

IN THE ELECTORAL COURT OF SOUTH AFRICA

HELD AT BLOEMFONTEIN

CASE NUMBER: **27/2024EC**

In the matter between:-

REYNO DAWID DE BEER

Complainant

and

ELECTORAL COMMISSION OF SOUTH AFRICA

First Respondent

MOSOTHO MOEPYA

Second Respondent

JANET LOVE

Third Respondent

GLEN MASHININI

Fourth Respondent

NOMSA MASUKU

Fifth Respondent

DHAYANITHIE PILLAY

Sixth Respondent

COMPLAINANT’S HEADS OF ARGUMENT

[IN RESPECT OF DIRECTIVES ISSUED ON 30 JULY 2024 AT 18H10]

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INTRODUCTION

1. These Heads of Argument are only limited and submitted in accordance with the directives issued by the Court on 30 July 2024, which were received at 18h10 that evening. Specifically, paragraph 1 of the directives states: “*The parties are directed to submit heads of argument on the circumstances in which this court is*

obliged to institute an investigation, and whether there is any obligation that the investigation takes any specific form.”

2. The Complainant, Reyno Dawid De Beer, brought this complaint against the 2nd to 6th Respondents, being the commissioners of the Electoral Commission of South Africa (“IEC”), cited as the 1st Respondent.
3. The complaint was brought under Section 20(7) of the *Electoral Commission Act, 1996 (Act No. 51 of 1996)* (“**Act**”)¹, read with Rule 8 of the Rules Regulating the Conduct of the Proceedings of the Electoral Court (“**Rules**”)².
4. In particular, Section 20(7) cross-references to Section 7(3)(a)(ii) of the **Act** which, in relevant part, states:-

“A commissioner may –

(a) only be removed from office by the President –

(i) on the grounds of misconduct, incapacity or incompetence;

(ii) after a finding to that effect by a committee of the National

Assembly upon the recommendation of the Electoral Court;

¹ The Electoral Court may investigate any allegation of misconduct, incapacity or incompetence of a member of the Commission and make any recommendation to a committee of the National Assembly referred to in section 7(3)(a)(ii).

² r8 reads “(1) An allegation of misconduct, incapacity or incompetence on the part of a member of the Commission must be - (a) in writing and, if possible, accompanied by supporting evidence; and (b) lodged with the Secretary. (2) The member concerned must respond in writing to the allegations within the time prescribed by the Court. (3) Upon receipt of the response of the member concerned or after the expiry of the time prescribed by the Court in terms of subrule (2), the investigation must be dealt with in accordance with the directives of the Court. (4) The Secretary must submit the written recommendation of the Court and any other documents which the Court may deem fit to the National Assembly without delay.”

and

(iii) the adoption by a majority of the members of that Assembly of a resolution, calling for that commissioner's removal from office;

(b) be suspended from office by the President at any time after the start of the proceedings of the committee contemplated in paragraph (a)(ii)..." [My Emphasis]

5. The Complainant seeks this very investigation into allegations of misconduct, incapacity, or incompetence against all of the commissioners of the IEC.

Pending Objections

6. The Complainant has submitted various written objections in relation to previous directives and proceedings which were never formally addressed by the Court. These Heads of Argument should respectfully be read to incorporate those objections, especially concerning the right of the IEC to oppose the complaint in the manner it did, and the conflict of interest related to the IEC's attorneys representing both the IEC and the individual commissioners.

Judicial Precedents

7. Upon research within the limited time provided, no precedent by either the Electoral Court or any other superior court in relation to the interpretation and effects of Section 20(7) of the **Act** or Rule 8 of the **Rules** could be found.
8. This suggests that this investigation might be the first of its kind to come before this Court. Therefore, in the interest of justice, it would be prudent for the Court to consider inviting *amici curiae* to assist in reaching a well-informed decision.

