

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT: 245/21

In the intervention application of:

DEMOCRATIC ALLIANCE

Applicant for Intervention

In the matter between:

ELECTORAL COMMISSION OF SOUTH AFRICA

Applicant

and

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

First Respondent

TEN OTHERS

Second to Eleventh Respondents

DEMOCRATIC ALLIANCE'S APPLICATION TO INTERVENE

KINDLY TAKE NOTICE THAT the Applicant for Intervention (**the DA**) hereby applies to this Court for an order in the following terms:

Intervention

1. It is directed that this matter be dealt with as an urgent application and that the DA's non-compliance with the ordinary rules for service and time-periods is condoned.
2. The DA is granted leave to intervene in the proceedings as an intervening party.
3. Any party opposing the DA's application is directed to pay the costs of the application, including the costs of two counsel.
4. The DA will comply with the timelines for the filing of written submissions by respondents as set out in the directions issued by this Court on 6 August 2021.

Substantive Relief

5. The DA is granted direct access to this Court.
6. It is declared that the Electoral Commission's (**the Commission**) failure to hold a voter registration weekend for the October 2021 election is unconstitutional and invalid.
7. The Commission is directed to hold a voter registration weekend on either 27 to 29 August 2021, or 3 to 5 September 2021; and
8. Notwithstanding section 6(1A) of the Local Government: Municipal Electoral Act 27 of 2000, the names of people registered on the voter registration weekend contemplated in paragraph 6 may to be added to the voters' roll for the 27 October 2021 local government election.

9. In the alternative to prayers 3 to 5 above:

9.1. It is declared that the First Respondent's (**the Minister**) proclamation of the election date in terms of s 24(2) of the Local Government: Municipal Structures Act 117 of 1998 (**the Structures Act**) on 3 August 2021 is unconstitutional and invalid;

9.2. The Commission is directed to hold a voter registration weekend on either 27 to 29 August 2021, or 3 to 5 September 2021;

9.3. The Minister is directed, on the day after the voter registration weekend is held in terms of prayer 9.2, in terms of s 24(2) of the Structures Act, to proclaim the date of the election as 27 October 2021; and

9.4. It is declared that, notwithstanding the declaration in prayer 9.1 that the Minister's proclamation is invalid, the election timetable published by the Commission on 4 August 2021 will be the timetable governing the 27 October 2021 election, subject to any future amendments by the Commission.

10. The Commission's application is dismissed.

11. The Commission and the Minister are directed to pay the DA's costs, including the costs of two counsel.

TAKE FURTHER NOTICE that the affidavit of **WERNER HORN** will be used in support of this application.

TAKE NOTICE FURTHER that if you intend to oppose this application you are required, **by 13 August 2021**, to lodge with the Registrar and to serve on the applicant's attorneys an affidavit setting out the grounds on which you oppose the application.

TAKE FURTHER NOTICE that the DA has appointed the address of their attorneys below as the address at which they will accept service of all process in these proceedings. The DA accepts electronic service at the following addresses: elzanne@mindes.co.za and karin@mindes.co.za

SIGNED AND DATED AT CAPE TOWN ON THIS 11TH DAY OF AUGUST 2021.



E JONKER

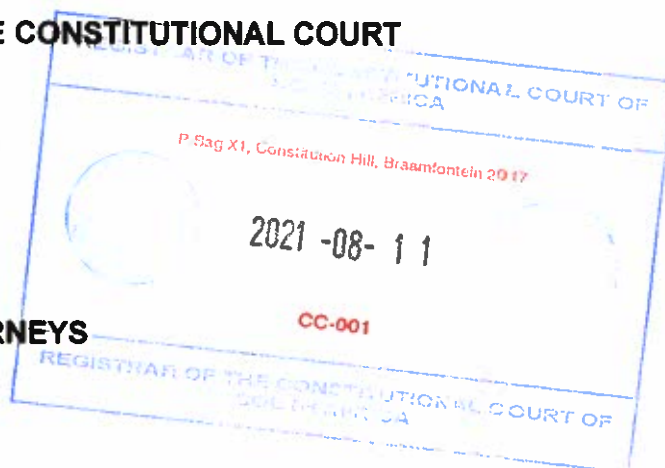
MINDE SCHAPIRO & SMITH INC.

Attorneys for the DA

Care of: Christodoulou & Mavrikis

Suite 3A, Fricker Rd, Illovo Boulevard, Johannesburg

TO: THE REGISTRAR OF THE CONSTITUTIONAL COURT
 Constitution Hill
 Johannesburg



AND TO: MOETI KANYANE ATTORNEYS

Applicant's Attorneys

Per email: moeti@kanyane.co.za

And to: THE MINISTER OF COOPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS

First respondent

e-mail: AvrilW@cogta.gov.za

c/o THE STATE ATTORNEY

Email: ichowe@justice.gov.za
StateAttorneyPretoria@justice.gov.za

and

BY ELECTRONIC MAIL

And to: THE MEC FOR LOCAL GOVERNMENT FOR THE EASTERN CAPE

Second respondent

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BY ELECTRONIC MAIL

And to MEC FOR LOCAL GOVERNMENT FOR THE FREE STATE

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BY ELECTRONIC MAIL

And to: THE MEC FOR LOCAL GOVERNMENT FOR GAUTENG

Fourth respondent

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And to: THE MEC FOR LOCAL GOVERNMENT FOR KWAZULU-NATAL

Fifth respondent

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BY ELECTRONIC MAIL

And to: THE MEC FOR LOCAL GOVERNMENT FOR LIMPOPO

Sixth respondent

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And to: THE MEC FOR LOCAL GOVERNMENT FOR MPUMALANGA

Seventh respondent

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sam@mpg.gov.za; Skunene@mpg.gov.za and
MkhwanaziZF@mpg.gov.za

BY ELECTRONIC MAIL

And to: THE MEC FOR LOCAL GOVERNMENT FOR THE NORTHERN CAPE
Eighth respondent

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mmanyeneng@ncpg.gov.za; pseane@ncpg.gov.za

BY ELECTRONIC MAIL

And to: THE MEC FOR LOCAL GOVERNMENT FOR NORTH WEST
Ninth respondent

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BY ELECTRONIC MAIL

And to: THE MEC FOR LOCAL GOVERNMENT FOR THE WESTERN CAPE
Tenth respondent

Email: Graham.Paulse@westerncape.gov.za;

BY ELECTRONIC MAIL

And to: THE SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION
Eleventh respondent

Email: ugopichund@salga.org.za

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**CCT: 245/21**

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DEMOCRATIC ALLIANCE

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In the matter between:

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**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

First Respondent

TEN OTHERS

Second to Eleventh Respondents

FOUNDING AFFIDAVIT:**DEMOCRATIC ALLIANCE'S APPLICATION TO INTERVENE**

I, the undersigned

WERNER HORN

do hereby state under oath:

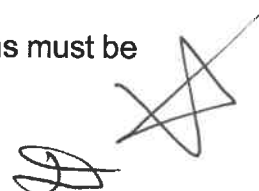


I INTRODUCTION

1. I am an adult male, and a member of the Applicant for Intervention (**the DA**). I serve as the DA's representative on the National Party Liaison Committee.
2. The contents of this affidavit are true and correct and, unless it appears otherwise from the context, within my personal knowledge. Where I make legal submissions, I do so on the advice of the DA's legal representatives. I believe that advice is correct.
3. The DA is a political party that will compete in the local government elections scheduled for 27 October 2021. It has not been cited as a respondent in these proceedings even though the relief sought directly affects it. It therefore seeks leave to intervene in the proceedings as a respondent. It has a direct and substantial interest in the application.
4. The Applicant (**the Commission**) has applied to this Court for an order that will, in effect, suspend the operation of s 159(2) of the Constitution to permit the local government elections to be held in February 2022, instead of October 2021.
5. This is truly extraordinary relief. The Commission is asking this Court to amend, by judicial writ, the clear and unambiguous text of the Constitution.
6. The Commission relies largely on a report prepared by Justice Moseneke following an inquiry commissioned by the Commission in terms of s 14 of the Electoral Act (**the Moseneke Inquiry**). The DA made detailed submissions to the Moseneke Inquiry (**DA1**). In those submissions, the DA argued that:

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- 6.1. Unless Parliament passed a constitutional amendment, the elections had to proceed on 27 October 2012; and
- 6.2. The elections should proceed because it was possible for them to be held in a manner that was free and fair.
7. That remains the DA's position. It opposes a postponement. The elections should proceed as the Constitution demands.
8. The DA opposes the application on two simple, yet fundamental, grounds.
9. **First, this Court has no power to grant it:**
- 9.1. Regular elections are a fundamental and founding value enshrined in s 1 of the Constitution. Interfering with those would undermine the "*system of democratic government, to ensure accountability, responsiveness and openness*" that the Constitution guarantees. Preventing regular elections undermines the core structure of the Constitution.
- 9.2. The Constitution is supreme. It binds this Court. This Court has no power to grant an order suspending the operation of a constitutional provision.
- 9.3. The Constitution provides for a mechanism to deal with unanticipated situations – constitutional amendment. That is the only way to avoid constitutional obligations. In this case, to make matters worse, the situation now called in aid by the Commission for rewriting the Constitution, was not unanticipated.
- 9.4. The Commission incorrectly pits constitutional provisions against each other. But the Constitution is a harmonious whole. Its provisions must be



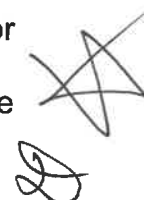
read consistently, not contradictorily. It should not be interpreted so that it is internally contradictory, or so that obligations it imposes require non-compliance with other constitutional provisions

10. Second, even if it could suspend the Constitution, **this Court should only do so in the clearest of cases** where there could be no doubt that it was necessary to protect some other central constitutional value. That is not the case here:

10.1. The **epidemiological evidence** on which the Commission relies is, at best, ambivalent and contradictory. The most eminent expert who provided evidence to the Moseneke Inquiry – Prof Karim – told the Inquiry in no uncertain terms: *“The best time [to hold the election] is October. ... October is probably a safer bet than going with December or going with March.”* There is, therefore, no clear threat to the rights to life, bodily integrity and health – and certainly no threat that could be cured by holding elections in February 2022.

10.2. **Comparative experience** shows that it is possible to hold free, fair and safe elections during the pandemic. The Commission’s own evidence shows that elections have only caused spikes in infections when they were held when infections were already high, and when large gatherings were permitted. Neither will occur in an October 2021 election.

10.3. It is still **possible to register voters** for an election on 27 October 2021. This can be achieved either by suspending the operation of s 6(1A) of the Local Government: Municipal Electoral Act until after registration, or by declaring the First Respondent’s (**the Minister**) proclamation of the



election date invalid and requiring it to be re-proclaimed after registration. The DA seeks that relief in its application. That is just and equitable relief, with respect.

10.4. The restrictions on large gatherings imposed to prevent the spread of the virus will not prevent candidates from effectively campaigning. The same restrictions apply to all those competing in the elections and all other means of campaigning remain available.

10.5. The Commission has the ability to ensure that voting will be safe. The Commission has provided no evidence to suggest that turnout will be significantly lower because of the pandemic. The experience in by-elections suggests the opposite.

10.6. The Commission, the Executive and Parliament have improperly sought to shift their constitutional responsibilities onto this Court. The Commission has acted tardily, and certainly without due expedition. It has failed to take a wide range of measures that would have ensured the elections could be held on time, freely and fairly. The Executive and Parliament have failed to use their powers to ensure the elections could be free and fair.

11. This affidavit is structured as follows:

11.1. **Part II** explains why this Court has no power to grant the relief; and

11.2. **Part III** shows why, even if it has the power, it should not exercise it on these facts.

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II THE COURT CANNOT POSTPONE THE ELECTIONS

12. The Commission says the purpose of this application is to *"approach a competent court to seek a just and equitable order to defer the local government elections to not later than the month of February 2022."* (FA para 84-5).
13. Section 159(1) and (2) of the Constitution read:
- (1) *The term of a Municipal Council may be no more than five years, as determined by national legislation.*
 - (2) *If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.*
14. The effect is that the next local government election *"must"* be held by 1 November 2021. The Constitution admits for no wriggle room beyond the 90 days in s 159(2). The Commission identifies no provision of the Constitution that contemplates departure from this deadline. Or as this Court has put it: *"the Constitution does not provide for the extension of this term of five years."*
15. As a result, the relief the Commission seeks is not just a postponement of an election, but either:
- 15.1. A suspension of a clear, mandatory constitutional provision; or
 - 15.2. An implicit amendment of s 159(2) of the Constitution to add the proviso: *"unless a court orders otherwise"*.



16. Its desire to procure this relief is based on the conclusions of Justice Moseneke. While Justice Moseneke did take the view that the elections should be postponed, he expressed no view on whether this Court had the power to do so. He wrote: *"May a court of competent jurisdiction grant or permit the extension or relaxation of a fixed term deliberately set by the Constitution? Happily, our current assignment does not require us to answer this difficult question which we respectfully leave for the courts to decide."* (Report, para 254, record p 221).
17. The DA submits that it is not possible for a court to postpone the elections without a constitutional amendment. I first stress the value of regular elections. I then set out the reasons why such a power can never exist. Lastly, I briefly address the legal bases on which the Commission relies.

