

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**Case No: CCT245/21**

In the application to be admitted as *amicus curiae*:

**AFRIFORUM NPC**

Applicant

*In re:*

In the matter between:

**ELECTORAL COMMISSION OF SOUTH AFRICA**

Applicant

**and**

**MINISTER OF COOPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS**

First Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
IN THE PROVINCIAL GOVERNMENT OF  
THE EASTERN CAPE**

Second Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
IN THE PROVINCIAL GOVERNMENT OF  
THE FREE STATE**

Third Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
IN THE PROVINCIAL GOVERNMENT OF  
GAUTENG**

Fourth Respondent

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IN THE PROVINCIAL GOVERNMENT OF  
KWAZULU-NATAL**

Fifth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
IN THE PROVINCIAL GOVERNMENT OF  
LIMPOPO**

Sixth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
IN THE PROVINCIAL GOVERNMENT OF  
MPUMALANGA**

Seventh Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
IN THE PROVINCIAL GOVERNMENT OF  
THE NORTHERN CAPE**

Eighth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
IN THE PROVINCIAL GOVERNMENT OF  
THE NORTH WEST**

Ninth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
IN THE PROVINCIAL GOVERNMENT OF  
THE WESTERN CAPE**

Tenth Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT  
ASSOCIATION**

Eleventh Respondent

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**NOTICE OF URGENT APPLICATION TO THE ACTING CHIEF JUSTICE TO BE  
ADMITTED AS *AMICUS CURIAE*  
IN TERMS OF RULE 10 READ WITH RULE 12**

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**PLEASE TAKE NOTICE** that the applicant (AfriForum NPC) applies to the Acting Chief Justice in terms of Rule 10(4) read with Rule 12 for an order in the following terms:

1. That the forms, service and normal time periods provided for in the Rules of this Honourable Court be dispensed with by the Acting Chief Justice and subject further to such directions that may be issued by the Acting Chief Justice.
2. That the applicant (AfriForum NPC) be admitted in the main application as *amicus curiae*.
3. That the applicant (AfriForum NPC) be permitted to lodge written submissions on or before 18 August 2021, alternatively on or before such date as the Acting Chief Justice may direct or on such terms and conditions as may be directed by the Acting Chief Justice.
4. That the applicant (AfriForum NPC) be afforded the opportunity to make oral submissions on the date of the hearing of the application on 20 August 2021.

**TAKE FURTHER NOTICE THAT** the affidavit of **MORNE MOSTERT** will be used in support of this application.

**TAKE FURTHER NOTICE** that the applicant has appointed the address as set out below at which it will accept service of all process in these proceedings.

**TAKE FURTHER NOTICE** that this application is further to be dealt with in terms of Rule 12(1) in terms of directions as issued by the Acting Chief Justice.

DATED AT PRETORIA ON THIS THE 12<sup>th</sup> DAY OF AUGUST 2021.



**HURTER SPIES INC**  
**Attorneys for AfriForum NPC**

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Ref: **MULLER/Ik/HH7354**

**TO: THE REGISTRAR OF THE CONSTITUTIONAL COURT**

1 Hospital Street

Constitution Hill

Braamfontein

**AND TO: MOETI KANYANE INCORPORATED**

**Attorney for the Applicant**

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Tel: 012 003 6471

Ref: M Kanyne/BC/M00232

E-mail: [moeti@kanyane.co.za](mailto:moeti@kanyane.co.za); [Mashudu@kanyane.co.za](mailto:Mashudu@kanyane.co.za)

C/O: RAMS Incorporated

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Ref: Mr W Moeketsane

**AND TO: MINISTER OF COOPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS**

**First Respondent**

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**BY ELECTRONIC MAIL**

**AND TO: MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
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**Second Respondent**

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**Third Respondent**

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**BY ELECTRONIC MAIL**



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Sixth Respondent**  
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**BY ELECTRONIC MAIL**

