

ADDRESSES AS A BONE OF CONTENTION IN ENSURING FREE AND FAIR LOCAL GOVERNMENT ELECTIONS

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ABSTRACT

The test for democracy is the regular free and fair elections. In South Africa, in order for one to be eligible to exercise ones right to vote one has to register for elections in the common voters' roll. The settings in which the national and provincial elections on the one hand, and the local government on the other, take place and are conducted are different. Although the IEC has a duty to record the addresses of the voters in the common voters' roll, the importance of the recordal of addresses in the local government elections is the more prominent. This is so because local government elections are conducted on ward basis as opposed to the national and provincial elections that are conducted on party list system. The importance of addresses in the local government elections cannot be underestimated: they assist in ensuring that only voters eligible to vote in particular wards do so. Addresses also enable candidates to canvass the votes from the eligible voters. Although the IEC has a duty to record addresses of the voters such duty arises where the addresses are available. Failure by the IEC would not per se render the elections not to be free and fair. The impact of such irregularity must be proven before the elections could be held not to have been free and fair.

Keywords: Democracy, Elections, IEC, voters, Free and fair.

1. INTRODUCTION

Regular elections are one of the measures of democracy in a country. The right to vote is essential for the legitimisation of governments. According to Adar, Hamdcock and Rukambe (2004) elections are a precursor to the creation of a democratic government. One of the functions of elections is the entrenchment of democracy. Multi-party elections

is the prerequisite for a democratic state (Adar, Hamdcock and Rukambe, 2004). This is reflected in the Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution) which states that the Republic is founded on, among others, "universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness." These abstract ideas have been concretised in section 19(2) of the Constitution which guarantees to every citizen the right to free, fair and regular elections. The freeness, fairness and regularity of elections are what grants legitimacy to the ruling government as they reflect the leadership preference of the electorate (see Adar, Hamdcock & Rukambe, 2004; Ojo, 2011). Although the regularity of elections does not necessarily tantamount to democracy, regular elections are still a vital element in any democratic society. In South Africa elections are held at the three tiers of government, being the national, provincial and local spheres of government.

The rationale for this paper is to discuss the role of the recordal of addresses by the Electoral Commission (popularly called the IEC) in the national voters' roll especially for the administration and conduct of local government vis-à-vis the national and provincial government elections. The importance of this aspect has been highlighted by the Constitutional Court in the case of *Kham v Electoral Commission* (2016 (2) SA 338 (CC)). In this case the Constitutional Court set aside the by-elections that were held in Tlokwe in 2013 on the basis that they were not free and fair because the IEC had failed to provide the candidates in those elections with the certified copy of the segments of the voters' roll that contained the addresses of the electorate in those by-elections. Because of the decision in *Kham v Electoral Commission* 2016 (2) SA 338 (CC), the IEC had harboured some doubts as to whether the

(national) local government elections that were due to be held in August 2016 would suffer the same fate as the Tlokwe by-elections as the IEC had failed to scrupulously record the addresses of the electorates even after that became a requirement after December 2003. The importance of the recordal of addresses in the local government elections as opposed to the national and provincial elections is that the former are contested on ward based system as opposed to a party list system at the national and provincial level. Thus, the recordal of addresses of electorate in the voters' roll plays a significant role in assisting to ensure that only those voters' who reside within the demarcated area (ward) and eligible to vote do so to the exclusion of others. Given the above, with regard to local government elections, the ultimate objective of this paper is to scrutinise, in light of the Constitutional Court judgments, the role the voters' addresses play in the determination of the freeness and fairness of elections in local government. In other words, what is the value that the recordal of addresses in the common voters' roll add in the determination of whether local government elections are free and fair or not? Qualitative research would be utilised in this paper. The study would mainly draw from the decisions of the courts relating to the role the residential addresses have in the determination of whether elections are free and fair. In addition, the study would rely, for content analysis, on legislation and other materials including books and journal articles.

