



Credible Elections: Addresses on the Voters' Roll

1. Introduction

Municipal elections are elections for local government in areas of South Africa which have been demarcated to represent the interests of individual communities. Like national elections, these elections must be free, fair and regular. The by-elections that took place in 2013 in the Tlokwe local municipality, which includes the town of Potchefstroom and surrounding areas, were set aside by the Electoral Court on the grounds that voters' addresses did not appear on the voters' roll. This, in turn, raised concerns that the forthcoming local government elections on August 3rd may be manipulated in a manner that could render them unfair. Essentially, the argument is that if addresses do not appear on the roll for each voting district or ward, manipulation is possible: a party with a safe majority in one ward could send a few hundred of its supporters to vote instead in a more marginal ward. Such 'bussing in' of voters would obviously undermine the ward-based nature of municipal elections.

On the other hand, to require the Independent Electoral Commission (IEC) to ascertain the addresses of all 34 million registered voters would be to present it with a massive logistical task, a task made all the more difficult in the many parts of the country where people simply do not have a formal, verifiable address. Such people could effectively be disenfranchised if they were unable to supply an address. A classic conundrum was therefore in place: without addresses, elections could lose credibility; but forcing people to provide addresses could deprive significant numbers of their right to vote.

2. The Tlokwe Case

The municipality of Tlokwe was the departure

point for a number of problems that impact local government elections and their credibility. Suspected irregularities arose in by-elections held there on 7th August 2013. On this date, a number of independent candidates stood for election but were unsuccessful. Some of them believed this was due to voters being allowed to vote in areas in which they did not reside. When a second by-election was held on 18th September, one of the candidates alleged to the IEC that there had been a manipulation, orchestrated by a political party, whereby some voters had been brought in to vote in districts other than their own. This complaint resulted in further by-elections, which were scheduled for October, being postponed. Subsequently, when a new voters' roll was provided, it was found that some parts of it were incomplete, in that certain voters' addresses were missing. This meant, apart from the possibility of manipulation, that candidates could not find, visit and canvass voters.

Candidates also claimed that some of the wards in Tlokwe were not clearly defined and that there might have been an overlap of ward sections. This could confuse voters about which areas they could vote in, and would thus negatively influence the outcome of the election for some of the candidates.

The candidates' complaints eventually found their way up to the Constitutional Court, which ruled on the matter in November 2015, in the case of *Kham and Others vs Electoral Commission and Another [2015] ZACC 37*.¹ The Court ordered, *inter alia*, as follows:

Firstly, when registering a voter to vote in a particular voting district after the date of the Court's order, the IEC was obliged to obtain sufficient particularity of the voter's address to enable it to ensure that the voter is at the time of registration ordinarily resident in that voting

district.

Secondly, that in all future municipal elections or by-elections the IEC was obliged to provide all candidates with a copy of the voters' roll to be used in that ward, including the addresses of all voters, where these addresses were available.

The first of these orders was clearly intended to be prospective: "after the date of the Court's order" registration of a voter would have to include obtaining "sufficient particularity" of the voter's address. It appears, though, that the IEC interpreted the second order to mean that it should supply addresses only where it already had them – where they were "available" in the IEC's databases; it did not understand the Court to mean that it should set about obtaining addresses for people it had registered in previous years.

As a result, when the Tlokwe by-elections were finally set down for February 2016, there were still over 4 000 missing addresses, and once again the independent candidates approached the Electoral Court for a ruling. That Court ruled in their favour and postponed the by-elections, ordering the IEC to obtain and provide all reasonably available addresses – not just those it already had. The IEC, daunted by the prospect of having to find addresses not just for Tlokwe but, by implication, for the whole country – and this in good time for the August 2016 local elections – appealed to the Constitutional Court.

3. The Core Issues

It is worth noting that the ward system plays an important part in local democracy; unlike at national and provincial level, half of our council representatives are directly elected in constituencies (municipal wards). The ward system promotes greater accountability because citizens elect an identifiable individual to be their councillor, as opposed to voting solely for a party. In addition, the ward system promotes a closer relationship between the residents of a ward and their representative. Thus, it is crucial to preserve the integrity of the ward system, and to ensure that only residents of a ward vote in that ward. Having addresses on the voters' roll for each ward (technically, on the relevant ward segment of the national voters' roll) would achieve this. It would also allow candidates to access the database of addresses of the wards; assess the make-up of the population; set up door-to-door visits, etc. These

factors contribute to the freedom and fairness of an election.

