



**THE ELECTORAL COURT OF SOUTH AFRICA
BLOEMFONTEIN**

Not Reportable

(1) CASE NO: 008-2024EC

In the matter between:

LABOUR PARTY OF SOUTH AFRICA

Applicant

and

THE ELECTORAL COMMISSION OF SOUTH AFRICA

Respondent

(2) CASE NO: 012-2024EC

In the matter between:

AFRICAN CONGRESS FOR TRANSFORMATION (ACT)

Applicant

and

THE ELECTORAL COMMISSION OF SOUTH AFRICA

Respondent

(3) CASE NO: 011-2024EC

In the matter between:

AFRIKAN ALLIANCE OF SOCIAL DEMOCRATS (AASD)

Applicant

and

THE ELECTORAL COMMISSION OF SOUTH AFRICA

Respondent

(4) CASE NO: 009-2024EC

In the matter between:

ALL AFRICAN ALLIED CONGRESS (AAAC) Applicant

and

THE ELECTORAL COMMISSION OF SOUTH AFRICA Respondent

(5) CASE NO: 010-2024EC

In the matter between:

DR SIPHO PIENAAR MALAPANE Applicant

and

THE ELECTORAL COMMISSION OF SOUTH AFRICA Respondent

Neutral Citation: *Labour Party of South Africa and Others v Electoral Commission of South Africa and Others* (008/2024EC; 012/2024EC; 011/2024EC; 009/2023EC; 010/2024EC) [2024] ZAEC 04 (09 March 2024)

Coram: Zondi JA, Shongwe AJ, Adams AJ, Professors Phooko and Ntlama-Makhanya (Additional Members)

Heard: 5 April 2024 – as a videoconference on *Microsoft Teams*

Delivered: 15 April 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by publication on the website of the Supreme Court of Appeal and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 15 April 2024.

Summary: Section 20 of the Electoral Act – *Election Timetable for the Election of the National Assembly and the Election of Provincial Legislatures* – non-compliance by applicants with timetable relating to s 27 requirements – submission of lists of candidates by political parties and nomination of independent candidates – non-compliance and failure to meet deadlines in timetable factually to be blamed on the applicants and not on the IEC's online system – therefore, nothing unlawful about the

IEC's insistence on compliance with the deadlines in the timetable – the IEC must not be placed in a situation where it has to make *ad hoc* decisions about political parties and candidates who have not complied with the Act –
Applications dismissed with no order as to costs.

ORDER

The following identical order is made in each of the above five review applications under the separate case numbers:

The application is dismissed with no order as to costs.

JUDGMENT

Adams AJ (Zondi JA and Professor Ntlama-Makhanya (Additional Member) concurring):

[1] The applicants in the above five applications, four unrepresented registered political parties and one independent candidate (Dr Malapane), intended to participate in, and contest, the upcoming national and provincial elections scheduled for 29 May 2024. All of the applicants failed to comply with the *Election Timetable for the Election of the National Assembly and the Election of Provincial Legislatures* (timetable) promulgated in terms of s 20 of the Electoral Act¹ by the respondent, the Electoral Commission (Commission) in these applications. Most of the applicants fell foul of item 9 in that they had failed to meet the deadline prescribed in the said provision, which reads as follows: -

'9 Cut-off date for submission of list of candidates and nominations of independent candidates

¹ Electoral Act, Act 73 of 1998.

- (a) Registered parties that intend to contest this election must nominate and submit a list of their candidates for the election to the chief electoral officer in the prescribed manner by 08 March 2024.
- (b) Nominators of independent candidates that intend to contest this election must submit their nominations to the chief electoral officer in the prescribed manner by 08 March 2024.'

[2] The main complaint by the applicants related to the *Online Candidate Nomination System* (OCNS or portal) of the Commission onto which the list of candidates, as well as the prescribed supporters' lists, were required to be uploaded. The portal, so it was alleged by the applicants, made it impossible for them to comply with the requirement to upload by Friday, 8 March 2024, onto the system their candidate lists and the supporting documentation.

