REPUBLIC OF SOUTH AFRICA

ELECTORAL COURT HELD AT DURBAN

CASE NO:001/13 IEC

REPORTABLE

In the matter between:

ANDRE DAWID LÖTTER **APPLICANT**

and

THE ELECTORAL COMMISSION **FIRST RESPONDENT**

AFRICAN NATIONAL CONGRESS **SECOND RESPONDENT**

INKATHA FREEDOM PARTY **THIRD RESPONDENT**

Neutral Citation: *Andre Dawid Lötter v The Electoral Commission and Others* (Case no 001/13 IEC) [2013] ZAEC 1 (7 May 2013)

Summary

Election – Law – Municipal by-elections – Section 17 of the Local Government Municipal Electoral Act 27 of 2000 – Timetable for management of elections by Electoral Commission – Strict adherence – Requirement to submit bank guaranteed check by first cut-off date – applicant submitted necessary documents within time limit but failed to supply a bank guaranteed cheque – Supply of cash instead – Constitutional values and dictates to facilitate the

participation in elections requires section 17 to be read widely and the cash tender should have been accepted as compliance with the requirements of s 17 – The tender of cash was evidence of the seriousness of the intention of contesting the election and therefore compliance with the provisions of s 17.

J U D G M E N T

WEPENER J: (MTHIYANE DP WITH ADV M M MTHEMBU CONCURRING)

[1] On 23 April 2013 this court made an order in the following terms:

1. The Independent Electoral Commission (first respondent) is ordered to request, as contemplated by Section 8 of the Local Government Municipal Electoral Act 27 of 2000, the Member of the Executive Council to postpone the by-election to be held on 24 April 2013 in Ward 22 of Abaqulusi Municipality, Kwazulu-Natal.

2. The Independent Electoral Commission is ordered to investigate the allegations of fraud raised in the application in relation to the voters' roll of Ward 22 of Abaqulusi Municipality, Kwazulu-Natal.

3. The Independent Electoral Commission is ordered to accept the nomination of Andre Dawid Lötter (the applicant) as a candidate in the municipal by-election to be held in Ward 22 of Abaqulusi Municipality, Kwazulu-Natal.

4. The Registrar of this court and the Registrar of the Kwazulu-Natal High Court, Durban, are authorised to communicate the contents of this order to the parties by e-mail or fax or such other method as may be appropriate.

[2] Owing to the urgency of the matter we did not give reasons for the order we made. We indicated then that reasons for it would be handed down in due course. This judgment embodies those reasons.

[3] The applicant who, describes himself as a politician and free-lance translator, resides in Ward 22 of the Abaqulusi Local Municipality (Ward 22). He is also a registered voter in the ward and was the former counsellor for the ward, having elected to resign from that office on 29 January 2013.

[4] The first respondent is the Independent Electoral Commission (the Commission), a body established pursuant to the Constitution, with its objects set out in s 4 of the Electoral Commission Act 51 of 1996 (Electoral Commission Act) as being to '*strengthen constitutional democracy and promote democratic electoral processes*'. The Constitution obliges the Commission to manage elections in accordance with national legislation, in this case the Local Government Municipal Electoral Act 27 of 2000 (the Municipal Electoral Act). The second and third respondents are the African National Congress (ANC) and the Inkatha Freedom Party (IFP), both respectively, registered political parties having an interest in the by-election which were to be held on 24 April 2013 in Ward 22, in that they nominated candidates for election in the by-election. Although there were a number of by-elections in municipal wards throughout the country to be held on 24 April 2013, the by-election in Ward 22 is the only by-election that is the subject matter of this application.

[5] The applicant sought an order directing that the holding of the by-election on 24 April 2013 be postponed as contemplated in s 8 of the Municipal Electoral Act. The section provides:

> '*Postponement of elections*
>
> *8(1) The Commission may request the Minister or, in the case of a by-election, the MEC, to postpone the voting day determined for an election if the*

> *Commission is satisfied that it is not reasonably possible to conduct a free and fair election on that day.*
>
> *(2) On receipt of such a request, the Minister by notice in the Government Gazette, or the MEC by notice in the Provincial Gazette, must postpone the voting day for the election to a day determined in the notice, but that day must fall within a period of 90 days of the applicable date mentioned in section 24(2) or 25(3) of the Municipal Structures Act.*'

The result is that, if Commission requests the MEC (defined as the member of the Executive Council of a province responsible for local government in the province) to postpone the voting day, the MEC is obliged to postpone the voting day by notice as prescribed.

