering" affidavits have been filed. In its answering affidavits filed in the ACT, Labour Party and AASD applications, the Commission has responded to the cases advanced by the three applicants in those matters. In the circumstances of this case, in particular the extreme urgency with which this matter is being litigated, it is unfair, unjust and prejudicial to require of the Commission to respond – on all fronts, as it were – to the multiplicity of affidavits filed by entities that make common cause with the applicants but do not come out and assert that they too are applicants and seek relief as applicants. That is just too much for the Commission to contend with in the circumstances of this case.

[78] A further factor weighing against the admission of the affidavits in the present instance is their dubious evidential value. They consist of bald averments without substantiating proof. Ultimately the overriding considerations are fairness and prejudice. The unfairness and prejudice in this case are self-evident. For these reasons, the further affidavits of the co-respondents stand to be disregarded.

Merits of the main applications

General

[79] The right to vote is of significant importance in our democracy. That must be understood against the backdrop of the calculated denial by the apartheid regime of this most basic right of all citizens. This denial was accompanied by the alternative policies like the creation of the dreaded Bantustans and separate, inferior and ineffectual legislatures for Indian and so-called Coloured people. These policies were not intended to enhance democracy, or the right to vote, but to deny it. Their true objective was to deepen the legislative wedge between South Africans of different races, to divide and rule.

[80] This Court in *August* eloquently enunciated the importance of the right to vote—

> "Universal adult suffrage on a common voters' roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement."[54]

[81] Within this contextual importance of the right to vote, the Commission is constitutionally constrained by section 190 of the Constitution to ensure that free and fair elections are conducted. That is a manifestation and implementation of the section 19 right to vote. The Electoral Act explicates how the Commission is to perform

[54] *August* above n 41 at para 17.

the constitutional obligation in section 190 of the Constitution. And the Electoral Commission Act expounds the Commission's powers, functions and duties.

[82] Like all organs of state, in accordance with the doctrine of legality, the Commission has only those powers granted to it by the law, that is, the Constitution and legislation, be it principal (Acts) or subsidiary legislation (Regulations, etc). Rigid adherence to these instruments by both the Commission and all parties is required so that there is fairness to all parties[55] and to ensure that the Commission can properly arrange a free and fair and smooth running election.[56] Absent rigid adherence the efficiency and fairness requirements will be undermined.[57] That requires deadlines, like those contained in the Election Timetable to be strictly adhered to. Fairness to compliant parties would be subverted if parties who fail to comply with a regulation are nonetheless permitted to contest an election. The Commission does not have the power in law to condone non-compliance with the Electoral Act, the Regulations and the Election Timetable.[58] This rigidity is tempered by the provisions of section 20(2) of the Electoral Act, which grant the Commission the power to amend the Election Timetable. That power is to be exercised only if it considers the amendment necessary for a free and fair election or if the voting day is postponed in terms of section 21.

[83] Where a party fails to comply with the Election Timetable, or any other election regulation, that party will be excluded from the election. That follows by operation of law. The Commission is bound by the provisions of the Electoral Act and the Electoral Commission Act and it has no power to condone non-compliance.[59] This Court has emphasised that "the Commission must not be placed in a situation where it has to make ad hoc decisions about political parties and candidates who have not

[55] *Inkatha Freedom Party* above n 26 at para 52; *New National Party of South Africa v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at paras 12-3; *Kham* above n 45 at para 78.

[56] *Inkatha Freedom Party* above n 26 at para 55.

[57] Id; see also *Good Party v Electoral Commission of South Africa* [2023] ZAEC 4 at para 16.

[58] *Inkatha Freedom Party* above n 26 at para 57.

[59] *Liberal Party* above n 28 at paras 22 and 25.

complied with the Act".[60] The second judgment criticises the Commission for what it calls the Commission's inflexible stance in refusing to consider amending the timetable. That criticism is unfounded. I need say no more than to reiterate that there is unequivocal authority of this Court that the Commission has no power to amend the timetable, save where it is necessary to ensure a free and fair election or the voting day is postponed.[61]

The Labour Party's application for direct access

[84] Rule 18 regulates direct access to this Court.[62] The overriding consideration is the interests of justice. A proper case must be made out – direct access is not simply

[60] *Inkatha Freedom Party* above n 26 at para 55.

[61] *Inkatha Freedom Party* above n 26; *Liberal Party* above n 28.

[62] Rule 18 reads—

> "(1) An application for direct access as contemplated in section 167(6)(a) of the Constitution shall be brought on notice of motion, which shall be supported by an affidavit, which shall set forth the facts upon which the applicant relies for relief.
>
> (2) An application in terms of subrule (1) shall be lodged with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out–
>
> (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;
>
> (b) the nature of the relief sought and the grounds upon which such relief is based;
>
> (c) whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot;
>
> (d) how such evidence should be adduced and conflicts of fact resolved.
>
> (3) Any person or party wishing to oppose the application shall, within 10 days after the lodging of such application, notify the applicant and the Registrar in writing of his or her intention to oppose.
>
> (4) After such notice of intention to oppose has been received by the Registrar or where the time for the lodging of such notice has expired, the matter shall be disposed of in accordance with directions given by the Chief Justice, which may include–
>
> (a) a direction calling upon the respondents to make written submissions to the Court within a specified time as to whether or not direct access should be granted; or
>
> (b) a direction indicating that no written submissions or affidavits need be filed.
>
> (5) Applications for direct access may be dealt with summarily, without hearing oral or written argument other than that contained in the application itself: Provided that where the respondent has indicated his or her intention to oppose in terms of subrule (3), an application for direct access shall be granted only after the provisions of subrule (4)*(a)* have been complied with."

there for the asking.[63]

[85] The Labour Party accepts that if the issue estoppel point is decided against it, that puts an end to its case. For that reason, that is a good place to start. Issue estoppel is a genus of the *exceptio res judicata* (a matter already judged).[64] It augments the ambit of the *exceptio res judicata* by relaxing some of its requirements. The common law requirements of *res judicata* that the relief claimed and the cause of action be the same in both the case in question and the earlier judgment are relaxed where it is appropriate to do so. Where the facts and circumstances justify the relaxation of these requirements, the remaining requirements are that a second case cannot concern the same parties and the same issue that arose in a prior case. The latter determination involves an enquiry into whether an issue of fact or law was an essential element of a prior judgment on which reliance is placed.[65] It matters not that the cause of action and the relief sought are different. Despite its name, issue estoppel remains a defence of *res judicata*. The principle that each case must be assessed on its own facts and considerations of fairness and equity, not only to the parties but also to others, will apply.[66]

[86] It is plain that the parties here are the same and the same issue arises, namely the freeness and fairness of the election as an alleged result of the Labour Party's inability to comply with the requirements of section 27 of the Electoral Act due to the alleged malfunction of the OCNS. The Electoral Court has already decided the question of the malfunction against the Labour Party. Issue estoppel bars the Labour Party from bringing this question before us as if it has not litigated previously. Also, there is no reason, and none is seriously suggested by the Labour Party, why it could not, like ACT and AASD, have appealed the Electoral Court's order. The Commission suggests that

[63] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) at para 23.

[64] *Res judicata* as a defence means that a case has already been decided and cannot be re-litigated.

[65] *Mkhize N.O. v Premier of the Province of KwaZulu-Natal* [2018] ZACC 50; 2019 (3) BCLR 360 (CC) at para 37, citing *Smith v Porritt* [2007] ZASCA 19; 2008 (6) SA 303 (SCA) at para 10; *Democratic Alliance v Brummer* [2022] ZASCA 151 at para 13.

[66] *Smith* above id at para 10; *Brummer* id at para 13.

the direct access application is a stratagem by the Labour Party to evade the unfavourable evidence adduced in the Electoral Court. It is not necessary to adjudge this point. It suffices to state that the reasons advanced by the Labour Party as to why it seeks leave from this Court for direct access and not leave to appeal directly to this Court, fail to pass muster.

[87] First, it contends that it could not have sought the relief it now seeks in an appeal. That explanation is singularly unpersuasive, because the Commission indicated in the Electoral Court that if the Labour Party's relief was granted, it would necessitate a postponement of the elections. Under section 172(1)(b) of the Constitution, this Court has wide remedial powers, bounded only by considerations of justice and equity.[67] This Court can grant relief beyond that sought in an applicant's notice of motion.[68]

[88] Second, the Labour Party claims that the political rights of its members and supporters were not before the Electoral Court. But that is not true – in that Court, it expressly placed reliance on its and its supporters' section 19 political rights. In any event, as stated, the question of the alleged infringement of those rights is inextricably linked to the factual dispute about the alleged malfunction of the OCNS.

[89] Lastly, the Labour Party contends that it is contradictory for the Commission to rely on issue estoppel and in the same breath plead that this Court lacks jurisdiction since this is a mere factual dispute. That submission is misconceived, the Labour Party cannot be permitted to bypass the provisions of section 96(1) of the Electoral Act in circumstances where it has already had a hearing on the same issue in the Electoral Court, and lost.

[67] *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) at para 83.

[68] *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47; 2018 (2) SA 571 (CC); 2018 (3) BCLR 259 (CC) at para 211.

[90] Consequently, the Commission's reliance on issue estoppel is meritorious and must be upheld. What remain are the applications for leave to appeal directly to this Court brought by ACT and AASD.

ACT's and AASD's applications to appeal directly to this Court

[91] As explicated, the central issues are:

(a) did the OCNS malfunction on 8 March 2024; and

(b) if it did malfunction, was that the reason for the applicants failing to comply with the Election Timetable?

