

REPUBLIC OF SOUTH AFRICA



ELECTORAL COURT HELD AT DURBAN

CASE NO: 001/13 IEC

In the matter between:

ANDRE DAWID LÖTTER

APPLICANT

and

THE ELECTORAL COMMISSION

FIRST RESPONDENT

AFRICAN NATIONAL CONGRESS

SECOND RESPONDENT

INKATHA FREEDOM PARTY

THIRD RESPONDENT

Heard: 4 DECEMBER 2013

Delivered: 6 DECEMBER 2013

J U D G M E N T

WEPENER J: (MTHIYANE DP AND MOSHIDI J CONCURRING)

[1] The applicant is a former ward councillor of Ward 22 of the Abaqulusi Local Municipality and was also the applicant in the matter that served before

this Court in April 2013. The first respondent is the Electoral Commission ('the Commission') a body established pursuant to the Constitution in terms of the Electoral Commission Act ('the Electoral Commission Act'). The second and third respondents are the African National Congress ('ANC') and the Inkatha Freedom Party ('IFP'), both respectively, registered political parties who had an interest in the by-election which were to be held on 24 April 2013 in Ward 22, in that they nominated candidates for election in the by-election.

[2] During April 2013 this Court heard an application for review of a decision of the Electoral Commission to call a by-election pursuant to the provisions of s 20 (1) of the Electoral Commission Act 51 of 1996 ('the Electoral Commission Act'). When doing so, this Court sat as a court of review as provided for in s 20(1). On 7 May 2013 this Court delivered a judgment in the review proceedings. The matter is reported as *Lötter v Electoral Commission* [2013] 4 All SA 152 (ELECT CT); 2013 JDR 1545 (EC); [2013] ZAEC 1. For the sake of completeness I set out the orders given in the matter:

1. *The Independent Electoral Commission (first respondent) is ordered to request, as contemplated by Section 8 of the Local Government Municipal Electoral Act 27 of 2000, the Member of the Executive Council to postpone the by-election to be held on 24 April 2013 in Ward 22 of Abaqulusi Municipality, Kwazulu-Natal;*
2. *The Independent Electoral Commission is ordered to investigate the allegations of fraud raised in the application in relation to the voters' roll of Ward 22 of the Abaqulusi Municipality, Kwazulu-Natal;*
3. *The Independent Electoral Commission is ordered to accept the nomination of Andre Dawid Lötter (the applicant) as a candidate in the municipal by-election to be held in Ward 22 of the Abaqulusi Municipality, Kwazulu-Natal;*
4. *The Registrar of this court and the Registrar of the Kwazulu-Natal High Court, Durban, are authorised to communicate the contents of this order to the parties by email or fax or such other method as may be appropriate.'*

Only the order in paragraph 2 is relevant for purposes of this judgment.

[3] The Court gave the reason for the order in 2 above to investigate the allegations of fraud in paragraphs 40 and 41 of the *Lötter* judgment. The

reason for that order was that such investigation must lead to the removal of unlawfully registered voters from the voters' roll.

[4] Pursuant to the orders issued by the Court, the applicant sought leave from the Constitutional Court to appeal this Court's order. On 2 September 2013 the Constitutional Court refused leave to appeal but remitted to this Court two questions for consideration:

1. *Save as set out in paragraph 2 below, the application for leave to appeal against the order of the Electoral Court made on 23 April 2013 is refused, as it would not be in the interests of justice for this Court to hear the matter at this stage.*
2. *The matter is remitted to the Electoral Court for it to consider:*
 - (a) *the applicant's contention that the first respondent did not comply with paragraph 2 of the order of the Electoral Court because its investigation of the allegations of fraud in relation to the voters' roll of ward 22 of Abaqulusi Municipality, Kwazulu-Natal was inadequate as its report did not identify the perpetrators of the fraud; and*
 - (b) *whether, if the perpetrators of the fraud become known, sanctions or penalties prescribed by law should be imposed.'*

[5] Pursuant to the above order, this Court on 11 November 2013 issued the following directions:

1. *On 2 September 2013 the Constitutional Court refused the applicant André Dawid Lötter leave to appeal against the judgment and order made by this court on 23 April 2013.*
2. *Despite refusing leave the Constitutional Court, however, remitted the matter to this court with the direction that this court consider whether the Commission complied adequately with the order made by this court, which ordered the Commission to investigate the allegations of fraud raised in the application in relation to the voters' roll of Ward 22 of Abaqulusi Municipality, KwaZulu-Natal, "in that the names of the persons involved in the fraud are not identified".*
3. *Given that the order of the Constitutional Court cannot be effected, without this court being placed in possession of the Commissioner's Report of its investigation, affidavits and such submissions as may be relevant, the parties are directed as follows:*
 - 3.1. *The Commission is directed to file with the Secretary of this court, the Report of its investigations conducted in terms of paragraph 2 of the order made by this court on 23 April 2013.*
 - 3.2. *The applicant, Mr André Dawid Lötter, is directed to file an affidavit setting out grounds for his contention that paragraph 2 of the order made by this court on 23 April 2013 was not complied with, but limited to the aspect reserved by the Constitutional Court for consideration by this court, namely that the investigation 'was*

inadequate as its [the Commission's] report did not identify the perpetrators of the fraud'.

- 3.3. *The Commission is directed to, within three days of receipt of Mr Lötter's affidavits, to file such response as it may consider necessary.*
- 3.4. *Upon the filing of the documents referred to above, the parties may file such further heads or written submissions as they may consider necessary, but confined solely to the aspect referred to in paragraph 2 above, reserved for consideration by this court. Such heads should not be longer than 10 pages. '*

In response to the above directions the Commission filed two reports, the first dated 11 July 2013 and the second dated November 2013 and other documentation.

[6] Despite the limited issues for determination, the applicant filed an affidavit of some 105 pages (without annexures) citing a number of additional respondents including all the Commissioners of the Commission and other officials of the Commission. In his affidavit and in argument before us the applicant attempted to widen the issues which were referred to this Court by the Constitutional Court for consideration. At the commencement of the proceedings, The Judge Presiding, Mthiyane DP, explained to the applicant the issues that were referred to this court for consideration. All attempts to assist the applicant to only deal with the matters that were properly before the court for consideration or to obtain clarification from him regarding what can only be regarded as sweeping, unsubstantiated allegations, were regrettably, largely unsuccessful as the applicant showed little understanding or appreciation for that which was to be decided by the Court. Efforts to assist him were met with resentment and regarded as an interruption as he continued to deliver a prepared speech, most of which bore no or little relevance to the issues that were referred to this Court by the Justices of the Constitutional Court.

[7] It is not necessary to embark upon an analysis of some of the new matters raised by the applicant. This hearing was only concerned with the two issues referred to us by the Constitutional Court i.e. whether: (a) the

Commission complied with this Court's order that it should investigate the allegations of fraud as set out in paragraph 2 of the order of this Court and (b) whether, if the perpetrators of the fraud become known, sanctions or penalties prescribed by law should be imposed.

[8] As already indicated, the Commission filed an affidavit in which it explains the steps it took in order to comply with the order of this Court directing it to investigate the allegations of fraud made by the applicant. It is necessary to set in some detail the steps taken by the Commission, the relevant portion of which is as follows:

THE REPORTS ON THE INVESTIGATION INTO ELECTORAL FRAUD IN WARD 22

- 17 *In response to the directions of this Court, the Commission has lodged two reports with the Court. The first report is one that served previously before this Court and before the Constitutional Court, dated 11 July 2013. The first report details the first phase of the investigation by the Commission into Ward 22. In this phase, the Commission electronically analysed voter movement and identified a pattern of registration that was unnatural and peculiar and which provided, in the view of the Commission, prima facie evidence of possible registration fraud. This is evident from paragraphs 2 – 4 of the first report.*
- 18 *The provincial electoral office did an in loco investigation in relation to the high number of voting district moves in Ward 22 and dispatched a team of 25 field workers to conduct a more in depth investigation from 13 – 17 May 2013.*
- 19 *The investigation included visits to addresses provided on registration forms to determine whether the applicants were actually ordinarily resident at such addresses. As a result of the investigation, 1541 applicants were identified as those who ought to be returned to the voting district of original registration which was outside of Ward 22.*
- 20 *Because the decision to remove an individual from the voters' roll for a particular Ward constitutes administrative action on the part of the Commission, any decision to remove the name of an individual from the roll must, by law, be preceded by a procedurally fair process which includes giving notice to the individual of the proposed removal from the roll and an opportunity to make representations. Therefore, a procedurally fair process was followed by the Commission, as detailed in the first report, before the names of a total of 1525 voters were removed from the segment of the voters' roll for Ward 22.*
- 21 *All registrations which appeared to the Commission to have been fraudulent were referred to the SAPS and all relevant information which the Commission possessed was provided to the SAPS. This included full names, identity numbers and known addresses.*

- 22 *Moreover, the Commission met regularly with leaders of political parties in the province with a view to seeking their cooperation in decisively dealing with registration fraud.*
- 23 *The Applicant has criticised the process followed by the Commission which led up to the removal of 1525 people from the voters roll in Ward 22. He alleges that the process followed was “misdirected and tax-payer-expensive” because the Commission used 4 different ways to notify persons who were about to be removed from the voters’ roll for Ward 22 of the proposed action.*
- 24 *This criticism, with respect, is clearly premised on the applicant’s ignorance of the requirements of fair administrative action and more particularly of the importance of the right to vote in our democracy. The effect of removing someone from the segment of the voters’ roll in a ward in which that person is validly registered is effectively to prevent that person from exercising his/her constitutionally protected right to vote. Such action cannot be undertaken lightly and without due and careful determination by the Commission that the person is not entitled to vote in that Ward. Moreover, the community in Ward 22 are not a homogenous group who can all be notified via one method of notification. The community speaks different languages, has differing levels of access to social and other media, internet, email and the like. For notice to be meaningful, it must be provided in the way in which the person concerned is most likely to receive it. Therefore, the Commission chose to utilise a number of different media for notifying people of the fact that it proposed to remove them from the roll for Ward 22. This, I submit, was appropriate and necessary. The applicant’s criticism in this regard is therefore entirely without merit.*

The Second Report

- 25 *Once it became clear to the Commission that there was a possibility of wide scale fraudulent registration of voters in Ward 22, the Commission decided that its investigation required a second phase focused on new registrations or first time applicants for registration.*
- 26 *In the second phase, a total of 762 applicants were considered as part of the Commission’s investigation. First time applicants amounted to 510 people and the balance of 252 people were those who reapplied for registration as voters prior to the special registration weekend in March 2013.*
- 27 *From 11 – 13 September 2013, a team of trained electoral project coordinators visited each of the addresses given as part of the REC1 application for registration form. At the given addresses, investigators enquired whether the person concerned was ordinarily resident at that address or not. If the answer was in the affirmative, that applicant was recommended for retention on the segment of the voters’ roll for Ward 22. If the person was not resident at that address, he/she was identified as a candidate to be removed from the segment of the voters’ roll for Ward 22.*

- 28 *The investigation also revealed (as is clear from the section of the table on page 2 of the second report, marked "Voters found during Feb TCR") new residents in the area who had not registered for Ward 22.*
- 29 *In total, 343 applicants were not found or known to reside at the given addresses. Accordingly, notices of intention to correct the registration details for the 343 applicants identified were issued. These were delivered to the given addresses by the Sheriff. Moreover, advertisements were taken out in a local newspaper, notices were placed in the municipal offices in Vryheid and at the local offices of the Commission and an attorney was placed at the local offices of the Commission to assist and evaluate any representations which were made. Ultimately, only 6 persons actually made representations and all 6 of those were retained on the segment of the voters' roll for Ward 22.*
- 30 *Accordingly:*
- 30.1 *337 persons were removed from the segment of the voters' roll for Ward 22 and placed back on the segment of the roll for the voting districts in which they were originally registered. This was done in terms of section 11(1)(a) of the Electoral Act.*
- 30.2 *Where no previous registration was evident, that person was placed on a section of the voters' roll under a new category called "registered in an incorrect voting district." This was done in terms of section 11(1)(b) of the Electoral Act.*
- 30.3 *Twenty-eight (28) applicants whose REC1 forms could not be located were retained on the segment of the voters' roll in Ward 22.*
- 31 *The information gathered in this investigation was provided to the SAPS which has an investigation into fraud in Ward 22 underway already under Vryheid CAS 38/04/2013.'*