[3] So, for example, it was contended by the applicant in the first application under case number 008-2024EC (the Labour Party) that the 'prescribed manner' ended up being completely unmanageable and unworkable. 'It involved having to upload tens of thousands of people's names and their details as contained in thousands upon thousands of reams of paper onto the Commission's Online Candidate Nomination System'. The system, so it was alleged by the Labour Party, is cumbersome and difficult to use. And this was the general tenet of the complaints by the applicants. It was also stated that the system sometimes 'kicked them out' and would often 'hang'. In sum, the applicants were aggrieved by the fact that, according to them, it was simply impossible to upload everything onto the portal in the short time that was given.

[4] The Commission opposes all of these applications on the basis that the applicants, in failing to comply with the requirements to nominate candidates and to submit their lists of candidates, were the authors of their own misfortune. These applicants, so it is alleged by the Commission, are themselves to blame for the fact that they did not meet the deadline prescribed by item 9 of the timetable and not the supposed shortcomings in the OCNS of the Commission. This point is confirmed, according to the Commission, by the fact that the vast majority of political parties, as well as independent candidates, had no difficulty using the OCNS. The system, so

the case on behalf of the Commission goes, was reasonable and user-friendly as demonstrated by the fact that several unrepresented political parties used it to submit the details of their supporters, nominate candidates and make payments. Dozens of represented political parties also used the OCNS to nominate candidates and make payments – about 87 parties (of which 76 are ‘unrepresented’) and 24 independents were able to comply with the provisions of s 27 of the Electoral Act by using the portal.

[5] The reason why the Labour Party was unable to comply with the requirements to compete in the elections, so the Commission contends, is because it left everything to the last minute, as did all of the other applicants. Party registration, gathering signatures of supporters and the uploading of candidate nomination lists were left by these applicants until the very last minute.

[6] The issue to be considered in these applications is therefore whether there was anything unlawful in the time limit prescribed by item 9 and the strict enforcement thereof by the Commission. Closely related to this issue is whether, all things considered, the elections will not be free and fair as a result of the applicants being excluded from contesting the elections.

[7] It is accordingly convenient to deal with all of these matters in one judgment. The cases on behalf of the last two applicants stand on somewhat of a different footing in that those applicants fall far short from making out cases for the relief sought by them. Their matters will therefore receive separate attention, albeit rather briefly.

[8] A convenient starting point for a discussion of the issues to be considered by the Court is the fact that an election timetable and the deadlines set therein are essential for the facilitation of free and fair elections. Electoral authorities, like the Commission, would not be able to run a free and fair election without clear rules regulating the submission and verification of party and candidate information. For an election to be free and fair, and to be perceived as free and fair, all parties must be held to these rules. As submitted on behalf of the Commission, there can be no *ad*

hoc condonations or indulgences – otherwise some of the parties will be perceived as being favoured by electoral authorities, who must remain neutral.

[9] There are, of course, limits to the powers of the Commission. For instance, it cannot unlawfully or irrationally impose deadlines in the election timetable. And this, as indicated before, is exactly the issue to be considered in these applications – did the Commission act unlawfully and/or irrationally in strictly enforcing the time limits imposed by the timetable?

[10] At a factual level, this question is to be answered in favour of the Commission. Its evidence demonstrates that its online portal – the OCNS – functioned without issues at the relevant times. I find myself in agreement with the submission on behalf of the Commission that, if regard is had to the undisputed and unchallenged fact that 87 political parties and 24 independents made use of the OCNS ahead of the upcoming election, seemingly without any difficulties, it has to be accepted that the system was working properly and was fit for purpose. They were all able to meet the timetable's deadline whilst using the OCNS. Some of those parties were able to use the OCNS to meet the timetable's deadline at the very last minute.

[11] Moreover, as was explained in detail by the Commission, all the applicants were able to use the OCNS to significant degrees. In some cases, applicants were able to upload data relating to thousands of supporters. The applicants' own version reveals that the OCNS could not have been unfit for purpose. Otherwise the applicants would not have succeeded in uploading the various information they uploaded. That they failed to upload all the information for all the elections they wished to compete in is a demonstration of their own failure, not of that of the Commission.

