

**IN THE ELECTORAL COURT OF SOUTH AFRICA  
HELD AT BLOEMFONTEIN**

**Reportable  
Case number: 10/2022 EC**

In the matter between:

<b>ELECTORAL COMMISSION OF SOUTH AFRICA</b>	<b>First Applicant</b>
<b>CHIEF ELECTORAL OFFICER</b>	<b>Second Applicant</b>
 and	
<b>SPEAKER OF THE uMHLATHUZE LOCAL COUNCIL</b>	<b>First Respondent</b>
<b>MUNICIPAL MANAGER: uMHLATHUZE LOCAL MUNICIPALITY</b>	<b>Second Respondent</b>
<b>SPEAKER OF THE KING CETSHWAYO DISTRICT COUNCIL</b>	<b>Third Respondent</b>
<b>MUNICIPAL MANAGER: KING CETSHWAYO DISTRICT COUNCIL</b>	<b>Fourth Respondent</b>
<b>INKATHA FREEDOM PARTY</b>	<b>Fifth Respondent</b>
<b>ECONOMIC FREEDOM FIGHTERS</b>	<b>Sixth Respondent</b>
<b>DEMOCRATIC ALLIANCE</b>	<b>Seventh Respondent</b>
<b>COUNCILLOR ANNEKE LANGE</b>	<b>Eighth Respondent</b>
<b>COUNCILLOR MUZIWOKUTHULA MSIMANGO</b>	<b>Ninth Respondent</b>
<b>COUNCILLOR MAKHOSI MADIDA</b>	<b>Tenth Respondent</b>

**Neutral Citation:** *Electoral Commission of South Africa and Another v Speaker of the uMhlathuze Local Council and Others* (10/2022 EC) [2022] ZAEC 11 (1 December 2022)

**Coram:** Zondi JA, Shongwe AJ, Modiba J, and Professor Ntlama-Makhanya and Professor Phooko (Additional Members)

**Heard:** 22 September 2022

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09:45 am on 1 December 2022.

**Summary:** Election of councillors to district council in terms of item 20 of Schedule 2 to the Local Government: Municipal Structures Act 117 of 1998 – Review in terms of the principle of legality, not brought within a reasonable time – Whether the delay should be overlooked – Interpretation of item 20 as read with s 157 of the Constitution – Just and equitable remedy – Procedure: whether there was non-joinder of other interested parties.

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## ORDER

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1. It is declared that the election on 23 November 2021 of the eighth, ninth and tenth respondents by the Electoral Commission as members of the King Cetshwayo District Council as representatives of the uMhlathuze Local Council, as contemplated in s 23(1)(b) of the Local Government: Municipal Structures Act 117 of 1998, was unlawful, unconstitutional and invalid.
2. The decision of the Electoral Commission to elect the eighth, ninth and tenth respondents is reviewed and set aside.
3. It is declared that the proceedings of any decisions taken by the King Cetshwayo District Council are not invalid only by reason that the eighth, ninth and tenth respondents were members of that Council at the time.
4. The eighth, ninth and tenth respondents are ordered to vacate office in the King Cetshwayo District Council within fourteen days from the date of this order.
5. It is declared that the orders in paragraphs 1 and 2 shall not affect the legality of the payment of any salary or benefits to the eighth, ninth or tenth respondents prior to the date of this order.
6. No order as to costs is made.

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## JUDGMENT

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**Zondi JA (Shongwe AJ, Modiba J, and Professor Ntlama-Makhanya and Professor Phooko (Additional Members) concurring)**

### **Introduction**

[1] On 2 August 2022, the applicants, the Electoral Commission of South Africa and the Chief Electoral Officer (the Commission), brought an application in this Court seeking an order in the following terms:

1. Declaring that the purported election on 23 November 2021 of the Eighth, Ninth and Tenth Respondents as members of the King Cetshwayo District Council as a representative of uMhlathuze Local Council as contemplated in section 23(1)(b) of the Local Government: Municipal Structures Act 117 of 1998, was unlawful, unconstitutional and invalid;
2. Correcting, reviewing and setting aside the above election of the Eighth, Ninth and Tenth Respondents;
3. Declaring that the proceedings of any decisions taken by the King Cetshwayo District Council are not invalid only by reason that the Eighth, Ninth and Tenth Respondents were members of that Council at the time;
4. Declaring that the orders in paragraphs 1 and 2 shall not affect the legality of the payment of any salary or benefits to the Eighth, Ninth or Tenth Respondents prior to the date of this order.'

[2] The purpose of the application is to have reviewed and set aside the election of the eighth to tenth respondents (the affected councillors) as councillors of the King Cetshwayo District Council on 23 November 2021 on the ground that their election was unlawful, in that it had been conducted in a manner inconsistent with the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act) (the impugned decision).

[3] The impugned decision was made by the Commission's representatives who were tasked with managing the election and seat allocation procedures on the King Cetshwayo District Council. In short, the Commission seeks the review and setting aside of its own decision. The Commission delayed to bring the review application. It seeks condonation for the delay.

[4] The first to the fifth respondents and the eighth to the tenth respondents, the three affected councillors, oppose the relief sought by the Commission. These respondents are the Speaker of the uMhlathuze Local Council, the Municipal Manager: uMhlathuze Local Municipality, the Speaker of the King Cetshwayo District Council, the Municipal Manager: King Cetshwayo District Council, Inkatha Freedom Party (IFP), as

well as the affected councilors, namely Councillor Anneke Lange, Councillor Muziwokuthula Msimango and Councillor Makhosi Madida respectively.

[5] The respondents oppose the application essentially on three main grounds. In addition to opposing the application on the merits, the respondents also raise two preliminary points on which they seek the dismissal of the application. They contend, first, that the Commission delayed unreasonably in launching the review application; secondly, that the Commission failed to join the uMhlathuze Municipal Council, the King Cetshwayo Municipal Council, the KwaZulu-Natal Member of the Executive Council for Cooperative Government and Traditional Affairs (the MEC) and the Minister of Cooperative Government and Traditional Affairs (the Minister), who, they claim, have a direct and substantial interest in the matter (non-joinder). As regards the merits, they contend that the relief sought by the Commission is incompetent, as it is based on the Commission's flawed construction of the relevant provisions of the Structures Act. In the alternative, the respondents contend that if this Court should find that the Commission's interpretation of the Structures Act is correct and that the three affected councillors should not have been elected, the Court should in the exercise of its discretion grant a just and equitable remedy. In this regard, the respondents contend that in the event that the election of the three affected councilors is found to be irregular, they should be allowed to serve until the end of their terms of office or until their removal in terms of s 46 of the Structures Act or their requisition in terms of the Structures Act.

### **Issues**

[6] Four issues fall to be considered in this matter: firstly, whether the delay should be overlooked; secondly, the merits of the review, which entails the interpretation of the Structures Act; thirdly, the determination of the just and equitable remedy; and fourthly, whether the Commission's failure to join the Minister, the MEC and the relevant municipalities is fatal to its application.