Unreasonable Timeframe

9. The Complainant was afforded less than three (3) days to produce these Heads of Argument, with the deadline set for Friday, 2 August 2024, at 16h00. This contrasts with the total of nine (9) days provided to the Respondents to submit their arguments, which is until Thursday, 8 August 2024, at 16h00.
10. In light of this highly unreasonable treatment, the Complainant respectfully requests the right to submit replying Heads of Argument to those of the Respondents, due on Thursday, 15 August 2024, at 16h00. Similarly, this would allow six (6) days to prepare a response, the same time the Respondents were afforded after scrutinising my Heads of Argument for their own responses, ensuring fairness and alignment with the time provided to the Respondents.

IEC's Constitutional Duty of Transparency and Impartiality

11. In addition to the specific directives and procedural considerations, it is crucial to underscore the broader constitutional obligations that inform the conduct of the IEC itself, in relation to these very proceedings.
12. Section 7(2) of the *Constitution of the Republic of South Africa, 1996* ("**Constitution**"), imposes a duty on the state to respect, protect, promote, and fulfill the rights entrenched in the Bill of Rights.
13. This duty of the IEC, as an organ of state, as intended in Section 239 of the **Constitution**,³ extends to its individual commissioners necessitating transparency and accountability in their official operations.
14. To this end the IEC, in as much as its commissioners, as an organ of state, must:-
 - (a) *preserve the peace, national unity and the indivisibility of the Republic;*
 - (b) *secure the well-being of the people of the Republic;*
 - (c) *provide effective, transparent, accountable and coherent government for the Republic as a whole;*
 - (d) *be loyal to the Constitution, the Republic and its people;*

³ "*organ of state*" means - (a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

- (e) *respect the constitutional status, institutions, powers and functions of government in the other spheres;*
- (f) *not assume any power or function except those conferred on them in terms of the Constitution.*⁴

15. Furthermore, the IEC's constitutional obligation includes ensuring that its legal representatives present balanced arguments that uphold the principles of independence and impartiality. This is essential to maintain public trust and confidence in the electoral process and the integrity of the institution.
16. The IEC's legal team, therefore, has a duty to produce Heads of Argument that reflect these values, even if such arguments are not necessarily in favour of the commissioners being investigated. This approach reinforces the IEC's commitment to acting in the interest of the public at large and supports the proper functioning of its constitutional mandate.⁵

LEGAL FRAMEWORK

17. Section 20(7) of the **Act** empowers the Electoral Court to investigate any allegations of misconduct, incapacity, or incompetence against a commissioner of

⁴ s41(1) **Constitution**

⁵ s181(2) – (3), 190 – 191 **Constitution**

the IEC. It provides that the Court may conduct such an investigation in such a manner as it deems fit.

18. Rule 8 of the **Rules** outlines the procedural framework for the conduct of proceedings before the Electoral Court in relation to the investigation of the complaint, including the Court's discretion in determining the conduct of investigations.

CIRCUMSTANCES WARRANTING AN INVESTIGATION

Trigger for Investigation

19. The Court is obliged to institute an investigation under Section 20(7) when credible allegations are brought before it that may reasonably suggest misconduct, incapacity, or incompetence on the part of the commissioners. The threshold is not the establishment of guilt but the presence of sufficient grounds to warrant a formal inquiry.
20. The reference in Section 20(7) to “*may*” does not imply that the Court has a discretion to lodge an investigation, but merely outlines that it is empowered to do so.

Duty to Uphold Integrity

21. The IEC, as a constitutional body responsible for overseeing elections, must maintain the highest standards of integrity, independence, and impartiality. Any credible allegation against a commissioner that threatens these principles necessitates an investigation by this Court to safeguard the public's confidence in the electoral process.

Nature of Allegations

22. In the present case, the allegations against the commissioners pertain to potential misconduct, incapacity, or incompetence, which, if proven, could undermine the integrity of the IEC and the credibility of the past elections in South Africa.
23. The Complaint sets out a factual scenario of events, substantiated by sufficient evidence and confirmed by the Respondents to have occurred, albeit the misconduct, incapacity, or incompetence relating thereto are disputed, setting the scene for a *prima facie* case for investigation.

OBLIGATION AND FORM OF INVESTIGATION

Discretion of the Court

24. While the Court has discretion in determining the form and manner of the investigation, this discretion is not unfettered.⁶ The investigation must be fair, transparent, and thorough, adhering to principles of natural justice and procedural fairness.