[12] The Commission also gave examples of at least three unrepresented parties that are competing in all the available elections. This demonstrates – rather persuasively – that if a party or an independent candidate had prepared properly and had undergone the necessary training and guidance offered by the Commission, they would have experienced no difficulty in complying timeously with the provisions of

s 27. One of the parties, for example, was only formally registered after 6 March 2024 – two days before the deadline, yet it was ready and able to upload its documents. It managed to upload all the signatures it needed to compete, upload all its candidate nominations, and pay the required deposit.

[13] If these parties, which faced similar challenges to the applicants, were all able to comply and will compete in the upcoming election, the rhetorical question to be asked is why the applicants could not do likewise. As contended by the Commission, the obvious reason for the applicants' failure to comply was not the timetable or the OCNS that was the problem, it was the applicants' lack of preparedness.

[14] The simple point is that, on the probabilities, the OCNS was not as ineffective and cumbersome to use as the applicants would make it out to be. It follows that it was, as alleged by the Commission, the applicants' unpreparedness and their tardiness which resulted in their inability to comply with the provisions of s 27. In the context of this opposed application, which implies that the principle in *Plascon Evans*² finds application, it cannot possibly be said that the version of the Commission is so far-fetched and untenable that this Court can reject it out of hand. Put another way, the Commission's version on the facts cannot and should not be rejected by this Court out of hand, as one being patently implausible and far-fetched. Therefore, factually it cannot be said that there was anything untoward or unlawful with the Commission's insistence on strict compliance with the time limits imposed by the timetable.

[15] It is of course so that laws and regulations should be interpreted to promote political participation. That serves both the right to stand for political office and to vote. This then requires an interpretation of s 27 that promotes the political rights enshrined

² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) Sa 623 (A) at pp 634 and 635 held as follows: -

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers ...'.

in s 19 of the Bill of Rights in the Constitution. The issue being whether the applicants ought to be allowed to contest the elections notwithstanding their non-compliance with the time limits imposed by the timetable. In my view, not, and for the reasons expanded upon in the paragraphs which follow.

[16] It is so, as submitted on behalf of the Commission, that parties and candidates want to participate in free and fair elections. Voters must vote in free and fair elections. If the elections are not free and fair, political participation is not promoted, but stifled. This, however, requires the Commission, political parties and independent candidates to all adhere to the deadlines set in the electoral timetable precisely to give effect to all the section 19 rights. It is also necessary to promote the founding values of democracy and universal suffrage.

[17] In *Inkatha Freedom Party*³, Ngcobo CJ held that ‘the foundational values of universal suffrage and multi-party democracy ... [as foundational values] are best advanced through the Commission’s rigorous adherence to the provisions of the Act’. Rigorous adherence to deadlines ‘is crucial to the integrity of the electoral process’. It may be apposite to cite in full the para 55 of the judgment, which reads as follows: -
‘[55] It is necessary that the integrity of the electoral process be maintained. Indeed, the acceptance of the election as being free and fair depends upon that integrity. Elections must not only be free and fair, but they must be perceived as being free and fair. Even-handedness in dealing with all political parties and candidates is crucial to that integrity and its perception by voters. The Commission must not be placed in a situation where it has to make *ad hoc* decisions about political parties and candidates who have not complied with the Act. The requirement that documents must be submitted to the local offices of the Commission does not undermine the right to vote and to stand for election. It simply gives effect to that right and underscores the decentralised and local nature of municipal elections.’ (Emphasis added).

[18] The electoral timetable is the central mechanism which regulates and thus gives effect to the rights to vote, stand for public office and to free and fair elections.

³ *Electoral Commission v Inkatha Freedom Party* 2011 JDR 0421 (CC).

[19] Counsel for the Commission submitted that fairness cannot be assessed subjectively by considering only the circumstances of one non-compliant party or candidate. It is inherently unfair to parties and candidates that complied with a deadline to permit the alteration of that deadline, especially to where the alteration is for purposes of suiting the convenience of a party that failed to comply with the deadline purely in consequence of subjective factors. It would come at a cost to political parties and independent candidates who have planned their campaigning based on the proclaimed date and who have not been cited in these proceedings.

