



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 245/21

In the matter between:

DEMOCRATIC ALLIANCE

Third Intervening Party

In re the matter between:

ELECTORAL COMMISSION OF SOUTH AFRICA

Applicant

and

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

First Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF
THE EASTERN CAPE**

Second Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF
THE FREE STATE**

Third Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF
GAUTENG**

Fourth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF
KWAZULU-NATAL**

Fifth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF
LIMPOPO**

Sixth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF**

THE COURT

MPUMALANGA

Seventh Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF
THE NORTHERN CAPE**

Eighth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF
THE NORTH WEST**

Ninth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF
THE WESTERN CAPE**

Tenth Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
ASSOCIATION**

Eleventh Respondent

and

AFRICAN NATIONAL CONGRESS

First Intervening Party

INKATHA FREEDOM PARTY

Second Intervening Party

MAKANA INDEPENDENT NEW DEAL

Fourth Intervening Party

AFRICAN TRANSFORMATION MOVEMENT

Fifth Intervening Party

FORUM 4 SERVICE DELIVERY

Sixth Intervening Party

ONE SOUTH AFRICA MOVEMENT

Seventh Intervening Party

ECONOMIC FREEDOM FIGHTERS

Eighth Intervening Party

and

**COUNCIL FOR THE ADVANCEMENT OF THE
SOUTH AFRICAN CONSTITUTION**

First Amicus Curiae

FREEDOM UNDER LAW (RF) NPC

Second Amicus Curiae

**SOUTH AFRICAN INSTITUTE OF RACE
RELATIONS**

Third Amicus Curiae

AFRIFORUM NPC

Fourth Amicus Curiae

Neutral citation: *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance and Others* [2021] ZACC 30

Coram: Zondo ACJ, Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J

Judgments: The Court (unanimous)

Decided on: 20 September 2021

Summary: [Urgent application] — [direct access] — [free and fair elections] [local government election timetable] — [voter registration weekend] — [constitutionality of re-opening of candidate nomination process]

ORDER

On application for direct access to this Court:

1. The third intervening party's prayer for direct access on an urgent basis is granted.
2. Save as aforesaid, the third intervening party's application is dismissed.

JUDGMENT

THE COURT:

Introduction

[1] On 3 September 2021, in proceedings brought by the Electoral Commission of South Africa (Commission) under case CCT 245/21 (main case), this Court issued the following order (order):

“For reasons to follow, the Court, by majority decision, makes the following order:

1. The Electoral Commission’s application for direct access on an urgent basis is granted.
2. Save for what is set out in paragraph 1, the Commission’s application is dismissed.
3. The Democratic Alliance’s application for direct access is granted.
4. It is declared that the proclamation issued by the Minister of Cooperative Governance and Traditional Affairs (Minister) on 3 August 2021 in terms of section 24(2) of the Local Government: Municipal Structures Act 117 of 1998 (Structures Act), by which she proclaimed 27 October 2021 as the date for the local government elections (proclamation), is unconstitutional, invalid and is set aside.
5. Pursuant to paragraph 4, it is further ordered, in terms of section 172(1)(b) of the Constitution:
 - (a) The Commission must, within three calendar days after the date of this order, determine whether it is practically possible to hold a voter registration weekend with a view to registering new voters and changing registered voters’ particulars on the national voters’ roll in time for local government elections to be held on any day in the period from Wednesday, 27 October 2021 to Monday, 1 November 2021 (both dates inclusive).
 - (b) The Commission must notify the Minister of, and publicly announce, its determination as soon as it has been made.
 - (c) If the Commission determines that it is practically possible to hold a voter registration weekend:
 - (i) The Commission is directed to conduct a voter registration weekend.

- (ii) On the day following the voter registration weekend the Minister must issue a proclamation in terms of section 24(2) of the Structures Act determining a date for the local government elections in the period from Wednesday, 27 October 2021 to Monday, 1 November 2021 (both dates inclusive).
 - (iii) The timetable published by the Commission on 4 August 2021 (current timetable) shall, notwithstanding the provisions of section 11(1) of the Local Government: Municipal Electoral Act 27 of 2000 (Municipal Electoral Act), remain applicable, save that as soon as possible after the issuing of the proclamation envisaged in paragraph 5(c)(ii), the Commission must, in terms of section 11(2) of the Municipal Electoral Act, publish such amendments to the current timetable as may be reasonably necessary.
 - (d) If the Commission determines that it is not practically possible to hold a voter registration weekend:
 - (i) The Minister must, not earlier than 10 September 2021, issue a proclamation in terms of section 24(2) of the Structures Act, determining a date for the local government elections in the period from Wednesday, 27 October 2021 to Monday, 1 November 2021 (both dates inclusive).
 - (ii) Between the date of this order and 10 September 2021, eligible voters who wish to register may apply to do so at the relevant municipal office.
 - (iii) Subject to amendments reasonably necessitated by paragraph 5(d)(ii), the current timetable shall, notwithstanding the provisions of section 11(1) of the Municipal Electoral Act, remain applicable.
6. The Economic Freedom Fighters' conditional application for the relief set out in paragraphs 4 and 5 of its notice of motion is dismissed.
7. Each party shall pay their own costs."