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**BY ELECTRONIC MAIL**

**AND TO: MEC FOR LOCAL GOVERNMENT  
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Eight Respondent**  
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[mmadyo@ncpg.gov.za](mailto:mmadyo@ncpg.gov.za); [gbotha@ncpg.gov.za](mailto:gbotha@ncpg.gov.za)  
[mmanyeneng@ncpg.gov.za](mailto:mmanyeneng@ncpg.gov.za); [pseane@ncpg.gov.za](mailto:pseane@ncpg.gov.za)

**BY ELECTRONIC MAIL**

AND TO: **MEC FOR LOCAL GOVERNMENT**  
**IN THE PROVINCIAL GOVERNMENT OF NORTH WEST**  
**Ninth Respondent**  
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 Mafikeng  
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**Eleventh Respondent**  
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 175 Corobray Avenue  
 Waterkloof Glen  
 Pretoria  
 E-mail: [ugopichund@salga.org.za](mailto:ugopichund@salga.org.za)

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**FOUNDING AFFIDAVIT OF AFRIFORUM NPC**

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I, the undersigned,

**MORNE MOSTERT**

do hereby make oath and state:

## 1.

- 1.1 I am the Manager of Local Government Affairs of AfriForum NPC, a non-profit company registered under registration number 2005/042861/08 in terms of the company laws of the Republic of South Africa and also registered as a NGO under registration number 054-590 with its principal place of business at AfriForum Building c/o DF Malan and Union Streets, Kloofsig, Centurion, Gauteng Province.
- 1.2 I am duly authorised by AfriForum to represent it in this matter and to depose to this affidavit. I annex hereto marked "**AF1**" a resolution confirming same.
- 1.3 The contents of this affidavit fall within my personal knowledge, save where the context indicates otherwise and are true and correct to the best of my knowledge and belief.
- 1.4 Where this affidavit contains legal matter and submissions, they are made on the advice of AfriForum's legal representatives, which advice I believe to be correct.

## 2.

**URGENCY**

- 2.1 AfriForum seeks by way of this urgent interlocutory application to be admitted as *amicus curiae* by the Honourable Acting Chief Justice in terms of the prayers set out in the attached notice of application.
- 2.2 The urgency of this application is necessitated by virtue of the fact that the main application has been brought with extreme urgency with stringent

timelines required by the applicant (the Commission) and directions issued by the Honourable Acting Chief Justice.

2.3 As a result of these time constraints, AfriForum has been advised that it would cause a significant delay, perhaps one that may defeat the purpose of this application, if AfriForum were to first seek the written consent of all the parties in terms of Rule 10. In the circumstances, it has been considered appropriate and expedient to seek admission directly by way of application to the Honourable Acting Chief Justice on an urgent basis.

2.4 To this extent, AfriForum requests the Honourable Acting Chief Justice to dispense with the normal requirements of Rule 10 as far as the procedure is concerned.

### 3.

#### THE INTERESTS OF AFRIFORUM AND ITS MEMBERS

3.1 The main purpose and objectives of AfriForum as stated in its Memorandum of Incorporation are, *inter alia*, the promotion and advocacy of democracy, civil human rights and constitutional rights.

3.2 As an active role-player in civil society and considering its main objectives, AfriForum seeks to hold Government and other organs of state accountable to the Constitution, the rule of law and generally to proper democratic government.

- 3.3 For purposes of advancing its objectives, AfriForum is a civil rights organisation whose *locus standi*, particularly in terms of section 38 of the Constitution, has been recognised by the courts in various public interest related litigation.
- 3.4 At present, AfriForum has about 290 000 registered members country-wide. Its organisational structure includes 155 branches which are particularly active throughout the country on local government level. Through its branches, AfriForum is particularly active in the protection and promotion of community rights and interests in municipal areas with a focus on addressing issues pertaining to poor service delivery by many municipalities.
- 3.5 The subject matter of this application involves competing fundamental rights. To this end, it is beyond any debate that the extent of poor service delivery by many municipalities across the country and a failure by local government to fulfil its constitutional mandate in many respects, in itself infringes the fundamental rights of members of the public on a large scale. This includes the right to dignity and the right to livelihood.
- 3.6 At this point in time, the only way in which such delinquent municipal councils can be held accountable by the citizenry is to honour the right of the people to elect new municipal councillors and within the time period designed for regular elections in terms of section 159 of the Constitution.
- 3.7 The main application and the relief sought by the Commission following the recommendations in the report of the former Deputy Chief Justice Moseneke ("the Moseneke report") raises fundamental constitutional issues of wide public importance. It goes to the heart of some of the founding values of the