[6] Secondly, the applicant sought an order that he be allowed to register as a candidate in the postponed by-election.

[7] The applicant further sought that the court should impose '*all the penalties and sanctions provided for'* pursuant to the Electoral Act 73 of 1998 (the Electoral Act) and the Municipal Electoral Act, upon the ANC and IFP as a result of their alleged contravention of the Municipal Electoral Act.

[8] Fourthly, the applicant sought that it be ordered that the South African Police Services should expand their investigations to include the facts set out by him in the application.

[9] Fifthly, the applicant sought an order that all voters registered since March 2013 in Ward 22 be struck off the voters roll.

[10] The matter was set down for hearing on the afternoon of 23 April 2013, the day before the scheduled by-elections were to take place.

[11] The applicant appeared in person. The Commission was not represented but filed an affidavit in apparent opposition to the application. I say apparent, as the bulk of the factual evidence placed before the court by the applicant was uncontested and the Commission was not represented at the hearing, despite it being aware of the time that the matter was to be heard. Indeed, the Commission advised that it would abide the decision of the court. It is to be regretted that the Commission, which fulfils one of the most important functions in our democratic society, did not see fit to be represented at the court hearing where its actions were under scrutiny. Questions which arose during the hearing remain unanswered because of such absence and I am of the view that the Commission should in all instances arrange to be represented before this court as its contribution during the hearing of disputes involving it or its officials, can assist to advance the necessary understanding which a court should have so that matters which should be taken into account, in particular practical answers to questions that may arise during such hearing, are properly taken into account. The Constitutional Court said in *Electoral Commission of the Republic of South Africa v Inkatha Freedom Party* 2011 (9) BCLR 943 (CC) at par 34 that *"[i]t is undesirable that matters involving the conduct of elections should be decided without the benefit of the views of the Commission".*

[12] The ANC was represented by advocate Rall SC and the IFP by advocate Oliff. The ANC did not file an affidavit but stressed that it denied any impropriety as alleged by the applicant in his affidavit. The IFP filed an affidavit in which it denied any impropriety on its behalf but largely supported the facts regarding improper voter registrations as alleged by the applicant.

[13] The main issue for immediate determination was whether the by-election in Ward 22 should be postponed as a result of firstly, improper voter registrations and secondly, the refusal to accept the nomination of the applicant as a candidate in the by-election, rendering the by-election not to be free and

fair, the latter to be a constitutional imperative of any election. The Constitution provides in s 19(2) that '*[e]very citizen has the right to free, fair and regular elections of any legislative body established in terms of the Constitution.*'

[14] These issues were before this court on the basis that the decision of the Commission not to remove certain unlawful registered voters from the roll and its decision not to register the applicant as a candidate in the by-election fell to be reviewed.

[15] The postponement was requested on the basis that it would not be possible to conduct a free and fair election on the 25th of April 2013 by virtue of the two deficiencies referred to above and thus necessitating the postponement.

[16] The undisputed evidence of the applicant was that he wished to register as an independent candidate in the election in Ward 22. He was aware of the timetable issued by the Commission for the by-election, which was issued pursuant to the provisions of s 17(1) of the Municipal Electoral Act. I also quote s 17(2) and (3) of this Act as they too are relevant in this matter:

> '*Requirements for ward candidates to contest election*
>
> *17(1) A person may contest an election as a ward candidate only if that person is nominated on a prescribed form and that form is submitted to the office of the Commission's local representative by not later than a date stated in the timetable for the election.*
>
> *(2) The following must be attached to a nomination when the nomination is submitted:*
>
> *(a) In the case of an independent ward candidate, a prescribed form with the signatures of at least 50 voters whose names appear on the municipality's segment of the voters' roll for any voting district in the contested ward;*
> *(b) a prescribed acceptance of nomination signed by the candidate;*
> *(c) a copy of the page of the candidate's identity document on which the candidate's photo, name and identity number appear;*

(d) a deposit equal to a prescribed amount, if any. payable by means of a bank guaranteed cheque in favour of the Commission.

(3) The Commission must accept a nomination submitted to it and allow the nominated person to stand as a candidate in the ward if:-

(a) the provisions of section 16 and this section have been complied with'.