### **The delay**

[7] This being a legality review, I will consider, as part of assessing the delay, the merits of the impugned decision.<sup>1</sup> The respondents assert that the delay is unreasonable and there is no satisfactory explanation for it. They contend that the Commission's self-review application should fail for this reason alone. As for the merits of the review, the respondents contend that the Commission's proposed construction of item 20 of Schedule 2 to the Structures Act is incorrect and, that being the case, there is no legal basis to set aside the impugned decision.

[8] The Commission concedes that its delay (about nine months) was lengthy and unreasonable. It accepts that it was to blame for the delay. It, however, submits that this Court should overlook the delay and hear the matter despite the delay. I will deal with this aspect more fully when I consider the reasons advanced by the Commission for the delay.

[9] The Commission brought this review under the principle of legality read with s 20(1)(a) of the Electoral Commission Act 51 of 1996 (Commission Act). Unlike a review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), there is no fixed time specified for bringing the review under the principle of legality, the delay rule requires a party to institute review proceedings within a reasonable time, in other words, without undue delay.<sup>2</sup>

[10] The purpose and function of the delay rule was explained by Nugent JA in *Gqwetha v Transkei Development Corporations Ltd and Others* as follows:<sup>3</sup>

'It is important for the efficient functioning of public bodies (I include the first respondent) that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule – reiterated most recently by Brand JA in *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) at 321 – is twofold:

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<sup>1</sup> *South African National Roads Agency Limited v City of Cape Town* [2016] ZASCA 122; [2016] 4 All SA 332 (SCA); 2017 (1) SA 468 (SCA) para 81; see also *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) para 56.

<sup>2</sup> *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) para 48.

<sup>3</sup> *Gqwetha v Transkei Development Corporations Ltd and Others* [2005] ZASCA 51; [2006] 3 All SA 245 (SCA) paras 22-23.

First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more important, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroeiërs Afslaërs (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E-F (my translation):

“It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed – *interest reipublicae ut sit finis litium* . . . Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule.”

Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body, and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (*Wolgroeiërs Afslaërs*, above, at 42C).’

[11] The application of the undue delay rule requires a two-stage enquiry.<sup>4</sup> The Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited*<sup>5</sup> stated that firstly, it must be determined whether there was an unreasonable or undue delay and secondly, if so, whether the court should exercise its discretion to overlook the delay and entertain the application.<sup>6</sup> The Constitutional Court explained that the first stage involves a factual enquiry upon which a value judgment is made, having regard to all the circumstances of the matter. In other words, whether the interests of justice require an overlooking of the unreasonable delay. The reasonableness of the delay, the Constitutional Court proceeded, ‘must be assessed on, among others, the explanation offered for the delay. Where the delay can be explained and justified, then it is reasonable, and the merits of the review can be

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<sup>4</sup> *Gqwetha*, which was adopted in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) para 49.

<sup>5</sup> *Buffalo City* fn 2 above.

<sup>6</sup> *Buffalo City* para 48.

considered. If there is an explanation for the delay, the explanation must cover the entirety of the delay. But, as was held in *Gijima*, where there is no explanation for the delay, the delay will necessarily be unreasonable'.<sup>7</sup>

[12] The second stage, on whether an unreasonable delay should be overlooked, is a flexible one and entails a legal evaluation taking into account a number of factors such as potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision and whether such may be ameliorated by the court's power to grant a just and equitable remedy.<sup>8</sup> The nature of the impugned decision is another factor to be considered which, in essence, requires a consideration of the merits of the legal challenge against that decision.<sup>9</sup>

[13] Turning to the explanation for the delay, the Commission alleges that the impugned decision was made by its representative on or about 23 November 2021 as a result of misapplication of the provisions of the Structures Act. The representative concerned was by means of an email dated 2 December 2021 alerted to the fact that the decision might be incorrect and was asked to rectify the mistake. There was no response to this email. Nothing happened until mid-May 2022 when the Commission's Provincial Office conducted a routine Candidate Nomination System (CNS) audit when the discrepancy between the list of the sitting councillors and what was on the Commission system was again detected.

[14] The Commission brought this application on 2 August 2022. It provides the following explanation regarding the steps it took from May 2022 to August 2022. The Commission's officials deliberated internally between national and provincial offices – on how to deal with the problem identified by the CNS audit. After consulting with Walter Rambele Sheburi, the Deputy Chief Electoral Officer (the DCEO), Ms Masinga, one of the Commission's officials, decided that the problem should be raised at the next Provincial Liaison Committee (PLC) meeting, which was to be held on 20 May 2022.

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<sup>7</sup> *Buffalo City* para 52.

<sup>8</sup> *Buffalo City* para 54.

<sup>9</sup> *Buffalo City* para 55.



[15] The DCEO attended the PLC meeting on 20 May 2022, as did various district managers and members of the political parties and councillors. During the meeting, the DCEO specifically addressed his concerns regarding the election of the three affected councillors through the third round of elections, which was not provided for in terms of the relevant provisions of the Structures Act. He expressed the view that the election of the three affected councillors had been unlawful.

[16] The parties indicated that they would prefer the Commission to approach this Court to clarify the position. Although this is not indicated in the minutes, it was suggested that the Commission should obtain a legal opinion.

[17] The DCEO accepted this suggestion and took steps accordingly. On the same day, the DCEO sent an email to Ms Rekha Raath, a senior manager in the Commission's Legal Services Department, to ascertain whether the Commission could change their irregular allocations administratively – or whether they needed a court order. Her advice was that a legal opinion be obtained.

[18] On 30 May 2022, the Commission instructed Moeti Kanyane Attorneys to prepare a legal opinion. Given the novelty of the issue at hand, Mr Kanyane needed time to research and consider the issues, and to prepare his opinion. The Commission received the written opinion on 20 June 2022 by email. The opinion concluded that the Commission should approach this Court to review and set aside the impugned election.

[19] After considering the legal opinion, on 27 June 2022, the DCEO sent an email to the CEO and Mosotho Moepya, a Commissioner of the Electoral Commission, and asked for authorisation to institute the present application. On 28 June 2022, the Commission issued a request for quotations – and permission to proceed with the appointment of attorneys to institute the application.

[20] DMO Attorneys were appointed as attorneys of record on 30 June 2022. Subsequently, various consultations were held between the Commission's officials and

the instructing attorneys. On 7 July 2022, counsel was briefed to consider the matter – and to prepare the present application. Counsel consulted with the Commission’s officials on 13 July 2022.

[21] Mr Mathenjwa, the Commission’s representative to whom an email of 2 December 2021 was addressed, explains why he never acted on it. The fact of the matter is that he forgot about it and the Commission’s officials who issued instruction for the relevant emails to be sent, including those who sent and received them, did absolutely nothing to ensure that the relevant emails were acted upon.

[22] In the circumstances, the concession by the Commission that the delay is long and the explanation is unsatisfactory, was correctly made. Accordingly, I find that the delay was unreasonable.