[2] Pursuant to paragraph 5(a) of the order, the Commission on 6 September 2021, determined that it was possible to hold a voter registration weekend and announced that it would take place on 18-19 September 2021. In terms of paragraph 5(c)(ii) of the order, this meant that on Monday, 20 September 2021 the Minister of Cooperative Governance and Traditional Affairs (Minister) would be required to proclaim the election date. It was understood that the Minister intended to fix Monday, 1 November 2021 as the election date, and this remains the position. At a meeting of the National Party Liaison Committee (NPLC), the Commission notified political parties of its determination to hold a voter registration weekend on 18-19 September 2021. The Commission also informed them that it intended to amend the timetable to extend the date for submission of party lists and ward candidates to 21 September 2021 (extension decision).

[3] In a public statement issued later that day, the Commission explained the extension decision thus:

“In view of the fact that the voter registration process has been re-opened by the order of the Court, a number of amendments to the electoral timetable are necessary. This is permitted by the Constitutional Court’s order, which makes clear that the Commission is entitled to ‘publish such amendments to the current timetable as may be reasonably necessary’.

This includes the need to set a new deadline for candidate nominations. The scheme of the Municipal Electoral Act is that the voter registration deadline is intended to precede the candidate nomination deadline It is therefore necessary to allow political parties and independent candidates an opportunity to nominate candidates after the registration weekend of 18-19 September 2021 has occurred and after the voters’ roll has closed.

A meeting of the [NPLC] was held earlier today. It is clear [that] there are different interpretations amongst parties as to whether the order of the Constitutional Court permits the Commission to re-open nominations. The Commission has taken advice on the matter and is of the view that amending the timetable to re-open nominations is reasonably necessary in the circumstances.”

The present proceedings

[4] On 7 September 2021, and under the same case number as the main case, the Democratic Alliance (DA), launched the present urgent application for direct access. The substantive relief claimed in the notice of motion is that the extension decision be declared unconstitutional, unlawful and invalid, and that it be reviewed and set aside. The application is supported by the Inkatha Freedom Party (IFP), Economic Freedom Fighters (EFF), African Transformation Movement (ATM) and the South African Institute of Race Relations (SAIRR). It is opposed by the Commission, the Minister and the African National Congress (ANC). Freedom Under Law (FUL) filed written submissions in which it, too, argued that the DA's application should be dismissed. Makana Independent New Deal (MIND), without formally opposing, delivered a short affidavit from which it appears that it does not support the DA's application. As will appear from the heading of this judgment, all of these parties featured in the main case: as a respondent in the case of the Minister, as amici in the case of SAIRR and FUL, and as intervenors in the case of the others.

[5] In terms of this Court's directions, written submissions in the present proceedings had to be filed by Wednesday, 15 September 2021. Given the urgency of the case, there was no oral hearing. All the parties mentioned in the preceding paragraph, except MIND, delivered written submissions. Reasons in the main case were handed down on Saturday, 18 September 2021, comprising a minority and a majority judgment.¹ The present judgment must be read in the light of those reasons. Time does not allow an extensive rehearsal.

[6] The Minister's proclamation of 3 August 2021, which was set aside in terms of paragraph 4 of the order, had the result that citizens who had not before that date applied for registration on the voters' roll were not entitled to vote in the forthcoming local government elections and were not entitled to be nominated for election on party lists or as ward candidates. Items 4-6 of the current timetable deal with the processes

¹ *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs* [2021] ZACC 29 (majority judgment).

culminating in the certification of the voters' roll on 1 September 2021. In short, segments of the roll were to be open for inspection in the period 5-11 August 2021; the Commission was to finalise objections by 18 August 2021; and by 1 September 2021 the chief electoral officer was to certify the roll or segments and make them available for inspection.

[7] Items 7-13 of the timetable deal with processes for the submission of party lists and ward candidates. As from 3 August 2021, lists of candidates and nominations of ward candidates could be submitted to the Commission. The cut-off date for ward candidate nominations in terms of section 17 of the Local Government: Municipal Electoral Act² (MEA) was 23 August 2021 and the cut-off date for the submission of party lists in terms of section 14 of the MEA was 27 August 2021. It appears to be the understanding of the Commission and the political parties that a party intending to contest an election both by way of party lists and nomination of ward candidates had to meet the cut-off date of 23 August 2021. Processes to address non-compliance and duplications were to take place over the period 25 August-2 September 2021. By 7 September 2021 the Commission was to certify the registered parties entitled to contest the elections and their party lists, and by the same date the Commission was to certify a list of ward candidates. By 13 September 2021 the Commission had to issue prescribed candidate certificates to candidates on party lists and to ward candidates.