Constitution, *inter alia*, the supremacy of the Constitution and the rule of law in terms of section 1(c) of the Constitution and regular elections in terms of section 1(d).

- 3.8 It further relates to the fundamental right in terms of section 19(2) that every citizen has the right to free, fair and regular elections for every legislative body established in terms of the Constitution. It also involves other competing fundamental rights such as the right to life and the right to health.
- 3.9 It also relates to the provisions of section 159 of the Constitution regarding the term of a municipal council and the provisions of the Constitution which provides that when a term of a municipal council expires, an election must be held within 90 days.
- 3.10 Not only does AfriForum, by virtue of its main objectives, have an interest in the issues that are the subject matter of the main application, but its members all form part of the citizenry and electorate that has an interest in the participation in the local government elections which have been set to take place on 27 October 2021.
- 3.11 AfriForum and its members have a vital and fundamental interest in the question as to whether it would be competent for this Honourable Court to postpone the elections and if it is in principle competent for the Court to make such an order, whether it would be just and equitable, in the exercising of its discretion, for the court to order a postponement of the elections.
- 3.12 AfriForum does not seek to place any further or additional facts before the Court and will confine its submissions to matters of law by way of written



submissions, amplified by oral argument should the Honourable Acting Chief Justice permit AfriForum to do so in the capacity as *amicus curiae*.

4.

**POSITION TO BE ADOPTED BY AFRIFORUM**

- 4.1 AfriForum is not persuaded that a proper case has been established by the Commission, based on the recommendations in the Moseneke report, to justify a postponement of the elections to February 2022.
- 4.2 AfriForum would urge the court by way of submissions, a summary of which is provided below, not to grant the relief, with the result that the elections should proceed at the end of October 2021.

5.

**SYNOPSIS OF SUBMISSIONS TO BE ADVANCED BY AFRIFORUM**

- 5.1 The Commission, in seeking a declaratory order that it may hold the forthcoming local government elections outside the 90 day period required by section 159(2) of the Constitution and section 24(2) of the Local Government: Municipal Structures Act 117 of 1998 ("Structures Act"), is premised on the principle that the law does not require to do the impossible and that it is not reasonably possible or likely that the elections scheduled for 27 October 2021 will be held in a free and fair manner in light of the Covid-19 pandemic.



- 5.2 It is submitted that the concept of free and fair elections, as dealt with by this Honourable Court in the matter of **KHAM AND OTHERS v ELECTORAL COMMISSION AND ANOTHER 2016 (2) SA 338 (CC)** would require specific argument and submissions as regards how the concept is to be applied where circumstances are not normal and how it is to be assessed in the context of the Covid-19 pandemic.
- 5.3 This Honourable Court in **Kham** held that whether an election can be characterised as free and fair must always be assessed in context and it ultimately involves a value judgment.<sup>1</sup> It is submitted that this is an objective test.
- 5.4 This value judgment is one to be made by the court and would depend on all the evidence and the circumstances.<sup>2</sup> It is insufficient for the court to say that it has a doubt, or a feeling of disquiet, or is uncomfortable about the freedom and fairness of the election. It must be satisfied on all the evidence placed before it that there are real and not speculative or imaginary grounds for concluding that they were not free and fair<sup>3</sup>.
- 5.5 This becomes very pertinent in the context of this matter considering that the Moseneke report points to very divergent opinions of medical experts and provides no measure of real certainty whether the postponement of the elections to February 2022 would be preferable October 2021.