[92] I will assume, without deciding, that this Court's jurisdiction is engaged.[69] What bears consideration next is whether it is in the interests of justice to grant leave to appeal. One of the main factors in this enquiry is whether there are reasonable prospects of success.[70] That question must be decided on the papers before us on which there are evidently substantial disputes of fact. What is required, is to determine whether there is indeed a genuine, bona fide factual dispute between the parties. The various difficulties allegedly encountered in their use of the OCNS by ACT and AASD on 8 March 2024 have already been outlined. The Commission countered these allegations with countervailing allegations, supported by positive evidence that the two applicants' failure to comply was due, not to the malfunction of the OCNS, but to their having waited until the last day (8 March 2024), shortly before the 17h00 deadline to upload the documentation. This delay was exacerbated by their:

(a) misunderstanding of what needed to be done; and

(b) use of the most inefficient method of manual instead of bulk uploading.

[69] *N V M obo V K M v Tembisa Hospital* [2022] ZACC 11; 2022 JDR 0608 (CC); 2022 (6) BCLR 707 (CC).

[70] *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC) at para 12; *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 29.

[93] The approach to resolve disputes of fact on the papers is well-established. Elaborating on the well-known *Plascon-Evans*[71] approach, the Supreme Court of Appeal in *Wightman*[72] stated—

> "A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the [*Plascon-Evans*] test is satisfied."[73]

[94] The manner in which a dispute of fact may arise is well-known and has been authoritatively outlined in *Room Hire*.[74] The present instance falls under the first of the three scenarios enumerated in *Room Hire*. The Commission has denied all the material allegations by the applicant relating to the two central issues, the alleged malfunctioning of the OCNS and that this was what caused the applicants' non-compliance. The Commission has proceeded beyond mere denials and has put up positive facts to the contrary, and those facts are neither untenable nor far-fetched.

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[71] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C:

> "where an applicant who seeks final relief on motion she must in the event of conflict, accept the version set up by her opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers."

This approach has been endorsed by this Court for the resolution of constitutional disputes in *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 53.

[72] *Wightman t/a J W Construction v Headfour (Pty) Ltd* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA).

[73] Id at para 13.

[74] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163.

[95] Motion proceedings are unsuitable to decide probabilities. In instances where final relief is sought, motion proceedings are aimed at resolving issues of law based on common cause facts. And where disputes of fact arise, absent a referral for oral evidence, the *Plascon-Evans* approach, as amplified in *Wightman*, must be employed.[75] There is no basis to reject the Commission's denial that these two applicants' failure to comply with the Election Timetable was not due to the malfunction of the OCNS, but due to their own procrastination and ineptitude. The Commission supported its denial with positive facts. There is thus a genuine dispute of fact on the papers.

[96] The second judgment expresses disquiet about applying the well-established *Plascon-Evans* approach to resolving factual disputes on papers in constitutional issues. But this Court has pertinently approved that approach in *Rail Commuters*,[76] and has done so in subsequent cases, the most recent of which are *Mtolo* and *Democratic Alliance*.[77] *Mtolo* concerned the implication of the fundamental rights to access to housing, dignity and basic education. Tellingly, in *Democratic Alliance* this Court had to decide issues relating to section 19 political rights in respect of the 2021 local government elections. The case concerned the local government election timetable and the constitutionality of the re-opening of the candidate nomination process. There is no reason to depart from the test in constitutional cases.

[97] My Colleague expresses concern about the disadvantage to an applicant who is compelled to approach a court for relief by way of application, for instance in urgent applications. Courts are generally sympathetic to applicants in urgent applications and often permit papers to be amplified in reply, provided that the respondent is granted an

[75] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (4) BCLR 393 (SCA) at para 26.

[76] *Rail Commuters* above n 71 at para 55.

[77] *Mtolo v Lombard* [2021] ZACC 39; 2022 (9) BCLR 1148 (CC) at para 38; *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance* [2021] ZACC 30; 2022 (1) BCLR 1 (CC) at para 40.

opportunity to file further answering affidavits.[78] An adjudicator of fact will carefully scrutinise denials and controverting facts to determine whether they raise genuine and good faith disputes. A court will not lightly deprive a litigant who is obliged by law to bring proceedings by way of notice of motion and who seeks to discharge an onus of proof of an opportunity to adduce oral evidence or to cross-examine deponents to answering affidavits.[79] In advocating an alternative approach to determine the factual dispute based on the common cause facts and the probabilities, the second judgment ignores the caution expressed by the Supreme Court of Appeal in *Zuma*.[80]

[98] It is unclear why constitutional issues should receive different treatment. Due to its supremacy, the Constitution and the values that it embodies permeates all areas of the law. So, too, with constitutional issues, including and in particular in respect of alleged infringements of fundamental rights.[81] In any event, we are bound by *Rail Commuters*, *Mtolo* and *Democratic Alliance* and the second judgment has not attempted to show why those cases were wrongly decided on this point. As has been demonstrated, this Court has applied the test in cases where fundamental rights are implicated,[82] and in a case similar to this one implicating section 19 political rights and free and fair elections.[83]

[99] Tellingly, as I will presently demonstrate, even on their own version the applicants would in any event not have complied with the requirements by the deadline. They waited until the last moment, employed the most inefficient methods to upload documents and completely misunderstood what had to be done. This evidence of their

[78] *Lagoon Beach Hotel (Pty) Ltd v Lehane N.O.* 2016 (3) SA 143 (SCA).

[79] Under Uniform Rule 6(5)(g). See *AECI Ltd v Strand Municipality* 1991(4) SA 688 (C) at 698J-699A; *Freedom Under Law v Acting Chairperson; Judicial Service Commission* 2011 (3) SA 549 (SCA); [2011] 3 All SA 513 (SCA) at para 48.

[80] *Zuma* above n 75 at para 26.

[81] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 44; *Beadica 231 CC v Trustees, Oregon Trust* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) at para 29.

[82] *Mtolo* above n 77 and *Democratic Alliance* above n 77.

[83] *Democratic Alliance* id.

ineptitude and laxity does not come from the Commission, but from their own mouths. There is no need to apply *Plascon-Evans* – they are hoisted by their own petard.

[100] The *Plascon-Evans* test has stood the test of time and has been reaffirmed more than once by this Court in binding precedent. Jettisoning a tried and tested approach ("pedigreed" according to the second judgment) that has served us well for many decades in these circumstances is ill-conceived.

[101] There is a further important reason why the second judgment's concerns about the *Plascon-Evans* test is fallacious. ACT and AASD approached the case on the basis that there are factual disputes, and that they can be resolved by having regard to the evidence presented and by applying the well-established principles applicable to resolving factual disputes on the papers. They said so in their papers before the Electoral Court and in their submissions in this Court.[84] The second judgment impermissibly seeks to redesign the issues beyond the pleadings.[85]

[102] In applying this test, the Commission's version must plainly prevail. The Commission's contention that the OCNS functioned properly and was fit for purpose is well made. For context, the timeline preceding the promulgation of the Election Timetable bears emphasis. In *New Nation*,[86] this Court declared the Electoral Act inconsistent with the Constitution and, therefore, invalid to the extent that it did not allow an individual adult citizen to stand for election to the legislative bodies at national and provincial levels without having to be a member of a political party. This Court suspended that declaration of invalidity for 24 months to afford Parliament the opportunity to correct the constitutional defect within that period. The Electoral Amendment Act[87] is the legislation that was passed to correct that constitutional defect.

[84] See [43] above.

[85] *Molusi v Voges N.O.* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) at paras 27-8; *Fischer v Ramahlele* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) at paras 13-4.

[86] *New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11; 2020 (6) SA 257 (CC); 2020 BCLR 950 (CC).

[87] 1 of 2023.

It amended the Electoral Act to provide in section 27 for new, unrepresented parties to submit supporter names, identity numbers and signatures. The Amendment Act was assented to on 13 April 2023 and commenced on 19 June 2023.

[103] On 26 January 2024 the Commission opened the OCNS for parties to capture lists of supporters' signatures, 42 days before the deadline of 8 March 2024. On 23 February 2024, two weeks before the deadline, the Commission enabled the OCNS for the capturing of candidate information and forms. From these dates, parties could upload supporters' signatures and candidate information respectively.

[104] The Commission avers that the OCNS is user friendly. This was not disputed, or cannot be gainsaid. In this respect, four salient features of the OCNS bear mention:

(a) It permits bulk uploads – parties can, instead of doing it manually one by one, compile electronic spreadsheets (also offline) using the OCNS formatted spreadsheets, then upload those spreadsheets in bulk onto the OCNS.

(b) Parties can upload signed signature and candidate forms – the Commission requires scanned versions of supporters' signatures and signed candidate forms to be uploaded; they cannot be put onto spreadsheets. The scanned versions can be uploaded onto the OCNS.

(c) Multiple users can be assigned to the OCNS – a party must register an OPA who is the primary person for the party which has access to the OCNS. The OPA can assign multiple sub-users who can simultaneously perform different tasks on the OCNS.

(d) Parties can upload documents in any sequence – supporter and candidate information can be uploaded before paying a deposit. All that is required is a payment reference number before capturing candidates. This is obtained by indicating on the form which elections the party intends to contest. Parties can thereafter upload supporter and candidate information and pay the deposit by using their payment reference number.

[105] There is ample objective evidence beyond the Commission's say so that the OCNS worked. First, many other parties were able to comply with the deadline using the OCNS – 87 parties were able to comply with the section 27 requirements; 33 of those were unrepresented parties that managed to submit all the documents required to contest all the elections. Eighteen additional unrepresented parties submitted all documents required to contest all the provincial elections. Two parties, including one unrepresented party, managed to submit all their documents on 7 and 8 March 2024. At the hearing it was contended that it is improper to compare the applicants' experiences with the use of the OCNS. But that is exactly the point with a defence of objective impossibility relied upon by the applicants – what are the objective facts, gleaned from the experience of the use of the OCNS by a great number of parties, not the subjective experience or views of two parties.

[106] Second, on the objective evidence, many parties were able to upload a large number of documents in the last half hour before the deadline. Thousands of supporters and dozens of candidates were uploaded. This was done both manually (for example by Basic Income Grant SA) and in bulk (for example by the UMkhonto weSizwe Party and the Patriotic Alliance). Lastly and tellingly, the OCNS was used without any problem at all for both the 2019 general national and provincial elections and the 2021 local government election. This further fortifies the Commission's contention that the OCNS was fit for purpose and was functional at all material times.