[8] Certain parties failed to meet the candidate cut-off date of 23 August 2021. Notably, the ANC failed timeously to submit its party lists and ward candidate nominations in respect of 20 municipalities and 598 wards. In 13 of these municipalities, the ANC has comfortable majorities in the municipal councils, and has enjoyed these majorities in 11 of them for many years. One can thus understand why other political parties might object to an extension of the candidate cut-off date from 23 August to 21 September, since the extension would give the ANC an opportunity to remedy its failure to meet the previous candidate cut-off date whereas, without an extension, the ANC would be removed as a potentially successful political rival.

² 27 of 2000.

[9] The Commission's affidavit in opposition to the DA's application reveals that other parties also failed, to a greater or lesser extent, to meet the candidate cut-off date, including the three parties who resist the re-opening decision (the DA, EFF and IFP), but one may infer that the non-compliance by these three parties was not on a scale which swung their political calculus in favour of supporting the extension of the candidate cut-off date. ActionSA also opposed the extension. Other parties represented on the NPLC, on the other hand, supported the extension of the cut-off date, although they have not participated in these proceedings. They are, according to the Commission, the ACDP, AIC, Al Jama-ah, COPE, FF Plus, Good, PAC and UDM.³

[10] The DA's case focuses on paragraph 5(c)(iii) of the order and on the dismissal, in paragraph 6 of the order, of the relief claimed in paragraphs 4 and 5 of the EFF's notice of motion in the main case. The DA, supported by the IFP and EFF, contends that an extension of the cut-off date from 3 August to 21 September is incompatible with these components of the order.

[11] The extension decision in its formal aspect will involve an amendment of the current timetable. In law, therefore, the decision will only be taken on 20 September 2021. Factually, however, the Commission has decided what it will do. Although the Commission could change its mind, nothing on the papers suggests that it will. If the DA has established that the Commission's intended course of action is unconstitutional and unlawful, it would in principle be entitled to a judicial remedy. The DA's application cannot, therefore, be rejected on the basis that it is premature. Nor can the DA be criticised, as some of its opponents have done, for coming to court precipitately without the benefit of the light which the Court's reasons might have shed on the order's interpretation. The DA did not know when the Court would hand

³ The full names of these parties are the African Christian Democratic Party (ACDP); African Independent Congress (AIC); Al Jama-ah; Congress of the People (COPE); Freedom Front Plus (FF Plus); Good; Pan Africanist Congress (PAC) and United Democratic Movement (UDM). ATM has been omitted from this list because, according to its explanatory affidavit, its silence at the NPLC meeting on 6 September 2021 has been wrongly interpreted by the Commission as signifying its agreement with the extension. Although the Commission, in a supplementary affidavit, has taken issue with the ATM's explanation, nothing turns on this.

down reasons,⁴ and potentially its complaint might have needed resolution before those reasons became available.

Interpreting court orders

[12] The order with which a judgment concludes has been described as the “executive part of the judgment”, because it defines what the court requires of the parties who are bound by it.⁵ For this reason, it was said in *Ntshwaqela* that although the order must be read as part of the entire judgment, and not as a separate document, the order’s meaning, if clear and unambiguous, cannot be restricted or extended by anything else stated in the judgment.⁶ The modern approach is not to undertake interpretation in discrete stages but as a unitary exercise in which the court seeks to ascertain the meaning of a provision in the light of the document as a whole and in the context of admissible background material.⁷ This principle applies to the interpretation of court orders, as decisions of this Court make plain.⁸

[13] The principle is unaffected by the circumstance that, for reasons of urgency, the order preceded the reasons. Analogously, in *International Trade Administration Commission*, this Court said that, in interpreting a court’s order, regard could be had to the court’s subsequent judgment on an application for leave to appeal.⁹ A court order is made for particular reasons and for particular purposes, and although these may be discerned from the order itself, greater light is shed on them by the judgment.

⁴ The parties were only notified on the afternoon of Friday, 17 September 2021 that the reasons for the order would be distributed to the parties electronically on 18 September 2021.

⁵ *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 716B-C (*Ntshwaqela*).

⁶ *Id.*

⁷ *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at para 52 and *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (8) BCLR 807 (CC) at para 65.

⁸ *Minister for Justice and Constitutional Development v Chonco* [2010] ZACC 9; 2010 (7) BCLR 629 (CC) at para 6; *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 29; and *Department of Transport v Tasima (Pty) Limited; Tasima (Pty) Limited v Road Traffic Management Corporation* [2018] ZACC 21; 2018 (9) BCLR 1067 (CC) at para 42.

⁹ *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at para 71.