2. THE MEANING OF FREE AND FAIR ELECTIONS

The phrases "Free" and "fair", in the context of elections, have defied a precise definition and are determined with regard to the prevailing circumstances and context of particular elections. It is in this regard that Ojo (2011) posits that all nation states are still in search of an ideal electoral system i.e one endowed with all the elements of freeness and fairness. He further states that "all the elements of free and fair elections are difficult to come by, though they are a necessity in the attainment of a democratic polity, but a minimum number of such prerequisites is required for democracy to be consolidated." This, therefore, presuppose that there is a threshold that has to be met before the elections could be said to be free and fair. However, no internationally accepted definition of free and fair elections exists. The freeness and fairness of elections must be considered and assessed in context (Kham v Electoral Commission 2016 (2) SA 338 (CC)). Thus, a move away by the

international observers from rigidly searching for a universal definition of free and fair in assessing the integrity of elections towards a new meaning. The criterion they have adopted to determining the integrity of elections is whether or not the "election is a legitimate expression of the will of the people or properly reflects the wishes of the people" (Kham v Electoral Commission 2016 (2) SA 338 (CC)).

The freeness and fairness of the elections is not a once off election-day phenomenon but is a culmination of processes and events leading to the election-day (Kham v Electoral Commission 2016 (2) SA 338 (CC); Booysen, 2002). It is on this basis that some flaws in the election process may be countenanced but not others. It is not each and every irregularity in the election process that would render the elections unfree and unfair. It is the nature, the gravity and the extent of the irregularity that must be considered in determining whether elections were free and fair or not (Electoral Commission v Mhlope 2016 (5) SA 1 (CC)). The Constitutional Court, in Kham v Electoral Commission 2016 (2) SA 338 (CC), has distilled four elements that must enjoy pre-eminence in the determination of the freeness and fairness of elections. They are:

First, every person who is entitled to vote should, if possible, be registered to do so.

Second no one who is not entitled to vote should be permitted to do so.

Third, in so far as the elections have a territorial component, as is the case in municipal elections where candidates are in the first place elected to represent particular wards, the registration of voters must be undertaken in such a way as to ensure that only voters in that particular area (ward) are registered and permitted to vote.

Fourth, the Constitution not only protects the act of voting and outcome of elections, but also the right to participate in elections as a candidate and to seek public office (my emphasis).

There is disagreement among commentators whether the phrase free and fair is composite or whether it consists of separate and independent requirements. According to Bishop and Hoefler (2016; see also Booysen, 2002) the two are separate but interdependent on each other. The freeness of elections refers to rules governing the elections and processes leading up to the elections whereas the

fairness refers to the events taking place on the day of the elections. They argue that elections cannot be fair if the run up to the elections was not free. The Constitutional Court, on the other hand, views this as a composite requirement which cannot be separated (Kham v Electoral Commission 2016 (2) SA 338 (CC)). However, the common thread running through these divergent views is that it is meaningless to exercise the right to vote if those elections do not meet certain minimum. For instance, a legitimate registration process (if the elections are subject to registration), each vote carry equal measure, the right of those who qualify to stand for office etc (see Currie & de Waal, 2005). Free and fair elections lie at the heart of any constitutional democracy ((Kham v Electoral Commission 2016 (2) SA 338 (CC); Bishop & Hoeffler, 2016). It is only through free and fair elections that the substantive content of the right to vote could be given effect to and legitimacy. The right to vote can only be meaningful when exercised within a free and fair environment (Kham v Electoral Commission 2016 (2) SA 338 (CC); Currie & de Waal, 2005). The freeness and fairness of the elections cannot only be determined by how the electorates have been treated but extend to how the participants (candidates) are also dealt with (see Lotter v Electoral Commission [2013] 4 All SA 152 (Elect Ct)). Section 19(3)(b) guarantees the rights of the citizens to stand for public office and, if elected to hold office. The law entrusts the IEC with the duty to preserve and maintain these ideals. Failure to diligently carry out its mandate may result in the elections not being free and fair. It is clear that these requirements are not an event, but a process. It is in this light that the failure by the IEC to record the addresses of the voters after this became a requirement in 2003 must be viewed. The next section deals with the role of the IEC in ensuring free and fair elections.