[17] The timetable is an important document as the dates and times therein contained obtain the force of law when the provisions of s 17 are applied. The timetable lays down no less than twelve target dates, two of which are relevant to this application. According thereto, the cut-off date and time for submission of nomination of candidates was 17h00 on 3 April 2013 and the cut-off date and time for a party or independent candidate to submit outstanding ward candidate documents was 17h00 on 9 April 2013.

[18] The applicant avers that provisions of the time table are '*imprecise*', resulting in a noncompliance therewith by him thus qualifying him for condonation. The facts are that the applicant arrived at the office of the local representative of the Commission on 3 April 2013 in order to submit his nomination as a candidate in the by-election to be held on 24 April 2013. It is not in dispute that the applicant complied with the provisions of s 17 of the Municipal Electoral Act, save that he failed to present a bank guaranteed cheque as provided for in s 17(2)(d) of the Municipal Electoral Act, but instead tendered a cash payment. The representative of the Commission refused to accept the money, insisting upon a bank guaranteed cheque was to be submitted with the nomination documents. According to the evidence of the applicant, the banks were closed at the time of his submission of the nomination documents and he was unable to then obtain a bank guaranteed cheque.

[19] The applicant stated that by virtue of the unclear wording of the timetable he should have been entitled to submit a bank guaranteed cheque by the second cut-off date on 9 April 2013 as it allowed for a person to submit

'outstanding candidate documents.' Although there is some force in this argument if regard is had to the wording of the timetable, it does not take account the provisions of s 17(2A) of the Municipal Electoral Act. It provides:

> '*If any document mentioned in paragraphs (b) and (c) of subsection (2) were not attached to the nomination, the Commission must –*
> *(a) notify the nominating party or person in writing by no later than the date stated in the election timetable; and*
> *(b) allow the nominating party or person to submit their outstanding document by no later than a date stated in the election timetable*.'

[20] The timetable thus allowing for 'outstanding' documents to be filed, restricts it to those documents referred to in s 17(2A) and the bank guaranteed cheque can strictly speaking not be produced at the later date. The applicant is correct that the timetable itself does not so specify and it may be prudent for the Commission to, in the future, specify which documents are to be supplied together with the submission of the nomination and which documents may be submitted as 'outstanding' documents on the second date to make it absolutely clear to laypersons that only documents referred to in s 17(2A) may be submitted at the later date. However, and more importantly, the refusal to accept the cash offered by the applicant, together with his nomination, is in my view, decisive of this issue.

[21] In *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC) at paragraphs 24 – 28 it was held:

> *'[24] Construed on its ordinary language, section 14 of the Municipal Electoral Act suggests that a political party may not contest an election if it has not, by the prescribed date, lodged with the Commission's local representative three things: a notice of intention to contest the election; a party list and a deposit in the prescribed amount payable by means of a bank guaranteed cheque. Similarly section 17 provides that a ward candidate may not contest an election unless he or she has been nominated in the prescribed manner and on the prescribed form by the due date, and that form must have been submitted together with the prescribed deposit to the office of the Commission's local office. In construing whether there has been compliance with these provisions I am*

mindful of the reasoning of Van Winsen AJA in Maharaj and Others v Rampersad (1964 (4) SA 638 (A) at 642 C)*:*

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

[25] The question thus formulated is whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose. A narrowly textual and legalistic approach is to be avoided as Olivier JA urged in Weenen Transitional Local Council v Van Dyk: (2002 (4) SA 653 (SCA) at 659)*:*

> *"It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the ordinance is to follow a common-sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A) at 434 A – B). Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should be read as 'may'; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have a posteriori, not a priori significance. The approach described above, identified as '… a trend in interpretation away from the strict legalistic to the substantive' by Van Dijkhorst J in Ex parte Mothuloe (Law Society, Transvaal, Intervening) 1996 (4) SA 1131 (T) at 1138 D – E, seems to be the correct one and does away with debates of secondary importance only."*

[26] It is common cause in this case that the applicant had lodged the notice of intention to contest the election and the party list with the local office of the Commission. The dispute turns on whether it had lodged an adequate deposit as required by the section. Before interpreting what section 14(1)(b) and section 17(2)(d) mean when they stipulate "a deposit equal to a prescribed amount, if any, payable by means of a bank guaranteed cheque in favour of the Commission", it is necessary to consider the central payment facility instituted by the Commission in these elections.