Specific Forms of Investigation

25. The Court may choose from various investigative methods, including but not limited to:
- 25.1. A formal inquiry with evidence being led and witnesses being called;
 - 25.2. A review of documentary evidence and written submissions;
 - 25.3. An independent investigation by an appointed panel or expert.

Requirement of Specific Form

26. There is no statutory obligation for the investigation to take a specific form,

⁶ r8(3)

provided that the chosen method is adequate to uncover the truth and allows for the fair and proper consideration of the allegations. The Court must ensure that all parties have the opportunity to present their case and respond to the evidence against them.

Courts Authority to Write Own Rules

27. This Court is empowered in terms of the **Act** that it “...*may determine its own practice and procedures and make its own rules.*”⁷
28. This would be the ideal opportunity for this Court to write specific rules in relation to the procedures to conduct the investigation.

MEANING OF “INVESTIGATE” IN THE CONTEXT OF SECTION 20(7) & RULE 8

Definition and Scope

29. **Investigation** is a term that means to examine and to look at carefully, discover the factor make a legal inquiry.⁸

⁷ s20(3) **Act**

⁸ The Law Dictionary, Featuring Black’s Law Dictionary, 2nd Ed., available at <https://thelawdictionary.org/investigation/>, accessed 1 August 2024

30. The term “*investigate*” within the context of Section 20(7) of the **Act** and Rule 8 of the **Rules** therefore implies a systematic, detailed, and impartial examination of the allegations brought against the IEC commissioners. This encompasses collecting evidence, interviewing witnesses, and scrutinizing relevant documents to ascertain the validity of the claims.

Thorough and Objective Examination

31. The investigation must be thorough, leaving no stone unturned. It requires an exhaustive examination of all pertinent facts and circumstances surrounding the allegations to determine whether the commissioners have engaged in misconduct, are incapacitated, or are incompetent.
32. The investigation must be objective and unbiased, ensuring that all parties are treated fairly. It must be conducted with an open mind, free from preconceived notions, and must consider both inculpatory and exculpatory evidence.
33. The investigation must adhere to the principles of procedural fairness, including the right to be heard, the right to present evidence, and the right to cross-examine witnesses. This ensures that the process is just and equitable.

Judicial Interpretation

34. The interpretation of “*investigate*” by this Court in relation to investigations by the

IEC, this Court emphasises the need for a comprehensive inquiry that seeks to uncover the truth. Judicial precedents underscore that an investigation must be more than a superficial review; it must be a deep dive into the allegations to ensure justice is served.

35. In *Mwali*⁹ this Court highlighted the IECs obligation to do proper investigations. Thus, this Court is obliged to follow its own judgment and apply it to itself. Also see the *ACU*¹⁰ case where the importance of a proper investigation and outcome are stressed.
36. This Court recently in *Khumalo*¹¹ referred to a Constitutional Court case¹² where a Court is obliged to call for further investigation in order to render a fair judgment in the interest of the public.¹³ The Constitutional Court held:-

“[34] Second, it means that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether this particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if "the right remedy is sought by the right

⁹ *Mwali v The Electoral Commission of South Africa and Another* (Case no 019/2016) [2016] ZAEC 6 (22 November 2016)

¹⁰ *Academic Congress Union v Independent Electoral Commission* (Case no 006/22EC) [2022] ZAEC 10 (06 July 2022)

¹¹ *Khumalo v Electoral Commission of South Africa and Others* (0025/2024 EC) [2024] ZAEC 20 (12 June 2024)

¹² *Ibid*, para. 39

¹³ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2012 JDR 2298 (CC)

person in the right proceedings". To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest."¹⁴

37. In *Reddy*¹⁵ the IEC mandated an independent legal firm to conduct a proper investigation and there is no reason in law why this Court cannot request the same from the IEC to do in this very case.