3. THE ROLE OF IEC IN ENSURING FREE AND FAIR ELECTIONS

Electoral integrity is easily determined by establishing whether the elections engender the confidence of the electorate in the process leading to the election as well as the outcomes thereof. In order to ensure this, institutionalised mechanisms for the administration of the elections must be built and maintained. These are normally found in the legislative framework (The Electoral Knowledge Network, 2013). In South Africa, section 190 of the Constitution, through the Electoral Commission Act 51 of 1996, establishes the Electoral Commission and entrust it with the

duty to ensure that elections are free and fair. The primary object of the Commission is to strengthen constitutional democracy and promote democratic electoral processes (Ndletyana (ed), 2015). This is in recognition that "the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless" (Kham v Electoral Commission 2016 (2) SA 338 (CC)). The IEC must ensure that contestation in elections is on a level playing field (Kham v Electoral Commission 2016 (2) SA 338 (CC)). Thus the freeness and fairness of elections depends, in large measure, on how the IEC has carried out its constitutional and legislative duties in the administration and conduct of the elections ((Kham v Electoral Commission 2016 (2) SA 338 (CC)). The Constitutional Court (Kham v Electoral Commission 2016 (2) SA 338 (CC)) has posited that the IEC has to be held to higher standards in the execution of its constitutional mandate. Legislation entrust the IEC with a range of duties and responsibilities. It is in the main the compliance with these statutory duties and responsibilities by the IEC as well as the contestants and the electorate that would be decisive in determining whether the elections were free and fair (The Electoral Knowledge Network, 2013). Not all of these duties and responsibilities would be considered in this paper but only those pertinent to this discussion.

The first duty of the IEC is to compile and maintain the national common voters' roll and that potential voters are registered in the common voters' roll (sections 5 and 8 Electoral Act 73 of 1998). The same national common voters' roll is used for municipal elections (section 5(1) Local Government: Municipal Electoral Act 27 of 2000). A voter must be registered only for the district in which that voter is ordinarily resident (section 8(3) Electoral Act 73 of 1998). Generally, a voter must cast his or her vote in the district in which he or she is ordinarily resident. However, in the national and provincial elections the law admits certain exceptions in this regard (see section 24A Electoral Act 73 of 1998). In relation to local government elections the law requires the IEC to ensure that a voter may only vote if his name appears "on the certified segment of the voters' roll for a voting district which falls within the municipality" (section 5 (2) Local Government: Municipal Electoral Act 27 of 2000). In other words, a voter must not be allowed to vote beyond the borders of the ward in which he or she had registered. It is the duty of the IEC to establish the voting districts whereas wards are delimited by the Municipal Demarcation

Board. In order to ensure that the electorate cast their vote in the correct ward and district, legislation requires that his or her address, where available, be recorded in the common voters' roll (Section 16(3) Electoral Act 73 of 1998). In order to ensure the legitimacy and integrity of the voters roll the IEC must make it available for inspection in the national and provincial elections and, in the case of local government elections, segments of the voters roll for the districts to be used in elections (see section 16 Electoral Act 73 of 1998 and section 6 Local Government: Municipal Electoral Act 27 of 2000). This assist parties and candidates participating in elections to investigate the eligibility and existence of the voters appearing on the voters roll and whether they have registered in a particular ward. Furthermore, it enables the candidates to visit and canvass voters (Kham v Electoral Commission 2016 (2) SA 338 (CC)).

In addition, legislation affords any disgruntled party to object to any segment of the voters roll (section 15 Electoral Act). Section 65 of the Local Government: Municipal Electoral Act (see s 55 of the Electoral Act in relation to National and Provincial Elections) grants an opportunity to any party to object to any aspect that may be material to the declared results. The IEC has a duty to address these issues. In terms of section 18 of the Electoral Commission Act the Electoral Court may review any decision of the Commission relating to an electoral matter. In other words, the jurisdiction of this court is limited to electoral matters. Although the duty and responsibility to administer and conduct elections in a free and fair manner rest with the IEC, where there are disputes the Electoral Court would serve as an impartial arbiter.