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<sup>1</sup> Par [34]

<sup>2</sup> Par [90]

<sup>3</sup> Par [91]

- 5.6 Importantly, this court said in **Kham** that the expression highlights both the freedom to participate in the electoral process and the ability of the political parties and candidates, both aligned and non-aligned, to compete with one another on relatively equal terms so far as that can be achieved by the Commission.<sup>4</sup>
- 5.7 The court also referred to certain elements as being of fundamental importance to the conduct of free and fair elections.<sup>5</sup>
- 5.8 When considering the concept and its contextual application, it will be submitted that the exercising of the value judgment by the court, considering that it is context sensitive, cannot in the present circumstances of the Covid-19 pandemic be applied as if conditions are ideal and normal.
- 5.9 There must an element of flexibility when exercising an objective value judgment. For instance, it has been an inherent feature of the pandemic and its effect on virtually all walks of life, that freedoms and rights in terms of our Constitution have been adversely affected or limited in many respects.
- 5.10 Society has had to adjust in order to continue to function and be economically active despite serious threats to life and health. To this extent, Government was empowered in terms of the Disaster Management Act, 57 of 2002 to issue regulations in order to protect the health and lives of people as far as possible and to mitigate the effects of the disaster. Government had to adopt and apply internationally accepted safety measures and health protocols which have now become part of the ordinary daily lives of the citizens of the Republic.

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<sup>4</sup> Par [86]

<sup>5</sup> Par [34]

- 5.11 All the measures adopted by Government over the past 17 months in terms of the Disaster Management Act have consistently required a trade off and balancing act between restrictions imposed in order to mitigate the effects of the spread of the virus and the pandemic and the protection of the health and safety of the people, but also the normalisation of free economic activity and the daily lives of people as far as possible.
- 5.12 It will be submitted that our constitutional imperative of a democratic state founded on certain principle values such as the supremacy of the Constitution, the rule of law and regular elections in a multi-party system of democratic Government to ensure accountability, responsiveness and openness, must be honoured and allowed to continue despite the state of the pandemic in South Africa. Such elections can inevitably only occur within the inherent restrictions caused by the pandemic.
- 5.13 In this regard, it is the constitutional duty and function of the Commission in terms of section 190 of the Constitution to manage elections in accordance with national legislation and to ensure that the elections are free and fair.
- 5.14 It is submitted that in order to comply with the duty to ensure that elections are free and fair, it is incumbent upon the Commission to do so within the context and circumstances of the present state of the pandemic and it can only be expected of the Commission to do so within all its reasonable means, supported by the other arms of Government to the extent necessary.
- 5.15 Again, in this regard, it would be unreasonable to expect the Commission to manage and conduct the elections and to ensure that the elections are free and fair as if circumstances were normal. To adopt such an approach would

not be a proper and reasonable exercise of a value judgment. The concept is inherently flexible and must have a measure of relativity in the circumstances, without aggregating the key essential features of a free and fair election as set out in **Kham**.

5.16 It will be submitted that it is instructive and significant that in the submissions made by the Commission before the Moseneke inquiry, the Commission gave the assurance that it has made proper arrangements to conduct free and fair elections in October 2021.<sup>6</sup>

5.17 The preparations included the application and compliance with Covid-19 health protocols for voter registration and election day. The Commission's submissions included measures to be put in place to reduce the risk of the virus on election day and these protocols were set out by the Commission. The Commission further submitted that the Covid-19 protocols adopted by it are reasonable measures to ensure that the elections are held in a manner that safeguards the health of voters, electoral staff and others who will attend voting stations during the voter registration weekend or voting day.<sup>7</sup>

5.18 The Commission repeatedly assured the Moseneke inquiry that it was ready to discharge its constitutional and legislative obligations to conduct the general local government elections in October 2021, and that it was at an advanced stage of preparations.<sup>8</sup>

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<sup>6</sup> See Par [26]; [27]; [29]; [33]; [34]; [35] and [37] of Moseneke report