[9] On his own version the applicant asserts that 'most of the perpetrators of the fraud committed in Ward 22 of Abaqulusi...have indeed already become known...' The applicant does not state why there are others that are not known. I must consequently accept the version of the Commission that it indeed identified the perpetrators of the fraud. The applicant conceded during argument the number of voters removed from the roll is as set out by the Commission.

[10] It is, in my view, clear that the Commission has done a thorough and complete investigation into the fraudulent registration of voters in Ward 22. It identified and removed fraudulently registered voters from the voters' roll. All evidence of fraud has been forwarded to the South African Police Service ('SAPS') to assist with the further prosecuting of those responsible for the fraud.

[11] It is the Commission's contention that it is not the body which should conduct the criminal investigations, arrest and prosecution but that those are functions of the SAPS and the prosecuting authority. I am in agreement with this contention. The Commission identified the possible perpetrators of the fraud and referred the evidence to the SAPS for further action.

[12] The applicant complained that the Commission 'has done nothing to fully uncover the extent of their perpetrations, nor to bring to answer those that have already been identified'. This contention is wholly incorrect and there is no merit in the allegation and indeed contradicts the applicant's own version. In paragraph 18 of his founding affidavit he averred that most of the perpetrators of the fraud have indeed become known. In my view, the Commission complied with paragraph 2 of the order of this Court, and so too, with paragraph (a) of the order of the Constitutional Court, remitted to this Court for consideration.

[13] The Commission did investigate the fraudulent registrations, identified the perpetrators of the fraud and took action by removing the names of fraudulently registered voters from the voters' roll, and as I have said, complied with paragraph 2 of the order of this Court.

[14] It remains to consider the further issue referred to this Court for consideration, namely paragraph (b) of the order of the Constitutional Court which is whether any sanctions or penalties, as prescribed by law, should be imposed. It bears noting that the consideration of paragraph (b) of the order of the Constitutional Court, in my view, is dependant upon a finding of this Court in respect of paragraph (a) of the order of the Constitutional Court. As I have already indicated the alleged perpetrators have been identified and the matter is in the hands of the police for investigation. The legal process has not run its full course. It may well be that the alleged perpetrators of the fraud, if convicted, should be visited with appropriate punishment and sanctions.

[15] Common law penalties for fraud or penalties for the contravention of the Electoral Act, the Electoral Commission Act or the Municipal Electoral Act will depend on criminal proceedings that may follow upon the information which was supplied to the SAPS and a conviction of any person of such offence or offences. In the view which I take in respect of paragraph (a) of the order of the Constitutional Court and in the light of the steps taken by the Commission, the need to consider sanctions and penalties has not arisen.

[16] The penalties or sanctions provided for in s 96 of the Electoral Act and s 78 of the Municipal Electoral Act may be imposed by a court as determined by this Court (s 20(4)(b) of the Electoral Commission Act) to hear matters, should the necessary facts present itself and are not for this Court to impose.

[17] In the result the Commission complied with paragraph 2 of the order made by this Court on 7 May 2013. Similarly, the issues referred to this Court by the Constitutional Court have been satisfactorily dealt with by the Commission. The contention to the contrary advanced by the applicant is without merit and falls to be rejected.

[18] Accordingly, the following order is made:

The Electoral Commission has complied with paragraph 2 of the order made by this Court on 7 May 2013.

WEPENER J
**JUDGE OF THE ELECTORAL
COURT**

APPEARANCES

FOR THE APPLICANT:

In Person

FIRST RESPONDENTS' COUNSEL: PM Kennedy SC with S Rajab-
Budlender

Instructed by: Gildenhuys Malatji