4. THE COURTS AND THE FREENESS AND FAIRNESS OF LOCAL GOVERNMENT ELECTIONS

As already stated, the Constitutional Court regards the requirement that elections be free and fair as a composite one. In the context of local government elections, the most important element for regarding elections as being free and fair is that registration of potential voters must be undertaken in such a way that only voters within a particular area are registered in that area and only those so registered are allowed to cast the vote in that area. This has been confirmed by the Constitutional Court in the cases of (Kham v Electoral Commission 2016 (2) SA 338 (CC) & Electoral Commission v Mhlope

2016 (5) SA 1 (CC)). In the case of Kham v Electoral Commission (006/2013) [2015] ZAEC 2 (19 March 2015) the applicants challenged the freeness and fairness of the by-elections held in Tlokwe in 2013 on the basis that the IEC had allowed voters who did not register for those elections in the wards in which the by-elections were held to vote. The essence of the applicant's complaint was that more voters had registered in the relevant wards than it could be justified by the influx of new residents in those areas. In other words, the relevant segments of the common voters' roll were inaccurate, incorrect and unreliable. The contention by the applicants was that voters may have been "bussed" from areas outside the wards where the elections were held.

The applicants argued that the IEC had failed to record the addresses of the registered voters and this made it impossible for the candidates to verify the existence of particular voters or their right to register in the particular wards. Because of these issues the applicants sought an order from the Electoral Court in Kham v Electoral Commission (006/2013) [2015] ZAEC 2 (19 March 2015) declaring those by-elections irregular and thus not free and fair. The respondents (the IEC) conceded that voters who were not entitled to be registered and therefore vote in those wards had been so registered and partook in those by-elections. However, the IEC argued that the elections should not be declared to have been unfree and unfair because the number of such voters was so negligible as to not affect the outcome of the elections. The Electoral Court upheld the IEC's contentions and dismissed the application.

The applicants appealed to the Constitutional Court. The Constitutional Court held that the IEC had failed in its duties to ensure that only the eligible voters voted in the by-elections. The nature of local government elections required the IEC to uphold the principle that only voters ordinarily resident in the wards where elections are held vote. This principle was of outmost importance in the local government elections as these elections are conducted on ward basis as opposed to the national and provincial elections which are conducted on a party list system (Kham v Electoral Commission 2016 (2) SA 338 (CC)). The IEC argued that it had no obligation to include addresses of the potential voters in the voters' roll. To this argument, the Constitutional Court held that the addresses of the potential voters was of cardinal importance in ensuring that only eligible voters cast their vote in the by-elections. Despite the Constitutional Court reaffirming the

proposition that not all irregularities in elections rendered the elections unfree and unfair, it found that the by-elections in Tlokwe were not free and fair and set them aside. In this regard the Constitutional Court held that the applicants' complaint did not much relate to the outcome of the by-elections but on how the by-elections were conducted. The Constitutional Court, although convinced from the statistics provided by the IEC that even if the number of votes that were irregularly cast could be given to the applicants' the applicants would still have lost the by-elections, it found for the applicants' in the following words (*Kham v Electoral Commission* 2016 (2) SA 338 (CC)):

[The applicants] ability to participate fully and effectively in the by-elections was hampered by the failure of the IEC to fulfil its obligations in regard to the registration of voters, and the content and the timing of the production and provision of the relevant segments of the voters' roll. The focus must be on the impact that this had on their exercise of the right to stand for public office. It is not on whether or not they would have won or lost had the arrangements for the by-elections being different and not suffered from the flaws of which they complain, but on whether they were seriously hampered in their participation in the electoral process.

And the Court ultimately held (*Kham v Electoral Commission* 2016 (2) SA 338 (CC)) :

These seven by-elections fail that test [that of freeness and fairness]. They were conducted against the background of fears that voters had been wrongly registered in wards where they were not ordinarily resident and not entitled to vote. It transpired that these fears were well-founded. The freeness and fairness of the elections is not only a mathematical or statistical game. That a party to elections has received many votes does not in itself speak to the integrity of those elections. As already indicated, the processes leading to the casting of votes are equally important. And it is on that basis that the Constitutional Court held that the by-elections were not free and fair.

5. ADDRESSES AS BONE OF CONTENTION FOR FREE AND FAIR ELECTIONS

In *Kham* the Constitutional Court had found the by-elections in Tlokwe to have been unfree and

unfair and set them aside. It ordered that the new by-elections be held. With regard to the recordal of addresses, the order of the Constitutional Court read as follows:

- (c) It is declared that when registering a voter to vote in a particular voting district after the date of this 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.
- (d) It is declared that in all future municipal elections or by elections the Electoral Commission is obliged in terms of section 16(3) of the Electoral Act 73 of 1998 to provide all candidates in municipal elections, on the date on which they are certified, with a copy of the segment of the national voters' roll to be used in that ward in that election including the addresses of all voters, where these addresses are available.