<sup>7</sup> Par [35] of Moseneke report

<sup>8</sup> Par [37] of Moseneke report

- 5.19 Furthermore, if consideration is given to the recommendations made in the Moseneke report with regard to additional measures that the Commission may have to adopt within the Covid-19 context to ensure free and fair elections, it will be submitted that most of the recommended measures, to the extent that they have not already been covered by the Commission, are fully capable of being implemented for purposes of the October elections.<sup>9</sup>
- 5.20 The aforesaid summary of the submissions made by the Commission to the Moseneke inquiry is to be read with the full submissions by the Chief Electoral Officer, Mr Mamabolo and presentations made to the Moseneke inquiry. These submissions span across approximately 60 pages.
- 5.21 It is not possible to traverse all the salient features of the Commission to the Moseneke inquiry, but it is instructive to note that the Commission has successfully conducted by-elections in November / December 2020 on the so-called “*Super Wednesday*”. On its own version, the Commission had adjusted voting protocols as new lessons were learnt.<sup>10</sup>
- 5.22 In paragraph 113,<sup>11</sup> the following significant statement is made:

*“Taking into consideration the measures to be applied during the LGE2021 as detailed above, I will submit that all the reasonable measures have been taken in ensuring not only that a free and fair LGE2021 will be held but that they will be held in a manner that safeguards the health of all voters and personnel who will be in*

<sup>9</sup> See in this regard the recommendations in par [302] – [316]

<sup>10</sup> See par [110] – [114] at paginated pages 275 - 277

<sup>11</sup> Paginated page 276

*attendance, as long as they too are willing participates to adhere to the measures in place.”*

5.23 In the PowerPoint presentation to the Moseneke inquiry, the Commission concluded as follows<sup>12</sup>:

- *Conducting a general election is a huge logistical undertaking involving many moving parts.*
- *This submission indicates that the Commission has pulled out all the stops to ensure that it will be technically ready to conduct LGE2021.*
- *In this regard, electoral supplies, logistics and infrastructure have been arranged, the necessary legal framework for the orderly conduct of elections is in place, political boundaries have been determined, electoral staff has been recruited and are undergoing training.*
- *An election is ultimately about people. The Commission has set out the measures that it will undertake to ensure that voter participation in the registration drive and on voting day will not expose them to increased risks, and the measures envisaged to re-assure voters that this is in fact the case.*

5.24 When considering the abovementioned, it was certainly the affirmed and considered view of the Commission, prior to the Moseneke report, that it will be able to hold and ensure free and fair elections by the end of October 2021.

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<sup>12</sup> Paginated page 314

- 5.25 What seems to have been pivotal in the reasoning in the Moseneke report for preferring a postponement of the elections to February 2022, is the assumption that a large portion of the population are likely to be vaccinated after October 2021 and that even if community immunity at the target of 67% of the population is not reached in February/March 2022, there will be far less risks of hospitalisation and death than there will be in October 2021.
- 5.26 In this regard it will be submitted that it cannot on the current scientific evidence merely be accepted that February/March 2022 is to be preferred from a health and safety point of view. In this regard, Professor Abdool Karim expressed the view before the Moseneke inquiry that we are likely to see several new variants by March 2022 and he expressed the belief that at some stage there is going to be a variant that escapes immunity and once that variant arrives, everyone who has been vaccinated will be back to square one.<sup>13</sup>
- 5.27 Furthermore, based on projections done by Professor Karim, he maintains that the best time to hold the elections is in October 2021, rather than 3 months later. This view was based on the expected trajectory of the current third wave.<sup>14</sup>
- 5.28 It also needs to be considered that according to Professor Karim, the chosen target of vaccinating 67% of the population to reach community immunity was the benchmark a few months ago and in his view, there is a need for a higher proportion than 67% to be vaccinated to achieve community immunity. He

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<sup>13</sup> Par [224]

<sup>14</sup> Par 223



also pointed out that the efficacy of the vaccines currently being used is much lower than the vaccines that Government intended to use when it settled on the required 67%.<sup>15</sup>

5.29 In this regard it will be submitted that the state of progression of vaccination of the population played no role when free and fair by-elections were held in 2020 by the Commission. An important consideration in the deferment of the by-elections was the trajectory of the virus and the by-elections were held when the infection rates were lower, before the emergence of the second wave.