Paragraph 6 of the order

[14] Contrary to the DA's contention, paragraph 6 of the order is not a judicial determination, and does not imply, that the candidate cut-off date may not be extended. Paragraph 4 of the EFF's notice of motion sought an order compelling changes to the Disaster Management Regulations¹⁰ so as to permit meetings of more than 100 persons for the sole purpose of enabling political parties to conduct their internal processes for selecting candidates. Paragraph 5, which was conditional upon this Court granting the relief in paragraph 4, sought to compel the Commission to extend the candidate cut-off date. The relief claimed in paragraph 4 of the EFF's notice of motion was refused, with the result that the relief claimed in paragraph 5 fell away without the need to consider that prayer on its merits. Although this conclusion could be reached solely with reference to the order read together with the EFF's notice of motion, it is confirmed in the reasons contained in the majority judgment.¹¹

Paragraph 5(c)(iii) of the order

[15] With this point disposed of, the way is clear to address the main issue in the DA's application, namely paragraph 5(c)(iii) of the order. This paragraph stipulated that the current timetable (i.e. the timetable issued by the Commission on 4 August 2021) remained applicable:

“[s]ave that as soon as possible after the issuing of the proclamation envisaged in paragraph 5(c)(ii), the Commission must, in terms of section 11(2) of the Municipal Electoral Act, publish such amendments to the current timetable as may be reasonably necessary.”

[16] The DA contends that the Commission is only entitled to amend the current timetable to the extent that this may be “reasonably necessary” as contemplated in paragraph 5(c)(iii). Building on this premise, the DA alleges that the amendments which were rendered “reasonably necessary” by the order were those amendments

¹⁰ Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002, GN R480 GG 43258, 29 April 2020.

¹¹ Above n 1 at para 265.

reasonably necessary to accommodate the addition of new voters to the roll. On the DA's case, the implicated parts of the current timetable are items 4-6. The order did not envisage, so the DA contends, any adjustment to the timetable in respect of party lists and ward candidates.

[17] Paragraph 5(c)(iii) of the order must be read in the context of the order as a whole and in the light of the reasons contained in the majority judgment. Paragraph 5 of the order follows upon the declaration in paragraph 4 that the Minister's proclamation of 3 August 2021 was unconstitutional and invalid and set aside. The order does not explain why the Minister's proclamation was found to be unconstitutional (this explanation is to be found in the majority judgment's reasoning), but the essence may nevertheless be inferred from paragraph 5(a) of the order. Pursuant to the setting aside of the proclamation, the Commission had to determine whether it was practically possible to hold a voter registration weekend "with a view to registering new voters and changing registered voters' particulars on the national voters' roll" in time for elections to be held in the period 27 October-1 November 2021. The focus of the Commission's determination was the voters – the addition of new voters and the changing of existing voters' registration details. Paragraph 5(a) did not direct the Commission to assess whether a voter registration weekend could be held with a view to enabling new candidates to enter the lists or to compete in new districts.

[18] The issuing of the proclamation without a voter registration weekend had the effect of preventing hundreds of thousands of citizens from registering as voters or from changing their registered voting districts. It was the effect of the proclamation on these citizens, in their capacity as voters, that was the primary focus of attention in the affidavits and submissions in the main case. This is unsurprising. Eligible citizens who were sufficiently interested in municipal politics to want to stand as candidates could be expected to have registered on their own initiative, or on the initiative of their parties, before 3 August 2021, either online or by attending at their municipal electoral offices. (It must be added, though, that according to the ANC many of its candidates

were in fact disbarred from standing because they had been waiting for the voter registration weekend and were then taken by surprise when the proclamation was issued shortly after the cancellation of the registration weekend. And MIND's deponent states that his party decided to throw its lot in with another local party, Makana Citizens Front, and they had numerous problems that they could not "resolve optimally in the short timelines available, including potential candidates who turned out not to be registered or who were registered in the wrong municipalities".)

[19] The order made it clear that, come what may, the elections had to be held on or before 1 November 2021, with or without a voter registration weekend. The order was intended to accommodate new voters if this was practically possible. Suppose that, at the time the Commission was called upon to make its determination in terms of paragraph 5(a) of the order, the Commission concluded that it would be possible to accommodate new voters in time for elections on or before 1 November, but that it would not be possible to do so if the Commission also had to accommodate new candidates. If the "reasonably necessary" amendments contemplated in paragraph 5(c)(iii) included not only the accommodation of new voters but also, as a necessary corollary, the accommodation of new candidates, the Commission would, on the supposition made, have been forced to determine that it was not practically possible to hold a voter registration weekend, since it would not have been possible to accommodate all "reasonably necessary" amendments to the timetable. This would not have been in keeping with the order, where the focus fell on the interests of voters, not candidates.

[20] This reading of the order as a whole is in keeping with the reasons contained in the majority judgment. The majority judgment pointed out that 14.5 million eligible citizens were not registered as voters and that, based on past experience, in a voter registration weekend around 650 000 new voters might register while about one million registered voters might change their voting districts. It was the foreclosing effects of the proclamation on these citizens, in their capacity as voters, that were found in the majority judgment to have rendered the Minister's proclamation

irrational. The majority judgment attached no significance to the fact that the Minister's proclamation also had the effect of precluding eligible citizens from registering as voters so that they could contest the elections as candidates.