THE IMPORTANCE OF REGULAR ELECTIONS

18. Regular elections are a vital component of any democracy. Elections are the most important opportunity for citizens to not only elect their new representatives, but also hold their current leaders accountable. That is why s 1(d) of the Constitution includes regular elections as a founding value, and s 19(2) provides all citizens with a right to regular elections.
19. If elections are not held regularly, it undermines the basic structure of democracy. It denies citizens the ability to choose their leaders and improve their circumstances. It permits manipulation for political ends. And it inevitably taints the independence of any institution given the task.




20. First, citizens can no longer ensure accountability and responsiveness. That – according to s 1(d) – is the purpose of regular elections. Citizens are denied the right to replace leaders who have proved unsuitable with leaders who they believe will better fulfil their promises, and serve the citizens' interests. Every day that elections are delayed is a day that citizens are denied that most basic constitutional right.
21. The Commission seriously understates the importance of regular elections. It seems to believe that a delay of 120 days makes no difference. That is never true – that is 120 days' of rights violations and 120 days during which the Constitution's founding values are ignored.
22. Those 120 days are particularly vital when the majority of local governments are dysfunctional. The Auditor-General's recent report on Local Government reveals, in stark terms, the parlous state of local government. The Report is available at <https://www.agsa.co.za/Portals/0/Reports/MFMA/201920/2019%20-%202020%20MFMA%20Consolidated%20GR.pdf>.
23. The Auditor General reveals disturbing facts about the state of municipalities' finances and governance:
- 23.1. Many municipalities are on the brink of financial collapse. The finances of *"just over a quarter of municipalities is so dire that there is significant doubt that they will be able to continue operating as a going concern in the near future."* Moreover, *"[a]lmost half of the other municipalities are exhibiting indicators of financial strain, including low debt recovery, an inability to pay creditors, and deficits."* (AG Report p 8)



- 23.2. Many municipalities are so poorly run that some *“do not even pay over taxes such as pay-as-you-earn and value added tax to the South African Revenue Service or transfer contributions to the pension funds of their employees.”*
- 23.3. Only 28% of municipalities could even provide the Auditor General with quality financial statements to audit. Only 27 of 257 municipalities received unqualified audits with no findings. 22 municipalities received disclaimed reports with findings.
- 23.4. 86% of municipalities had material non-compliance with legislation. In the 2019/20 financial year, there was at least R26 billion in irregular expenditure. And by the end of the year, municipalities had accumulated R79.22 billion rand in irregular expenditure that had not been dealt with.
24. These are not formal or technical errors; they are failures that undermine constitutional rights. The Auditor General explains that the failures of local government have *“resulted in material financial losses at some municipalities and substantial harm to their ability to deliver on their mandate.”* Municipalities’ wasteful spending has direct consequences for the realization of basis socio-economic rights:

There have been many calls from all quarters of the country to turn around the decline in local government. Barely a day goes by without shocking revelations of fraud and corruption, wastage, infrastructure deterioration, and municipalities that have lost the trust of the communities they serve. The most jarring is the impact of service delivery failures on the most vulnerable of our citizens – the poor.



25. The only way to improve the position of local government is, according to the Auditor General, to improve leadership:

We are convinced that if municipal leaders at both administrative and political level, supported by their provincial leadership, are fully committed to turn around local government towards the capable, efficient, ethical and development-oriented institutions envisaged by the Constitution, improvements are bound to follow. We have seen great results where leadership has moved beyond the politics and obstacles and taken definite strides towards a better future for the communities they serve.

26. The key requirements the Auditor General identifies for the mayor and councillors are “*ethical and courageous leadership, service-orientation, good governance and accountability*”.
27. Local government elections are the only opportunity that citizens have to fix these problems by voting out the bad leaders, and voting in new leaders who will exhibit these characteristics. Without being able timeously to exercise their right to vote for new leaders, they are ongoingly denied two sets of rights: first, their right to regular elections, and second their socio-economic and dignity rights are undermined because they cannot improve their access to basic goods like water, sanitation, roads, electricity, sewerage and refuse collection. These basic services have collapsed in many municipalities. Postponing elections prevents citizens from using their vote to improve their own situation and ensure the realization of their socio-economic rights.
28. Second, if elections are not regular, then there is always the risk of political manipulation to delay elections until they are more politically convenient. Enforcing hard electoral deadlines makes it impossible for any entity to

maliciously manipulate election dates. It also insulates organs of state – including constitutionally independent entities like the Commission – from allegations that they are setting the dates of elections to favour one party over another.

29. This is a concern that arises even when elections are postponed for what appear like legitimate reasons. IESA, in its submission to the Moseneke Inquiry, (DA2) makes the point that *“once the decision to delay an election is made based on health and safety considerations, it becomes challenging to justify those conditions have improved later to the extent that the elections are now justified.”* (p 13) The risk is that *“postponements to a planned election have often lead to further postponements and heightened uncertainty in the political space, which introduces its own set of risks.”* (p 20) Once this Court accepts it has the power to postpone elections, it will be asked to do so again and again, whenever a party can make a claim that an election might not be free and fair.
30. The Commission pits regular elections against the right to free and fair elections as if they are contradictory rights. They are not, they are complementary. To be free and fair, an election should also be regular. If the dates of elections are manipulated, that will reduce the fairness of the election. Elections must be regular precisely to ensure that they are fair.
31. Third, requiring this Court to determine when elections will be held is a threat to this Court’s own independence and legitimacy. If it has the power to postpone elections then, no matter how wisely it exercises that power, it will be accused of playing politics by some quarters. Its decision – whether to postpone or not postpone – will serve the interests of some parties rather than others. Refusing



to even consider whether elections should be postponed – will protect the Court from any allegation of political favouritism. Setting the date for elections – and especially postponing them past constitutionally set deadlines – is a power no entity should have, especially a court.

NO POWER FOR JUDICIAL SUSPENSION OF THE CONSTITUTION

32. There are four reasons this Court could never grant relief suspending or amending the Constitution, and should never be asked to do so.
33. First, s 2 of the Constitution provides: *"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."* The Constitution binds not only the Executive and the Legislature, but also the Judiciary. Courts cannot make an order that is contrary to the Constitution because it would undermine the supremacy of the Constitution. If courts are not constrained by the Constitution, then the Constitution is no longer supreme, courts are.
34. It is no exaggeration to say that granting this relief will open a Pandora's box. Once this Court accepts that it can grant relief that is contrary to unambiguous constitutional text, there are no limits to its power. It will then be at large to do anything that it considers just and equitable. More obvious and dangerous, is that no doubt parties will ask it to exercise that power whenever to them the Constitution seems to produce what some may consider to be an unjust or undesirable outcome. Other branches of government might even intentionally fail to or be lulled into a failure to perform their constitutional obligations in order




to force this Court into a position where it must violate the Constitution. Once the box is opened, there is no way to predict what will come out.