Focus on Individual Commissioners

38. The investigation under Section 20(7) of the **Act** and Rule 8 of the **Rules** is specifically aimed at the individual commissioners and not the IEC as an organ of state. This distinction is crucial, as the commissioners are being investigated in their personal capacities for allegations of misconduct, incapacity, or incompetence. The IEC itself is not the subject of this investigation.

¹⁴ *Ibid*, para. 34

¹⁵ *The Electoral Commission v Reddy & Others* (0024/24EC) [2024] ZAEC 23 (03 July 2024)

THE INQUIRY

Adversary v Inquisitorial Systems

39. South Africa utilises two systems of fact finding in our courts, namely the inquisitorial and adversarial systems.
40. The main difference between the two systems is the role of the judicial officer in the proceedings. The inquisitorial system is judge-centred while the adversary system is party-driven. The difference in the judicial role-description has profound implications for the way in which the objectives of the criminal [or civil] justice are pursued.¹⁶
41. Therefore, the concept 'adversarial system' is best described with reference to the general characteristics associated with the adversarial model. Broadly speaking, such a system refers to the conduct of proceedings where the parties control all stages from inception to judgment, as well as the pace of pre-trial litigation. The judge must decide only the disputed issues defined by the parties without investigation. Meaning that only the evidence which the litigating parties choose to place before court can be adjudicated upon, and the judge is unable to

¹⁶ South African Law Reform Commission Discussion Paper 96 (Project 73) Simplification of Criminal Procedure (A More Inquisitorial Approach to Criminal Procedure)' (30 June 2001) *para.* 2.9, p 8

determine what questions are to be answered or evidence should be presented.¹⁷

42. When a court follows inquisitorial processes, it means that the court takes an active role in investigating and gathering evidence in a legal matter. This is in contrast to adversarial processes, where the parties involved in the case are primarily responsible for presenting evidence and arguments to the court.
43. In an inquisitorial system, the judge or presiding officer plays a more investigative role. They may question witnesses, gather evidence, and seek out information to arrive at a decision. This approach is often seen in civil law systems and is intended to ensure that the truth is uncovered and that all relevant evidence is considered, even if the parties themselves do not bring it forward.
44. South Africa, like many other countries with a mixed legal system, incorporates elements of both inquisitorial and adversarial processes in its legal proceedings. However, the extent to which a court follows inquisitorial processes can vary depending on the nature of the case and the rules of procedure applicable in that context.

¹⁷ Hurter, Estelle. 2016. "The Litigant in Person and the Access to Justice Dilemma: Quo Vadis South Africa". *Comparative and International Law Journal of Southern Africa* 49 (3):428-54. available at <https://unisapressjournals.co.za/index.php/CILSA/article/view/8242>, accessed on 23 April 2024

Judicial Inquiry

45. The procedures for a judicial inquiry as set out in the *Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000)* (“**Equality Act**”) are constitutionally aligned and can be used as a model for this Court to follow, especially considering the informal processes applying to both these courts.

46. The **Equality Act**¹⁸ mandates that:-

“The equality court before which proceedings are instituted in terms of or under this Act must hold an inquiry in the prescribed manner and determine whether unfair discrimination, hate speech or harassment, as the case may be, has taken place, as alleged.”

47. In *George*¹⁹ the **SCA** emphasised that this inquiry is mandatory:-

“The statute obliges an equality court before which proceedings are instituted to hold an inquiry in the manner prescribed in the regulations and to ‘determine whether unfair discrimination has taken place as alleged’ (s 21(1))...” [My Emphasis]

48. Upon a comprehensive reading of the judgment, once more from the **SCA** in *Manong*²⁰, it becomes evident that the Equality Court, being a creation of statute, is mandated to adhere strictly to the provisions of the **Equality Act** and is not

¹⁸ s21(1) **Equality Act**

¹⁹ *George* para. 5

²⁰ *Manong v Eastern Cape Department of Roads and Transport & others* (369/08) [2009] ZASCA 50 (25 May 2009)

authorised to dismiss a complaint without conducting a proper inquiry first. This would also apply to this Court.