[23] The Constitutional Court held in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*<sup>10</sup> that s 237 of the Constitution ‘acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality’. The Electoral Court Rules place a premium on the importance of expeditious institution of reviews and this is reflected in Rule 6, which stipulates that a party who wants to take the Electoral Commission on review must do so within three days after the decision has been made. The reason for this is that, in general, electoral matters are urgent and ought to be finalised expeditiously.

[24] The next question is whether this Court should nevertheless exercise its discretion to overlook the delay and entertain the application. Do the interests of justice require that this Court to overlook the unreasonable delay? In determining whether or not to overlook the unreasonable delay I have considered, first, the inherent potential for the resultant prejudice if the impugned decision is set aside. What the Commission

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<sup>10</sup> *Khumalo* fn 4 above para 46.

seeks in this matter is an order setting aside the election of the three affected councillors, which, if granted, would mean that they will have to vacate their seats in the King Cetshwayo District Council and return to the uMhlathuze Local Council, from which they were appointed. Further, the King Cetshwayo District Council, instead of having 10 seats, will have 7 seats and the three seats would remain unallocated.

[25] This will, however, not affect the ability of the King Cetshwayo District Council to govern the local government affairs of its own community under s 151(3) and s 160 of the Constitution. It is correct that should the affected councillors be removed from the King Cetshwayo District Council, they stand to lose their benefits which they enjoy as members of the King Cetshwayo District Council. In order to avoid the adverse effect that the declaration of invalidity may have on the affected councillors, the Commission requests the Court to declare that the setting aside of the decision should not have retrospective effect.<sup>11</sup>

[26] As regards the nature of the impugned decision, it must be borne in mind that the relief sought by the Commission is based on what it contends is the correct interpretation of item 20 of Schedule 2 to the Structures Act. The respondents reject the construction contended for by the Commission. They contend that, properly interpreted, item 20 allows the Commission to allocate all the seats even if one of the political parties decide to walk out of the meeting where the appointment of representatives of the Local Municipality to the District Municipality is to be made.

[27] The matter raises an important issue of law concerning the interpretation of item 20. It is apparent from the parties' arguments that they interpret item 20 differently and it is important that this controversy should be put to bed, as it is likely to occur in the future. If the Commission's proposed interpretation is correct, then it means that the election of the three councillors was unlawful and this Court is enjoined by s 172(1)(a) of the Constitution to declare their election invalid. The delay has not enhanced the prejudice to the three councillors; instead, they have benefitted from the mistake. The

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<sup>11</sup> *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* [2019] ZACC 28; 2020 (1) SA 450 (CC) para 91.

uMhlathuze Local Council has also not been prejudiced by the delay. It has enjoyed more representation on the King Cetshwayo District Council than it would have but for the election decision. Furthermore, this is not a case where the delay may weaken the Court's ability to fully ventilate the issues arising from the loss of evidence and the key witnesses becoming unavailable. All the facts on which to make a decision are still available. I am of the view that, in the interest of legal certainty, the merits of the application including the interpretation of item 20 should be considered.

[28] In conclusion, I hold therefore that the Commission's unreasonable delay should be overlooked and that the merits of the decision be considered. This then leads me to the merits of the application and how item 20 should be interpreted.

### **Factual matrix**

[29] Before turning to the interpretation and application of the pertinent statutory provisions, it is necessary to set out in some detail the background culminating in the present application. The Commission is one of the Chapter 9 institutions which were established to support constitutional democracy as required by the Constitution. It was established in terms of the Commission Act. Its primary duties are to 'manage elections of national, provincial and municipal legislative bodies in accordance with national legislation'; to 'ensure that those elections are free and fair'; and to 'declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible'.<sup>12</sup> In this matter we are required to examine the manner in which the Commission discharged its function in relation to the election of the three affected councillors to represent uMhlathuze Local Council (the Local Council) in the King Cetshwayo District Council (the District Council).

### **The elections**

[30] The Local Government Elections were held on 1 November 2021. As a result, a total of 67 (sixty-seven) seats were awarded in the uMhlathuze Local Municipality. The seats were awarded as follows (in descending order):

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<sup>12</sup> Section 190(1) of the Constitution.

- |     |                                    |           |
|-----|------------------------------------|-----------|
| (a) | African National Congress          | 27 seats; |
| (b) | Inkatha Freedom Party              | 23 seats; |
| (c) | Democratic Alliance                | 8 seats;  |
| (d) | Economic Freedom Fighters          | 6 seats;  |
| (e) | African Christian Democratic Party | 1 seat;   |
| (f) | National Freedom Party             | 1 seat;   |
| (g) | Vryheidsfront Plus                 | 1 seat.   |

[31] Subsequently, a meeting of the local council was convened in order to, among other things, conduct the election and appointment of representatives of the uMhlathuze Local Council to the King Cetshwayo District Council in terms of Schedule 2 to the Structures Act. Section 23(1)(a) and (b) of the Structures Act provides for councillors elected in accordance with Part 1 of Schedule 2 by voters, to proportionally represent the parties that contested the election within the district municipality, and councillors appointed in accordance with Schedule 2 by the councils of the respective local municipalities within that district municipality, to directly represent those local municipalities. The District Council has a total of 43 seats (18 seats allocated to councillors elected in terms of s 23(1)(a), and 25 seats allocated to councillors appointed in terms of s 23(1)(b)).

[32] King Cetshawayo District Municipality comprises five local municipalities, and its seats are allocated as follows:

- |     |                                |              |
|-----|--------------------------------|--------------|
| (a) | uMhlathuze Local Municipality  | 10 seats;    |
| (b) | uMlalazi Local Municipality    | 6 seats;     |
| (c) | Mthonjaneni Local Municipality | 2 seats;     |
| (d) | Nkandla Local Municipality     | 3 seats; and |
| (e) | uMfolozi Local Municipality    | 4 seats.     |

[33] The members chosen at this meeting would be sent to represent the Local Council on the District Council. However, once the meeting was convened, 27 councillors, who represented the African National Congress (ANC), walked out of the

meeting before signing the attendance register, purportedly in protest for reasons not relevant to these proceedings. A councillor, representing the National Freedom Party (NFP), attended the meeting but abstained from voting.

[34] Despite the absence of the ANC councillors, a quorum was present as contemplated in s 30(1) of the Structures Act. The remaining 39 councillors took part in the procedures regulated by Schedule 2 to the Structures Act to elect representatives of the Local Council to the District Council.

[35] Only three parties (the IFP, the DA and the EFF) submitted candidate lists in terms of item 17(1) of Schedule 2 for which the members of the Local Councils cast their votes. In other words, the members of the Local Council had to cast their votes in favour of their preferred list. Each councillor would cast one vote for one list only.