[20] I agree with these submissions. The point is, as was held by the Constitutional Court in *Liberal Party*⁴, that the idea that an election timetable can be altered because one party had failed to comply with it, should be rejected. An amendment to the timetable, the Court held, 'is not necessary for a free and fair election'. In fact, in the Court's opinion, it would have had the opposite effect – it 'could prejudice other parties' election build-ups and indeed free and fair elections'.

[21] As regards the individual applicants and those issues which require special mention, it is noteworthy that the Labour Party uploaded sufficient supporter information to participate in the national ballot, and in the ballot for all nine regions of the National Assembly elections, as well as in the North West Provincial Legislature. It only captured candidates to compete in the national ballot of the National Assembly. The Labour Party's failure to upload candidate lists for any of the regions in the National Assembly election, or any of the Provincial Legislatures, was, in my view, of its own doing, not the Commission's.

[22] The simple point of the Labour Party matter is that it did not comply on time. That was not a result of the OCNS or the Commission's conduct, but the fact that it left compliance to the last minute and then ran out of time. It only captured its first candidate just 36 minutes before the deadline at 16:24 on 8 March 2024. There was no reason for this when it could have begun fulfilling the requirements the day it was

⁴ *Liberal Party v The Electoral Commission and Others* (CCT 10/04) [2004] ZACC 1; 2004 (8) BCLR 810 (CC) (5 April 2004).

notified that it had been registered as a political party on 7 February 2024, and could have taken steps to register long before that.

[23] In the circumstances of this matter, the Labour Party's grounds of review are without merit. Importantly, it cannot be said with any conviction that the Commission took an irrational decision to stick to the timetable. The vast majority of parties successfully used the OCNS to compete in the upcoming elections. The Labour Party's failure was of its own doing. It was not 'necessary' for free and fair elections for the Commission to amend the timetable to accommodate that failure. Amending the timetable, as alleged by the Commission, will threaten the holding of an election on 29 May 2024. Jettisoning the current timetable will place the Commission under serious pressure and will force a postponement of the election date.

[24] The irrationality review ground holds no water. The Commission's refusal to amend the election timetable is patently rational.

[25] For all of these reasons the Labour Party's application stands to be dismissed.

[26] The same fate is to be suffered by the application of ACT, which failed to submit its complete list of candidates on time. Its case is that its delay was due to 'no fault' on its part and that its failure resulted from the fact that the OCNS was not 'fit for purpose'. On the basis of the facts as alluded to *supra*, ACT's case is not sustainable. The evidence before this Court demonstrates that the OCNS did not malfunction on 8 March 2024. Moreover, as submitted on behalf of the Commission, the fact that ACT itself successfully uploaded supporter information and paid its deposits on 8 March 2024, belies its contention that the OCNS was not 'fit for purpose' or that the system 'malfunctioned'.

[27] What is also instructive is that before 8 March 2024 ACT never reported any issues with the OCNS. Its first complaint was a phone call to the Commission at 14:00 on 8 March 2024. This, in my view, lends credence to the version of the Commission that there was nothing wrong with the OCNS. The difficulties arose from the lack of preparation on the part of ACT and the fact that they left their submission of the requisite documentation until the very last minute. Also, because of their lack of

preparation and their failure to familiarise and acquaint themselves with the OCNS, they appear not to have made effective use of the system, which was a direct cause of them running out of time before they were able to comply fully with the requirements set out in s 27 of the Electoral Act. So, for example, ACT failed to 'bulk upload' their list of candidates, which would have ensured that they uploaded in a much shorter period.

[28] As for the applicant in the third application (AASD), which failed to comply with the requirement that it submits its candidate lists in the prescribed manner by the deadline, the relief it seeks is, in substance, an exemption from compliance, and an extension of the deadline for it alone. That relief is not competent. For that reason alone, this application should be dismissed.