35. Second, the Constitution must be interpreted harmoniously so that the various provisions work together. It should not be interpreted so that it is internally contradictory, or so that obligations it imposes require non-compliance with other constitutional provisions. Yet that is exactly what the Commission proposes.
36. It posits a conflict between, on the one hand, s 159 and the constitutional demand for regular elections, and, on the other hand, the right to free and fair elections and the rights to life, bodily integrity and health. As I explain below, those rights are not threatened at all, or will not face a lesser risk in February 2022 compared to October 2021. But the Commission commits a deeper error. It creates conflict between constitutional provisions and asks this Court to choose between them. The correct approach is to interpret the Constitution to avoid conflict. That can only be done by holding elections by the constitutional deadline, and treating any impact on constitutional rights as an implicit internal limitation of those rights that the framers recognised and accepted.
37. Third, to the extent that there is some overwhelmingly objective and obvious need to amend the Constitution, then it is not for this Court to do so, let alone urgently by direct access. I am advised that the courts have repeatedly rejected the notion that the Constitution can be amended outside the procedure specified for amendment in s 74 of the Constitution. This will be dealt with in legal argument.

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38. Fourth, the constitutionally appropriate way to postpone an election would be through constitutional amendment. The only way to avoid a clear constitutional obligation is to amend the Constitution in terms of s 74. Parliament has that power. The Executive, or any member of Parliament who believed a postponement was warranted could have introduced an amendment. The amendment could have taken many forms – from increasing the term of office to six years, to permitting this Court to sanction an electoral postponement in defined circumstances.
39. The DA did not introduce an amendment because it does not believe any postponement is necessary. But that was the only constitutionally permissible route for the Commission or any other political party that sought postponement to follow.
40. But none of the other parties represented in Parliament who have publicly supported postponement introduced a bill in Parliament. The Commission provides no evidence of any attempt to engage with the Executive or Parliament to seek the introduction of a constitutional amendment. Instead, time went by without any action until it was too late. It is now no longer possible to amend the Constitution because the timelines in ss 74(5) and (7) of the Constitution cannot be met before 1 November 2021. But separation of powers entails both rights and responsibilities. The Executive and Parliament had the power to amend the Constitution, coupled with a responsibility to exercise that power properly if the need arose. This Court does not have the power to amend the Constitution, and has the responsibility to say so.



41. In sum, this Court does not have the general and free-floating power to order that the local government elections are postponed. This is the case even if this Court were convinced that the elections could not be free and fair.
42. The only and proper solution is a constitutional amendment. And for that reason the application by the Commission must be dismissed, insofar as it asks this Court to effectively achieve that amendment. What is more, there is a path forward that allows the elections to continue in October 2021, that is manifestly better than postponing the elections in October contrary to the Constitution. That is by the relief that the DA seeks, which is aimed at ensuring free and fair elections through the mechanisms available to the Commission, and by ensuring registration of voters.

THE COMMISSION'S CAUSES OF ACTION MUST FAIL

43. The Commission invokes two alternative bases for the extraordinary relief it seeks:
- 43.1. The common-law doctrine that the law does not require the impossible;
and
- 43.2. This Court's power in s 172(1)(b) to grant just and equitable relief.
44. Neither is a basis for suspending or amending the Constitution.



Impossibility is Not a Basis to Suspend the Constitution

45. The Commission's argument runs like this: There is a common law doctrine that "*no one should be compelled to perform or comply with that which is impossible*" (FA para 249). It is "*objectively impossible for the Commission to hold constitutionally compliant local government elections*" because of the impact of Covid-19 (FA para 250). Therefore, this Court can amend the Constitution to permit elections beyond the deadline in s 159(2) of the Constitution.
46. This argument fails for four reasons.
47. First, the common law may not be used to upend the Constitution. The Constitution is a written document – and is the supreme law. Its clear text and stricture cannot be sidestepped through the invocation of a common-law principle. To do so would undermine the supremacy of the Constitution.
48. Second, the common law principle the Commission invokes only applies to situations where the alleged impossibility is objective. Put differently, it does not apply where the impossibility is subjective. Even assuming that October elections cannot be free and fair – which I repeat the DA does not accept – it was self-evidently possible for the Commission to comply with its constitutional obligations. What was required was a constitutional amendment.
49. The Commission focuses only on its own constitutional powers to argue it has been put in an impossible position. As it cannot amend the Constitution, it claims compliance is impossible. But that cannot be correct. When assessing whether it really was impossible to comply with constitutional provisions, the Court must objectively consider whether the Constitution provides a mechanism to address the problem. It does – an amendment under s 74.



50. The fact that the power had to be exercised by different constitutional bodies is irrelevant. It could never be that where the other branches fail to make use of the existing mechanism to resolve the problem, another body can claim that compliance was impossible.
51. Third, even if the power could be exercised in some circumstances, it should never be exercised here. The Commission correctly observes that the *lex non cogit ad impossibilia* is a principle of equity. It is subject to another principle of equity: “*he who comes into equity must come with clean hands*”. The impossibility principle does not avail to a litigant if that litigant is to blame (partially or fully) for the alleged impossibility of performance. It is also a fundamental principle that no person can take advantage of his own wilful or negligent and unlawful conduct.
52. Yet that is precisely what the Commission seeks to do here. As I set out in detail in **Part III**, the Commission has failed to act diligently and without delay to address the problems caused by the Covid-19 pandemic. It now seeks to rely on its own multiple failures to claim it is impossible to hold free and fair elections. That can never be permissible. If it were, it would create a precedent for organs of state to fail to fulfil their constitutional obligations in order to force this Court into a position where it must suspend those obligations. Yet I am advised that the opposite standard is true: this Court has held that constitutional obligations must be fulfilled, no matter how difficult.
53. Fourth, for the reasons set out in **Part III** it is not impossible for the Commission to hold a safe, free and fair election in October. The *lex non cogit ad impossibilia* principle does not apply to circumstances where it will merely be difficult – or



even very difficult – for an event to occur, or for a person to discharge their duties. But that is the highwater mark of the Commission’s case. It remains possible for the Commission to comply with all its constitutional obligations.

Never Just and Equitable to Amend the Constitution

54. The Commission’s alternative cause of action is to argue that this Court should pre-emptively declare its failure to hold local government elections within the time prescribed by s 159(2) as unconstitutional and invalid. It will then grant a “just and equitable” remedy under s 172(1)(b) of the Constitution suspending the declaration of invalidity, and directing the Commission to hold the election by 28 February 2022.
55. This approach, while inventive, is meritless.
56. First, there is no precedent for a pre-emptive declaration of constitutional invalidity. Such an order puts the cart before the horse. It assumes that the elections cannot be free and fair in October 2021. But that is not a foregone conclusion. If this Court rejects the Commission’s primary contention – namely that the evidence objectively discloses that the elections simply cannot proceed – the foundation of the declaratory relief sought under section 172(1)(a) would also crumble.
57. It is also nonsensical precisely because it is impossible to predict the future. As I explain in more detail below it is likely that an election will be safer in October 2021 than in February 2022. The Commission wants this Court to predict the



future and conclude that an election will be free and fair in February 2022 when the evidence is – at best for the Commission – deeply uncertain.