[36] The quota of votes for a seat was determined in terms of the formula set out in item 19 of Schedule 2, namely,  $[(A \div B) + 1]$ . The formula was applied as follow in this case:

67 (being the number of members on the Local Council)  $\div$  10 (being the number of seats on the District Council awarded to the Local Council)

= 6.7+1 (disregard fractions)

= 7.

Accordingly, a candidate list would be allocated one (1) seat on the District Council for every seven (7) votes received.

### **The impugned decision**

[37] The IFP's list received 25 votes, the DA' list received 8 votes and the EFF's list received 6 votes. Thereafter, the seats had to be allocated in terms of the procedure stipulated in item 20 of Schedule 2. I will deal with the provisions of item 20 shortly. During the first round, seats were allocated as follows in terms of item 20:

- (a) The IFP's candidates' list was allocated 3 of the 10 available seats;
- (b) The DA's candidates' list was allocated 1 of the 10 available seats;

(c) The EFF's candidates' list was allocated 0 of the available seats.

Thus, after the first round of seat allocation, 4 of the 10 available seats were allocated.

[38] The surpluses of the lists were used to allocate the remaining seats in terms of item 20(2)(a) and this exercise produced the following results:

(a) The IFP's candidates' list was allocated one additional seat;

(b) The DA's candidates' list was allocated one additional seat; and

(c) The EFFs candidates' list was allocated one seat.

Thus, after the second round of allocations of seats, 7 of the 10 available seats had been allocated.

[39] The Commission alleges that at this point, in terms of item 20, the process for the allocation of seats to the District Council should have stopped. This is because, so runs the argument, only seven seats were allocated owing to the absence of the ANC councillors and the abstention of the NFP councilor. The three remaining seats should have been left unallocated. It says this did not happen. Instead, the Commission's representatives, who were tasked with managing the election and seat allocation procedures, took the independent decision to allocate the three remaining seats by allocating one additional seat to each of the three contesting candidates' list (the IFP, the DA and the EFF).

[40] The respondents disagree with the Commission's interpretation of item 20. Although they accept that the surpluses remaining after the first allocation should be used to allocate the remaining seats, they disagree that the seats remaining after **the** use of the surpluses should have remained unallocated. They contend that if there are still seats to allocate after the second round, the Commission must continue to allocate them in the order of the highest surplus until all the seats are allocated.

### **Interpretation**

[41] The dispute therefore is about a proper interpretation and application of item 20 of Schedule 2 to the Structures Act. Which one of the two interpretations is a correct one? The proper approach to statutory interpretation is well known following *Natal Joint*

*Municipal Pension Fund v Endumeni Municipality*,<sup>13</sup> which was endorsed in *Capitec Bank Holdings Limited v Coral Lagoon Investments*, in which it was stated:<sup>14</sup>

‘. . . The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)* offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, ‘[t]he inevitable point of departure is the language of the provision itself.’

What this means is that one is firstly to consider the language used, which must be given its ordinary grammatical meaning, unless this results in absurdity, repugnancy, or inconsistency with the rest of the document. The language used must be understood in the context in which it is used and having regard to the purpose of the provision of the document.

[42] Section 39(2) of the Constitution enjoins a court, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights.<sup>15</sup> This means that the interpretation to be placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and the statute must be reasonably capable of such interpretation.<sup>16</sup>

[43] Item 20 is located in Schedule 2 to the Structures Act, which is headed ‘Electoral System for District Councils’. It is in Part 2 of Schedule 2, which deals with the

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<sup>13</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

<sup>14</sup> *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) at para 25.

<sup>15</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 72.

<sup>16</sup> *Bato Star* was quoted with approval by Khampepe J in *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) para 50.



'Allocation and Election of Representatives of Local Councils to District Councils'. Item 20 provides as follows:

'20 Allocating seats

- (1) The number of votes cast in favour of each list must be divided by the quota of votes for a seat and the result is the number of seats allocated to that list.
- (2)
  - (a) If the calculation in subitem (1) gives a surplus, that surplus must compete with other similar surpluses of any other lists, and any seat or seats not allocated under subitem (1) must be awarded in sequence of the highest surplus.
  - (b) If the surplus on one list is equal to the surplus on any other list, the seat or seats must be awarded in sequence of the highest number of votes cast for those lists.'

The crucial provision is thus item 20(2)(a), and the question to be determined is the meaning of the phrase 'any seat or seats not allocated under subitem (1) must be awarded in sequence of the highest surplus'.

### **The Commission's contentions**

[44] As regards the text of item 20, the Commission contends that the interpretation of item 20(2)(a) contended for by the respondents, which is to the effect that all the remaining seats must be awarded in sequence of the highest surplus, is absurd. It argues that the problem with this reading is that it focuses on the words 'any seat or seats . . . must be awarded', and ignores the fact that the seats are awarded by competing with other surpluses. The following example may explain how the process contemplated by item 20(2)(a) applies: (a) A surplus is the fraction which represents how close a list was to achieving an additional seat; (b) If the quota for a seat is 10 votes, and a list receives 25 votes, it will receive two seats in round one, and have a surplus of 0.5. Another list that receives 32 votes, will have three seats in round one, and a surplus of 0.2; (c) When those surpluses compete, 0.5 is higher than 0.2, so the first list will receive the first additional seat; and (d). However, the surpluses are then finished. They are a representation of almost achieving another seat. The Commission asserts that the surpluses can logically only 'compete' once. On the basis of this analysis the Commission argues that the respondent's interpretation makes no sense to the extent that it ignores the nature of a 'surplus', and the requirement that the surpluses compete.

[45] With regard to the context, counsel for the Commission submitted that item 20 must be interpreted in the context, firstly, of s 157 of the Constitution and, secondly, of Schedule 2 to the Structures Act, in which it is located. Section 157 of the Constitution is headed 'Composition and election of Municipal Councils'. It provides as follows:

- '(1) A Municipal Council consists of—
- (a) members elected in accordance with subsections (2) and (3); or
  - (b) if provided for by national legislation—
    - (i) members appointed by other Municipal Councils to represent those other Councils; or
    - (ii) both members elected in accordance with paragraph (a) and members appointed in accordance with subparagraph (i) of this paragraph.
- (2) The election of members to a Municipal Council as anticipated in subsection (1)(a) must be in accordance with national legislation, which must prescribe a system—
- (a) of proportional representation based on that municipality's segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference; or
  - (b) of proportional representation as described in paragraph (a) combined with a system of ward representation based on that municipality's segment of the national common voters roll.
- (3) An electoral system in terms of subsection (2) must result, in general, in proportional representation.
- (4) (a) If the electoral system includes ward representation, the delimitation of wards must be done by an independent authority appointed in terms of, and operating according to, procedures and criteria prescribed by national legislation.
- (b) . . .
- (5) A person may vote in a municipality only if that person is registered on that municipality's segment of the national common voters roll.
- (6) The national legislation referred to in subsection (1)(b) must establish a system that allows for parties and interests reflected within the Municipal Council making the appointment, to be fairly represented in the Municipal Council to which the appointment is made.'