The orders in 5(c) and (d) are prospective in their operation from the date of this order and do not affect the validity of any election or by election held prior to the date of this order.

Several days before the by-elections were to be held as ordered by the Constitutional Court the independent candidates lodged a complaint with the IEC the effect of which was that the IEC had failed to comply with the *Kham* order in that the voters roll did not contain the physical addresses of some 4000 voters. In reply to this complaint, the IEC argued that the order in *Kham* had a prospective effect which meant that the IEC was only obliged to provide a voters' roll which contained the addresses of the newly registering voters or those that were re-registering after the date of the *Kham* order. With regard to those who had registered before *Kham*, the IEC was only obliged to provide the addresses if they were available to the IEC. The IEC contended that it had no obligation to obtain such addresses if it did not have them. Dissatisfied by the IEC's response the, independent candidates approached the Electoral Court for an order setting aside the relevant segments of the certified voters' roll and the postponement of the by-elections. The Electoral Court upheld the independent candidates' application (*Mhlophe v Independent Electoral Commission of South Africa* (001/2016 EC) [2016] ZAEC 1 (10 March 2016)).

The IEC appealed¹ against the decision of the Electoral Court and also applied for direct access² to the Constitutional Court. The justices of the Constitutional Court were not in agreement as to the meaning to be attached to the Kham order. Three judgements were written as a result. With regard the appeal all the justices agreed that it should be dismissed. The essence of that was that in Tlokwe, for both the by-elections and the local government elections that were scheduled for August 2016, the IEC had a duty to provide a certified voters' roll that contained the addresses of the voters where available. In other words, the IEC was absolved from providing the voters' roll that contained addresses in other parts of the country. With regard direct access the two judgements found that it should be granted, while Japhta J dismissed it.

Although the first two judgements orders are substantially similar, the reasons for their conclusions diverge materially. The reason for this divergence lay in the interpretation of section 16(3) of the Electoral Act, in particular the meaning to be ascribed to the term "available" in that provision and the "prospective" nature of the order in Kham. According to the majority judgement, penned by Mogoeng CJ, "available" in section 16(3) mean "objectively available" or "reasonably available" (Electoral Commission v Mhlope 2016 (5) SA 1 (CC)). Mogoeng CJ interpretation of this term is rooted in the history of the promulgation of this provision. Before December 2003 it was not a requirement that the IEC record the residential addresses of the voters whether available or not. Although Mogoeng CJ held that (Electoral Commission v Mhlope 2016 (5) SA 1 (CC)):

Available addresses within the context of this section [section 16(3)] does not mean those that the IEC chooses to make available or that happen to have been recorded by the IEC and are thus available to be produced together with the voters' roll, when required by those contesting the elections. It is much more than what the IEC has in its records.

However, Mogoeng CJ concluded by holding that section 16(3) does not envisage a situation where

the IEC is under the duty to record the pre-2003 addresses despite the fact that those addresses may be objectively available. In other words, section 16(3) does not impose on the IEC a retrospective duty to record the addresses of the voters who registered prior to 2003. Put differently section 16(3) does not impose a duty on the IEC to record the pre-2003 addresses even where they are objectively available if the IEC had not recorded them during the registration then. This is so because, although the legislature was aware of the fact that the IEC did not have a duty to record the addresses when processing the amendment, it did not provide that section 16(3) must apply retrospectively. There is no duty on the IEC to go back to correct its pre-2003 registration records to include the registrant's addresses (Electoral Commission v Mhlope 2016 (5) SA 1 (CC) 49-50).

With regard to the prospective effect of the Kham order, Mogoeng CJ held that:

"When registering a voter to vote in a particular voting district after the date of this order, the Electoral Commission is obliged to obtain sufficient particularity of the voter's address."