5.30 At this point in time, we know that the third wave has in all likelihood already reached its maximum peak and even since the Moseneke report, there has been a substantial downward trend in the daily infection rate. Professor Madhi pointed out that based on past patterns with waves 1 and 2, it may be that October is a period of relative calm, with a resurgence in December 2021 onwards.<sup>16</sup>

5.31 The report also points out that on the assumption that no new variant will emerge from now until then, October 2021 will be a period of low infections. It is further stated that the present Delta driven third wave is predicted to peak and thereafter decline during August and September 2021 and that if this pattern holds, October 2021 will be a period of low transmission.<sup>17</sup>

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<sup>15</sup> Par [218]

<sup>16</sup> Par [225]

<sup>17</sup> Par [281]

**Domino effect on compliance with municipal legislation should the election be postponed**

- 5.32 It is submitted that neither the Moseneke inquiry nor the Commission has sufficiently evaluated the domino effect and ramifications of the postponement of the election of new municipal councils in regard to the timeous implementation of vital provisions that have a direct effect on the performance of the constitutional and legislative mandate of municipal councils and service delivery.
- 5.33 For instance, section 25 of the Local Government: Municipal Systems Act, 32 of 2002 ("Systems Act") is of vital importance. Therein it is prescribed that each municipal council must adopt, within a prescribed period after the start of its elected term, a single, inclusive and strategic development plan for the development of the municipality which, *inter alia*, forms the policy framework and general basis on which annual budgets must be based.
- 5.34 Section 26 of the Systems Act lists the core components of an integrated development plan and its functioning within a municipality. The System's Act also requires compliance prior to the adoption of such integrated development plan with processes and procedures for consultations with the local community.<sup>18</sup>
- 5.35 In terms of section 35 of the Systems Act, an integrated development plan of a municipal council is the principal strategic planning instrument which guides and informs all planning and development and all decisions with regard to

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<sup>18</sup> See sections 28 and 29

planning management in the municipality and binds the municipality in the exercise of its executive authority.

- 5.36 Interwoven and linked to the adoption of an integrated development plan is the annual budget preparation process of a municipality. Section 21(1)(b) of the Local Government: Municipal Finance Management Act, 56 of 2003 ("MFMA"), places an obligation on the mayor of a municipality to at least 10 months before the start of the budget year, table in the municipal council a time schedule outlining key deadlines for the preparation, tabling and approval of the annual budget, the annual review of the integrated development plan and the annual review of budget related policies. In terms of section 21(2) of the MFMA, when preparing the annual budget, the mayor of the municipality must take into account the municipality's integrated development plan.
- 5.37 Taking the aforementioned into consideration, a postponement of the local government elections to February 2022 would have a serious adverse and prejudicial effect on the ability of municipal councils to timeously comply with fundamental and key provisions of the abovementioned municipal legislation.
- 5.38 As matters stand at present, the term of municipal councils already expired in terms of section 159 of the Constitution on 3 August 2021. The set date of the election literally, at the last day of expiry of the 90 day period, following the expiry of the term of municipal councils, is already late considering meeting the requirements in section 25 of the Systems Act.
- 5.39 To delay this process further until February 2022 would make it virtually impossible for municipal councils to comply with processes and procedures in regard to community participation and then be able to timeously comply with

the budget preparation processes linked to the adoption of the integrated development plan.