[46] In developing this argument counsel for the Commission submitted that s 157(6) of the Constitution requires the national legislation envisaged in s 157(1)(b) to '*establish a system that allows for parties and interests reflected within the Municipal Council making the appointment, to be fairly represented in the Municipal Council to which the appointment is made*'. That is why, argued counsel, the Structures Act does not simply permit the local council to appoint, by majority rule, whomever it pleases to represent it on the district council. Instead, it seeks to ensure 'fair representation' by requiring an election in line with each list's support in the council.

[47] To bolster his argument, counsel referred to Steytler and De Visser, who conclude that the system established by the Structures Act for a local council to appoint members to the district '*stays well within the limits set by . . . s 157(6)*'.<sup>17</sup> It does so, because the system '*is based on proportionality. . . The composition of a local council's delegation to the district council will thus reflect the composition of the local council*'.<sup>18</sup> It is not a constitutional deficiency that the Structures Act 'goes beyond the constitutional instruction of "fairness" and demands such proportionality'.<sup>19</sup> By doing so, it provides 'greater protection for minorities than the constitutional provision requires'.<sup>20</sup>

[48] Counsel submitted that the Commission's interpretation gives effect to this protection by ensuring that the local council's seats on the district council proportionally represent each party's support in the local municipality. Counsel pointed out that Schedule 2 does specifically provide for leaving a local council's seats on the district council unfilled and this can occur in two situations: (a) Item 22 provides that, if a party's list contains 'fewer names than the number of seats allocated to that list', then item 10 applies to the extent that it can be applied. Item 10 deals with insufficient party lists for direct elections to the district council. Item 10(3)(a) specifically provides for situations where 'the seat or seats must remain unfilled'. It is only if the vacancies caused by unfilled seats means the district cannot achieve a quorum that the party forfeits the

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<sup>17</sup> Steytler and De Visser 'Local Government' in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2008) at 26.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid at 27.

<sup>20</sup> Ibid.

seats and they are reallocated.<sup>21</sup> (b) Similarly, under item 23, if a councillor appointed by the local municipality ceases to hold office, item 11 applies. It provides that the next person on the party's list is appointed. But item 11(2) provides:

'Where a party list has become exhausted, item 10, adjusted as may contextually be necessary, applies to the supplementation of the list, and if the party fails to supplement its list, or if the party has ceased to exist, the vacancy must remain unfilled.'

[49] Counsel submitted that these provisions show that the Structures Act does not abhor a vacuum. It specifically provides for seats to 'remain unfilled' where the party that obtained the necessary votes to fill them cannot do so. It is only when there is a risk the district municipality will be inquorate that those seats are filled by other parties.

[50] Counsel went further to state that the same principle should govern the interpretation of item 20, asserting that parties should only receive seats that reflect their votes on the local council, and therefore their support amongst the municipality's residents. Counsel submitted that the Commission's interpretation achieves this and the respondents' interpretation seeks to fill a vacuum at all costs, even if that cost is to distort the will of the electorate.

[51] In the third instance, counsel submitted that the Structures Act should be compared to other electoral legislation dealing with the allocation of seats. As a case in point he cited Schedule 1A to the Electoral Act 73 of 1998 (Electoral Act), which deals with the allocation of seats in the National Assembly. It provides for the award of seats from both a regional list, and a national list. For the national list, seats are allocated, in the first round, in the same way as under item 20 – the number of votes is divided by the quota for a seat.

[52] But then, unlike item 20, he proceeded, Schedule 1A specifically provides for a second and third round of allocations. The Commission's heads of argument ably argued this point as follows:

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<sup>21</sup> Structures Act, Schedule 2, items 10(3)(b) and following.

'It first provides for the award of seats according [to] the highest surplus, like item 20. But it limits the award of those seats *"up to a maximum of five seats so awarded: Provided that subsequent awards of seats still remaining unawarded must be made in sequence to those parties having the highest average number of votes per seat already awarded"*.<sup>22</sup> This item specifically contemplates a third round of allocation, and does it on a basis that makes sense – instead of continuing to allocate seats based on the order of surplus, after five seats have been awarded on that basis, it changes the basis of award to the average number of votes per seat. . . [This] avoids the irrational distortions of doing multiple rounds of seat allocation based on the highest surplus.' (Own emphasis.)

[53] Counsel stated that it was clear from this analysis that where the Legislature wanted three rounds of allocation, it said so, and it specified how it would happen. In item 20 of Schedule 2 to the Structures Act, however, Parliament did not specify a third round, because it preferred to leave seats not allocated in the second round unallocated.

[54] As regards the purpose of item 20, counsel submitted that its plain purpose is to ensure that a district council's representatives reflect the extent of support for the respective parties in the local municipality. The Commission's interpretation of item 20, he argued, achieves that goal perfectly. Parties will never receive more district seats than the votes they can muster for their lists in the local council:

- (a) It ensures that, if a party decides not to vote when district representatives are elected (either by being absent or abstaining), that party will not get representation on the district council;
- (b) If the results are that seats are unfilled, that is not a result of a flawed electoral system, but a reflection of the political choices made by parties on the local council; and
- (c) In this case, he submitted, the three seats should be unfilled, because the ANC chose not to participate. That was its choice, freely taken.

### **Submissions on behalf of uMhlatuze Local Council and affected councillors**

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<sup>22</sup> Electoral Act, Schedule 1A, item 6(c).

[55] The thrust of counsel for uMhlathuze Local Council and the three affected councillors' argument is that item 20 does not determine quotas for *political parties* who are represented on the district council. On the contrary, proceeded his argument, what item 20 does is determine quotas for *local councils* in relation to representation in the district council. This was so, he argued, because the Structures Act recognises that the municipal councils do not consist exclusively of political parties who must be given an enclave or reservation of interest in councils. This is because, proceeded the argument, firstly, the political parties are already partly accorded proportional representation at local level through s 22 read with Part 3 of Schedule 1 to the Structures Act, that is, between the party representatives and ward or independent councillors. Secondly, political parties are already partly accorded proportional representation through s 23(1) (a) read with Part 1 of Schedule 2 to the Structures Act, through councillors directly elected to represent political parties at district council level.

[56] In developing his argument counsel submitted that in the local government sphere, the Constitution envisages a mixed electoral system that is based on constituency representation (ward councillors) and party proportional representation. He emphasised that this case concerns a mixed electoral system that is not dependent solely on political party representation. He rejected the Commission's argument that where a party chooses not to participate in a local council's election, it is deciding not to send its share of councillors to the district council, and that there is no reason why its choice should provide a windfall of seats to its political opponents that is disproportionate to their support among the citizens of the local municipality. He argued that the Commission's interpretation seeks to achieve a preservation of political party interest at the district level, which is something that is not consonant with a scheme designed by s 157(3) of the Constitution and the Structures Act.