[27] The first question that arises is whether that facility was in conflict with the provisions of sections 14 and 17. Sections 14 and 17 contemplate that the deposit will be paid at the local office of the Electoral Commission. The bulk payment facility contemplates however that the payment can be made elsewhere — at the head office of the Commission. The question that arises is whether to the extent sections 14 and 17 state that the payment is to be made at the local government office, it is a peremptory provision that prevented the Commission from providing an alternative location for payment, in this case, the national office of the Commission. The purpose of section 14 (and section 17) is to ensure that a deposit is paid by a political party (or ward candidate) to establish that they have a serious intention of contesting the election. There is no central legislative purpose attached to the precise place where the deposit is to be paid. In my view, to interpret sections 14 and 17 in a manner which prohibits the Commission from making such a facility available to political parties would be to read the provision unduly narrowly and to misunderstand its central purpose. In effect, what the Commission did, after consulting with the Party Liaison Committees, was to make an additional method of payment available to parties in a manner which facilitated their participation in the elections. Many parties took advantage of this system. In so doing, the Commission did not offend the intention of the legislature in requiring the payment of deposits as stipulated in sections 14 and 17 of the Municipal Electoral Act.

[28] An interpretation of sections 14 and 17 which accepts that the Commission had the power to act in such a manner facilitates the participation in elections and is far more consistent with our constitutional values, than reading the section strictly to prohibit such a payment system. I conclude therefore that the provisions in sections 14 and 17 which state that payment should be made

at the local office of the Commission, properly construed, do not prevent the Commission from establishing a system such as the central payment facility under consideration here. That facility was available to all those who wished to contest the elections and permitted them to make payment at an alternative venue to facilitate participation in the municipal elections. The system was both fair and sensible and facilitated participation in the elections without undermining the obligation of candidates and parties to pay deposits to evidence the seriousness of their intention of contesting the elections. Payments made under the central payment system complied therefore with the provisions of sections 14 and 17.'

[22] If regard is had to the purpose of the timetable and its requirements, it cannot be said that there has been any disadvantage or negative impact on the election. Pillay J, said the following in *National Peoples Party v Electoral Commission* (002/11 IEC) [2011] ZAEC 3 (21 April 2011) at para 23:

'*[23] The purpose of the time-table is to facilitate the smooth running of the election process. It is intended to allow the administration of elections to proceed without disruption and for officials to properly prepare for the election by, inter alia, the announcement of the contesting parties and candidates and preparation and distribution of ballot papers to mention a few aspects. It also serves to avoid unfair advantage, occasioned by late entry, to a particular party (or candidate). Most of all, it is intended to allow time for the voter to be timeously informed of everything he or she has to be aware of before casting a vote, for example who is participating in the election, which party is represented in a particular ward, and which individuals are running for election in a particular municipality.*'

Pillay J, went on to say in para 38:

'[38] While it must be recognised that the time-table is to be adhered to, it is hardly likely that any subsequent steps as set out in the time-table would have been commenced with when the applicant's documents were tendered. No harm would have been caused by him accepting the documents when it was tendered even on the assumption that it was after 17h00 on the 25 March 2011, because it would not have resulted in any disadvantage or prejudice to anyone. The respondent would not have been inconvenienced thereby because the next segment of the process of preparing for the election had not yet started, for example starting to check the documents and informing parties and candidates of outstanding or faulty documents.'

Thus, although compliance by the applicant was not strictly to what it ought to have been, the injunction has nevertheless been complied with (*Maharaj* at p 642) and the object of the Municipal Electoral Act to ensure that the applicant has a serious intention of contesting the election, has been achieved.

[23] This being so, the cash offered by the applicant evinced the same serious intention to contest the election referred to by O'Regan J in the *African Christian Democratic Party* case. A practical plan could have been made to allow the applicant to participate in the election. He could either have been afforded the opportunity to deposit the cash there and then and to replace that deposit with a bank guaranteed cheque the next day or the Commission could have accepted the cash in lieu of a bank guaranteed cheque. This would have facilitated participation in the elections in a manner that is more consistent with our constitutional values than prohibiting participation of a candidate by strictly interpreting legislative purposes. Had the Commission supplied cogent reasons why such a cash payment would have been unacceptable, I may have considered the matter differently but, in the absence of any indication that there is a legislative purpose attached to a bank guaranteed cheque as against cash or that the Commission was unable to receive cash for any particular reason, I am of the view that the tender of the cash amount in lieu of the bank guaranteed cheque was sufficient to '*evidence the seriousness of their (*his*) intention of contesting the elections*'. See the *African Christian Democratic Party* case at para 28.