58. Second, this Court's powers under s 172(1)(b) are wide, but not limitless. It could never extend to granting relief that contradicts constitutional requirements. That would be inconsistent with the supremacy of the Constitution. It would make the Court supreme as it would always be able to grant any order it deemed just and equitable. It could order the removal of a President if it thought it was just and equitable. It could overturn results of an election to install a party it thought would better advance constitutional rights. It could rewrite budgets solely to fit its view of what was just and equitable. It would reduce constitutional law to equity. The power, once taken, has no enforceable limit. It is a power no court should want, with no manageable judicial standards, and a wholesale destruction of separation of powers.
59. Third, for the reasons given in Part III, there is no basis to conclude that elections in October 2021 cannot be free and fair. Even if there was doubt about the freeness and fairness of an October 2021 election, there is certainly no basis to conclude that an election will be any more free and fair in February 2022. Once the Court has accepted the awesome power the Commission intends for it, then the door will have been opened. It is likely, and at least possible, that the Commission will be back in front of this Court in December or January asking for it to again postpone the elections because there is a surge of cases, or a new variant, or failures in the vaccine rollout.

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III THE COURT SHOULD NOT POSTPONE THE ELECTIONS

60. This Court has no power to grant the relief the Commission has sought. But even if it did have that power, it should refuse to postpone the elections. This Court should never, in urgent motion proceedings as a court of first and last instance, suspend the Constitution save in the face of incontrovertible evidence. There is no such evidence here.
61. The Commission's case rests on an incorrect premise – that elections in February 2022 will be much safer than elections in October 2021. Its dire predictions of thousands of deaths if the election is held in October 2021, and a completely safe election in February 2022, are both extremes without solid foundation. In truth the medical evidence shows that elections may be safer in October 2021 than in February 2022. At best for the Commission, it is uncertain what will be safer.
62. In addition, all the Commission's mechanical concerns about registration, campaigning and voting are either misplaced, or can be addressed without postponing the election. Elections in October 2021 may be different from previous elections, but they will be free and fair.
63. This Part addresses the following topics:
- 63.1. The standard for this Court to suspend or amend the Constitution;
- 63.2. The elections in October 2021 will be safe; and
- 63.3. The elections in October 2021 will be free and fair.



THE STANDARD TO AMEND OR SUSPEND THE CONSTITUTION

64. The DA does not accept the relief the Commission seeks is competent. But if it is, the question is: When would be appropriate for a court to grant it?
65. The DA submits that a court should only grant such relief in the clearest of cases. Where there is reasonable doubt or debate about whether or not a suspension of the Constitution is warranted, this Court should respect the Constitution. This Court has adopted a similar standard for interdicting the performance of executive functions. If that standard applies in that context, it should most certainly apply to suspending the Constitution in order to postpone elections.
66. This is particularly important in these circumstances where this Court is confronted with extremely urgent motion proceedings where it will be the court of first and last instance. This Court is therefore at a serious disadvantage:
- 66.1. It cannot reasonably elicit oral evidence from experts.
- 66.2. Because of the self-created urgency of the matter, it is unlikely to obtain alternative views from epidemiologists who disagree. The DA has had only one week, including a long weekend to prepare this affidavit. We have been unable, in the time available to us, to secure our own epidemiologist to assess the evidence provided to the Moseneke Inquiry, and most critically, to update those predictions based on the most recent data about the progress of the third wave of infections, the rollout of vaccinations, and knowledge of new variants. We imagine that other parties who oppose suspension have faced similar difficulties.

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- 66.3. The Moseneke Inquiry does not resolve the problem. With all due respect to Justice Moseneke, his conclusions can only take the matter so far and are not a substitute for this Court's duty to decide the questions for itself (assuming for a moment it assumed the power to do so). But then the Court would be faced with a legal opinion about expert evidence. It is, strictly speaking, inadmissible hearsay. The Commission has – quite properly – put up (most of) the actual evidence that served before Justice Moseneke, confirmed under oath. This Court must itself consider that evidence and reach its own conclusions. It would be a dereliction of its duty, and delegation of its powers, to simply accept Justice Moseneke's analysis of that evidence.
- 66.4. And the Court would not have the benefit, in the time available, of proper countervailing and updated evidence for it to perform this task. That is not the Court's fault; nor the fault of the DA or any other opposing respondents. But it is a critical problem that undercuts the Court's ability to grant a just and equitable remedy that effectively amounts to an amendment of the Constitution.
67. In short, this Court should only grant the relief the Commission seeks if the evidence is overwhelming or indisputable that an election in February 2022 will be significantly safer than an election in October 2021. If there is doubt or uncertainty, the Court should refuse the relief and allow the Constitution to take its course.

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THE OCTOBER 2021 ELECTION WILL BE SAFE

68. The Commission's entire application rests on the proposition that an election in February 2022 will be significantly safer than an election in October 2022. As it puts it: "*the Commission is unable to produce constitutionally complaint [sic] local government elections before November 1 2021*" (FA para 9). The primary reason is that the risk of deaths from Covid-19 in October 2021 is higher because fewer people will be vaccinated.
69. The Commission has selectively presented the evidence placed before the Moseneke Inquiry to paint a stark picture of October death, and February life. But the Commission's own evidence, and the evidence before Justice Moseneke that the Commission omitted, does not support that conclusion.
70. While it is true that more people will be vaccinated by February 2022, that does not mean that elections held then will be safer.
- 70.1. All the evidence suggests that South Africa will be between waves, with very low rates of Covid-19 in October 2021. There is every chance we will be in the fourth wave in February 2022.
- 70.2. Moreover, as Prof Karim explained in his oral presentation to Justice Moseneke, vaccines are not a "*magic wand*" that will render elections safe. There is a strong likelihood that new variants will develop that will undermine the efficacy of our existing vaccines.
- 70.3. Finally, contrary to the Commission's assertions, the evidence about elections in other countries demonstrates that they can be safe during a pandemic if the necessary precautions are taken.



The Commission's Evidence is Ambivalent

71. The Commission seeks, in its Founding Affidavit, to paint the medical evidence presented to the Moseneke Commission as universally supporting the postponement of the election. But that is not correct. The medical evidence is ambivalent about whether or not an election held in February 2022 will be any safer than an election held in October 2021.
72. I focus on the following:
- 72.1. The evidence of Prof Karim;
 - 72.2. The evidence of other experts; and
 - 72.3. The evidence before the Moseneke Inquiry that was omitted by the Commission.