[57] He argued that the interpretation of s 157(3) of the Constitution that places an emphasis on the protection of the political parties was *rejected* by Madlanga J in *New*

*Nation Movement NPC and Others v President of the Republic of South Africa and Others*.<sup>23</sup> Madlanga J had this to say at para 80:

'Section 157(3) then requires that an electoral system under section 157(2) (meaning either exclusively party based or comprising a combination of party lists and ward representation) "must result, in general, in proportional representation". This is the clearest possible statement that dispels the notion that proportional representation is consonant only with representation through political parties. So, the reference in sections 46(1)(d) and 105(1)(d) to "results, in general, in proportional representation" does not assist the interpretation advanced by the respondents.'

[58] Counsel submitted that following the Constitutional Court judgment in *New Nation Movement*, the focus has now shifted from political parties to the right of the citizens to participate in political activities. In support of this proposition he referred to paras 158 and 159 of the judgment, in which Jafta J stated:

'When political parties contest elections, they do not do so at the behest of citizens. And citizens who are not members of the party cannot demand to be nominated by it. Even those who are members cannot all be nominated despite their wish to hold public office. The nomination of candidates is left to the whims of the political party concerned. This is inimical to the exercise of rights so fundamental to our democracy. Section 19(3)(b) entitles every adult South African who wishes to do so, to contest elections and if elected to hold public office.

The exercise of these important rights is not within the gift of political parties which may choose who gets to enjoy the right to hold office. Political parties may justifiably do that where they have contested elections in their own right. If they win, it is proper for them to nominate their own representatives in the National Assembly or Provincial Legislatures.'

[59] Counsel submitted that the Structures Act – a national legislation envisaged in s 157(1)(b) of the Constitution – enacted ss 22 and 23 to respond to what s 157 mandated. He stated that the Legislature chose the option in s 157(2)(b) to have a mixed electoral system at local government level deliberately. He argued that at district level, s 23(1) of the Structures Act draws a distinction between two forms of

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<sup>23</sup> *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC).

representation, namely, proportional representation, which is provided for in s 23(1)(a) and constituency representation, which is provided for in s 23(1)(b).

[60] Counsel rejected the Commission's argument that only seven seats should have been allocated because of the absence of the ANC and NFP councillors and that the three remaining seats should have been left unallocated. He argued that the absence of the 27 ANC councillors at the local council meeting at which the representatives to the district council were being elected did not result in the Local Council representative having to be restricted to seven seats in the District Council and did not mean that three seats ought to have been left unallocated. He stated that the Local Council was entitled, by law and through the formula determined by the Minister in terms of s 20(1)(a) and (b), to 10 seats in the District Council. He argued that item 20 leaves no room for 'unallocated' seats. He maintained that what is envisaged in item 20, regarding allocation, is that ordinarily the allocation determined by item 20(1) will not result in any surpluses and that all seats will be allocated.

[61] He submitted that the interpretation of item 20 contended for by the Commission is absurd and has the effect of disenfranchising the relevant local council at district level and would have the following undemocratic consequences:

- (a) It would undermine the composition of the District Council and thereby its institutional integrity;
- (b) Leaving three seats unallocated, would have the effect of creating vacancies within the District Council which would necessitate another process of filling them (there would only be 40 of the 43 seats at the District Council filled);
- (c) This would undermine democracy of local government to represent its electorate at district level. It will attenuate or reduce its representativity at the district council level undemocratically.
- (d) It would reduce the voice of uMhlathuze Local Council, in that it would have three less votes as a 'bloc' in the District Council.



[62] Counsel for King Cetshwayo District Council associated himself with the submissions made by counsel for uMhlathuze Local Municipality parties and the three affected councillors relating to the interpretation and application of item 20.

[63] The reliance by counsel for the affected councillors on the *New Nation Movement* judgment is misplaced. The *New National Movement* is irrelevant to the issues before this Court. The issue before the Constitutional Court in the *New Nation Movement* concerned the constitutionality of the Electoral Act. The question there was whether, to the extent that it allows individuals to be elected to the National Assembly and Provincial Legislature only through membership of political parties, the Electoral Act is unconstitutional. The issue before the Constitutional Court did not concern the interpretation of item 20 of Schedule 2 to the Structures Act which deals with 'Electoral System for District Councils.'

### **IFP's contentions**

[64] Counsel for the IFP submitted that there are two jurisdictional facts to be met for item 20(2)(a) to be operative. Firstly, there must be a surplus after having done 'round one' in item 20(1). Secondly, there must be a remaining seat unallocated in item 20(1) and the seat available for allocation must be awarded in sequence of the highest surplus. She submitted that if there are still seats and surpluses remaining – surpluses arising from the calculation under item 20(1) – not arising from calculation under item 20(2)(a), the remaining seats must be allocated.

### **Findings**

[65] The interpretation contended for by the IFP cannot be correct. It does not explain what happens if there are no surpluses but not all seats are allocated. It would seem to me that if there are no surpluses under item 20(1), the operation of item 20(2)(a) is not triggered and therefore the remaining seats must be left unfilled. The IFP's interpretation does not explain why the remaining seats in the absence of surpluses could be left unfilled. That construction is, in my view, not the correct one.

[66] The result of using 'the highest surplus' multiple times, as suggested by the IFP and the three affected councillors, is that a party that may have fewer votes ends up benefiting more than a party that has more votes. I agree with the Commission's proposed interpretation of item 20(2)(a). It makes sense both textually and contextually. The words 'any seat or seats' mean that the second round only applies if all the seats were not assigned in the first round. If all the seats are allocated in the first round, one does not need to go to the second round. However, this does not mean that all available seats must be allocated even if there are no surpluses.

[67] The Commission's interpretation is also supported by s 157 of the Constitution in the context of which item 20 must be interpreted. Section 157(6) ensures that the system established by the Structures Act for a local council to appoint members to a district council reflects the composition of the local council.

[68] The purpose of item 20 is to ensure that the district council's representatives reflect the extent of support for the parties in the local municipality. The Commission's interpretation of item 20 achieves that goal. That interpretation ensures that parties will never receive more district council seats than the votes they can muster for their lists in the local council. Unlike the respondents' interpretation, the Commission's interpretation does not create multiple distorting effects in instances where a large number of councillors do not participate on the election, as it recognises that the Structures Act does provide for seats to remain unfilled where the party that obtained the necessary votes, such as in the present case, to fill them, cannot do so.

[69] The allocation by the Commission's representatives of the remaining three seats, to the IFP, the DA and the EFF, respectively, resulting from using the surpluses twice, was unlawful and was inconsistent with the Structures Act. The appointment of the three affected councillors was therefore unlawful, unconstitutional and invalid. Consequently, the question is whether the appointment should be set aside. This is the question I now turn to.