[107] The applicants were the authors of their own misfortune. They failed, as a reasonable prudent political party would, to:

(a) ensure that they do all things necessary to comply with section 27 of the Electoral Act, in particular the deadlines in the Election Timetable;

(b) gain a proper understanding of what was required of them in terms of the Electoral Act and the Election Timetable; and

(c) utilise the most efficient methods to meet the requirements in the Election Timetable, particularly since they had waited so late to do so.

[108] Having waited until some two hours before the deadline, ACT chose the most inefficient method for uploading and failed to make use of the last resort option, physical delivery of the lists to the Commission's head office in Centurion. ACT only started uploading its candidates at 14h53 on 8 March 2024 and its last at 16h46. It chose to manually upload the candidate lists instead of using the bulk upload function. Further, ACT could have physically delivered the lists to the Commission's head office as ACT is based in Gauteng. Waiting from 23 February 2024 until two hours before the deadline and then using the most inefficient method of uploading was unreasonable and imprudent.

[109] ACT adduces no evidence in support of its bald averment that the OCNS was not fit for purpose and that it "operated slowly", was "difficult to use", "hung", "froze" and "glitched". There are no videos, expert reports or screenshots. ACT's reliance on the videos of the Land Party is misplaced – they depict a person manually uploading candidates one by one. It is of considerable significance that ACT was able to successfully upload its supporter information and pay its deposit on the OCNS on 8 March 2024. It would not have been able to do so if the OCNS was not fit for purpose or had malfunctioned. It is further of some significance that ACT did not complain about the OCNS until it made the first telephone call to the Commission at 14h00 on 8 March 2024. This is a further factor that redounds in favour of the Commission's version.

[110] AASD only captured its first candidate a second before the deadline (at 16h59:59). It appears to have waited until the very last moment apparently because it laboured under a misapprehension of how the OCNS worked. On its mistaken understanding of how the OCNS functioned, it first had to upload all the supporter information, before uploading candidate lists. In truth, AASD could have done it in any sequence because it had a payment reference number. AASD only submitted a candidate list for one election, in the Free State Provincial Legislature. But it did not comply with section 27(2)(cB) for the Free State election, because it did not submit the signatures of the required number of supporters by the deadline.

[111] Plainly, AASD only has itself to blame for its non-compliance. The further two grounds on which it relies for its default do not pass muster. First, it says that in past elections the Commission had fixed different deadlines. That is of no relevance whatsoever – the timetable set for this election applied and had to be complied with. Second, AASD blames loadshedding. This, too, does not avail AASD – loadshedding has become a distressing reality of South African life and one has to plan for that eventuality.

[112] There is a further reason why AASD's application must fail. It seeks impermissible relief – in essence AASD seeks an ad hoc exemption from compliance and an extension of the deadline only for itself. This is untenable in law – even if the OCNS did not work and that had caused AASD not to comply, it could justify different relief like an amendment to the timetable to enable all parties to comply and a postponement of the election. It could never justify an ad hoc individualised exemption for AASD alone to the exclusion of all other parties, as this Court held in *Liberal Party*.[88]

[113] To sum up: the OCNS was functional and fit for purpose on 7 and 8 March 2024. ACT and AASD only have themselves to blame for their non-compliance. There are no reasonable prospects of success and leave to appeal must be refused.

[114] The second judgment proposes a declaration of rights as alternative relief. Although that was also suggested at the hearing by the Commission, it found no favour at all with the other parties. Given the outcome, it is not necessary to say anything more about it.

[88] *Liberal Party* above n 28.

Costs

[115] The parties had approached this Court to assert their constitutional rights and they are thus deserving of *Biowatch*[89] protection.

Conclusion

[116] For these reasons, the Court issued the orders of 10 May 2024.

BILCHITZ AJ:

Introduction

[117] I have had the pleasure of reading the judgment authored by my Colleague Majiedt J (first judgment). I rely in this judgment largely on the detailed factual matrix as described by him except where there are differences in our understanding of the facts. I agree with the dismissal of the Labour Party's application for direct access on the grounds of issue estoppel. I also agree with the dismissal of direct leave to appeal in the case concerning the Afrikan Alliance of Social Democrats (AASD) but only on the grounds that there are lack of prospects of success due to the relief sought not being permissible. I, however, would have granted leave to appeal and limited relief in the case concerning the African Congress for Transformation (ACT). I also disagree with a number of the findings the first judgment makes in relation to important procedural questions that arose in the course of deciding this case.

[118] I should, in advance, indicate that the judgments in these cases were prepared in great haste in seeking to provide the parties with reasons prior to the elections on

[89] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

29 May 2024. It would have been desirable to have more time to consider many of the significant issues they raise but urgency has required that we produce reasons under the pressure of severe time constraints.[90]

[119] In what follows I will address four issues. First, I indicate why the well-known *Plascon-Evans* rule should not be applied to motion proceedings in circumstances – such as those that arose in the ACT case – where applicants have no possibility of instituting action proceedings. Secondly, I consider the failure of the Commission to consider amending the Election Timetable in the face of numerous complaints about its internet portal. I find that organs of state have a duty to be responsive to individuals – indeed, they must properly investigate and consider the complaints that are received and determine whether they impact on the exercise of their mandates. In this case, the Commission needed to consider the impact of the numerous complaints it received on the fundamental rights at stake enshrined in section 19 of the Constitution – the right to vote, the right to stand for public office and the right to free, fair and regular elections. I, consequently, find that its failure to consider amending the Election Timetable is reviewable in terms of several grounds of the Promotion of Administrative Justice Act[91] (PAJA). Thirdly, I address what would constitute just and equitable relief in the ACT case and find that the ACT is entitled to a declaration of rights. Finally, I raise difficulties I have with the first judgment's findings relating to a number of unusual interlocutory requests to admit additional affidavits in Labour Party and ACT.

The application of the Plascon-Evans rule where action proceedings are not available

[120] The central factual dispute that was raised in ACT related to the functioning of the OCNS. The applicant suggests that the system was not "fit for purpose" and makes a number of complaints that it was subject to several glitches. These included that it "operated slowly, was difficult to use, unstable, unreliable and required frequent

[90] The Court is, of necessity, often placed in such circumstances in election matters: see *Inkatha Freedom Party* above n 26 at para 6.

[91] 3 of 2000.

logging 'off' and 'on'". The OCNS, it was claimed, also "hung", "glitched" and "froze" while ACT was capturing and uploading its candidate lists, particularly on 8 March 2024 prior to the deadline. ACT contends that the cumulative effect of these flaws meant that it was not reasonably capable of complying with the deadline. The Commission disputes these complaints and submits that the OCNS did not malfunction, was continually monitored by its external service provider, and had a 100% uptime during the relevant period. Its functionality, it contends, is demonstrated by the fact that multiple other parties were able to upload their information before the deadline. Consequently, there appears to be a clear dispute of fact as to whether the OCNS worked properly at the relevant time or not.

[121] The Electoral Court resolved this factual dispute as follows:

> "The simple point is that, on the probabilities, the OCNS was not as ineffective and cumbersome to use as the applicants would make it out to be. It follows that it was, as alleged by the Commission, the applicants' unpreparedness and their tardiness which resulted in their inability to comply with the provisions of section 27. In the context of this opposed application, which implies that the principle in *Plascon-Evans* finds application, it cannot possibly be said that the version of the Commission is so far-fetched and untenable that this Court can reject it out of hand. Put another way, the Commission's version on the facts cannot and should not be rejected by this Court out of hand, as one being patently implausible and far-fetched. Therefore, factually it cannot be said that there was anything untoward or unlawful with the Commission's insistence on strict compliance with the time limits imposed by the timetable."[92]

[122] In this passage, the Electoral Court rather confusingly utilises two approaches to evaluate the evidence before it. The first is whether, on a balance of probabilities, the OCNS did not place insurmountable obstacles before the applicants to comply. The second involves the application of the well-established *Plascon-Evans* rule as well as its exceptions to determine the dispute of fact that arose concerning the functionality of the OCNS. The Commission submits before us that we are bound to apply the

[92] Electoral Court Judgment above n 21 at para 14.

Plascon-Evans rule. The first judgment approves of this approach and itself applies the *Plascon-Evans* rule to find that there are no reasonable prospects of success in this matter.[93] Given the fact that the rule's application is of central importance to the reasoning and outcome in both the Electoral Court, and this Court, it is necessary to consider the application of the rule in circumstances such as the present.[94]

[123] The *Plascon-Evans* rule was originally recognised in *Stellenbosch Farmers' Winery*,[95] a case relating to a trademark infringement. A dispute of fact had arisen on the papers and the court of first instance decided the matter on the basis of the facts that were common cause. On appeal, Van Wyk J disagreed with the approach taken by the court of first instance (to focus on the common cause facts) and stated that the correct approach is as follows:

> "It seems to me that where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order. . . . Where it is clear that facts, though not formally admitted cannot be denied, they must be regarded as admitted."[96]

[124] Given the vast impact of such a rule, it is somewhat surprising that there was not more discussion in the judgment of the Full Court of the justification as to why its approach was to be preferred to that of the court of first instance. Nevertheless,

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[93] The first judgment recognises there is a clear dispute of fact and suggests the need to invoke the *Plascon-Evans* rule to decide the dispute at [95] – although, it also suggests, at one point, there is no need to apply *Plascon-Evans* at [99].

[94] For that very reason, raising this question is not purely of academic interest nor does it impermissibly seek to go beyond the pleadings as is suggested by the first judgment. Considering whether the application of the rule in circumstances such as the present is apposite, is both in the interests of justice and necessary for disposing of this matter: see *Booi v Amathole District Municipality* [2021] ZACC 36; [2022] 1 BLLR 1 (CC); 2022 (3) BCLR 265 (CC); (2022) 43 ILJ 91 (CC) at para 35. The parties were additionally provided with an opportunity to address the issue in oral argument: see *Tuta v The State* [2022] ZACC 19; 2023 (2) BCLR 179 (CC); 2024 (1) SACR 242 (CC) at paras 52-3.