Prof Karim

73. Professor Karim is a world-renowned epidemiologist. He is currently:
- 73.1. Adjunct Professor in Immunology and Infectious Diseases at Harvard University;
 - 73.2. Professor of Global Health in the Department of Epidemiology at Columbia University;
 - 73.3. Associate at the Ragon Institute of Massachusetts General Hospital at MIT and Harvard University;

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- 73.4. Adjunct Professor of Clinical Epidemiology and Health Services at Cornell University; and
- 73.5. Director of the Centre for the AIDS Programme of Research in South Africa.
74. He has been intimately involved in the South African government's response to the Covid-19 pandemic. He has received awards for his global work on the Covid-19 pandemic.
75. Prof Karim gave evidence to the Moseneke Inquiry, which he confirms under oath in this application. His submission is attached to the Founding Affidavit. His oral submission is available online at https://www.youtube.com/watch?v=NE7XO_CT6nw and begins at 7:24.
76. The Commission provides a rather selective account of Prof Abdool Karim's evidence to the Moseneke Inquiry. It mentions his evidence only twice:
- 76.1. To point out the risks of exposure, identified by Prof Abdool Karim, that elections pose (FA paras 155-6); and
- 76.2. To confirm that the Delta variant spreads much faster than previous variants (FA para 162).
77. The Commission neglects to tell this Court that Prof Abdool Karim opposed postponement on epidemiological grounds. In his view, clearly expressed in his oral evidence to Justice Moseneke, it will be safer to hold the election in October 2021 than February 2022. His reasons are simple.



78. First, the third wave will be over before the election and there will be a low rate of transmission at the end of October. In his words:

78.1. *"I will be quite confident in saying to you that we will be done with this wave by the end of August. That's the likely scenario. ... If I was a betting man, I would put my money we will be done with our third wave by the end of August, more likely somewhere in August, but by the end of August."* (7:42:30)

78.2. *"In October, we will be in low transmission. We will be at quite a small number of cases. What do we consider low? less than 3000 cases per day. I would imagine by October we will be more like 1000 to 2000 cases per day, so pretty low."* (7:43:35)

79. As I explain below, all the evidence suggests – and the Commission itself accepts – that an election held when case levels are low does not pose a substantial risk of spreading the virus.

80. Second, it is possible to manage all the risks posed by elections, except for large gatherings. Again, in Prof Abdool Karim's words:

These risks [posed by elections] are quantified, you can make lists, you can deal with them. There's none of these risks, in my view, anything that we can't get away from. The one you can't get away from is rallies and marches. Because if there are going to be rallies and marches, there's nothing you can do – those are super-spreading events. You've just got to get the political parties to agree not to do that. ... But the small group meetings, house-to-house can be done with a reasonable level of risk mitigation.



81. Third, it is unlikely that vaccines will solve the problem and that they will make elections safe in early 2022. Prof Abdool Karim was emphatic on this point in his presentation. He said the following:

- 81.1. When Justice Moseneke put to him that elections would be safer in early 2022 because more people would be vaccinated, he said: "I disagree." He then explained:

Everything that I have seen tells me that we are likely to see several new variants by the time you get to, lets say, March next year. And, at some point, there is going to be a variant that escapes immunity. The moment you have a variant that escapes immunity, that means everybody that has been vaccinated is back to square one. I am deeply concerned that we are heading down that road. I can't tell you that it's going to happen or not, because I can't read the tea leaves in that way. But everything I have seen tells me that is quite a likely scenario. ... This is going to be an illusion, that you can get to herd immunity and life goes back to normal. That's not going to happen, not for quite a while. (7:56:28)

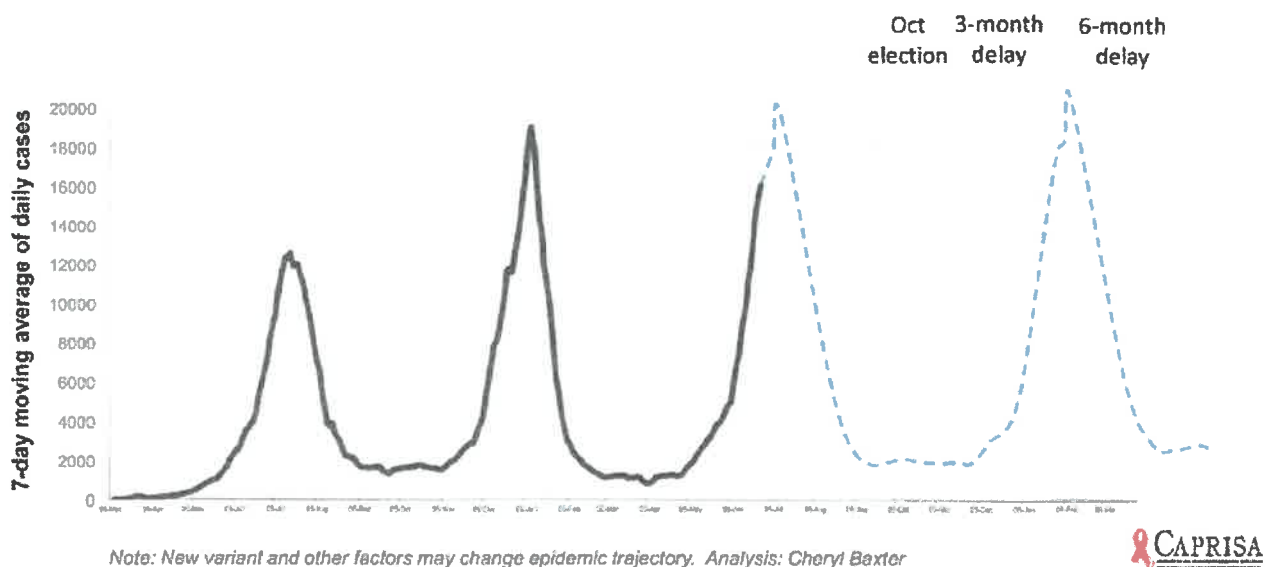
- 81.2. Later, when the argument was put to him again, he said the same thing:

I don't follow that dictum, because I don't think it's true, that we should simply bank on vaccinations, that the vaccinations are a magic wand, we just vaccinate people then we can go and do whatever we want. I don't believe that, and that's not being borne out.