[24] This interpretation of s 17 '…facilitates the participation in elections and is far more consistent with our constitutional values, than reading the section strictly to prohibit such a payment system.' (*African Christian Democratic Party* at para 28.) Such an interpretation does not prevent the Commission from accepting payment in cash as an alternative to facilitate participation in the election. Such a system of payment would be both 'fair and sensible' to facilitate 'participation in the elections without undermining the obligation of a candidate "...*to pay deposits to evidence the seriousness of their intention of contesting the elections*' (*African Christian Democratic Party* case at para 28).

[25] The tender of cash therefore complied with the provisions of s 17. I find support for this view also in para 31 of the African Christian Democratic Party case where it was said:

'*[31] In considering whether the surplus payment held by the Commission should be considered to be in compliance with the provisions of sections 14 and 17, the importance of promoting multi-party democracy and the political rights of citizens should be borne in mind. Of crucial relevance also is the underlying statutory purpose of sections 14 and 17 which appears to be to ensure that candidates and political parties contesting elections declare their intentions to do so by a certain date and provide the Electoral Commission with the necessary information to enable them to organise the elections. The payment of an electoral deposit ensures that the participation of political parties and candidates in the elections is not frivolous. The payment of the deposit is complementary to the key notification required for organising the elections, namely, the notification of the intention to participate and the furnishing of details of candidates.*'

[26] The failure to allow the applicant to enter the by-election as a candidate would have negatively affected the free and fair character of the elections which were to commence a few hours after the hearing of this application. If the Commission was represented as one would have preferred, the court could have been advised that it would have been possible to include the applicant as a candidate on the ballot papers the following morning. Although I doubt that such would have been possible, the applicant should also have been afforded the opportunity to canvas the voters in the ward during the period preceding the election. This too, is his Constitutional right pursuant to the provisions of s 19(1)(c) of the Constitution which reads as follows:

'19. Political rights
(1) Every citizen is free to make political choices, which includes the right
…….
(c) to campaign for a political party or cause.'

His inability to do so would negatively affect upon his candidacy and render the election anything but free and fair. This conclusion, in my view, required that the by-election in Ward 22 was to be postponed pursuant to s 8 of the Municipal Electoral Act.

[27] In the circumstances, the refusal of the official in the employ of the Commission to accept the nomination of the applicant as a candidate in the by-election was based on an unduly narrow application of the provisions of s 17 of the Municipal Electoral Act and the Commission's decision to refuse to accept the applicant as a candidate, falls to be reviewed and set aside.

[28] Having regard to the aforesaid, I was of the view that on condition that the applicant tendered the deposit to the Commission forthwith, the order in paragraph three below should be issued.

[29] The second, main issue which is set out in the affidavit of the applicant, is the large scale unlawful, or even fraudulent, registration of voters in Ward 22, which voters have been 'bussed' into the ward from neighbouring wards to register for the by-election in Ward 22. It appears that by-elections are particularly susceptible to this practice in that voters from wards in which there are no by-elections and thus where their votes are not needed, are brought into a ward where by-elections are to be held in order to boost the number of voters of particular political parties or candidates.

[30] The applicant, as the former ward Councillor of Ward 22, knew the ward and its people well. He stated that a number of residents had left the ward to move to newly built RDP (Reconstruction and Development Plan) houses, which became available to them. Whilst there were 3695 voters in the previous election in 2011, this number should now have reduced by virtue of the relocation of a number of families to their new houses. There was, in addition, no large increase of inhabitants in the ward. Nevertheless, there were a sudden extraordinary number of new voters registered in the ward that surged the number of registered voters to 6165. It is clear that something drastic happened in the ward regarding voter registration. The applicant further stated that he had had discussions with certain leaders of both the ANC and IFP, who had admitted that they had brought persons from other wards to register in Ward 22. Both political parties deny any untoward conduct and I need not make any finding in this regard. The IFP supports the applicant and supplies evidence on affidavit of persons, not from Ward 22, having been registered as voters in the ward. The applicant stated that he knew the people of Ward 22 and found persons at the office of the Commission, who were registering for the upcoming election who he had never seen before. He set out that there was a large scale registration of persons who did not reside within Ward 22.