[21] Furthermore, the majority judgment explains that the order left open the possibility of a voter registration weekend because the majority was of the view that there might still be time, in advance of elections held on or before 1 November, to accommodate the processes for adding voters to the roll, for objections and certification, and for printing and dissemination of segments of the roll to voting stations. The majority judgment paid no similar attention to the practical possibility of extending the candidate cut-off date and the related logistics of printing and disseminating unique ballots for all municipalities and wards.

[22] In this regard, paragraph 258 of the majority judgment, which existed in this form, in draft, before the Commission's determination of 6 September 2021 was announced, is of particular relevance:

“The regime to apply if the Commission determined that it was practically possible is contained in paragraph 5(c) of the order. Although a setting aside of the proclamation of 3 August 2021 might ordinarily have had the effect of causing the current timetable to fall away, and although the issuing of a fresh proclamation might ordinarily have triggered an obligation on the Commission's part to issue a new prospective timetable in terms of section 11(1) of the MEA, these ordinary consequences would have put paid to elections on or before 1 November 2021. For this reason, paragraph 5(c)(iii) decreed that the current timetable would stand, though the Commission would be entitled to amend the timetable ‘as may be reasonably necessary’. The amendments which we foresaw as ‘reasonably necessary’ were those implicating items 4-6 of the timetable. Our order neither required nor precluded the Commission from amending other items of the timetable, provided of course that such changes still enabled the elections to be held on or before 1 November 2021.”

[23] In the circumstances, an extension of the candidate cut-off date does not fall within the ambit of the amendments which paragraph 5(c)(iii) contemplated as

“reasonably necessary”. The contrary contentions advanced by the Commission and the ANC must be rejected. It also follows that the reasons which the Commission gave for the envisaged amendment in its public statement on 6 August 2021 were unsound. In that statement the Commission justified its decision squarely with reference to paragraph 5(c)(iii) of the order.

Section 11(2) of the Municipal Electoral Act

[24] However, the fact that the Commission incorrectly justified the envisaged amendment with reference to the order is not the end of the case. The amendment has not yet been formally made. That will only happen after the Minister issues her new proclamation. The fact that the Commission incorrectly believed that the proposed amendment fell within the scope of paragraph 5(c)(iii) of the order does not mean that the Commission did not genuinely believe that such an amendment was reasonably necessary. While the DA and EFF call the Commission’s bona fides into question, we cannot on the papers reject the genuineness of the Commission’s view.

[25] The importance of this is that paragraph 5(c)(iii) of the order is not the only legal source for the Commission’s power to amend the timetable. Although the Commission did not say so in its statement published on 6 September 2021, it has stated in its affidavit in the present proceedings that it regards the extension decision as justified in the exercise of the power conferred on it in section 11(2) of the MEA, quite independently of paragraph 5(c)(iii) of the order.

[26] In its replying affidavit the DA said that “once a bad consideration materially influences a decision, the fact that other grounds which inform the decision were good does not save the tainted decision”. The position here is, however, distinguishable from cases where a public functionary has exercised a discretionary power for a mixture of reasons, some of which fall outside the legitimate scope of the empowering statute. In the present case, the extension decision has not yet formally been taken. And importantly, this is not a case of a mixture of good and bad reasons for a decision based on a single source of authority. Rather, it is a case of the same essential reasons

being advanced to justify a decision which could allegedly be taken in terms of two independent sources of authority, namely the order and section 11(2). The fact that the one source of authority (the order) is not available to the Commission does not mean that the same outcome, justified independently with reference to another source (section 11(2)), is impeachable.

[27] It may be so that the de facto decision which the Commission announced on 6 September 2021 was flawed because it was, at that time, based solely on the order. However, there would be no grounds for engaging this Court’s jurisdiction on an urgent and direct basis merely to establish that a decision taken on that basis alone could not stand, or that the de facto decision of 6 September 2021 was invalid. The important question is whether the Commission is entitled to adhere to its proposed amendment with a view to effecting it on 20 September 2021. This requires us to determine whether the order precludes the Commission from relying on section 11(2) and whether, if the order does not so preclude the Commission, the DA has established that the proposed amendment would still be unconstitutional and unlawful.

[28] Sections 11(2) and (3) of the MEA provide:

- “(2) The Commission may, by notice as required in subsection (1)(b), amend the election timetable if—
 - (a) it considers it necessary for a free and fair election; or
 - (b) the voting day is postponed.
- (3) Any act required to be performed in terms of this Act must be performed by no later than a date and time stated in the election timetable.”