82. Fourth, while he was clear that there could be no certainty about when a fourth wave would occur, his model suggested that South Africa would be in the middle of its fourth wave, not in October 2021, but in February 2022. This is the last slide of his presentation (p 502)



Estimated case numbers if elections delayed by 3 or 6 months (assuming 3rd wave is 1.5 x as long as 1st and 2nd waves)



83. As Prof Abdool Karim explained, there might not be a fourth wave. *“But I don’t know that. I don’t know if we’ll have a fourth wave. I’m just going on the basis that each time, each subsequent wave has been worse than the previous one. All my ideas that we’ll do better as we go along, have not panned out.”*
84. In sum, Prof Abdool Karim’s evidence, which the Commission glossed over, presents a compelling argument that an October 2021 election will be safer than a February 2022 election. In his words: “The best time is October. October is probably a safer bet than going with December or going with March.”
85. While Justice Moseneke recognizes this divergence (paras 223-227), he never explains why he discounts Prof Abdool Karim’s view in favour of the views of other experts. Justice Moseneke appears to simply accept that more vaccinations will decrease risk, without engaging with the timing of waves, and the risks of new variants that Prof Abdool Karim clearly set out. The

Commission certainly never explains why this Court should prefer the other experts' predictions to Prof Abdool Karim's.

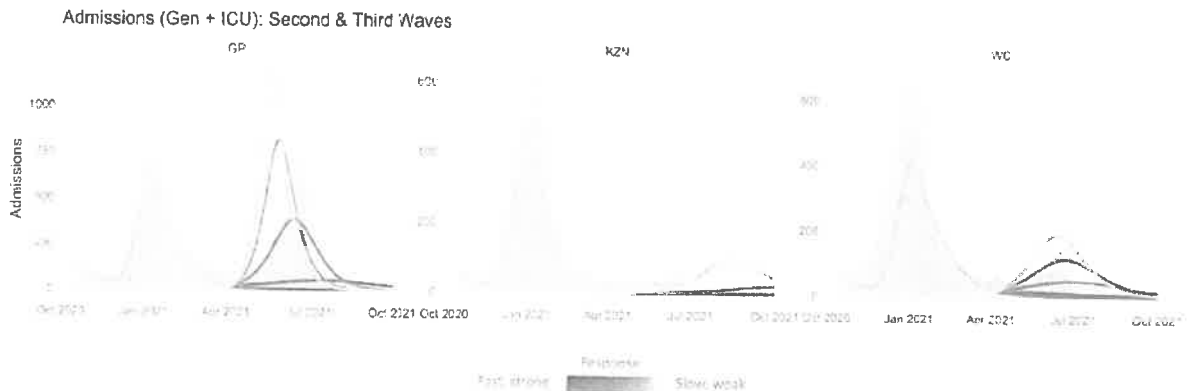
86. I stress: this Court need not decide which expert view is correct; and it need not determine whether Justice Moseneke was correct in his weighing of Prof Abdool Karim's views versus that of other experts. It need only determine whether the Commission has established the clearest of cases. The evidence of Prof Abdool Karim demonstrates that, at best for the Commission, there is significant doubt about whether a February 2022 election will be safer. In those circumstances, this Court should not suspend or amend the Constitution.

Other Experts

87. Even those experts who suggested – expressly or tacitly – that an election in February 2022 would be safer than the one scheduled for October 2021 emphasised the limits of their knowledge. Dr Abdullah, for example, states: *“Any exercise to predict the future trends of the transmission of infection, the evolution of transmissibility (contagiousness) and the changing pathogenesis and presentation of COVID-19 in population subsets must be done with both caution and spades of humility.”* (MFA2, p 362) And Dr Madhi says: *“It’s difficult to predict what the status of Covid would be by October 2021, as its dependent on multiple factors”* (SAM1, p 506).
88. In addition, they agree with much of Prof Abdool Karim's analysis, if not his conclusions about when the election should be held:
- 88.1. Dr Madhi recognizes that *“it might well be that October 2021 is [a] period of relative calm in the pandemic experience in SA, with a resurgence more likely to occur later in the year (December onward)”* (SAM1, p 507).

Similarly, Dr Miot's model anticipates that South Africa will be between waves in October 2021. This is his graph (p 519):

Tracking projections for the third wave



And Dr Moultrie says: *"Cases and admissions are expected to reduce to low levels by September 2021."* (p 553)

88.2. Dr Abdullah accepts that vaccines are not a "magic wand". As he puts it: *"the country is unlikely to vaccinate sufficient numbers of adults to impact significantly on the transmission dynamics of a fourth wave. In addition, there is always the likelihood of a new mutation. ... With so many regions of the world under-vaccinated we could very easily see a new strain that more fully escapes both vaccine induced and natural immunity during a fourth wave."* (MFA2, p 371)

88.3. Dr Madhi emphasizes a different point – that the most important question is not overall vaccination rates, but how many of the most vulnerable people (those over 50) have been vaccinated. He writes: *"If [Government] can ensure high coverage of the high risk groups (e.g. >70% coverage of anyone older than 50 years of age), even with*

ongoing circulation of the virus, the major deleterious effects of a resurgence (hospitalization and death) can be largely mitigated.” (SAM1, p 507)

89. Far from a “*substantial convergence*” that elections in October 2021 will be more dangerous, the expert evidence appears to confirm the three underlying rationale’s for Prof Abdool Karim’s view:

89.1. South Africa will be between waves in October 2021;

89.2. Vaccinations may not solve the problem; and

89.3. The biggest problem with elections is large gatherings, not voting.

The Gaps in the Commission’s Evidence

90. It is telling that all the Commission has done is put up the submissions made by epidemiologists to the Moseneke Commission. Those submissions were made more than a month ago, in late June 2021. Despite admitting that much has changed since then, and despite there being two weeks between the release of the Moseneke Report and this application, the Commission has not procured any updated expert reports.

91. The Commission has also not provided any evidence regarding the rate of vaccination by age group. Dr Moultrie’s evidence shows that people were far more likely to be admitted to hospital, and to die, if they are over 50 (see pp 556 and 558). Those over 50 have had earlier access to vaccinations. Yet the

Commission never tells this Court how many people in that group are likely to be vaccinated by October 2021.

The Comparative Experience

92. The Commission relies on the experience in other countries to suggest that holding elections during the pandemic will result in a spike of Covid-19 cases and deaths. But that is not what the evidence shows at all.
93. The Commission accurately summarises the evidence of elections in other African countries as follows:

the data suggests that where mandatory protocols were put in place and properly enforced, the elections did not cause a spike in infections; whereas in countries where protocols were not in place or not adequately implemented there was an increase in Covid-19 infections after the elections. (FA para 198)

94. The bottom line is that, if safety protocols are followed, elections will not increase Covid-19 infections. It was the Commission's responsibility to put safety protocols in place in order to hold a free and fair election in the constitutionally stipulated timeframe.
95. The view that elections can be safely held with safety protocols is supported by the Commission's own evidence from both the United States and India:
 - 95.1. In the United States it was large campaign rallies, particularly by the Republican Party that caused a spike in cases (FA para 205.3). Prof Abdool Karim points out in his oral submission to the Moseneke Inquiry

that the US held its November 2020 election when it was already experiencing 29 cases per 100 000 (7:34:58). The peak of our second wave was 32 cases per 100 000.