### Just and equitable relief

[70] As regards the remedy, s 172(1)(b) of the Constitution provides that upon a declaration of constitutional invalidity, a court may make any order that is just and equitable. In *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*,<sup>24</sup> Jafta J stated that the court's remedial power is not limited to declarations of invalidity. It is much wider and is without restrictions or conditions. The learned judge referred with approval to *Hoërskool Ermelo*,<sup>25</sup> in which the following is stated at para 96:

'The power to make such an order derives from s 172(1)(b) of the Constitution. First, s 172(1)(a) requires a court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Section 172(1)(b) of the Constitution provides that when this Court decides a constitutional matter within its power it "may make any order that is just and equitable". The litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made. In other words the order must be fair and just within the context of a particular dispute.'

[71] Jafta J went on to hold in *Economic Freedom Fighters*:

'The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution. In *Hoërskool Ermelo* Moseneke DCJ declared:

"A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or

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<sup>24</sup> *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) para 210.

<sup>25</sup> *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC).

supervisory orders. This approach is valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution”.<sup>26</sup>

[72] Counsel for the affected councillors and the municipalities concerned urged this Court to, in the exercise of its discretion, decline granting a declaratory relief even if it should find that the appointment of the affected councillors was unlawful. This was due to the Commission’s inexcusable delay and that the relief is inconsequential and their appointment caused no harm to the extent that it did alter the political control of the District Council. In the alternative, it was submitted by the respondents that if the Court was inclined to grant the declaratory relief, it should, however, decline to set aside the irregular appointments. It was argued that the effect of removing the three councillors would have the effect that the Local Council is penalised by depriving it of its allocated number of seats in the District Council as a result of the election by certain of its councillors, along the party lines, not to participate in its internal process for the election of representatives. The argument was that all councillors should remain representatives until the end of their terms of office; or until properly removed in terms of s 46 of the Structures Act; or until they resign or are removed in accordance with the provisions of the Structures Act.

[73] Counsel for the IFP submitted that, in the exercise of its discretion, the Court should take into account the fact that there is no explanation by the Commission why it did not proceed in terms of s 20(6) read with Rule 7 of the Electoral Court Rules, which allows it to approach this Court for a ruling on the proper interpretation of any law in relation to future matters. She argued that the Commission could have approached this Court for declaratory relief concerning the proper interpretation of the Structures Act.

[74] In relation to the just and equitable remedy, the Commission submitted that this Court should grant a three-part remedy. First, it should declare that the election of the affected councillors to serve as the Local Council’s representatives on the District Council was unlawful, unconstitutional and invalid and set it aside. Second, it should

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<sup>26</sup> *Economic Freedom Fighters* fn 25 above para 211.

declare that the setting aside decision should not affect the validity of decisions taken by the District Council while the affected councillors were in office. The Court was requested specifically to order that those decisions are not adversely affected by the fact that the affected councillors were improperly in place. There is authority for this proposition. This was the approach adopted by the Constitutional Court in *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*.<sup>27</sup> Third, the order should also not require the affected councillors to repay any salary or benefits that they received.

[75] It is correct that the election of the affected councillors occurred as a result of the Commission's representatives' error resulting from misapplication of the provisions of item 20 of Schedule 2. As I have demonstrated in the preceding paragraphs, the consequence of the error is that the representation of the Local Council on the District Council has been distorted. If the Court should allow the affected councillors to remain on the District Council until their term of office ends, the distortion of representation on the District Council will continue to exist.

[76] I accept that the mistake was innocent and that the decision to remove the three councillors who benefited from the mistake will cause them prejudice. However, the mistake resulting from the misapplication of item 20 should not be allowed to upset the balance which s 157(6) of the Constitution seeks to establish by requiring that the Structures Act 'must establish a system that allows for parties and interests reflected within the Municipal Council making the appointment, to be fairly represented in the Municipal Council to which the appointment is made'. As Steytler and De Visser correctly observe, s 157(6) ensures that the composition of a local council's delegation to the district council should reflect the composition of the local council.<sup>28</sup>

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<sup>27</sup> *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* [2018] ZACC 23; 2018 (10) BCLR 1179 (CC); 2018 (2) SACR 442 (CC) para 93.

<sup>28</sup> Steytler and De Visser 'Local Government' in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2008) at 26.

[77] I am led to the conclusion that the election of the affected councillors was constitutionally invalid and should be set aside. It is, however, important that in order to limit the consequences which this order may have on the decisions taken by the District Council and the benefits the affected councillors received while they were in office, the declaration of the invalidity order should not adversely affect such decisions and benefits.

[78] The IFP's contention that the election of the affected councillors should not be set aside on the ground that the Commission should not have instituted the review proceedings but should have approached this Court in terms of s 20(6) read with Rule 7 of the Electoral Court Rules for a ruling on the proper interpretation of the law in relation to future matters, must be rejected. The Commission was not only entitled, but also duty bound, upon the discovery of the mistake to approach this Court for a setting aside of the unlawful decision resulting from its mistake.<sup>29</sup> This is because s 2 of the Constitution proclaims that the Constitution is supreme; and that law or conduct that is inconsistent with it is invalid.

### **Non-joinder**

[79] The next point taken by uMhlathuze Local Municipality was that there has been non-joinder of all the parties with a material interest in these proceedings, namely, the uMhlathuze Municipal Council, the King Cetshwayo Municipal Council, the Minister of Cooperative Governance and Traditional Affairs (the Minister) and the Member of the Executive Council for Cooperative Governance and Traditional Affairs (the MEC), and that for this reason, the application should be dismissed.

[80] In general, the courts have consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the proceedings or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially

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<sup>29</sup> *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) para 33.

affect the party's interests.<sup>30</sup> This principle was reaffirmed by the Constitutional Court in *Snyders v De Jager*.<sup>31</sup> The test for joinder is that a litigant must have a direct and substantial legal interest that may be affected prejudicially by the judgment of the court in the proceedings concerned. Thus, if an order or judgment cannot be sustained without necessarily prejudicing the interests of third parties that had not been joined, then such parties have a legal interest in the matter and must be joined.<sup>32</sup>

[81] Counsel argued that uMhlathuze Local Council has a material interest and is a necessary party to be joined in these proceedings. This, it was contended, arises from the fact that should the relief sought in this application be granted, it would reduce the voice of uMhlathuze Local Council in the District Council, in that it would have three less seats and votes. It would thus prejudicially affect its interest. It was submitted that the citation of the Speaker or the Municipal Manager is not enough.

[82] The uMhlathuze Local Municipality's non-joinder point should fail. It was not necessary for the Commission to cite it separately. A similar point was raised by the municipality, and, rejected by the court in *Skweit*.<sup>33</sup> In *Skweit*, the applicant had approached the court seeking a review and setting aside of the Greater Taung Municipality's decision to remove him as a member of the executive committee of the Municipality. In response, the Municipality contended that although the applicant had cited the Speaker and Municipal Manager in their official capacities, that was not enough, and that the applicant ought to have cited the Municipality itself.<sup>34</sup>

[83] The court rejected the non-joinder objection. Leeuw J held that the *'failure to cite the Municipality as a party to the application . . . does not prejudice the Applicant in any way'*.<sup>35</sup> The learned judge pointed out that even under Uniform rule 53, which deals with the production of a record for review purposes, there is no requirement that there be a

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<sup>30</sup> *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659.