[29] The SAIRR submitted that the effect of section 11(3) is that a date in an election timetable that has already passed cannot be amended. Because the candidate submission date of 23 August 2021 had come and gone by the time the Commission proposed to amend the timetable, the amendment – so it was contended – was impermissible. This argument is not supported by the language of section 11(3),

which does not constrain the Commission's power of amendment, either expressly or by necessary implication.

[30] The Commission submits that the order does not deprive it of its ordinary statutory powers to amend the timetable in terms of section 11(2). The Commission alleges that it considers it necessary, for a free and fair election, to re-open and extend the candidate cut-off date, and that such extension is permitted by section 11(2)(a). It also alleges that because the Minister will, in her new proclamation, be postponing the election date from 27 October 2021 to 1 November 2021, the Commission may amend the timetable in terms of section 11(2)(b).

[31] The Commission is correct that this Court's order did not preclude it from amending the current timetable in terms of section 11(2).¹² The order does not say so, and it would have been an egregious judicial intrusion on the Commission's statutory powers to have done so. That this was not the intended effect of the order is made clear in the passage quoted earlier from the majority judgment.¹³ Section 11(2) is one of the powers which Parliament has conferred on the Commission to enable it to fulfil its constitutional duty, imposed by section 190(1)(b) of the Constitution, to ensure that the elections it manages are free and fair.

[32] The ruling in paragraph 5(c)(iii) of the order that the current timetable would "remain applicable" was made so as to relieve the Commission of the difficulties which section 11(1) of the MEA might otherwise have posed. Section 11(1) provides that when an election has been called, the Commission must compile and publish an election timetable. An election is "called" when the Minister proclaims the election date.¹⁴ Since the Minister's proclamation of 3 August 2021 was set aside, the new proclamation contemplated in paragraph 5(c)(ii) of the order would be an act whereby the elections are "called". But for the saving provisions of paragraph 5(c)(iii), the new

¹² Compare *S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Limited* [2018] ZACC 37; 2019 (1) SA 370 (CC); 2018 (12) BCLR 1553 (CC) at paras 51-65.

¹³ See [22].

¹⁴ Section 24(2) of the Local Government Municipal Structures Act 117 of 1998.

proclamation would have triggered an obligation by the Commission to compile and publish a new timetable. In the ordinary course, such a timetable could not require persons to do things on dates which lay in the past, i.e. the dates in the timetable would need to be prospective. Since this Court did not know whether all the steps in a new and prospective timetable could be accommodated in time for elections on or before 1 November 2021, it was thought just and equitable to “override” section 11(1) by allowing the current timetable to stand.

[33] It does not follow, from these saving provisions in the order, that the Commission was precluded from exercising its ordinary powers of amendment in terms of section 11(2). The only qualification inherent in the order was that amendments should not be such as to make it impossible to hold elections on or before 1 November 2021.

[34] This said, it is doubtful whether section 11(2)(b) of the MEA finds application. The election date has not been “postponed”. The proclamation which determined the election date to be 27 October 2021 has been set aside. With the setting aside of the proclamation, there ceased to be any election date at all. When the Minister issues her new proclamation, she will in law be determining an election date, not postponing an election date. Sections 8 and 9 of the MEA deal with the postponement of elections.

[35] As to section 11(1)(a), the Commission in its answering affidavit has said that it regards the extension of the candidate cut-off date to be necessary for free and fair elections. The Commission has not yet formally amended the timetable, as this will only happen following the issuing of the new proclamation on 20 September 2021. The Commission, however, intends to amend the timetable in this way, and political parties and candidates are no doubt organising their affairs on the basis that this will happen. The question is whether the DA has established that this decision by the Commission, when it is formally taken and implemented, will be unconstitutional, unlawful and invalid.

[36] The Commission explains that this Court's order of 3 September 2021, and the Commission's determination that it will be possible to hold a voter registration weekend, are supervening events which have caused the Commission to reassess its timetable in the light of its constitutional mandate to hold free and fair elections. The ordinary legislative scheme is that any persons who are registered voters on the date of the proclamation fixing the election date are entitled to stand as candidates. Even if this Court's order did not make it "reasonably necessary" for the timetable to be amended so as to allow the participation of new candidates, it would be in keeping with the legislative scheme, and would enhance the freeness and fairness of elections, if eligible citizens who had not applied for registration before 3 August 2021, but who did so before the Minister's new proclamation on 20 September 2021, were able to stand as candidates.

[37] The Commission has decided that the extension of the candidate cut-off date can be accommodated while still holding elections on 1 November 2021. Although there has not, as a matter of law, been a "postponement" of the election date, the current timetable was formulated on the basis of a proclaimed election date of 27 October 2021, whereas the Commission has reassessed the timetable on the basis that the Minister intends to proclaim 1 November 2021 as the election date. This gives the Commission five additional clear calendar days to work with.