[95] *Stellenbosch Farmer's Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C).

[96] Id at 235E-F.

subsequently, the rule was affirmed in several other cases.[97] In 1984, the Appellate Division in the now famous case of *Plascon-Evans*,[98] incidentally also about a trademark infringement, was presented with a dispute of fact in motion proceedings. It reaffirmed the application of the earlier rule but added some clarifications and exceptions, also without providing an explicit justification for its approach.[99] The first exception is that the denial by the respondent of a fact alleged by the applicant must be such as "to raise a real, genuine or bona fide dispute . . . [of] fact".[100] If the respondent does not raise such a real, genuine or bona fide dispute of fact, and the respondent does not utilise its right to call for the deponent to the affidavit to be cross-examined, and the court is satisfied that the applicant's factual averments have "inherent credibility", it may consider the facts as alleged by the applicant in determining its final order.[101] The second exception to the general rule is that the court is justified in rejecting the allegations or denials made by the respondent where they are "so far-fetched, so untenable that a court is justified in rejecting them on the papers".[102]

[125] In the more recent case of *Wightman*,[103] the Supreme Court of Appeal elaborated upon and widened the scope of one of the exceptions. It held that "[a] real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed".[104] Thus, where the facts must necessarily be in the possession of the respondent and they are able to provide evidence if the applicant's version is true or not, then a bare or ambiguous denial of those facts will generally not

[97] *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Greenpoint) (Pty) Ltd* 1976 (2) SA 930 (A) at 938A-B; *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 430H-431A; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Báckereien (Pty) Ltd* 1982 (3) SA 893 (A) at 923G-924D.

[98] *Plascon-Evans* above n 71.

[99] These exceptions are helpfully outlined by Davis J in *Ripoll-Dausa v Middleton N.O.* 2005 (3) SA 141 (C) at 152-3.

[100] Id at 152.

[101] Id.

[102] Id at paras 151-2.

[103] *Wightman* above n 72.

[104] Id at para 13.

be sufficient for a court to conclude that there is a real, genuine dispute of fact. Heher JA goes on to find that respondents must take the responsibility seriously to place their version of the facts before the court in their answering affidavits and, "[i]f that does not happen it should come as no surprise that the court takes a robust view of the matter."[105]

[126] This brief history helps to illustrate two points. The first is that the justification for the rule being introduced was not properly articulated in the judgments that introduced it. Secondly, the courts have over time developed exceptions and increased the scope for those exceptions to apply. The nature of the exceptions suggests they have been developed to mitigate the potential unfairness the rule can create towards applicants.[106] Nevertheless, it remains the case in motion proceedings that if a respondent puts up a credible version of facts that contradicts those put forward by the applicant, matters will be determined on the basis of the version put forward by the respondent.

[127] The ethos underlying the Constitution has often been quoted in a famous dictum by Mahomed J in *Makwanyane*.[107] There, he stated the following:

> "The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution."[108]

[128] That ethos requires courts over time to consider and re-think all the legal rules and principles South Africa inherited from the pre-constitutional era. Section 39(2) of

[105] Id.

[106] There is also very little explicit justification in the case law for why the exceptions were introduced and so it is necessary to infer that justification from the content of the exceptions.

[107] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

[108] Id at para 262.

the Constitution enshrines that duty: "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." One of the central features of the spirit, purport and objects of the Bill of Rights was famously captured by Professor Etienne Mureinik when he articulated the notion that South Africa has moved from a culture where authority was to be respected for its own sake to a culture of justification, where every exercise of power must be capable of justification to the people of South Africa.[109]

[129] In giving effect to this culture of justification, the central question, in the current context, is what is the underlying basis for preferring the version of the respondent when deciding disputes of fact in motion proceedings? The first judgment suggests a possible line of reasoning: that "[m]otion proceedings are unsuitable to decide probabilities. In instances where final relief is sought, motion proceedings are aimed at resolving issues of law based on common cause facts."[110] Yet, this does not adequately provide a justification for the *Plascon-Evans* rule. If motion proceedings are not suitable for deciding probabilities, why should the respondent's version be preferred where there is a dispute of fact? If they can only be used to resolve issues of law, then one will only be able to utilise them where the facts are common cause. Yet, the *Plascon-Evans* rule precisely regulates circumstances where disputes of fact arise in motion proceedings. Prima facie, that approach calls for justification given that litigants have a right in section 34 of the Constitution to have disputes resolved in a "fair" public hearing before a court.[111] Fairness would seem to require, as a starting point, that, when adjudicating a dispute of fact, neither the applicant's nor respondent's version is accorded any

[109] Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *South African Journal on Human Rights* at 31-3.

[110] First judgment at [95].

[111] Section 34 of the Constitution states:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

automatic preference.[112] The problem then remains: why prefer the version of the respondent?

[130] The only justification I have been able to find in our jurisprudence in the limited time available for preparing this judgment is that put forward by O'Regan J in *Rail Commuters*.[113] The main focus of the discussion in the relevant section of that case was whether the Constitutional Court had jurisdiction to decide factual disputes where they are connected to constitutional issues. In finding that the Court does have such jurisdiction, O'Regan J then goes on to consider how disputes of fact are to be dealt with and affirms the applicability of the *Plascon-Evans* rule and its exceptions to constitutional matters. The justification she offers for applying the rule in these circumstances is the following: "[g]iven that it is the applicant who institutes proceedings, and who can therefore choose whether to proceed on motion or by way of summons, this rule restated and refined as it was in [*Plascon-Evans*] is a fair and equitable one".[114]

[131] The justification provided can be expanded upon as follows: individuals approaching a court have a choice between action and motion proceedings. They know that action proceedings are designed to address disputes of fact and motion proceedings to address questions of law. If they come to court knowing there is a dispute of fact and do so on the basis of motion proceedings, then they should bear the burden of their choice. The *Plascon-Evans* rule is justifiable as the applicant knows that, if they come to court on the basis of motion proceedings, then genuine disputes of fact will be decided in favour of the respondent if they place a version before that court that is not far-fetched and untenable.

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[112] The first judgment effectively admits the concern raised by the rule in [97] and suggests, effectively, the answer lies in procedural mechanisms such as calling for oral evidence or amplifying the papers that judges can utilise to avoid undue prejudice to applicants. The first judgment also highlights the role of the exceptions in averting unfairness. However, the very fact that judges have to utilise these devices to ensure fairness to applicants, in fact, corroborates the concern I have sought to highlight – namely, that preferring the version of respondents is problematic in the circumstances I identify and can result in unfairness.

[113] *Rail Commuters* above n 71.

[114] Id at para 53.

[132] That justification has serious shortcomings: for instance, it assumes that applicants know, in advance of bringing motion proceedings, that a dispute of fact will arise (which may not be true). However, in the current context, what is critical is that it presumes that there is a choice to be made by the applicant and an alternative procedure for determining the dispute of fact is available. If no such alternative procedure is available, there are no good grounds to apply the *Plascon-Evans* rule.

[133] There are a range of circumstances that arise where no alternative procedure exists. The first example of this kind are situations of great urgency which may only allow for instituting motion proceedings. In 2005, such a case arose in *Mahala*.[115] That case dealt with a different context to the present, but involved an urgent determination as to whether a common law wife or mother was entitled to bury the deceased the next day. A dispute of fact arose as to whether the deceased was indeed married to the applicant and whether he was close to his mother. Erasmus J recognised that there was no time to refer the matter to oral evidence. He held that the matter must be decided on affidavit and that usually he would have had to apply the *Plascon-Evans* rule. He stated, however, that "[t]hat approach is possibly not entirely satisfactory for a matter such as the present".[116] He held that a more "robust" approach may be required and that the court should then grant the order if the court is satisfied that there is "sufficient clarity regarding the issues to be resolved".[117] The Court proceeded to evaluate the evidence and decided in favour of the applicant.[118]

[115] *Mahala v Nkombombini* 2006 (5) SA 524 (SE).

[116] Id at para 9.

[117] Id.

[118] Counsel for the respondent, Mr Bishop, submitted in the hearing that this was not a true departure from the *Plascon-Evans* rule as the respondent had put up a bare denial to the allegation that she was aware of the marriage of the deceased to the applicant. That did not constitute a genuine, bona fide dispute of fact. That may be correct in the particular circumstances of that case though, in *Wightman* (above n 72), the Court recognised that a bare denial could be sufficient depending on the circumstances. Moreover, counsel's submission does not answer the question of whether it would have been fair automatically to prefer the respondent's version had she put up a version that could have been said to constitute a genuine, bona fide dispute of fact. Erasmus J's reservations about the application of the rule in these circumstances, in my view, are well-founded.

[134] Professor Danie Brand, in an illuminating article,[119] provides another example of urgent circumstances where the application of the *Plascon-Evans* rule can lead to injustice and where no alternative procedure is available. He considers a situation that arose in the case of *Schubart Park*, where individuals sought to resist an eviction in the face of state authorities who claimed that the buildings in which they lived were unsafe.[120] In that case, the applicants launched urgent motion proceedings claiming, based on the *mandament van spolie*, that their possession of their homes should not be disturbed. Professor Brand points out that the *Plascon-Evans* rule requires that the state authorities' version be preferred and makes it particularly difficult for poor litigants without access to resources to prove their case and defend their rights.[121]

[135] In the High Court in *Schubart Park*,[122] the application of the rule was fatal to the applicants and resulted in their continuing eviction from their homes. Professor Brand points out too how this position exacerbates the predicament of applicants on appeal.[123] Since appellate courts generally accept the factual findings in the courts below and the Constitutional Court may refuse to accept jurisdiction over pure disputes of fact, the application of *Plascon-Evans* in the lower courts may scupper any effort to appeal. That too happened in *Schubart Park* where this Court refused an application to adduce further evidence and the matter was decided on the version put forward by the City.[124] The *Plascon-Evans* rule can thus load the dice against those who are poor, most vulnerable and wish to give effect to their rights.