49. An inquiry in terms of the ***Equality Act*** is prescribed in terms of the ***Equality Act Regulations***.²¹ For convenience summarise such process in relevant terms which this Court may consider for its own inquiry processes:-

49.1. The inquiry must be conducted in an expeditious and informal manner which facilitates and promotes participation by the parties.

49.2. The proceedings should, where possible and appropriate, be conducted in an environment conducive to participation by the parties.

49.3. The court is a court of record and -

49.3.1. the proceedings at an inquiry must be recorded by the Court or by a person appointed or designated thereto by the presiding officers;

49.3.2. the proceedings at an inquiry must be taken down in shorthand or recorded by mechanical means and may be transcribed only if the presiding officer so directs or where required by law;

49.3.3. the shorthand notes or any transcription thereof or any mechanical recording of the proceedings or transcription

²¹ GN R764 GG 25065 (13 June 2003); r10 ***Regulations***

thereof must be certified as true notes, a true transcription, or a true record taken, as the case may be, whereafter they become part of the record of the proceedings and for purposes of disposal are regarded as records of the civil court.

- 49.4. On the date assigned by the secretary, a directions hearing must be held by the designated presiding officer to resolve matters of an administrative or procedural nature in respect of the inquiry.
- 49.5. At a directions hearing the presiding officer must give such directions in respect of the conduct of the proceedings as he or she deems fit.
- 49.6. Without detracting from the generality of paragraph 49.5, the presiding officer may, after hearing the views of the parties to the proceedings, make an order in respect of -
- (i) discovery, inspection and exchange of documents;
 - (ii) interrogatories;
 - (iii) admission of facts or of documents;
 - (iv) the limiting of disputes;
 - (v) the joinder of parties;
 - (vi) *amicus curiae* interventions;

- (vii) the manner of service of documents not provided for in the regulations;
- (viii) amendments;
- (ix) the filing of affidavits;
- (x) the giving of further particulars;
- (xi) the place and time of future hearings;
- (xii) procedures to be followed in respect of urgent matters; and
- (xiii) the giving of evidence at the hearing, including whether evidence of witnesses in chief is to be given orally or by affidavit, or both.

48.7. Save as is otherwise provided for in the law of evidence, including the law relating to competency and compellability, as applicable in civil proceedings, applies in respect of an inquiry: Provided that in the application of the law of evidence, fairness, the right to equality and the interests of justice should, as far as possible, prevail over mere technicalities.

48.8. A party may cross-examine any other party who elects to give evidence or who is called by the other party.

48.9. The presiding officer must, where necessary and appropriate, ascertain the relevant facts about the complaint and to that end he or she may question any party who elects to give evidence or who is called as a

witness at any stage of the proceedings.

48.10. The presiding officer may on his or her own initiative call a person to appear before him or her as a witness in the proceedings.

49. The Constitutional Court has not entertained many matters relating to the inquisitorial system, other than that contained within the criminal justice system. However, in *Occupiers of erven 87 & 88 Berea*²² evaluated a judicial inquiry and ruled that:-

*“As is apparent from the nature of the enquiry, the court will need to be informed of all the relevant circumstances in each case in order to satisfy itself that it is just and equitable to evict and, if so, when and under what conditions. However, where that information is not before the court, it has been held that this enquiry cannot be conducted and no order may be granted.”*²³

50. Also in *Occupiers of erven 87 & 88 Berea*, the Constitutional Court highlighted that:-

“It is evident that the High Court that granted the eviction erred in assessing what it saw as the applicants’ consent. It accepted the factual consent without conducting an enquiry to establish its validity and legal effectiveness. Furthermore, it failed to appreciate that the duty to conduct

²² *Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet N.O.* [2017] ZACC 18 (‘*Occupiers of erven 87 & 88 Berea*’)

²³ *Id* para. 46

the enquiry is that of the court, which is obliged to be proactive in gathering information about all the relevant circumstances, considering that information and arriving at a just and equitable order in the circumstances of each case. The High Court thus failed to probe the matters that it was statutorily enjoined to do.”²⁴

51. In *Changing Tides*²⁵ the **SCA** has reaffirmed the importance of holding an ‘enquiry’ where constitutional rights are at stake.