But on the other hand, there is little point in ensuring maximum freedom and fairness in an election if, in doing so, you exclude large numbers of people – a few million, potentially – who do not have easily ascertainable or verifiable addresses. But this point was taken into account by the Constitutional Court in the *Kham* case when it ordered the IEC to obtain addresses with "sufficient particularity". Its order did not require the IEC to do the impossible – for example, to get addresses for people in unregulated informal settlements.

Nevertheless, the crux of the IEC's argument in its appeal to the Constitutional Court (heard in May this year) was that it simply could not obtain the necessary numbers of addresses in time for the August elections. Not everyone was sympathetic to this argument. The commentator Stephen Grootes, for instance, felt that the IEC had made little effort to deal with the issue. There were many ways in which citizens could prove their addresses:

*"Every South African knows, to get a cell phone SIM card you have to be able to provide proof of address. And the requirements there are actually stricter than the requirements the Constitutional Court has spelt out for the voters' roll. They also say there are various maps and tools available, including Google Maps that can be used to help voters show officials exactly where they live. This, they say, will make it easy for people who cannot read to explain where they live, and provide the "sufficient particularity" that the judges have previously asked for."*²

4. The Final Decision

Judgement was given in the Electoral Commission's appeal (*Electoral Commission vs Mhlope and Others [2016] ZACC 15*) on 14th June this year.³ The Constitutional Court was confronted with a dilemma: if it ruled that addresses were essential, it would effectively make it impossible for the 2016 local elections to go ahead, because of the logistical impossibility of the IEC obtaining and verifying 34 million addresses in good time for the August election deadline (that deadline being itself a constitutional requirement, in that elections must be held every five years). If, however, it ruled that addresses were not essential, it would be opening

the door to the possibility of voters' roll manipulation, as described earlier.⁴

The Court declared that the IEC's failure to obtain the necessary addresses was unlawful and constitutionally invalid, but at the same time the Court acknowledged that it was not feasible to require the IEC to remedy this before the August elections. Neither could the Court order the postponement of the elections so as to give the IEC more time to rectify the roll. Accordingly, it had to craft a compromise order that would give maximum effect to the different rights involved.⁵

Chief Justice Mogoeng (who handed down the majority judgement) noted that it was

*"an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis which could have grave consequences. It is about the upper guardian of our Constitution responding to its core mandate by preserving the integrity of our constitutional democracy. And that explains the unique or extraordinary remedy we have crafted, of suspending the duty that flows from a constitutionally valid statutory provision."*⁶

The Court's remedy was to suspend its declaration that the IEC's conduct was unlawful and give the IEC until 30 June 2018 to obtain the necessary addresses for the national voters' roll. It also ordered the IEC to report to Court every six months on its progress in this regard.

Importantly, though, the Court did not extend this suspension to cover the segment of the roll relevant to Tlokwe. It held that there was no reason why the IEC could not comply with the *Kham* order as far as this municipality was concerned (the logistical challenge being a manageable one for a single municipality, as opposed to the whole country). The suspension would also not apply to by-elections. In the result,

the August 3rd local elections will go ahead nationwide with a voters' roll that does not include all the necessary addresses, but in Tlokwe there will be a complete roll with addresses; and any by-election held after the August poll will have to be conducted with a roll bearing all voters' addresses. This means that, outside Tlokwe, no one will be precluded from voting due to the absence of their address from the roll. In Tlokwe, however, only those whose addresses appear on the roll for that municipality will be able to vote.

5. Conclusion

The fundamental requirement for the local government election, as for all our other elections, is that it should be free and fair. The Constitutional Court made it clear that the IEC should have acted more quickly and proactively to ensure that the flawed voter's roll was compiled correctly. Its failure to do so has possibly, and to a limited extent, jeopardised the freeness and fairness of the election, but there are numerous other mechanisms that can be employed on election day to minimise the chances of manipulation and to help ensure that people vote only in the ward where they are entitled to vote. But this is the last time that such an unsatisfactory situation will prevail, and from June 2018, if not sooner, the matter of addresses on the voters' roll ought to be a non-issue.

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¹ <http://www.constitutionalcourt.org.za/Archimages/23637.PDF>

² <http://www.dailymaverick.co.za/article/2016-03-30-a-tangled-mess-sa-local-elections-in-real-jeopardy/> 2016.

³ <http://www.constitutionalcourt.org.za/site/CCT55-16.html>

⁴ It would also be contradicting its own judgement in the *Kham* case a few months before.

⁵ This is necessarily an extremely basic summary of the Court's approach, which is fully set out in paragraphs 103 to 138 of the judgement.

⁶ Para 137.