<sup>31</sup> *Snyders and Others v De Jager (Joinder)* [2016] ZACC 54; 2017 (5) BCLR 604 (CC) para 6.

<sup>32</sup> *Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115; 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA); [2013] 1 All SA 40 (SCA) para 12.

<sup>33</sup> *Skweit v Speaker of the Greater Taung Local Municipality and Others* [2008] ZANWHC 52 (NWM).

<sup>34</sup> *Ibid* para 24.

<sup>35</sup> *Ibid* para 26.

'*separate citation of the board or tribunal itself*' in addition to any office bearer cited on the behalf of the board or tribunal.<sup>36</sup> The same is true in this case. It was unnecessary for the Commission to cite the municipalities separately.

[84] A further point raised by the uMhlathuze Local Municipality was that all of its councillors should have been joined and the Commission's failure to join them was fatal. A similar argument in a litigation against a municipal council was raised, and, rejected by the court in *Nelson Mandela Bay Municipality and Others v Qaba and Others*.<sup>37</sup> The court reasoned as follows at para 43:

'However, ordinarily, when a municipal council is cited in proceedings its chairperson or speaker is cited *nomine officio* and it is not necessary to cite each individual councillor. If the applicants succeed, the order – interim in nature – will be to suspend operation of certain resolutions taken by the municipal council pending a review to set them aside. Such order would be operative against the council as a whole. In this sense it will bind individual councillors.'

[85] In relation to the non-joinder of the Minister and the MEC, counsel for uMhlathuze Local Municipality submitted that the Minister has a direct and substantial interest in the relief and should have been joined, because the effect of the relief sought, if granted, would subvert the Minister's formula for the determination of the number of councillors. The basis for this contention is that the Minister is entitled to determine, and has determined, the formula to be utilised to determine the number of councillors of a municipal council and that number, the argument proceeded, is determined based on the number of voters registered in that municipality's segment of the national common voters' roll.<sup>38</sup>

[86] As regards the MEC, it was submitted that the MEC has a direct and substantial interest in these proceedings and should have been joined, because, proceeded the argument, in terms of s 20(3) of the Structures Act, the MEC has powers to deviate from the number of councillors determined within the prescribed confines.

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<sup>36</sup> Ibid.

<sup>37</sup> *Nelson Mandela Bay Municipality and Others v Qaba and Another* [2022] 3 All SA 239 (ECP).

<sup>38</sup> Section 20(1) and (2) of the Structures Act.



[87] This contention is based on an incorrect reading of the relief sought by the Commission. Properly construed, the Commission's case is that, based on its own interpretation of item 20, the election of the affected councillors to the District Council was unlawful, in that after the second round of allocation of the seats the three remaining seats should have been left unfilled. Should the relief sought be granted, it will not interfere with the MEC's exercise of powers under s 20 of the Structures Act. The MEC's competence to deviate from the number of councilors determined by the Minister in the uMhlathuze Local Municipality will remain unaffected by the order sought and, that being the case, the MEC has no direct and substantial interest in the outcome of these proceedings.

[88] In other words, the order sought will not compromise the Minister's rights to determine the formula according to which the number of councillors should be determined or the MEC's rights to deviate from the number of councillors determined for a municipality. There is no logical reason for the contention that the decision of this Court on the meaning of item 20 will affect the powers of the Minister or the MEC.<sup>39</sup> The non-joinder point in respect of the Minister and the MEC must therefore fail.

## **Conclusion**

[89] In conclusion, the Commissioner's delay in bringing the review application is overlooked, as it is in the interests of justice to do so. There is an explanation, albeit inadequate, for the unreasonable delay. The unlawfulness at issue warrants overlooking the Commission's unreasonable delay in seeking a review and setting aside of the impugned decision. The matter concerns the interpretation of item 20 of Schedule 2 to the Structures Act, which determines the manner in which the seats in the King Cetshwayo District Council were to be allocated. A distortion in the allocation of seats resulting from the misinterpretation of item 20 occurred in this matter. The effect of this was that the three affected councillors were elected when they should not have been. Their election was unlawful. This is a legality review and the most basic imperative of

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<sup>39</sup> *Minister of Public Service and Administration and Another v Public Servants Association obo Makwela and Others* [2017] ZALAC 64; [2018] 1 BLLR 7 (LAC); (2018) 39 ILJ 376 (LAC).

the principle of legality requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented.<sup>40</sup> The Commission is not seeking in this review to promote its own interest or to avoid the consequences of its own decision. What it seeks is the correction of the consequences of invalidity. The election of the three councilors was unlawful and must be set aside. The setting aside should not, however, have a retrospective effect.

[90] The non-joinder point should fail. It was not necessary for the Commission to join the relevant municipalities separately, because their respective Speakers have been cited in their representative capacity. The Minister and the MEC do not have a direct and substantial interest in these proceedings and their citation was not necessary.

### **Costs**

[91] As regards costs, the general rule is that costs follow the event. But, this being a constitutional litigation involving the Commission, an organ of state, the general rule does not find application. The issue was whether the election of the affected councilors to the District Council was unlawful, as contended by the Commission. This turned on the interpretation of the statutory provision relating to the appointment of councillors to the District Council to represent the Local Council and the manner in which seats in the District Council should be allocated. The parties interpreted the relevant statutory provision differently and advanced their case based on their own interpretation. Opposition to the relief sought by the Commission was therefore not unreasonable based as it was on the respondents' interpretation of the relevant statutory provision. In the circumstances, in accordance with the *Biowatch*<sup>41</sup> principle, the Commission, despite its success, will not be awarded costs. In the circumstances, no order will be made as to costs.

### **The order**

[92] In the result, I make the following order:

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<sup>40</sup> Asla para 118.

<sup>41</sup> *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

1. It is declared that the election on 23 November 2021 of the eighth, ninth and tenth respondents by the Electoral Commission as members of the King Cetshwayo District Council as representatives of the uMhlathuze Local Council, as contemplated in s 23(1)(b) of the Local Government: Municipal Structures Act 117 of 1998, was unlawful, unconstitutional and invalid.
2. The decision of the Electoral Commission to elect the eighth, ninth and tenth respondents is reviewed and set aside.
3. It is declared that the proceedings of any decisions taken by the King Cetshwayo District Council are not invalid only by reason that the eighth, ninth and tenth respondents were members of that Council at the time.
4. The eighth, ninth and tenth respondents are ordered to vacate office in the King Cetshwayo District Council within fourteen days from the date of this order.
5. It is declared that the orders in paragraphs 1 and 2 shall not affect the legality of the payment of any salary or benefits to the eighth, ninth or tenth respondents prior to the date of this order.
6. No order as to costs is made.

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D H ZONDI  
JUDGE OF THE  
ELECTORAL COURT

## APPEARANCES

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