Inquiry versus Enquiry

52. There appears to be a confusion in law what is meant by an “*inquiry*” and an “*enquiry*”.²⁶
53. Based on the context the word “*enquiry*” is used in *Changing Tides* and *Occupiers of erven 87 & 88 Berea*, it appears as if there was a *bona fide* mistake by having incorrectly used the word “*enquire*” instead of “*inquire*” in those two (2) judgments.
54. Reading these two judgments one would note the importance of a court dealing with, in those matters, an eviction where the **Constitution** demands that the court hearing those types of matters considers all relevant circumstances which can only

²⁴ *Id para. 55*

²⁵ *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others (SCA) [2012] ZASCA 116; 2012 (6) SA 294 (SCA); 2012 (11) BCLR 1206 (SCA); [2013] 1 All SA 8 (SCA) (14 September 2012) ('Changing Tides')*

²⁶ See the use of “*enquiry*”, instead of “*inquiry*”, in cases of mandated constitutional investigations by a court in *Changing Tides & Occupiers of erven 87 & 88 Berea*

refer to a formal “*inquiry*”.

55. The *Collins Dictionary* defines the word “*inquiry*”²⁷ as:

“1. An **inquiry** is a question which you ask in order to get some information.

2. An **inquiry** is an official investigation.

3. **Inquiry** is the process of asking about or investigating something in order to find out more about it.”

56. On the other hand, the same *Collins Dictionary*, defines the word “*enquiry*”²⁸ as, only an “*inquiry*”, therefore referencing back to its definition in respect of the latter.

57. Ms. Ashleigh Ferguson, a copywriter for the well-known writer’s blog *ProWritingAid*, explains the uses of “*inquiry*” and “*enquiry*” in very simple terms, better than any other dictionary, as:

*“The English language is full of commonly confused words. “**Inquiry** and **enquiry** are two of these, and it’s clear why—they are similar in sound and spelling. Additionally, the two words are used differently in different countries... **Enquire** and **inquire** are often used interchangeably. Both words are verbs which ask for information. They originate from the Latin*

²⁷ Collins Dictionary, available at <https://www.collinsdictionary.com/dictionary/english/inquiry>, accessed 23 April 2024

²⁸ Collins Dictionary, available at <https://www.collinsdictionary.com/dictionary/english/enquiry>, accessed 23 April 2024

*word quaere, which means 'to ask or seek'. **Enquire** means to ask a question in a general way or in a way that doesn't require an in-depth answer. **Inquiry** means to ask for information in a formal way, such as in an investigation.*"²⁹

58. For the fact that proceedings before court are undoubtedly formal, it should respectfully just be obvious that a court would then be conducting an “*inquiry*” instead of an “*enquiry*”.
59. Now that the Complainant has established that the word “*enquiry*” used in both these cited two judgments ought to be otherwise understood as an “*inquiry*”, the following procedures should, *mutatis mutandis*, apply to this Court’s investigation as well:-
- 59.1. Where the Court has not considered all relevant circumstances, it cannot conclude its inquiry;³⁰
- 59.2. The Court must specially consider the comparability of representation of the parties before it and provide guidance in the event some facts had been missed by a party who is not professionally represented and who might not have the same knowledge and experience as the legal practitioners representing the other side;³¹

²⁹ <https://prowritingaid.com/inquiry-vs-enquiry>

³⁰ *Occupiers of erven 87 & 88 Berea para. 46*

³¹ *Occupiers of erven 87 & 88 Berea para. 49*

- 59.3. Should the Court note that the parties who are informally represented might be prejudiced in any way in respect of the inquiry being conducted, the Court should explain to the informally represented parties their right to apply for legal aid and where appropriate direct them to approach a named legal aid clinic with a given address;³²
- 59.4. In brief, where no information is available, or where only inadequate information is available, the Court must decline to make an order - The absence of information is an irrefutable confirmation of the fact that the Court is not in a position to exercise this important jurisdiction;³³
- 59.5. The Court should be proactive to establish the relevant facts required to make an order.³⁴

Extent of the Inquiry

60. It is humbly submitted, unless this Court is satisfied that there are sufficient facts and evidence before it to render a final judgment, this Court is constitutionally obliged to proceed with its inquiry until it has considered all relevant circumstances and ready to conclude its findings.