[29] AASD advances four arguments for why it did not comply with s 27 and should be granted a unique opportunity to comply. In the main, it contends that the system required it to upload all the names, ID numbers and signatures of its supporters under s 27(2)(cB) before it could generate a payment reference. The Commission denies this claim. It could generate a payment reference simply by indicating in which election it wished to compete. The Commission's version is not far-fetched or implausible and must be accepted.

[30] This, together with the fact that it has to be accepted on the evidence before us, that there was no difficulty using the OCNS or complying with the prescribed requirements by the deadline, means that the AASD is not entitled to the relief sought by it. In the words of *Inkatha Freedom Party*, AASD wants the Commission to make *ad hoc* decisions about political parties and candidates who have not complied with the Act. That is something which cannot and should not be countenanced by this Court. As is the case with the other applicants, AASD failed to comply and to meet the deadlines in the timetable not because of the Commission's fault, but because of its own. It failed to begin its process in time to ensure it could upload its documents by the deadline. That is not the Commission's doing and does not entitle AASD to special treatment.

[31] That then leaves the applicants in the fourth application (AAAC) and in the fifth application (Dr Malapane). Both these applications fall to be dismissed simply on the basis that no sustainable causes of action are made out by these applicants.

[32] AAAC admits non-compliance with the deadlines. They specifically apply 'to be exempted from compliance with the 2024 National and Provincial Election Timetable'. Their failure to comply with the timetable can in no way be imputed on the Commission. The facts, simply put, are that the AAAC was only registered as a party by the Commission on 26 February 2024. This was ten working days before the deadline for the submission of candidate nominations and lists in the electoral timetable.

[33] The applicant did not meet that deadline and contends that had they been registered earlier by the Commission; they would have been able to comply. This contention is wholly untenable and stands to be rejected out of hand, especially since it is unsupported by any credible evidence. The other relief sought in the notice of motion – including requiring the Commission to fund the party's political activities – is obviously unsustainable in law. Nothing more needs to be said about it.

[34] Dr Malapane's case is equally without merit. He seeks a review against the 'decision of the Independent Electoral Commission ... which decision closed / cut off the nomination process on 8 March 2024, and for the Honourable Court to order re-opening of the candidate nomination process'. This is effectively an attack on the validity of the timetable. However, it is significant that the applicant concedes that he cannot 'find fault with the process or systems the Commission has put in place to ensure free and fair elections and the online option is aimed at easing the process'. This concession is fatal to the applicant's case.

[35] Dr Malapane concedes that he only registered as an 'Online Party Administrator (OPA)' on 6 March 2024 with a view to starting the nomination process to be an independent Candidate in the elections on 29 May 2024. Therefore, on his own version, he left the decision to register on the Commission's portal until the proverbial last minute. The applicant does not explain why he did this. He does not

explain when he decided that he desired to participate in the election, and why he left it until the last minute to register on the OPA.

[36] Dr Malapane concedes that he did not know how to work his way through the OCNS system. He had more than enough time to acquaint himself with the OCNS system and to register accordingly. He simply left matters to the last minute, and eventually failed to comply with the requirements of the timetable. He captured his first supporter at 21:38 on 6 March 2024. The applicant did not meet the required quota of 1000 signatures; certainly, even on his own version, he had not satisfied the quota at the time of the deadline.

[37] The fact of the matter is that the applicant did not know how the process for registration worked. Despite this, he left it until the last minute to try and seek clarity from the Commission. He has himself to blame for not affording himself a reasonable period of time to familiarise himself with the online registration system established by the Commission, and to timeously seek clarification on any issue he did not understand. For all these reasons, there is no basis for this Court to upend the election timetable in order to accommodate a prospective candidate like Dr Malapane.

[38] In the premises, all five applications fall to be dismissed.

[39] There is one last issue which requires my attention and that relates to the alleged late filing of the Commission's answering affidavit in the Labour Party application. It was submitted on behalf of the Labour Party that, because the Commission failed to comply with a direction of this Court dated 14 March 2024, it is automatically barred from filing an answering affidavit. In terms of the Court's directives, the Commission was directed to deliver its answering affidavit on or before 18 March 2024. The said affidavit was only delivered on 20 March 2024, and the Commission's explanation for the late filing was that they had been given an extension by the Court's secretary.