This means that the recordal of addresses referred only to the new registrants as well as to those who were re-registering. This means that every time the IEC registers a new voter or re-registers an old voter it must record that voters' address. The order in Kham is prospective in nature. Mogoeng CJ held that to require the IEC to record the pre-2003 available addresses would throw our electoral process in disarray because participants in the election could easily challenge the freeness and fairness of elections based on the non-availability of the pre-2003 addresses despite the fact that prior to this period the IEC was not required to record such addresses (Electoral Commission v Mhlope 2016 (5) SA 1 (CC)).

Madlanga J on the other hand sees matters differently. "Available" in section 16(3) does not necessarily refer to the addresses that are available to the IEC's database but those that are objectively or reasonably

¹ With regard to appeal, the IEC requested the Constitutional Court to set aside the order of the Electoral Court. It is limited to the record of the proceedings in the Electoral Court. In other words, generally parties could not raise issues beyond those dealt with by the Electoral Court.

² The application for direct access was dependent on the Court dismissing the appeal. The basis for the IEC to seek direct access was that the IEC be absolved from fulfilling the Kham requirements in relation to providing a voters' roll that contained addresses of the voters in the local government elections that were forthcoming in August 2016, as it could not, in the time available to those elections fulfil that requirement. The IEC contended that there were about 12 million registrations without addresses and it (IEC) was in no position to achieve the feat of ensuring that such addresses would be obtained before the elections. In essence the IEC sought a moratorium on its obligation.

available – those that exist. According to Madlanga J, if the word "available" in section 16(3) was of limited application i.e only to those addresses available to the IEC, then the mischief (that of visiting and canvassing voters on the one hand and verifying whether the voters had registered in the correct voting districts) intended by this provision could not be achieved. If the voters' roll was to be left to self-correct as contended by Mogoeng CJ that would mean that until such time that this has been achieved the participants in elections would be saddled with a useless or partially useless voters' roll. Failure to ensure that even the pre-2003 available addresses are recorded in the voters' roll would imperil the requirement that voters are only allowed to register in the districts in which they are ordinarily resident. For this reason, the IEC must take pro-active steps to ensure that addresses that are reasonably available are recorded in the voters' roll. Available in the context of section 16(3) mean ordinarily available and it is only in instances where the voter does not have a physical address that the IEC should be absolved from providing one. According to Madlanga J, this makes sense because when the legislature passed this provision it was aware of the circumstances prevailing in our country where there are residents who do not have the conventional addresses, for instance those living in villages and informal settlements (Electoral Commission v Mhlope 2016 (5) SA 1 (CC)).

With regard to the prospective nature of the Kham order, Madlanga J held that what the order meant was that the obligation to provide addresses does not apply to past elections. In other words, the validity of elections that took place before the order in Kham cannot be impugned based on Kham v Electoral Commission 2016 (2) SA 338 (CC). In relation to the Tlokwe by-elections the Court held that it would be anomalous that the Court in Kham declared the 2013 by-elections invalid on the basis that the voters' roll did not contain addresses, for it (the Court) to now find that the 2015 by-elections could proceed without the defect identified not being remedied (Electoral Commission v Mhlope 2016 (5) SA 1 (CC)).

Japhta J would, in addition to dismissing the appeal, have also dismissed the application for direct access. This is despite the fact that his reasoning largely corresponds with that of Mogoeng CJ. "Available" according to Japhta J means available to the IEC. The duty to record the addresses was bestowed on the IEC from December 2003. Despite the IEC's failure to comply with section 16(3) Japhta J would have dismissed the moratorium sought by the IEC because

the voters roll without addresses could not be said to be defective to the extent of prohibiting its use at the scheduled August local government. Japhta J concluded that:

"It follows that on the construction preferred here, the inability of the Commission to provide a voters' roll that contains addresses will not affect the upcoming municipal elections, except in Tlokwe" (Electoral Commission v Mhlope 2016 (5) SA 1 (CC) 84). In essence, Japhta J's view was that there was no evidence before the Court to prove the extent of the irregularities with regard to the voters roll.