61. In the event that the Court is not guaranteed that the inquiry is concluded and final

³² *Occupiers of erven 87 & 88 Berea para. 50; r10(9)(a) Regulations*

³³ *Occupiers of erven 87 & 88 Berea para. 51*

³⁴ *Occupiers of erven 87 & 88 Berea para. 52*

judgment can or cannot be rendered, the Complainant respectfully would like to list the following factors which the Court should then explore:-

- 61.1. Requesting further information from the parties;
- 61.2. Holding an *in loco* inspection, where appropriate;
- 61.3. Referral of the matter to another forum for further investigation;
- 61.4. Refer the matter to conciliation, mediation, and/or arbitration;
- 61.5. Do anything that a High Court is authorised to do.

CONSTITUTIONAL OBLIGATION FOR PROPER INQUIRY

Constitutional Mandate

62. The Electoral Court's obligation to conduct a proper inquiry into the actions of each IEC commissioner is underscored by the constitutional mandate to ensure free and fair elections. Section 19 of the **Constitution** guarantees every citizen the right to free, fair, and regular elections. Any breach of this mandate by an IEC commissioner must be rigorously investigated.

Individual Accountability

63. The principle of individual accountability requires that each commissioner be investigated independently based on the specific allegations against them. This ensures that the inquiry is thorough and that each individual's actions are scrutinized to uphold the integrity of the IEC.

Public Confidence and Trust

64. The public's confidence in the electoral process is paramount. A comprehensive and proper constitutional inquiry into the actions of each commissioner is necessary to maintain and restore trust in the IEC. Failure to conduct such an inquiry would undermine public confidence and could jeopardize the legitimacy of future elections.

Judicial Oversight

65. The Electoral Court, as the judicial body entrusted with overseeing the conduct of IEC commissioners, must exercise its oversight function diligently. This includes conducting proper constitutional inquiries into allegations of misconduct, incapacity, or incompetence to ensure that commissioners adhere to the highest standards of ethical conduct.

The Court's Contention to Judge the Complaint Solely on Papers

66. The Electoral Court's insistence on potentially adjudicating the complaint solely on the papers before it raises significant concerns regarding its constitutional duty. As an independent and impartial judicial body, the Electoral Court is entrusted with the responsibility to ensure that justice is served in a thorough and comprehensive manner. This duty includes conducting a proper investigation into the allegations against the commissioners of the IEC.
67. The Court's constitutional mandate requires more than a superficial review of the papers; it necessitates a detailed examination of the facts, evidence, and circumstances surrounding the complaint. The complexities and seriousness of the allegations necessitate a full investigation to ascertain the truth and uphold the integrity of the electoral process.
68. To summarily dispose of the complaint based only on the papers would undermine the Court's obligation to ensure a fair and just process. A proper investigation is essential to uncover all relevant facts and provide a comprehensive resolution to the allegations. The Court must therefore ensure that it adheres to its duty by conducting an investigation that meets the highest standards of judicial scrutiny and fairness.

FOREIGN LAW

United Kingdom

69. Legislation: Electoral Commission Act 2000 (UK)
70. Legal Reference: Electoral Commission Act 2000, c. 22 ³⁵
71. Relevant Section: Section 4: “*The Commission shall have the power to investigate its own procedures and the conduct of its members.*”
72. Procedure: The Act provides the authority for the Electoral Commission to investigate complaints about its members, including commissioners. While the Act grants investigative powers, the specific procedures are not detailed in the legislation itself. Instead, the Electoral Commission follows internal rules and practices, which include principles of fairness such as providing notice to the accused and an opportunity to respond. These procedures are suggested by the need for transparency and fairness but are not explicitly prescribed by the Act.

