



CONSTITUTIONAL COURT OF SOUTH AFRICA

Xolile David Kham and Others v Electoral Commission and Another

CCT 64/15

Date of hearing: 10 September 2015
Date of judgment: 30 November 2015

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in a matter concerning eight by-elections held in various wards in the Tlokwe Municipality between August and December 2013.

The applicants were unsuccessful candidates in the wards in which each of them had stood for election. Before the elections, the applicants had lodged objections with the respondent, the Electoral Commission (IEC), concerning voter registrations in their respective wards. After he had lost a by-election in September 2013, Mr Kham lodged an objection with the IEC but it was rejected. In the December by-elections in six wards, the applicants complained of the delay in receiving the segments of the national voters' roll to be used for the purposes of the by-elections. Furthermore, those segments did not include residential addresses for any of the voters, rendering it difficult, if not impossible, for candidates to find, visit and canvass voters.

The applicants approached the Electoral Court for an order that the December by-elections be postponed and for further relief, however the Electoral Court was unable to convene to hear the application. Accordingly, the by-elections proceeded as scheduled and the six applicants who were candidates lost. After the December by-elections and in response to the present litigation, the IEC conducted its own investigation into the allegations that voters not entitled to registration in these wards had been registered and that their participation had affected the result of the by-elections. It concluded that there were a number of such registrations and that some of those voters had voted, but that in no case had they done so in sufficient numbers to affect the result of the elections.

When the case was eventually heard by the Electoral Court the applicants contended that the IEC's investigation demonstrated that the by-elections had not been free and fair and that they should be set aside and fresh by-elections held. The IEC opposed this. The Electoral Court rejected the applicants' claims and dismissed the application.

Before the Constitutional Court, the applicants confined themselves to seeking an order setting aside the by-election results in eight wards relying on the irregularities that emerged from the IEC's own investigation. Their complaint was that on the evidence of irregularities in the IEC's own affidavit, the by-elections could not be said to have been free and fair and accordingly they should be set aside.

In a unanimous judgment written by Wallis AJ, this Court held that the process of electing councillors to public office is of cardinal importance for the healthy operation of our democracy at local government level. As such elections take place in wards, it is vitally important and a legal requirement for the chief electoral officer, when registering a voter on the voters' roll, to register that voter in the voting district in which they are ordinarily resident. This requirement had not been observed by the IEC. In addition, the obligation to provide all candidates with a copy of the relevant segment of the voters' roll containing the addresses of voters in the ward with their addresses ("where such addresses are available") was also ignored. That was a serious breach of the IEC's statutory obligations. Without voters' addresses, the ability of candidates to canvass voters was significantly impaired. In the respects identified above, the IEC fell short of these standards.

The Court held that the constitutional right of the independent candidates to participate in the elections was impaired as it was necessary to give full weight to the constitutional commitment to free and fair elections and its safeguard of the right to offer oneself for election to public office. It is essential to hold the IEC to the high standards that its constitutional duties impose upon it.

The Court granted leave to appeal to the first to seventh applicants and refused it in respect of the eighth applicant. It declared that the by-elections conducted in the Tlokwe Municipality on 12 September 2013 in ward 18 and on 10 December 2013 in wards 1, 4, 11, 12, 13 and 20, were not free and fair. The outcome of those by-elections was set aside and fresh by-elections are to be held. It was further declared that when registering a voter to vote in a particular voting district after the date of the order the Electoral Commission is 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. It also declared that the Electoral Commission is obliged by the Electoral Act to provide all candidates in municipal elections a copy of the segment of the national voters' roll, which must comply with certain criteria. Accordingly, the application for leave to appeal was granted and the appeal upheld with costs, including costs of two counsel.