**Compliance with section 159(2) of the Constitution not objectively impossible:**

- 5.40 The main relief sought by the Commission is based on the grounds that it would be objectively impossible to hold free and fair elections at the end of October 2021.
- 5.41 Prior to the publication of the Moseneke report, it was never contended by the Commission that it would be objectively impossible to hold free and fair elections at the end of October 2021.
- 5.42 It will be submitted that such a case of impossibility has not been convincingly established by the Commission now based on the Moseneke inquiry, which in essence weighed up the benefits and risks by means of a comparison between the respective positions in October 2021 and February 2022.
- 5.43 It will be submitted that even if it is assumed that the Covid-19 risks in relation to the threat of life and serious illness are expected, as reasoned by the Moseneke inquiry to be lower in February 2022, based on the expected percentage of the vaccination of people, it does not follow that because of this consideration, it would be objectively impossible to hold the elections in October 2021.
- 5.44 As the inquiry itself acknowledged, with reference to the input of medical experts, the virus is unpredictable and not well understood. Considering the views of Professor Karim that new variants are likely to continue to emerge,

the assumption that the vaccines will achieve the desired outcome is by no means certain.

5.45 It is submitted that it is indeed still possible, considering the submissions made by the Commission to the Moseneke inquiry, that the Commission can ensure free and fair elections in the circumstances and that the risks can be mitigated with proper management, enforcement of the required health protocols in the run up to the elections as well as to voting day.

5.46 In essence, it is submitted that the choice between October 2021 and February 2022 is a matter of relative comparison pertaining to risks and benefits at this point in time, but insufficient to conclude that it would be impossible to hold free and fair elections during October 2021.

5.47 It is submitted that it will be entirely premature for the Honourable Court to arrive at such a value judgement at this point in time.

5.48 It is submitted, furthermore, that absent a very clear case at this point in time of objective supervening impossibility of holding free and fair elections within the inherent limitations brought about by the pandemic, which limitations equally apply to all political parties who would participate in the election process, the court should not entertain the relief sought.

5.49 It will be submitted that what the Honourable Court is called upon to do is to effectively amend the fundamentally important provision of the Constitution contained in section 159(2) by extending the 90 day period. This provision has been purposely designed in line with one of the founding values of the Constitution in section 1(d) thereof.

- 5.50 In this regard, the Honourable Court should instead uphold the supremacy of the Constitution and the rule of law.
- 5.51 It is submitted that the court cannot be expected to make any order that would effectively amend the Constitution, as such would infringe the separation of powers doctrine.
- 5.52 In terms of section 44(1) of the Constitution, only the National Assembly has the power to amend the Constitution.
- 5.53 As far as the alternative relief sought by the Commission is concerned, based on just and equitable relief in terms of section 172 of the Constitution, the relief sought is unusual and somewhat startling. It requires of the Court to declare that what is in fact constitutional with reference to the 90 day period in section 159 of the Constitution, is to be declared unconstitutional and invalid in advance.
- 5.54 Following this premise of the relief, the court is then called upon to suspend the declaration of invalidity until 28 February 2022. What the court is called upon to do is to sanction, in advance, unconstitutional and unlawful conduct of the Commission and provide its blessing to the Commission not to hold the elections within the 90 day period.
- 5.55 It is submitted that this is clearly an unconstitutional roundabout way of circumventing a clear constitutional obligation. There is no scope for the application of just and equitable relief in such a case.

- 5.56 It is further submitted that it remains the duty of the Commission in terms of section 190(1) of the Constitution to give effect to the fundamental right of every citizen in terms of section 19(2) to free, fair and regular elections.
- 5.57 To the extent that this right has to be exercised within the circumstances and context of the Covid-19 pandemic, that right is no more and no less important than any other fundamental right in terms of the Constitution which has inherently been limited, considering section 36 of the Constitution as a result of measures that apply in terms of the Disaster Management Act, which is a law of general application.
- 5.58 Therefore it is submitted that in this context, section 36 of the Constitution finds application and the reasonable measures that apply in terms of the Disaster Management Act and regulations to the extent that it limits the right in terms of section 19(2) cannot be said not to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
- 5.59 As already stated above, the value judgment of the right to a free and fair election has to be objectively determined in the context of the pandemic and cannot be measured as if circumstances are completely normal. To this extent, it is submitted that it is within this reality that the issue is to be approached.
- 5.60 It can certainly not be reasonably expected of the Commission to manage the elections and to comply with the requirement of free and fair elections as if circumstances were normal. To this end, it is submitted that the requirement

of free and fair elections in this context has to be balanced with the foundational requirement of regular elections in terms of the Constitution.