[136] A second set of circumstances where the applicant has no choice but to institute motion proceedings is where the rules of a particular court only make provision for

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[119] Brand "Law and the City: Keeping the Poor on the Margins" (2014) *De Jure* 189.

[120] *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* [2012] ZACC 26; 2013 (1) SA 323 (CC); 2013 (1) BCLR 68 (CC).

[121] Brand above n 119 at 197.

[122] *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2011 JDR 1288 (GNP).

[123] Brand above n 119 at 198.

[124] That meant that, although relatively successful in the Constitutional Court in having the appeal upheld, the Court accepted that the applicants could not return immediately to their homes as the buildings were found, on the basis of the state's version, to be unsafe.

instituting motion proceedings. Proceedings before the Electoral Court, such as occurred in this matter, are only brought on motion proceedings. The Electoral Commission Act outlines the powers and functions of the Electoral Court. Section 20(1) reads as follows:

> "(a) The Electoral Court may review any decision of the Commission relating to an electoral matter.
> (b) Any such review shall be conducted on an urgent basis and be disposed of as expeditiously as possible."

[137] Section 20(2) provides as follows:

> "(a) The Electoral Court may hear and determine an appeal against any decision of the Commission only in so far as such decision relates to the interpretation of any law or any other matter for which an appeal is provided by law.
> (b) No such appeal may be heard save with the prior leave of the chairperson of the Electoral Court granted on application within the period and in the manner determined by that Court.
> (c) Such an appeal shall be heard, considered and summarily determined upon written submissions submitted within three days after leave to appeal was granted in terms of paragraph (b)."

[138] What is clear from these provisions is that, in the case of a review, it will be conducted on an urgent basis and is brought through lodging written submissions. A similar point applies to appeals which must be brought on application and involve speedy decisions on the basis of written submissions. The Rules of the Electoral Court[125] allow for a referral by the Court to oral evidence (rule 11(2)(e)) and a trial (rule 11(2)(f)). They do not, however, permit an applicant to bring a matter by way of action proceedings, thus negating the justification put forward by O'Regan J for applying the *Plascon-Evans* rule. Conducting a trial will also be difficult given the urgency attached to electoral reviews and appeals when they relate to an impending

[125] Rules regulating the conduct of the proceedings of the Electoral Court, GN R794 *GG* 18908, 15 May 1998.

election. That is borne out by the fact that all three present applications before us have been dealt with purely on the basis of written submissions.[126]

[139] The question then becomes whether it is fair to apply the *Plascon-Evans* rule in these circumstances and, effectively, to load the dice against the applicant. In my view, it is not. It is clear that applicants in electoral matters have no choice but to proceed by way of motion proceedings: the rationale for the application of the rule thus does not apply in these circumstances. Electoral disputes will often involve individuals or parties who are subject to the exercise of state power by the Commission. Such individuals or parties are seeking, in cases such as the present, to give effect to their centrally important political rights. It is thus hard to see what rationale exists in such cases for preferring the version of the respondent. Doing so, places a major hurdle in front of individuals or organisations seeking to vindicate their constitutional rights.[127] Courts, in general, must be attentive to the way in which procedural rules can effectively hamper the exercise of substantive constitutional rights.[128] The application of the *Plascon-Evans* rule in circumstances such as the present does exactly that.

[140] Indeed, it may well be that, when we are dealing with applications relating to the enforcement of fundamental rights where action proceedings are otherwise not available, the application of the *Plascon-Evans* rule is particularly ill-conceived. If we accept that fundamental rights are in large measure meant to protect vulnerable

[126] The same is true for many other leave to appeal applications this Court received from judgments of the Electoral Court which were dealt with purely on the basis of written submissions.

[127] The examples brought in the first judgment actually bear out this point. In *Democratic Alliance* (above n 77), the *Plascon-Evans* rule was used precisely in favour of upholding the version of the Commission that it had not acted improperly in extending the cut-off date for the submission of candidates (and against the allegations of the political parties). In *Mtolo* (above n 77), the Court claimed to be applying one of the exceptions to the rule – as mentioned, these can mitigate but not eliminate the potential unfairness I identify. It could also be argued that the approach of the Court in *Mtolo* involved circumventing the rule where it did not accord with what justice required, a clear indication that there is a problem with the general rule.

[128] In the context of socio-economic rights, Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta & Co Ltd, Cape Town 2010) at 203, has drawn attention to the way in which the placement of a burden to present evidence and arguments "in relation to the reasonableness of its measures on the State may well be critical in ensuring that socio-economic rights litigation is practically accessible to disadvantaged groups." See also Quinot "Substantive Reasoning in Administrative Law Adjudication" (2010) 3 *Constitutional Court Review* 111 at 116-7.

individuals against the power of the state and powerful private actors, why automatically prefer the version of those who are most powerful? This approach undermines the enforcement of fundamental rights – the most important normative commitments underlying South African constitutional democracy – and can undermine the control of public power and powerful private actors.[129]

[141] I therefore conclude that there is no good reason to apply the *Plascon-Evans* rule where alternative action proceedings cannot be instituted by an applicant – such as in the circumstances of this case. Dodson SC, in a comment on *Mahala*,[130] raises a wider question as to whether the rule should be jettisoned altogether given the burden it places on applicants and whether it is in fact constitutional:[131] it is not necessary, in this case, to determine those broader questions which can be left for future judicial and academic discussion.

[142] In the present case, on the approach I adopt, the court will determine the factual dispute based on the common cause facts and the probabilities.[132] In this case, it was common cause that there were complaints to the Commission (which it admitted). In the evidence submitted in Labour Party, the Commission admitted that 18 of the unrepresented parties, that is 35% of the total that registered on OCNS, will not be able to compete.

[143] The dispute of fact arose around whether or not the OCNS worked at the relevant time and whether the problems complained of by ACT were real. The Commission put up evidence that its service provider demonstrated that there was 100% uptime of the portal. Yet, we have three parties that complained of similar problems that placed

[129] I do not deny that this Court has applied the *Plascon-Evans* rule in disputes of fact relating to fundamental rights and constitutional issues – the question I raise is whether it should continue to do so, particularly in circumstances where the justification underlying the rule does not apply.

[130] *Mahala* above n 115.

[131] Dodson "Civil and Constitutional Procedure and Jurisdiction" (2006) *Annual Survey of South African Law* 763.

[132] Where possible and the circumstances allow, I agree that, where disputes of fact cannot be readily resolved on the papers, they should be referred to oral evidence.

affidavits before this Court. If we consider the version of additional parties who filed affidavits (as I suggest is permissible below), there was corroboration of these claims by 10 parties that experienced the same difficulties with the system.

[144] In the oral hearing, counsel for the Commission conceded that not all these parties could be said to be lying and that there could have been some glitches with the system. It was also consistent with the objective evidence that the website, for instance, may have slowed down with a large number of users uploading information at the last minute and caused some of the problems – "freezing", "hanging" – complained of by the applicant. The fact that some parties succeeded does not indicate that they had no difficulties nor that their being on the internet itself did not contribute to the malfunctioning of the system. Problems such as server upload difficulties and database bottlenecking are well-known and most internet users at some point have experienced them.[133] I find it therefore difficult to accept the conclusion of the first judgment that the OCNS simply functioned perfectly. The sheer volume of complaints points to the contrary conclusion that many parties faced problems utilising the system on 8 March 2024.[134] The question then that arises is, in the face of all these complaints, did the Commission behave appropriately in response? It is to that question that I now turn.

The Commission's failure to consider amending the Election Timetable

[145] When ACT failed to submit its information relating to candidate lists on time, it wrote to the Commission indicating that it had experienced "technical glitches with the online portal, with the system kicking us out every time we tried to transact." Similar complaints were sent to the Commission in the other two matters before us. The Commission also acknowledges it received complaints without specifying the number.

[133] There is vast literature on this topic which is mostly technical in nature: see, for an example, Schroeder and Harchol-Balter "Web Servers under Overload: How Scheduling Can Help" (2006) 6 *ACM Transactions on Internet Technology* 20.

[134] The ACT also states on affidavit that it was using new laptops and a stable and high-speed internet connection.

What then was the response of the Commission to the complaints it received? The letters it sent to ACT provide an indication of how it responded.

[146] The Commission correctly indicated that it had no discretion to condone non-compliance with the Election Timetable. It then stated that it was unaware of any technical glitches with its systems "which prejudiced any political parties or independent candidates throughout the process and such allegations are denied accordingly." In response to a lawyer's letter from ACT, it repeated the denial of knowledge of technical glitches. Yet, that knowledge was being placed before it by not just one party but multiple parties. It not only denied knowledge but did not indicate any steps it would take to investigate the matter or to consider its impact on free and fair elections, and, consequently, whether the Election Timetable should be amended.

[147] The applicant alleges that the Commission effectively "decided" not to exercise its power to amend the Election Timetable in terms of section 20(2)(a) of the Electoral Act.[135] The Commission states that it never made such a decision. Indeed, its correspondence suggests that its responses simply required adherence to the Election Timetable without any mention that it was even considering utilising its powers in terms of section 20(2)(a). In terms of the definition of administrative action in section 1 of PAJA, it is not only the taking of a decision that is reviewable but also the failure to take a decision. It is evident from the Commission's own submissions that it failed even to consider amending the Election Timetable, despite having received numerous complaints about the functioning of the online portal which many parties claimed prevented them from complying with the deadline. The question is whether such a failure to take a decision in these circumstances can be reviewed under any of the grounds listed in section 6(2) of PAJA.

[135] Electoral Court Judgment above n 21 at para 14.