[31] This unlawful registration of voters was possible because any person who arrived at the office of the Commission as a voter only needed to supply his or her identity document and fill in a form as to where that person alleged he or she resided within the ward. The Commission accepted this as evidence and registered such applicant as a voter. If the contentions of the applicant are indeed correct, and there appears to be no reason not to accept them as being correct, a sudden influx for registration of more than 2000 persons in Ward 22 should have raised flashing red lights with the Commission.

[32] On this basis, also, there has been a large scale registration of persons who were not from Ward 22 but were brought from elsewhere to register by supplying false addresses, the applicant should be entitled to relief.

[33] Mr Rall, appearing for the ANC, argued that the failure to join the MEC and the registered voters, non-suited the applicant as a result of non-joinder of these parties. I do not agree. Pursuant to the provisions of s 8 of the Municipal Electoral Act, the MEC is obliged to postpone the voting day in the event of the Commission requesting him or her to so. Once this court orders the Commission to issue such a request, the MEC is bound thereby.

[34] The further argument was that those voters who were fraudulently registered were not cited in these proceedings, resulted in a non-joinder of parties. I do not agree. It is quite apparent that a large number of persons, whose names are unknown to the applicant, were recently registered as voters in Ward 22. The applicant's request for a copy of the voters' roll was met by a refusal to supply one to him by virtue of the fact that he was not a candidate in the election. The application could not possibly know the names of the unlawful registered voters in order to cite them in these proceedings. Nor do I intend proposing any order that would affect their current status as registered voters of Ward 22.

[35] Mr Rall further argued that the remedy which the applicant should have pursued is contained in s 15 of the Electoral Act which reads:

'15. Objections to voters' roll.-

(1) In relation to any segment of the voters' roll or a provisionally compiled voters' roll, any person may object to the Commission in the prescribed manner to -

(a) the exclusion of any person's name from that segment;
(b) the inclusion of any person's name in that segment; or
(c) the correctness of any person's registration details in that segment.

(2) A person who objects to the exclusion or inclusion of the name of another person, or to the correctness of that person's registration details, must serve notice of the objection on that person.

(3) The Commission must decide an objection and, except for an objection in relation to a provisionally compiled voters' roll, by not later than 14 days after the objection was made, notify the following persons of the decision:

(a) The person who made the objection;
(b) the chief electoral officer; and
(c) in the case of an objection against the exclusion or inclusion of the name, or the correctness of the registration details, of a person other than the objector, that other person.

(4) The chief electoral officer must give effect to a decision of the Commission in terms of subsection (3) within three days.

(5) No appeal may be brought against the Commission's decision, subject to section 20 (2) (a) of the Electoral Commission Act.'

[36] The provisions of s 15 of the Electoral Act may not be entirely suitable for the situation described by the applicant where there was a large scale registration of persons who are unknown to the applicant. When there is such large scale unlawful registration of voters it is for the Commission itself to act when the unlawful conduct is brought to its attention, the latter which the applicant did do when he visited the Commission's' head office in Centurion.

[37] Although I will not attempt to suggest all the suitable measures which the Commission could and should take in order to avoid large scale unlawful voter registration, some steps do come to mind.

[38] The Commission is able to determine the pattern of registration of any individual voter by having regard to that particular voter's past registration as a voter. If there were large numbers of voters who suddenly registered in Ward 22 but who were previously registered in surrounding wards, it would be an indication that something was amiss. Unfortunately the information as to such

voter migration was not made available to us. The Commission should take the information regarding each voter who registered in Ward 22 since March 2013 and utilise its officials to see if such persons were indeed residing at their former addresses and not within Ward 22. If such persons are still so resident at their former addresses and found to reside outside Ward 22, the Commission must take steps to have such persons removed from the voters' roll of Ward 22. The Commission is entitled to acquire the necessary staff to do such an exercise, even on an urgent and wide scale basis, as is envisaged in s 5(2) of the Electoral Commission Act which provides:

> *'The Commission shall, for the purposes of the achievement of its objects and the performance of its functions –*
> *(a) acquire the necessary staff whether by employment, secondment, appointment on contract or otherwise;*
> *(b) ...*
> *(c) ...*
> *(d) ...*
> *that is necessary for or conducive to that.'*

The Act is a broad guideline and the Commission is entitled to take steps in order to promote free and fair elections.