[38] The DA points to statements made on behalf of the Commission in the main case where the Commission said that it was impossible to hold a voter registration weekend, or to accommodate new candidates registering during such a weekend, in time for elections to be held on 27 October 2021. It has to be acknowledged that, when confronted with the stern reality that elections would have to be held on or before 1 November 2021 come what may, the Commission seems to have revised its views as to what is possible. This is not to say that there is anything easy about accommodating new voters and candidates in time for elections on 1 November 2021. The Commission states in the present proceedings that it is in the process of making "truly herculean and unprecedented efforts, in the face of shorter timelines than ever

before” to achieve free and fair elections on 1 November 2021. It is fair to say that whereas in the main case, in which the Commission was hoping for this Court to authorise a postponement of the elections, the Commission focused on, and perhaps magnified, the problems of holding timeous elections, it has now been compelled by this Court’s order to become solution-oriented.

[39] The Commission states that once this Court issued its order and the Commission determined that a voter registration weekend was possible, the Commission was compelled to do the best that it could, acting in the best interests of voters. This Court’s order and the Commission’s determination were supervening events which made it possible to consider a candidate extension. Granting a candidate cut-off extension would be consistent with the legislative scheme, which makes timeous registration as a voter the determinant of whether a person may stand as a candidate. Extending the candidate cut-off date would best promote the fundamental right guaranteed to citizens in section 19(3)(b) of the Constitution to stand for public office and to hold office if elected, read with the eligibility conferred by section 158(1) of the Constitution on every citizen who is qualified to vote to be a member of a municipal council. It would also best promote the fundamental voting rights guaranteed to citizens in section 19, because of the expansion of the pool of candidates for whom citizens can vote. Moreover, one of the rights which newly registered voters acquire, by virtue of section 16(1)(b)(ii) of the MEA, is the right to nominate ward candidates who are registered voters as at the date of the proclamation calling the election. Absent an extension for candidate nominations, newly registered voters would not be able to exercise this right in relation to the 2021 local government elections.

[40] The DA and EFF evidently consider that the Commission’s decision to extend the candidate cut-off date has been taken in order to give the ANC a chance to remedy its failure to submit lists and candidates in certain municipalities. The ANC’s non-compliance with the cut-off date of 23 August 2021 was not a consequence of the fact that only persons who were registered voters as at 3 August 2021 qualified as

candidates. In short, the DA alleges that the Commission's decision is biased and improper, and is inconsistent with the even-handedness demanded of an independent electoral body. The EFF alleges that the ANC will be disproportionately benefited by the extension of the cut-off date. It is not possible, however, on these papers and in conformity with the *Plascon-Evans* rule¹⁵ to reject the Commission's denial of these imputations.

[41] The DA has stated that if the Commission merely wished to accommodate candidates who were not on the roll as at 3 August 2021, it would have sufficed to have granted this limited class of candidates the right to be added to party lists or nominated as ward candidates. A qualified candidate extension of this kind would not have allowed the ANC to submit party lists in municipalities where it failed to do so by 23 August 2021 or to include candidates who were already on the roll as at 3 August 2021 and whose names could thus have been included in candidate submissions made by 23 August 2021.

[42] While the Commission's decision to grant a general rather than a qualified candidate cut-off extension makes this attack by the DA possible, and may even lend it an aura of plausibility, we cannot on the papers reject the Commission's denial of improper motives. Furthermore, the Commission has provided a technical explanation as to why a qualified candidate cut-off extension would not have been possible. Once candidate submissions have closed, the Commission has electronic systems which analyse whether the candidates are on the roll and are registered in the right districts and whether there are duplications. These processes are too extensive to be done manually. Currently, the Commission's electronic systems are not set up to read the roll on a "date of registration basis". The Commission's chief electoral officer states in his affidavit:

¹⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) (*Plascon-Evans*) at 634E-635C. The *Plascon-Evans* rule is that an application for final relief must be decided on the facts stated by the respondent, together with those which the applicant states and which the respondent cannot deny, or of which its denials plainly lack credence and can be rejected outright on the papers. The rule has frequently been applied in this Court. See, for example, *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* [2019] ZACC 38; 2020 (1) SA 368 (CC); 2019 (12) BCLR 1479 (CC) at para 16.

“The enhancement of the candidate nomination system to allow for an exclusive verification of new entrants to the voters’ roll will entail a technical review of 33 stored procedures. This review will lead to a rewrite of some procedures. After the technical rewrite is complete a thorough test is required to ensure that the enhancements function as required.”

These changes to computer systems will take at least two to three weeks, and this simply cannot be accommodated, so the Commission alleges, within the truncated timetable.

[43] Given the urgency of the present proceedings and the fact that we did not hear oral argument, we do not finally decide the question whether the Commission’s decision is impeachable on the ground of ulterior motive. If, after the event, the DA or other political parties consider that the elections in particular municipalities were not free and fair because of alleged bias by the Commission in extending the candidate cut-off date, this judgment will not preclude such challenges. The papers in the present case have not persuaded us, however, that the Commission’s proposed decision to extend the candidate cut-off date, when and if it is eventually taken on 20 September 2021, will be unconstitutional and unlawful.