[148] Relevant to this enquiry is the notion of "responsiveness" in our Constitution.[136] During the transition to our democratic order, Professor Mureinik claimed that "[t]he best that democracy can be is a system in which government responds to the governed."[137] Voices such as his led to the value of responsiveness being enshrined in the foundational values of the Constitution which recognises in section 1(d) the importance of: "Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness." Section 195(1)(e) of the Constitution which is applicable to all spheres of government and organs of state requires that "[p]eople's needs must be responded to". Responsiveness, arguably, underlies the duty of the government to provide reasons for its decisions.[138]

[149] This Court has further recognised the importance of responsiveness in several rulings. In *Doctors for Life*,[139] Ngcobo J identified responsiveness as part of the notion of participatory democracy:

> "Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the Preamble to the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process."[140]

[136] This idea has unfortunately received too little attention. For a welcome exception see Govender "Power and Constraints in the Constitution of the Republic of South Africa 1996" (2013) 13 *African Human Rights Law Journal* 82.

[137] Mureinik "Reconsidering Review: Participation and Accountability" (1993) *Acta Juridica* 35 at 35.

[138] Id at 40.

[139] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*).

[140] Id at para 111.

[150] In elaborating upon this dictum in the context of a dispute concerning a cross-border municipality where the voices of the people in that municipality had been ignored, this Court stated the following in *Merafong*:[141]

> "To say that the views expressed during a process of public participation are not binding when they conflict with Government's mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public."[142]

[151] In *Joseph*,[143] this Court also stated the following: "[t]aken together, the values and principles described above require government to act in a manner that is responsive, respectful and fair when fulfilling its constitutional and statutory obligations."[144]

[152] The duty to be responsive has also played a role in electoral matters. For instance, in the case of *Johnson*,[145] the Electoral Court was seized with a matter where independent candidates requested assistance from a Commission official to indicate whether they had complied with the requirements to stand for elections. That Court held that the duties of the Commission included:

> "a duty to assist voters and candidates; such assistance should not be limited to ensuring that participants have sufficient knowledge of the electoral process; it should promote a culture of helpfulness to all involved in elections; it should display willingness to assist those members of the public who wish to participate in elections – such assistance not being restricted to voters alone but also to candidates."[146]

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[141] *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC).

[142] Id at para 51.

[143] *Joseph v City of Johannesburg* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC).

[144] Id at para 46.

[145] *Johnson v Electoral Commission* [2013] ZAEC 2; 2014 (1) SA 71 (EC).

[146] Id at para 31.

The failure of the Commission to assist the applicants led to the by-election being postponed.

[153] In *Independent Party*,[147] the applicants lodged an objection with the Commission regarding irregularities at certain voting stations. They received no response. They followed up and were informed by an official that their objection had been rejected by an administrative decision due to its being filed late. The Electoral Court held that there was a right enshrined in the relevant statute for individuals to submit objections to the Commission. The Commission had a concomitant obligation to consider, determine and apply its mind to the objections it received. The Court found in favour of the applicants and held that the Commission's conduct was unlawful and unreasonable.

[154] Responsiveness is important for, at least, three vital reasons.[148] The first is instrumental, and relates to enhancing decision-making: taking into account feedback and input from individuals or organisations in the political community helps government functionaries to recognise flaws in their decision-making, to correct errors and to ensure that the purposes of a state institution are attained.[149]

[155] The second is, what we may term dignitarian: as Ngcobo J recognised, participation enhances "the civic dignity of those who participate by enabling their voices to be heard and taken account of."[150] This rationale focuses on the importance of recognising individuals as having worth, who count in decision-making. The well-known philosopher Professor Jeremy Waldron puts the point as follows:

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[147] *Independent Party v Electoral Commission* [2001] ZAEC 1; [2001] 3 All SA (EC).

[148] I am influenced by an impressive article by Meyerson "The Moral Justification for the Right to Make Full Answer and Defence" (2015) 35 *Oxford Journal of Legal Studies* 237. Meyerson's concern is with the underlying justification for the right of a defendant in criminal law proceedings to participate in his or her trial and to be heard. However, the approaches she identifies provide a more general philosophical underpinning for procedural justice. For an application of this approach in the South African framework, see Cachalia "Exploring the relationship between violent protest and procedural injustice in South Africa's democratic transition" in Bilchitz and Cachalia *Transitional Justice, Distributive Justice and Transformative Constitutionalism* (Oxford University Press, 2023) at 363.

[149] Mureinik "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 *South African Journal on Human Rights* 464 at 471.

[150] *Doctors for Life* above n 139 at para 115.

> "Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such, it embodies a crucial dignitarian idea – respecting the dignity of those to whom the norms are applied as *beings capable of explaining themselves*."[151]

[156] The final underlying justification is relational[152] and links to the African ethos of *ubuntu*.[153] The focus here is on the quality of the relationships in society and the need to encourage harmony and respectful engagements between individuals and the state as well as between individuals themselves. It is with deep sadness that I note the recent passing of retired Justice Yvonne Mokgoro and it is a tribute to her legacy to refer to her ground-breaking insistence on the importance of the value of *ubuntu* in the new constitutional order.[154] Building warm, connected relationships between individuals and government institutions requires an effort on the part of the government to understand the perspectives of individuals and engage with them about problems that they may face.

[157] I have mentioned that responsiveness plays an important role in the duty to give reasons. Yet, it is also strongly connected to some of the particular grounds for a PAJA review. I will now explore three applicable grounds of review relating to ACT.

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[151] Waldron "The Rule of Law and the Importance of Procedure" (2011) 50 *NOMOS: American Society for Political and Legal Philosophy* 3 at 16.

[152] Botha develops a relational account of rights in "Metaphoric Reasoning and Transformative Constitutionalism (Part 2)" (2003) 1 *Journal of South African Law* 20 at 23.

[153] Tutu *No Future Without Forgiveness* (Ebury Publishing, 1999) at 35, explains "[s]ocial harmony is for us the *summu bonum* – the greatest good. Anything that subverts, or undermines this sought-after good, is to be avoided like the plague." The connection between *ubuntu* and the centrality of acting in ways that advance harmonious relationships is also explored in, amongst other works, Metz "Ubuntu as a Moral Theory and Human Rights in South Africa" (2011) 11 *African Human Rights Law Journal* at 537-541; Cornell and Muvangua *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (Fordham University Press, 2012) and Tamale *Decolonisation and Afro-Feminism* (2020) at 229-30.

[154] *Makwanyane* above n 107 at paras 306-7. For later uses of *ubuntu* in our jurisprudence, see, for instance, *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at para 68 and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 38; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at para 71.

[158] The failure to consider complaints or the experience of the public may well lead to a failure to make a decision – which is itself a ground of review under section 6(2)(g) of PAJA.[155] Professors Hoexter and Penfold write that:

> "[a]t common law, powers conferred upon administrators are inevitably accompanied by an implied duty to exercise the power . . . The PAJA perpetuates the common law position . . . by recognising that failure to take a decision is a ground of review."[156]

[159] For our purposes, the present alleged failure to take a decision related to section 20(2)(a) of the Electoral Act which provides: "The Commission may amend the [E]lection [T]imetable by notice in the Government Gazette – if it considers it necessary for a free and fair election". This provision grants the power to the Commission to amend the election timetable if it considers it necessary to do so for purposes of conducting a free and fair election.

[160] Multiple complaints about the functioning of the OCNS should have at least generated a concern on the part of the Commission that their internet system could have undermined the ability of these parties to participate in the election. That, in turn, could impact on their section 19 rights and whether the election was free and fair. There is no indication from the correspondence placed before the Court that the Commission applied its mind at all to amending the Election Timetable upon receipt of those multiple complaints. Basic responsive governance would have required an internal discussion within the Commission about whether an investigation should be conducted and consideration given to amending the timetable. In the absence of any evidence that such a process took place, the failure to take these steps in this regard did not conform to the duties our law places on the Commission and, therefore, the review on this ground must succeed.

[155] See, for instance, *Littlewood v Minister of Home Affairs* [2005] ZASCA 10; 2006 (3) SA 474 (SCA) at para 17.

[156] Hoexter and Penfold *Administrative Law in South Africa* 3 ed (Juta & Co Ltd, Cape Town 2021) at 433.

[161] For similar reasons, the decision falls foul of section 6(2)(f)(ii)(aa) of PAJA on grounds of not being rationally connected to the purpose of the power in section 20(2)(a) of the Electoral Act. That section deliberately grants flexibility to the Commission to amend the timetable if necessary for a free and fair election. The right to free and fair elections is included in section 19(2) of the Constitution. Inextricably connected to that right is the constitutional right of every adult citizen to vote (section 19(3)(a)) and to stand for public office (section 19(3)(b)).[157] In *New National Party*,[158] this Court recognised that free and fair elections of necessity require the establishment of fair processes to regulate voting. In discussing the duties of Parliament in this regard, this Court stated the following:

> "Parliament must ensure that people who would otherwise be eligible to vote are able to do so if they want to vote and if they take reasonable steps in pursuit of the right to vote. More cannot be expected of Parliament. It follows that an impermissible consequence will ensue if those who wish to vote and who take reasonable steps in pursuit of the right, are unable to do so.
>
> . . .
>
> Parliament is obliged to provide for the machinery, mechanism or process that is reasonably capable of achieving the goal of ensuring that all persons who want to vote, and who take reasonable steps in pursuit of that right, are able to do so. I conclude, therefore, that the Act would infringe the right to vote if it is shown that, as at the date of the adoption of the measure, its probable consequence would be that those who want to vote would not have been able to do so, even though they acted reasonably in pursuit of the right."[159]

[162] In this Court's recent *One Movement South Africa* judgment,[160] this standard was held to apply to the right to stand for public office. The majority judgment held that the

[157] *New National Party* above n 55 at para 12.

[158] Id.

[159] Id at paras 21 and 23.