[39] The Commission could then *mero motu* apply provisions of s 15 (3) of the Electoral Act to correct the unlawful position. If s 15(3) is found to confer insufficient machinery the Commission is hampered in that it does not have the necessary legal machinery to correct the voters' roll, it should act in order to avoid such a situation in the future. It has the duty to strengthen the constitutional democracy and promote the electoral processes without any prescription or curtailment of its powers (see s 4 of the Electoral Commission Act). It can further make recommendations in connection with the electoral legislation as is provided for in s 5 (1)(j) of the Electoral Commission Act.

[40] If it is found that there are a large number of unlawful registered voters in Ward 22 these voters must be removed from that voters' roll pursuant to s 5 (1)(e) of the Electoral Commission Act. The Commission is to *'compile and*

maintain voters' rolls by means of a system of registering of eligible voters by utilising data available from government services and information furnished by voters'. Each unlawfully registered voter can be removed from the voters' roll pursuant to an application to court if necessary.

[41] It is because of this view that the order in 2 below was issued. Unlawfully registered voters must be removed from the voters' roll as such a situation, un-remedied, is not conducive to a free and fair election in a democratic society.

[42] The remainder of the relief sought by the applicant can shortly be dealt with. This matter came before the court as a matter of urgency. Some parties did not have the time to file affidavits in support of their contentions. It would be dangerous to impose penalties and sanctions upon any of them without each of the allegations being properly ventilated before a court. In any event, the imposition of such penalties or sanctions is not urgent in its nature and should the applicant feel it is necessary to pursue such penalties and sanctions, he is not precluded from doing so.

[43] This court is not empowered to instruct the South African Police Services to perform its duties. A complaint was laid with them and the applicant is free to supply them with whatever further information he so wishes and only if there is indeed a failure by the South African Police Service to pursue an investigation in relation to the fraudulent conduct alleged on the papers, should the applicant approach senior officials within the South African Police Service for assistance.

[44] Also, it would indeed be dangerous for this court to declare that all voter registrations since a particular date be struck off the voters' roll. This court would be assuming the role of the Commission without having the necessary information in relation to the unlawful registration and in so doing i.e. striking off

all registered voters who registered since a particular date this court may cause an injustice to be done to those voters who were entitled to and did lawfully register during that time period. The removal of voters, unlawfully registered on the voters' roll of Ward 22, would be in the hands of the Commission once the investigation referred to in the second order below has been completed. The intention with the second order below is for the Commission to not only investigate but also to take the necessary steps against any unlawfully registered voters in order to remove them from the voters' roll.

[45] The applicant did, in the replying affidavit, seek further relief in that it required of this court to make recommendations to the President of the Republic of South Africa in order to address a number of inefficiencies such as the unlawful registration of voters during a by-election by the introduction of necessary legislation. This court, in my view, is not the body who should do so, but, pursuant to the provisions of s 5(1)(j) of the Electoral Commission Act, it is the Commission who may and can make such recommendations in relation to the review of electoral legislation currently in existence. The applicant is free to make these recommendations to the Commission, the latter that is the body empowered to make recommendations regarding the more efficient functioning of the electoral processes in the Republic.

[46] Having regard to the aforegoing the following order was issued on an urgent basis on the night preceding the by-election in Ward 22 on 24 April 2013.

> '*1. The Independent Electoral Commission (first respondent) is ordered to request, as contemplated by Section 8 of the Local Government Municipal Electoral Act 27 of 200. the Member of the Executive Council to postpone the by-election to be held on 24 April 2013 in Ward 22 of Abaqulusi Municipality, Kwazulu-Natal;*
>
> *2. The Independent Electoral Commission is ordered to investigate the allegations of fraud raised in the application in relation to the voters' roll of Ward 22 of the Abaqulusi Municipality, Kwazulu-Natal;*
>
> *3. The Independent Electoral Commission is ordered to accept the nomination of Andre Dawid Lötter (the applicant) as a candidate in the*

municipal by-election to be held in Ward 22 of the Abaqulusi Municipality, Kwazulu-Natal;

4. *The Registrar if this court and the Registrar of the Kwazulu-Natal High Court, Durban, are authorised to communicate the contents of this order to the parties by email or fax or such other method as may be appropriate.'*

WEPENER J
JUDGE OF THE ELECTORAL COURT

DATE: 7 May 2013