[40] This is not disputed by the Labour Party, which, however, contends that the secretary of the Court has no authority to grant such an extension. On 9 April 2024 –

after the application had been heard by this Court on 5 April 2024 – the Commission applied for condonation for the late filing of its answering affidavit insofar as it may be necessary. In a letter addressed to the Court’s secretary on 10 April 2024, the Labour Party reiterated its opposition to any condonation application by the Commission. The Labour Party contends that the application for condonation after the hearing of the matter is improper and extremely prejudicial to it. It therefore contends that the application for condonation should not be entertained by this Court as the Commission failed to comply with the rules of this court in that it failed to timeously apply for condonation. The answering affidavit of the Commission should, according to the Labour Party, be disregarded and the application adjudicated only on the basis of the papers of the Labour Party.

[41] Such condonation should, in my view, be granted. The explanation by the Commission for their non-compliance with the Court directive is reasonable. In any event, it would not be in the interest of justice that the said affidavit be excluded in a matter of such importance as the ones before this Court.

[42] Condonation should be and is therefore granted.

Costs

[43] The award of costs is a matter which is within the discretion of the Court considering the issue of costs. This discretion must be exercised judicially having regard to all the relevant considerations. One such consideration is the principle that in general in this Court an unsuccessful party ought not to be ordered to pay costs. But this is not an inflexible rule, and it can be departed from where there are strong reasons justifying such departure such as in instances where the litigation is frivolous or vexatious.

[44] I can think of no reason why the foregoing general rule should be departed from. Each party should therefore bear its own costs.

Order

[45] In the result, the following identical order is made in each of the above five review applications under the separate case numbers:

The application is dismissed with no order as to costs.

L R ADAMS
Acting Judge of the Electoral Court
Bloemfontein

I concur and it is so ordered,

D ZONDI
Chairperson of the Electoral Court
Bloemfontein

I concur.

Prof N NTLAMA-MAKHANYA
Additional Member of the Electoral Court
Bloemfontein

Professor Phooko (Shongwe AJ concurring):

[46] I have read the eloquently prepared judgment by my brother, Adams AJ (the majority judgment) and agree with the reasoning and the order made in respect of the applicants in the fourth and fifth applications.

[47] However, I am unable to agree with the reasoning and the outcome in so far as it relates to the first to third applications in that the applicants in those applications are to blame for their failure to meet the deadline stipulated in the election timetable for the submission of their lists of candidates. I set out the reasons for my dissent below.

[48] The integration of information technology into South Africa's electoral system has the potential to strengthen our democratic processes including making them user friendly such as the online voter registration that could be done from anywhere. Equally, the benefits of technology could only be enjoyed when one has digital skills to make use of the available technology.

[49] The Commission has introduced an Online Candidate Nomination System (OCNS) or ('the portal') which 'allows parties and Independents to capture and manage candidate lists, documentation and payments'⁵. There was one workshop that was conducted virtually for all political parties including the applicants on 29 February 2024. This was six days prior to the deadline for the submission of the list of party candidates. The purpose of the workshop was to equip the applicants about how to use the portal. In addition to a virtual presentation, the applicants were given a manual/presentation document.

[50] The evidence before this Court shows that the applicants had aired their dissatisfaction with the respondent about their challenges when using the portal. In fact, their discontent with the portal started from the virtual presentation where they could not ask questions and/or get a clear explanation about how the portal worked. The Commission's submission was that the applicants merely needed one day to complete the registration process. However, the applicants' testimony is that they hired a private venue and had at least dedicated two days with the assistance of several volunteers to upload the information on the portal. However, they were unsuccessful. In my view, the submission to the effect that the applicants only needed one day to upload the information on the portal cannot be sustained without more.