6. SYNTHESIS

The order in Kham proved to be vexing. The proof of this is the production of three judgements by the justices of the Constitutional Court (Commission v Mhlope 2016 (5) SA 1 (CC)). The vexing issues, as already stated, were whether the IEC had a duty to record the addresses of the voters who registered pre-2003, the meaning of "available" in section 16(3) of the Electoral Act 73 of 1998 and whether the IEC should be exempted from the duty to furnish participants in elections with a voters' roll that contained addresses for the scheduled August 2016 municipal elections. Although the majority of the Constitutional Court (per Mogoeng CJ) found that the IEC did not have a duty to record addresses pre-2003, the Constitutional Court failed to establish whether the missing addresses in Tlokwe were for voters who had registered pre-or post-2003. Although the duty to record addresses arose in 2003, the order in Kham makes it clear that, where available, the IEC must provide candidates in municipal elections with a voters roll that include the addresses of the voters, even for the pre-2003 registration where available. The provision of a voters' roll with addresses is not necessarily material to the freeness and fairness of the elections. What is important is the extent to which failure to provide a voters' roll that does not contain the electorates addresses might have on the integrity of the elections. The elections in the Tlokwe by-elections were declared not to be free and fair not necessarily because the voters' roll did not contain the addresses but because voters had registered in districts in which they were not ordinarily resident. This therefore made them legible to vote where they were not supposed to vote. Although the perfunctory reading of Kham seem to suggest it was for the absence of the addresses in the voters' roll that made the Court to declare the by-elections unfree and unfair, thus the IEC sought an order exempting

it to providing a voters' roll that did not contain the addresses for the August 2016 elections, a careful reading of the judgement suggest otherwise.

The prime reason the Constitutional Court declared the by-elections unfree and unfair was that there was a number of electorates who had registered in districts they were not supposed to have registered and therefore eligible to vote in wrong wards. Put differently, the Constitutional Court might not have declared the by-elections unfree and unfair only on the basis of the absence of addresses in the voters' roll without the substantive proof that the electorate were indeed registered in wrong districts. Section 16(3) of the Electoral Act 73 of 1998 itself places a duty on the IEC to provide addresses where they are available. It is axiomatic that there are instances where the voters might not have addresses. This eventuality is unlikely to lead to the declaration of elections as being unfree and unfair. However, a perplexing element of the judgement in Kham is that despite it being numerically or statistically proven that even without the irregular registrants the independent candidates might still have lost the elections as held by the Electoral Court, the Constitutional Court was still prepared to hold the elections unfree and unfair. This underscores the Constitutional Court holding that in administering and conducting elections the IEC must be held to higher standard and the participants (candidates) in elections have a legitimate expectation that they will be treated fairly despite the electoral muscle.

As held by Japhta J there was no need for the Constitutional Court to grant the IEC the moratorium it sought on the basis that the common voters' roll did not contain addresses. The reason for this, as held by the Constitutional Court, absence of addresses per se is not sufficient to render elections unfree and unfair. With regard to the elections that were scheduled in August 2016, no irregularity had been proven as regard the voters' roll. This despite the admission by the IEC that it did not record the majority of the electorates addresses. That the absence of addresses is not sufficient is buttressed by the fact that the Constitutional Court did not shut its door to complaints that could be raised even after the 2016 elections. That is even if such complaints related to addresses, each case would have to be dealt with on its merits. In principle the Constitutional Court should have dismissed the application for direct access on the basis that no live issue was brought before the court i.e the mere fact that the voters' roll did not contain addresses was not sufficient irregularity to result in the elections not being free

and fair (as held Japhta J), however the judgements of Mogoeng CJ and Madlanga J were more pragmatic in that they forestalled any challenge that might be brought against the IEC on the basis that the voters' roll did not contain the addresses of the voters. This prevented a deluge of applications to the Electoral Court on this aspect.

7. CONCLUSION

In this paper it has been argued that although the recordal of addresses is important in ensuring that, in particular local government elections, are free and fair, failure to record addresses would not per se render the elections not free and fair. This is more so because the provision prescribing that addresses be recorded requires that they be provided only where they are available. Although the judgements in the case of Kham adopted different interpretations to the terms "available". It is contended in this paper that "available" means existing. In other words, failure by the IEC to record the address of the voters where such addresses are available would amount to the failure by the IEC to fulfil its duties in terms of legislation. However, such failure on its own is not sufficient to render the elections not free and fair. In addition to this failure, the complainant must prove the impact that this failure would have on the freeness and fairness of the elections.

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