[160] *One Movement South Africa NPC v President of the Republic of South Africa* [2023] ZACC 42; 2024 (2) SA 148 (CC); 2024 (3) BCLR 364 (CC).

standard applied in circumstances where "the government takes positive steps to give effect to a right and thereby creates reciprocal duties."[161]

[163] The establishment of an internet portal was designed to help facilitate the exercise of the right to stand in an election for public office. The question therefore that should have been uppermost in the mind of the Commission was whether individuals were able to utilise the site if they acted reasonably. Determining an answer to that question is not a simple one and requires considering both possible failures on the part of the Commission as well as the parties themselves. Clearly relevant in this regard were the multiple complaints received and the number of parties that failed to comply with the requirements. The minority judgment in the Electoral Court was correct to draw attention to the fact that the circumstances in which such an enquiry must be conducted are those of present-day South Africa where there is a digital divide and many people lack full digital literacy.[162]

[164] The Commission submits persuasively that the fact that an individual or organisation complains does not determine whether there is merit to their complaint. Nevertheless, a responsive state institution does not simply dismiss complaints that relate to the very exercise of fundamental rights. Indeed, if their complaints were valid, then the functioning of the OCNS could have led to unfair exclusions from participation which would have infringed their right to stand for public office. The seriousness of the impact of the complaints on individual rights, and the concomitant ability to conduct free and fair elections should have led the Commission to investigate the complaints and consider amending the timetable. The failure to do so was irrational given its primary goal of ensuring a free and fair election. If it had responded quickly to the complaints and decided that it was necessary to amend the timetable, that could have been effected timeously without having to postpone the election.

[161] Id at para 259.

[162] *Electoral Court Judgment* above n 21 at paras 52-3.

[165] A further ground of review is relevant and that is that the responses of the Commission demonstrate an unacceptable level of rigidity. Professors Hoexter and Penfold write that "blind or rigid adherence to policies or guidelines is unacceptable in law, for it may 'preclude the person exercising the discretion from bringing his mind to bear in a real sense on the particular circumstances of each and every individual case coming up for decision'".[163] This is an example of what they term fettering discretion by rigidity which is a ground of review that falls under section 6(2)(i) of PAJA.[164]

[166] Clearly, the Commission should not be expected to amend the Election Timetable without a strong basis for doing so – the test is whether, doing so, is truly necessary for a free and fair election. However, it is granted a discretion to amend the timetable for good reason – there may be circumstances that arise that put a free and fair election in jeopardy. Where it receives multiple complaints about an internet system which has an impact on the ability of individuals or political parties to exercise their political rights, it, at a minimum, has a duty to consider the validity of the complaints and their impact on a free and fair election. The impression created by the Commission's responses is that it was dismissive and simply denied any truth in the allegations by the applicant. It was determined to push ahead with the elections no matter what without considering if its own systems had prevented the applicant from participating. That is unacceptable – with the clear evidence before it, it had a duty to exercise its discretion to investigate and consider the complaints and whether they justified amending the Election Timetable. Absolute rigidity is inconsistent with the responsiveness required of such an important organ of state.[165]

[167] I, therefore, conclude that the PAJA review succeeds on all the grounds discussed above and that the Commission had a duty to investigate and consider amending the Election Timetable in light of the multiple complaints received. The next

[163] Hoexter and Penfold above n 156 at 442, quoting *Richardson v Administrator Transvaal* 1957 (1) SA 521 (T).

[164] Id at 441.

[165] That rigidity also impacts on the reasonableness of the failure to investigate and consider amending the timetable in terms of section 6(2)(h) of PAJA. Given the existence of other grounds, I will not consider this ground in any further detail.

question then arises as to what would constitute an order that is just and equitable in terms of section 8 of PAJA.[166]

Just and equitable relief

[168] Determining what is just and equitable involves the exercise of a discretion and we are not bound by what the parties request or had requested in the lower courts.[167] That point is made clearly by the first judgment in relation to issue estoppel where it states "[t]his Court can grant relief beyond that sought in an applicant's notice of motion."[168] What constitutes just and equitable relief involves considering matters from the perspective of the applicant, the respondent as well as the wider public.

[169] The applicant no doubt would be delighted with an order remitting the matter to the Commission to consider whether to amend the Election Timetable. Relevant to whether the applicant should be granted such an order, however, is also the reasonableness of its own conduct and whether it bears part of the blame for not meeting the deadline. The first judgment has traversed some of the factors which point to the fact that the malfunctioning of the internet portal was not the sole reason for the failure of ACT to comply with the relevant requirements. In particular, an important dimension to consider is the fact that it was open to the applicant to deliver the candidate lists physically to the Commission's offices. The evidence demonstrated that the applicant was based in Johannesburg and only a half-hour drive from the Commission's head office. It does not appear far-fetched, in those circumstances, to require a reasonable political party faced with what it found to be insurmountable problems with the internet portal, to load its documents into a motor vehicle and submit them at the Commission's office.

[166] I have found the failure to take a decision was reviewable in terms of various grounds in section 6 of PAJA including section 6(2)(g) – consequently, both sections 8(1) and (2) are applicable. Both sections provide for a declaration of rights to be made.

[167] *Mhlope* above n 67 at para 83.

[168] First judgment at [87].

[170] The respondent has indicated that an order that required it potentially to amend the timetable at this point would also have severe consequences. The order would disrupt its own arrangements for the election and require it to open up a whole range of processes, which would require additional human resources. The budgetary implications it suggested were vast with much wasted expenditure and requiring an additional budget of over R500 million. It would also, it submitted, not be fair to the political parties who had complied. If we were to find in favour of the applicants, it submitted, we should simply grant a declaration of rights.

[171] Taking all these factors into account, in the circumstances, I would have granted leave to appeal and issued a declaration of rights.[169] O'Regan J in *Rail Commuters*, makes the following pertinent remarks about declaratory relief:

> "A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances."[170]

[172] A declaration of rights, in these circumstances, has the benefit of clarifying the legal position that the Commission has a duty to be responsive to political parties and that it must investigate and consider complaints that are made to it. In doing so, it must consider the validity of those complaints, the impact on the political rights of individuals and whether the elections would be free and fair if the timetable were not to be amended. That provides a determination of its duties, but does not create the deleterious consequences that would arise from setting aside the failure to make a decision at this time.

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[169] See, generally, Hoexter and Penfold above n 156 at 798-800.

[170] *Rail Commuters* above n 71 at para 107. This Court has also, for instance, in *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) only granted declaratory relief.

The admission of additional affidavits

[173] In both Labour Party and ACT, there were a number of unusual requests to admit additional affidavits. Rule 12 of the Rules of this Court explicitly contemplates a departure from ordinary procedures in urgent applications such as the present. In terms of rule 32, there is also a discretion of this Court to condone non-compliance with these rules. Given the importance of the factual disputes in this case, and the urgency with which filings had to take place, it seems to me a generous and less rigid approach is required in these circumstances. Provided no prejudice is caused to an opposing party, it is also to the benefit of this Court to have a full view of the factual issues that arise.

[174] Indeed, the instructive words of Madlanga J should be borne in mind when he considered this issue in *Eke*.[171] In that case, he stated the following:

> "Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said '(i)t is trite that the rules exist for the courts, and not the courts for the rules'".[172]

[175] In this light, I would like to consider the various requests. My Colleague Majiedt J is correct that, in direct access matters, the permissibility of filing a replying affidavit is contingent upon the directions provided by this Court. Given the directions issued did not provide for such an affidavit, the applicants should have launched a substantive application to justify filing such an affidavit. I disagree with my Colleague Majiedt J, however, that we are obliged to disregard the replying affidavit as a result. The Labour Party's request to file a replying affidavit is contained in the

[171] *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC).

[172] Id at para 39.

affidavit itself and it justifies its failure to launch a substantive application because of the urgency with which this matter was heard. The enquiry before us is whether, in terms of rule 32 of this Court's Rules, we should condone non-compliance with the rules in this instance. Since the replying affidavit takes the applicant's case no further, consists mostly of *ad seriatim* responses and also concerns matters that could all be dealt with adequately in written or oral argument, in my view, there is no good reason to justify its admission.

[176] The second request this Court had to consider is the Commission's request to admit a confirmatory affidavit from a company, Lockdown IT, which was contracted by the Commission to monitor the functioning of OCNS. The information contained in the affidavit is clearly of much relevance to the matter before us because it corroborates the information already placed by the Commission on the record before the Electoral Court regarding the website having 100% uptime. The affidavit explains what that means and what tests were done to monitor the website. It is hard therefore to see the prejudice to the applicant from admitting this affidavit: they were already aware of these claims by the Commission in the Electoral Court, and it was also not their case that the website crashed or was completely dysfunctional.[173] The affidavit is of a scientific or technical nature and capable of easy verification: in fact, this Court was provided with the data on the basis of which the claims in the confirmatory affidavit were made and so it is difficult to see on what basis it could be contested. I would therefore have admitted this affidavit.

[177] The last request I shall address is the admission of the "supporting" or "answering affidavits" filed by many of the other unrepresented political parties in Labour Party. In addition to the Commission, Labour Party joined roughly 362 additional unrepresented political parties as respondents. Some of those parties filed answering affidavits which provide evidence supporting the claim of Labour Party that there had been technical glitches with OCNS. For instance, 10 of these parties said

[173] As indicated above, their case is rather that the website malfunctioned on an ad hoc basis, slowing down and freezing temporarily. The Lockdown IT report does not exclude that possibility.

that the portal malfunctioned or froze on an ad hoc basis, six alleged the portal payment function did not work properly and seven alleged the portal malfunctioned when uploading documents and signatures.

[178] My Colleague Majiedt J has decided not to admit those affidavits on the basis that it is prejudicial to the Commission to have to respond to multiple affidavits by co-respondents who "make common cause with the applicants but do not come out and assert that they too are applicants and seek relief as applicants".[174] He further cites the dubious evidential value of the affidavits as reasons why they stand to be disregarded.

[179] The admission of affidavits by co-respondents supporting the case of applicants is a matter that has attracted several recent judicial decisions. *Minerals Council*[175] provides a recent illustration of the issues that arise in this regard. That case dealt with an application to determine the legal status of the 2018 Mining Charter – as either law or policy – which was important to clarify the framework within which rights-bearers could exercise their rights as well as the limitations on the regulatory powers of the Minister of Mineral Resources and Energy (Minister). The application was brought by the Minerals Council of South Africa against the Minister. A prior hearing ordered the joinder of three communities affected by the mining operations, three organisations who advocated for the rights of those communities and two trade unions. It is clear, in this case, that these additional respondents had a legal interest in the matter but that they did not have an identity of interests with the Minister. This is not, necessarily, an unusual situation. It is often the case, for instance, that it is necessary to join different levels of government in a matter but the approach of the provincial government may differ from that of the national government.