[51] It is incomprehensible why a novel system of this nature must be rushed through and be the only option (together with physical delivery at the Commission's national office in Centurion) available to submit the list of party candidates. I say so because the applicants' evidence is that they had all their documentation ready for submission but for the portal, they were unable to finish uploading it. I am mindful of the Commission's submission that the applicants did their task late. However, I am

⁵ <https://www.elections.org.za/pw/parties-and-candidates/information-centre> (accessed 8 April 2024).

of the view that other avenues could have been made available to submit the list of party candidates to cater for unforeseen circumstances such as the present one. The mere fact that 87 parties alongside 24 independent candidates were able to upload their information timeously as opposed to the applicants should not be used to disenfranchise potential candidates.

[52] In my view, the reliance on the number of people who were able to successfully use the portal overlooks the digital divide in our country⁶. The digital divide is on one hand the gap between individuals with, *inter alia*, skills to use technology, and on the other hand those without/limited expertise⁷. I am of the view that the complaints by the applicants cannot simply be dismissed as being their fault. To the contrary, they suggest that there is more that needs to be done to achieve digital literacy to realize the right to political participation in the digital era. We need an inclusive process that will ensure that members of our society are not left behind in this period of digital world.

[53] Even if the portal was in its maximum functionality, I am not persuaded that the applicants were adequately equipped to use it. Their challenges are stated clearly in their founding affidavits. The applicants, in particular the Labour Party of South Africa ('the Labour Party') presented uncontroverted evidence that the portal is dysfunctional. In the process of uploading the candidates list they had to pay the required deposit which they did, however through the electronic fund transfer (EFT). After sending their proof of payment to the Commission, the portal still could not pick up that a deposit had been made. The Commission continued to demand payment of the deposit. The Labour Party laid the dysfunctionality of the portal squarely in the doorstep of the Commission for this failure. This could have been managed better when the first complaints were raised immediately after the workshop.

⁶ See LK Mpleko *The Influence of digital literacy initiatives in South Africa: A Nemisa Case Study* (LLM thesis, University of Johannesburg 2022), A Gillwald and O Mthobi "After access 2018: A demand-side view of mobile internet from 10 African countries" April 2018 available at https://researchictafrica.net/wp-content/uploads/2019/05/2019_After-Access_Africa-Comparative-report.pdf (accessed 8 April 2024).

⁷ ST Faloye and N Ajayo: "Understanding the impact of the digital divide on South African students in higher educational institutions" 2023 *African Journal of Science, technology, Innovation and Development* 1734.

[54] Electoral justice is a process and not an event, it starts not only when one casts his or her vote at the ballot box but from the initial stage that eventually lead to the election day. In other words, both the pre- and post-election processes should be seen as being free and fair.

[55] The value of political participation especially in the context of South Africa's dark history cannot be overemphasized. In *Ramakatsa and Others v Magashule and Others*⁸, the Court recognized the history of our country where most African people were denied political rights. The Court said:

'The scope and content of the rights entrenched by section 19 may be ascertained by means of an interpretation process which must be informed by context that is both historical and constitutional. During the apartheid order, the majority of people in our country were denied political rights which were enjoyed by a minority. The majority of black people could not form or join political parties of their choice. Nor could they vote for those who were eligible to be members of Parliament. Differently put, they were not only disenfranchised but were also excluded from all decision-making processes undertaken by the government of the day, including those affecting them.'

[56] The new systems should strive towards inclusivity to enable everyone to participate fully in the electoral process at all stages. The processes must create an environment that do not place a doubt about our democratic processes. Considering the above exposition, I am of the view that the challenges encountered by the applicants ranging from the virtual training, the actual use of the portal, and their exclusion (and their members) in this process has the potential to raise a doubt whether or not the elections were free and fair.

[57] I am of the considered opinion that the applicants in the first three applications have made out a case for the relief sought in their notices of motion. Therefore, had I commanded the majority, I would have granted the relief sought by the applicants in the first to the third applications with no order as to costs. The fourth and fifth applications I would have dismissed, also with no orders as to costs.

⁸ *Ramakatsa and Others v Magashule and Others* [2012] ZACC 31; 2013 (2) BCLR 202 (CC) at para 64.

Prof R PHOOKO
Additional Member of the Electoral Court
Bloemfontein

I concur,

Z J SHONGWE
Acting Judge of the Electoral Court
Bloemfontein

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For the applicant in the
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