Australia

73. Legislation: Electoral Act 1918 (Cth) (Australia)

³⁵ <https://www.legislation.gov.uk/ukpga/2000/22/contents/enacted>

74. Legal Reference: Electoral Act 1918, Act No. 15 of 1918 ³⁶
75. Relevant Section: Section 196: “*The Commission may investigate any complaint or allegation made in relation to the conduct of the electoral officers.*”
76. Procedure: The Act authorises the Australian Electoral Commission (AEC) to investigate complaints against its officers, including commissioners. The legislation provides the authority for investigations but does not prescribe detailed procedures. Instead, formal procedures for conducting investigations, including evidence collection and hearings, are guided by administrative practices and principles of fairness. These procedures are suggested by the legislative framework rather than being explicitly detailed in the Act.

United States

77. Legislation: Federal Election Campaign Act (FECA)
78. Legal Reference: Federal Election Campaign Act, 52 U.S.C. § 30101 et seq. ³⁷
79. Relevant Section: Section 437g(a)(1): Provides the framework for investigations into complaints and enforcement actions by the Federal Election Commission (FEC).
80. Procedure: FECA establishes the framework for handling complaints and

³⁶ <https://www.legislation.gov.au/Details/C2022C00078>

³⁷ <https://www.law.cornell.edu/uscode/text/52/chapter-301>

conducting investigations by the FEC. While FECA provides the authority for investigations, the specific procedural details are outlined in FEC regulations and internal practices. The procedures for conducting investigations, including evidence collection and hearings, are guided by these regulations and are suggested by the legislative framework rather than being explicitly detailed in the Act.

Canada

81. Legislation: Canada Elections Act
82. Legal Reference: Canada Elections Act, RSC 1970, c. 31 ³⁸
83. Relevant Section: Section 517: “*The Chief Electoral Officer may conduct an investigation into any matter related to the administration of this Act.*”
84. Procedure: The Act grants the Chief Electoral Officer the authority to investigate complaints regarding the administration of the Act. The legislation provides the authority but does not prescribe detailed procedures for investigations. Procedures, including evidence collection and the opportunity for the accused to respond, are guided by administrative practices and principles of fairness. These are suggested by the need for transparency and accountability but are not explicitly prescribed by the Act.

³⁸ <https://laws-lois.justice.gc.ca/eng/acts/E-2.01/>

Summary

85. UK: The Electoral Commission Act 2000 (Section 4) provides the authority for investigations but does not prescribe detailed procedures. Procedures are guided by internal rules and practices.
86. Australia: The Electoral Act 1918 (Section 196) authorizes investigations but does not prescribe specific procedures. Formal procedures are suggested by administrative practices.
87. US: FECA (Section 437g(a)(1)) provides the framework for investigations, with specific procedures outlined in FEC regulations and internal practices.
88. Canada: The Canada Elections Act (Section 517) grants authority for investigations but does not prescribe detailed procedures. Procedures are suggested by administrative practices and principles of fairness.
89. These references show how different countries provide authority for investigating electoral officials, with procedural details often guided by internal practices and principles of fairness rather than being explicitly detailed in legislation.

CONCLUSION

90. Obligation to Investigate: The Electoral Court is obligated to investigate the allegations against the commissioners of the IEC, given the serious nature of the claims and the potential impact on the integrity of the electoral process.
91. Form of Investigation: The Court has the discretion to determine the most suitable form of investigation, provided it is fair, transparent, and thorough, ensuring justice for all parties involved.
92. Constitutional Inquiry: The Court must ensure that the investigation into each commissioner is conducted in line with constitutional principles, upholding the integrity and independence of the IEC.
93. Definition of Investigation: The term "*investigate*" within the context of Section 20(7) and Rule 8 requires a detailed, systematic, and impartial examination of the allegations, adhering to principles of procedural fairness and judicial interpretation.
94. Relief Sought: The Complainant respectfully requests the Court to conduct a comprehensive investigation into the allegations against the commissioners of the IEC, in a manner that upholds the principles of natural justice, the rule of law, and constitutional mandates.

REYNO D. DE BEER

Complainant (In Person)

Landline: 012 023 1976

Mobile: 0677357288

Email(1): reyno@libertyfighters.co.za

Email(2): debeerreyno@gmail.com

Date: 2 August 2024