[44] The DA alleges that the extension decision has led to financial prejudice for the party. First, it has allocated less campaign finance to municipalities where the ANC failed to field candidates, and the money which has gone to other municipal campaigns cannot now be retrieved. Second, it has prepared campaign material on the basis of its current slate of candidates, so accommodating new DA candidates would come at a cost. It can be assumed, for present purposes, that prejudice of this kind is one of many matters which the Commission should take into account when deciding whether to amend an election timetable. Whether it should carry decisive weight is ultimately a matter for the Commission to assess, and a court could not set aside a timetable amendment merely because the court would have attached greater weight to such prejudice.

[45] At the present time, and on these papers, we cannot find that the proposed extension decision would be susceptible to review on the basis of the financial prejudice the DA alleges. We do not have quantified details of the DA's allocation of campaign finance. The DA's decision to allocate less campaign finance to municipal campaigns from which the ANC would be absent must have been taken after 23 August 2021. From 24 August 2021 to the afternoon of Friday, 3 September 2021, the DA did not know that the elections would not be postponed to February 2022 by an order of this Court, and if they had been so postponed the candidate cut-off date would almost certainly have been altered. During that period, therefore, the DA's campaign finance decisions were taken despite the risk of change. By Monday, 6 September 2021 the Commission had notified political parties on the NPLC that the candidate cut-off date was to be extended. Regarding the costs which the DA has spent on campaign material for its existing slate of candidates, it is in the DA's own hands to decide whether to nominate other candidates from newly registered voters. It has not alleged that it is likely to do so, and it will no doubt take wasted costs into account in making such decisions.

[46] This judgment does not detract from the importance of adherence to deadlines imposed by election timetables.¹⁶ Our decision is concerned with the Commission's power to amend timetables in terms of section 11(2). When that power is lawfully exercised, it inevitably changes the deadlines, in which event there must be compliance with the amended deadlines. Self-evidently, it would be improper for the Commission to exercise its power of amendment in order to favour one particular party, but on the papers we cannot find that the Commission's proposed amendment will be vitiated on this basis.

Conclusion

[47] FUL criticised all the political parties who were active participants in the present matter – the DA, ANC, IFP and EFF – for “opportunism” and engaging in

¹⁶ *Liberal Party v Electoral Commission* [2004] ZACC 1; 2004 (8) BCLR 810 (CC) at paras 21-5 and *Electoral Commission of the Republic of South Africa v Inkatha Freedom Party* [2011] ZACC 16; 2011 (9) BCLR 943 (CC) at para 52.

“lawfare”. FUL submitted that it was not in the interests of justice for this Court to be drawn into this political wrangling. While there is merit in FUL’s criticisms of the tenor of some of the affidavits, the matter appeared to be one requiring urgent attention. As with the main case, there was not time for it to wend its way through the judicial hierarchy. The DA’s application was not without merit. On the issue whether the candidate extension is a “reasonably necessary” amendment as contemplated in the order, the DA, IFP and EFF were right, and the opponents of the DA, as well as FUL, were wrong. Given the desirability of a prompt resolution, the balance, when assessing the interests of justice, comes down in favour of allowing direct access on an urgent basis.

[48] However, and for reasons explained, the DA’s application must fail on the merits. The ANC has asked for a punitive costs order against the DA because of alleged scurrilous insinuations made against the Commission and this Court. The Commission itself has not sought costs. Whatever the DA’s spokespersons may have said extra-curially, its application was not manifestly improper. In line with this Court’s order in the main case, the parties should bear their own costs in the present proceedings.

Order

[49] The following order is made:

1. The third intervening party’s prayer for direct access on an urgent basis is granted.
2. Save as aforesaid, the third intervening party’s application is dismissed.

For Third Intervening Party:	A Cockrell SC, M Bishop, M Tsele and E Cohen instructed by Minde Schapiro & Smith Incorporated
For the Applicant:	S Budlender SC, N Luthuli and M De Beer instructed by Moeti Kanyane Attorneys
For the First Respondent:	N Maenetjie SC, R Tshetlo and B Dhladhla instructed by the State Attorney Pretoria
For the First Intervening Party:	T Ngcukaitobi SC and T Ramogale instructed by Gwala Dlamini Msane Incorporated
For the Second Intervening Party:	W N Shapiro SC, I Veerasamy and N L Nickel instructed by Lourens De Klerk Attorneys
For the Fifth Intervening Party:	A Katz SC, M Mhambi and K Perumalsamy instructed by M Magigaba Incorporated
For the Eighth Intervening Party:	M M Ka-Siboto instructed by Ian Levitt Attorneys
For the Second Amicus Curiae:	J Gauntlett SC QC and S Pudifin-Jones instructed by Nortons Incorporated
For the Third Amicus Curiae:	M Oppenheimer instructed by Cillier & Gildenys Incorporated