[180] In *Minerals Council*, the respondents from local communities filed answering affidavits. Those affidavits did not oppose the relief sought by the applicant but sought

[174] First judgment at [78].

[175] *Minerals Council of South Africa v Minister of Mineral Resources and Energy* 2022 (1) SA 535 (GP).

additional relief on other grounds including the review and setting aside of the Mining Charter completely. The Full Court found that the respondents had been correctly joined in the matter given that they stood to lose certain rights if the applicant's relief was granted. Once they were joined, the Court states the following about what they were entitled to do:

> "They were each then entitled to file a notice of intention to oppose and thereafter an answering affidavit. Their joinder did not, however, entitle them to mount a collateral attack on the Minister on *grounds different from those relied upon by the Minerals Council*."[176] (Emphasis added.)

[181] It is no doubt correct that a respondent cannot seek different relief to the applicant without bringing its own application or counter-application. However, I do not read *Minerals Council* to prevent the additional co-respondents in their answering affidavits from adducing arguments or evidence that support the applicant's case. If we accept that the co-respondents had to be joined on the basis that they had an important legal interest in the matter, it is undesirable to force them into a choice between supporting the applicant or abiding by the ruling. A respondent that has an interest in the matter should be entitled to respond in the way which reflects their interests. Simply supporting the case of the applicant with confirmatory claims is unobjectionable.

[182] In *Kruger*[177] too, a co-respondent was joined to the matter who supported the case of the applicant. As is made clear in Waglay JP's judgment:

> "[I]ts *involvement was not limited to placing evidence* before the court but it became involved as if it was an applicant in the proceedings, arguing the case of the said appellants and asking for the relief sought by the said appellants."[178] (Emphasis added.)

[176] Id at para 62.

[177] *Kruger v Aciel Geomatics (Pty) Ltd* [2016] ZALAC 92; (2016) 37 ILJ 2567 (LAC).

[178] Id at para 6.

[183] From this sentence, it is clear that Waglay JP did not have an objection to placing evidence before the Court by the co-respondent. Instead, the problem arose from the fact that the co-respondent sought the relief claimed by the applicant and argued the case as a co-applicant. That impression is bolstered by the following claim:

> "Once GSA [the co-respondent] sought the relief asked for by the said appellants *it was no longer placing evidence before the court [of first instance]*, it was making itself an applicant in the proceedings."[179] (Emphasis added.)

[184] What these cases establish is that it is impermissible for a respondent to try to become an applicant via the backdoor: simply placing evidence before the Court which supports the applicant's case is not. A contrary view on this same point was expressed in *African Transformation Movement*.[180] The Full Court in that case held the following:

> "There is no provision in the rules for a respondent in motion proceedings to deliver supporting papers thereby making itself in effect a co-applicant. If a respondent wishes to be a principal party in obtaining the relief sought by the applicant, it should apply to be joined as a co-applicant so that the other respondents in the matter can answer the case put up by it and so that the exchange of papers and subsequent hearing can proceed in the structured manner contemplated by the rules."[181]

[185] I recognise that, in some sense, these conflicting decisions arise from a gap in the Uniform Rules of Court.[182] As *Minerals Council* indicates, all parties with a legal interest in the matter should be included as respondents.[183] Yet, as they stand at present, rule 6(5)(c) and (d) of the Uniform Rules of Court appear only to contemplate the filing

[179] Id at para 11.

[180] *African Transformation Movement v Speaker of the National Assembly* [2023] ZAWCHC 101 [2023] 3 All SA 58 (WCC).

[181] Id at para 77.

[182] The gap would be best addressed by an amendment to these Rules to address the situation described in the text above.

[183] *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 168–70. This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions.

of an answering affidavit if one opposes the order sought in the notice of motion.[184] A similar provision is included in rule 11(3) of the Rules of this Court. The difficulty is that one may have a legal interest in the matter and support the relief sought by the applicant without wishing to become an applicant oneself.

[186] Adopting the approach articulated in *African Transformation Movement*, would confront a respondent with an interest in the matter with a Hobson's choice: either they abide by the decision of the court or they seek to join the matter as an applicant themselves or issue a counter-application. However, the co-respondents may have cogent reasons for supporting the relief sought by the applicant but not wishing themselves to become co-applicants. A pertinent example would be where an impecunious individual or community may have a legal interest in the matter but would not themselves have approached the court. That may be for a range of reasons: it could be that the relief would be advantageous but it is not a pressing matter on which they feel compelled to litigate; it could be that they lack the resources to become co-applicants; or, alternatively, that they are deterred from launching litigation as they do not wish to be mulcted with an adverse costs order if the claim is unsuccessful.[185]

[187] Moreover, it is also clear that the rules require joining different levels of government where the validity of a law is challenged which they administer.[186] It would be undesirable to force different branches of government to oppose such an application where they in fact have clear information as to why that law should be invalid even though they are not seeking that relief themselves.

[188] It is clearly important for a respondent opposing the order sought by an applicant to have an opportunity to respond to any arguments or evidence placed before a court by a co-respondent. At the hearing, counsel for Labour Party made the good point that

[184] *African Transformation Movement* above n 180 at para 76.

[185] The example highlights the fact that not every respondent which has a legal interest in a matter may have the resources to become an applicant. In developing procedural rules, courts should err in favour of enabling access to justice particularly in a country with such a large inequality of resources as our own.

[186] Rule 10A of the Uniform Rules of Court.

the way to address this problem would be for a court to allow the filing of a supplementary affidavit by a respondent who wishes to place before the court additional submissions to respond to adverse answering affidavits filed by a co-respondent. This Court has the discretion to allow for the filing of such a supplementary affidavit where required.[187]

[189] In addressing the circumstances of co-respondents who wish to support the case of applicants, I wish to refer once more to the words of Madlanga J in *Eke*:[188]

> "Under our constitutional dispensation, the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to 'secure the inexpensive and expeditious completion of litigation and . . . to further the administration of justice'. I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. In terms of this power, the High Court has always been able to regulate its own proceedings for a number of reasons, including catering for circumstances not adequately covered by the Uniform Rules [of Court], and generally ensuring the efficient administration of the courts' judicial functions."[189]

[190] It is clear that the Constitution in section 173 confers on superior courts the "inherent power to protect and regulate their own process". Moreover, rule 32 of the Rules of this Court allow the Court to "condone non-compliance with these rules" and to "give such directions in matters of practice, procedure and the disposal of any appeal, application or other matter as the Court or Chief Justice may consider just and expedient." In my view, the Court should utilise these powers to admit the affidavits of the additional unrepresented parties in Labour Party for the following reasons.

[191] The unrepresented political parties who were cited as co-respondents in this matter clearly did not wish to become applicants but had valuable information relating

[187] Rule 11(3)(c)(d) permits the lodging of further affidavits upon direction from the Chief Justice. Rule 32, as mentioned, provides a general discretion to condone non-compliance with the Rules and give directions in a manner the Court considers "just and expedient".

[188] *Eke* above n 171.

[189] Id at para 40.

to their own experience of the difficulties that they faced with the OCNS.[190] Moreover, in a matter such as this where the facts are centrally connected to the constitutional issues – whether the Election Timetable should have been amended and the effect on the applicant's section 19 rights – it is necessary to ensure that the Court has as full a picture as possible to make a determination. The evidential value of these claims is simply to confirm the difficulties faced by the applicant in relation to the OCNS – that, in itself, is extremely important in determining whether the Commission's failure to consider their complaints should be reviewed in terms of PAJA. To the extent that the co-respondents' claims simply support the evidence provided by the applicant about deficiencies in the OCNS, the Commission had a full opportunity to reply to these claims and in fact provided extensive evidence of its own in that regard (and, as already mentioned, I would have favoured admitting the additional evidence it provided given its relevance and importance to the determination of the issues before the Court). It is hard to conclude therefore that there is any prejudice or unfairness suffered by the Commission through the admission of these affidavits.

[192] For these reasons, I would therefore have found that the answering affidavits put forward by other unrepresented parties – to the extent that they provided evidence of their own experience with the OCNS – ought to have been admitted into evidence.

Conclusion

[193] In conclusion, this judgment, after examining the factual dispute between the parties, concludes that the review of the failure by the Commission to apply its mind to amending the Election Timetable must succeed. The ACT is entitled to a declaration that the Commission had a duty to investigate, upon receipt of the many complaints it received, whether the OCNS had placed impediments to the participation of those political parties – that had acted reasonably – in the election. After such an

[190] These are affidavits on oath confirming each party's experience of utilising the OCNS.

investigation, it then had a duty to consider whether to amend the Election Timetable in light of its findings.[191]

[191] This duty to consider would not have obliged the Commission to amend the timetable as the complaints may have lacked merit but it needed to be in a position to demonstrate that it had taken the complaints seriously and that it could provide reasons for not exercising its discretion to amend the timetable.

Case CCT 106/24

For the Applicant:	G Amm SC, L Peter and T Pooe instructed by Kruger Venter Incorporated
For the Respondent:	M Bishop, M Tsele and E Cohen instructed by Malatji and Company Attorneys

Case CCT 113/24

For the Applicant:	C D A Loxton SC and Z Bhero-Manentsa instructed by LDA Incorporated Attorneys
For the First Respondent:	M Bishop, M Tsele and E Cohen instructed by Moeti Kanyane Attorneys

Case CCT 114/24

For the Applicant:	M Ramaili SC, V Vilakazi and S Mbeki instructed by Moshoeshoe and Company Attorneys Incorporated
For the Respondent:	M Bishop, M Tsele and E Cohen instructed by Harris Nupen Molebatsi Incorporated