5.61 It is submitted that considering the inherent restrictions as a result of the restrictions on gatherings indoor and outdoor and considering that such limitation would apply equally to all political parties in terms of rallying in the election campaign and considering that those measures apply equally and fairly to all parties. That in itself cannot be decisive in holding the view that elections would not be free and fair.

5.62 If the new registrations of voters are compared with the statistics provided by the Commission with reference to the pattern in previous years, there is no fundamental decline in voter registrations. This will be demonstrated in more detail by means of written submissions based on the Commission's own figures as it appears from its founding affidavit.

5.63 To the extent that it may appear subsequently, depending on the circumstances in a specific district or voting station or ward, that inadequate measures were in place in order to protect the health and safety of voters, which may have deterred voters to cast their vote or to avoid a specific voting station, such an evaluation can only occur after the fact, in which event there is a backstop whereby by-elections can then be held in terms of section 25 of the Structures Act. The municipal legislation therefor caters for such eventuality.




6.

## CONCLUSION

- 6.1 It is submitted that the aforesaid synopsis of the submissions that AfriForum intends to advance as *amicus curiae* is pertinently relevant to the proceedings and requires a proper consideration given the fundamental importance of the issues involved in the application.
- 6.2 AfriForum believes that the submissions will be useful to this court and will differ from those of other parties who are presently cited in the application. It is unlikely that any of the state respondents in the application will oppose the relief sought by the Commission and it is unlikely that they will be inclined to advance any argument or submissions contrary to those of the Commission.
- 6.3 This provides all the more reason why the submissions of an *amicus curiae* in this matter would be in the interest of justice and in particular different from the reasons and submissions advanced by the Commission.
- 6.4 In the circumstances, AfriForum requests that it be admitted as *amicus curiae* by the Honourable Acting Chief Justice.

**WHEREFORE** AfriForum prays for an order as set out in the notice of application.

  
MORNE MOSTERT

THUS SWORN AND SIGNED AT PRETORIA ON THIS 12 DAY OF AUGUST 2021, BEFORE ME AS COMMISSIONER OF OATHS, THE DEPONENT HAVING ACKNOWLEDGED THAT HE UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, HAS NO OBJECTION IN TAKING THE OATH AND REGARDS THE OATH AS BINDING ON HIS CONSCIENCE AFTER COMPLYING WITH THE REQUIREMENTS OF GOVERNMENT NOTICE R1258, DATED 21 JULY 1972, AS AMENDED.



**COMMISSIONER OF OATHS**

BEFORE ME:

NAME:

CAPACITY:

ADDRESS:

**PETRUS GERHARDUS LOUWRENS KOEN**  
 COMMISSIONER OF OATHS Ex Officio  
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**RESOLUTION OF THE BOARD OF DIRECTORS OF AFRIFORUM NPC, TAKEN ON 4 AUGUST 2021**

It is hereby resolved that:

1. That AfriForum will launch an *amicus curiae* application to be admitted to the urgent Constitutional Court matter between the **Electoral Commission of South Africa // The Minister of Co-Operative Governance and Traditional Affairs & 10 Other (Case no: 245/2021)**. In the said application AfriForum will advance submissions regarding the view to have the local government elections outside the 90-day period required by Section 159(2) of the Constitution and to hold the elections before 28 February 2022.
2. That **MORNE MOSTERT** as Manager of Local Government Affairs at AfriForum, be authorised to act on behalf of AfriForum in general to do everything necessary to achieve the litigation purpose, including but not limited to the appointment of attorneys and the making of the necessary affidavits in furtherance of these proceedings.



CARL MARTIN KRIEL

CHIEF EXECUTIVE OFFICER

AfriForum