- 95.2. The cause of increased infections in India – according to the Commission – was “*mass rallies for the State Assemblies, as well as religious gatherings*” (FA para 206.3).
96. The Commission relies on Justice Moseneke’s conclusion that there were “staggering” numbers of deaths in these countries. But that ignores that the increase in deaths occurred only because those countries did not limit rally-based campaigning or enforce proper Covid-19 safety protocols.
97. There is **no evidence** that where elections are held with limitations on the size of gatherings, and with other reasonable Covid-19 precautions in place, that they increase the spread of the virus. And there is **no evidence** that parties and candidates will not comply with Covid-19 protocols.
98. By contrast, the comparative evidence and international best practice supports that elections should be held.
- 98.1. Many countries – including African countries – have held elections that were both free and fair, and occurred without significant increases in Covid-19.
- 98.2. The Commission can point to no country where a court has permitted elections to occur after a constitutional deadline. They either adhered to the deadline (as in the United States), amended the Constitution (as in Brazil), or passed emergency legislation (the United Kingdom and

France). The Commission asks this Court to exercise a power no other court in the world has ever exercised. Perhaps more importantly, this Court has been asked to do something that – in all other countries faced with the same dilemma – was dealt with by the legislature.

99. This assessment of the comparative experience is supported by two independent NGOs that provided evidence to the Moseneke Inquiry – the Electoral Institute for Sustainable Democracy in Africa (**EISA**) and Right to Care. The Commission does not address either of these submissions in any detail.
100. In its submission (**DA2**), EISA conducted a detailed assessment of the impact of elections on Covid-19 transmission in a range of states, particularly African states. They concluded that: *“No coherent picture emerges of any discernible patterns relating to post-campaign or post-election “surges” or spikes in infection rates reported.”* As a result, many countries *“have successfully held elections that allow for democratic participation while still safeguarding the larger population against increased infection rates.”* (p 4) Or, as EISA puts it later: *“There is already a large body of evidence to suggest that national elections can and have been conducted under all manner of conditions without unduly harming either the health or the political rights of a country’s populace.”* (p 20)
101. Right to Care’s submission (**DA3**) was prepared by a range of doctors and other experts. There is no explanation for why their evidence was discounted compared to the evidence of other individual experts. Their submission to the

Moseneke Inquiry aligns with Prof Abdool Karim's – elections can be safe if proper protocols are followed:

“the data suggests that where mandatory protocols were put in place and properly enforced, the elections did not cause a spike in infections; whereas in countries where protocols were not in place or not adequately implemented there was an increase in Covid-19 infections after the elections” (page 8);

102. They explain that according to the American Centre for Disease Control, *“there have been very few reports linking voting arrangements with community transmission.”* And they explain that both South Korean and French studies showed that no infections occurred as a result of elections. In particular, the French study showed that *“the election did not contribute to virus transmission in areas with already low levels of Covid-19”* (page 11). Right to Care advises that: *“Elections in COVID-19 hotspots could enhance the spread of the pandemic significantly, this risk is lower in areas with reduced infection levels.”* As Prof Abdool Karim argues, October 2021 is more likely to be a time of low infection levels than February 2022.
103. Right to Care concludes, based on its assessment of comparative practice: *“If the above WHO recommendations and the IIDEA recommendations are followed and adhered to, elections could be conducted safely with the possibility to avoid adding to the spread.”* (page 17)
104. Both these independent NGOs undermine the Commission's claim that comparative experience supports postponing the election.

Restrictions on Gatherings

105. As set out above, the only real risk posed by elections is large gatherings during the campaigns. All the other risks can be adequately mitigated. There is a simple solution to this problem – prohibit large gatherings.
106. The existing Level 3 DMA Regulations already prohibit gatherings of more than 100 people outside and 50 people inside, with limits for smaller venues. The DA believes that any stricter regulations, limiting gatherings to 10 or 20 people would be justified and would adequately serve to protect the spread of the virus. All the medical evidence and comparative experience supports this approach.
107. The Commission does not explain why limiting the size of gatherings is not enough – coupled with existing precautions for registration and voting days – to ensure that the elections are safe, and do not contribute to a rise in infections:
- 107.1. It does not explain why the current restrictions are inadequate.
- 107.2. If it believes they are inadequate, it does not explain why it has not used its statutory powers to impose gathering limits for the election period. The Commission has the power under s 88 of the Municipal Electoral Act to compile, issue, amend or replace an electoral code of conduct. The existing Code already contains limitations on gatherings necessary to ensure free and fair elections. An Electoral Code of Conduct “*binds every party contesting an election and every party and ward candidate*” (s 87). If a party contravenes the Code, the Chief Electoral Officer can approach the Electoral Court to enforce it (s 77(1)). Sanctions for contravening the Code include “*disqualifying the candidature of that person or of any candidate of that party*”; “*an order cancelling the*

registration of that party"; and *"an order reducing the number of votes cast in favour of that person or party"* (s 78(2)). In short, if the Commission believes stricter regulations of gatherings are necessary to ensure a safe, free and fair election, it has all the powers it needs to impose them.

107.3. Alternatively, the Commission could engage with the Minister to impose restrictions under the DMA, specifically for elections. It says it will do so for a February 2022 election, but never explains why it has not done so for the October 2021 election.

107.4. It does not provide any evidence that parties and candidates will not comply with restrictions on gatherings, or that it, together with law enforcement officials will be unable to enforce those restrictions.

108. There is, therefore, a clear and easy way to ensure that October elections will not spread the virus. The Commission and the Minister have all the powers they need to ensure safe elections. I explain below why the existing restrictions, or even stricter restrictions, would not render an election unfree or unfair. But for now, the only important point is that it is possible to protect the rights to life, bodily integrity and healthcare. One does that by simply limiting gatherings.

THE OCTOBER 2021 ELECTION WILL BE FREE AND FAIR

109. An election held in October 2021 will not only be safe, it will also be free and fair. In this section I show that:

109.1. It is possible to register voters in time for an October election;



109.2. Restrictions on gatherings do not render an election unfree or unfair;

109.3. There is no reason to think turnout will be low, or voting unsafe; and

109.4. Many of the shortcomings are a result of the Commission's and the Minister's conduct.

It is Possible to Register Voters in time for an October 2021 election


110. The Commission contends that *"the most significant"* impact of the Minister's proclamation of the election is that *"it is no longer possible to register voters for an election in October 2021"* (para 98.5.3). It states later that *"most significantly ... a significant proportion of the eligible population has not registered to vote"* (FA para 169). In short, it claims that its failure to register voters means the election will not be free and fair.

111. The Commission relies on s 6(1A) of the Municipal Electoral Act, which reads: *"Except where this Act otherwise permits, only a voter who applied for registration prior to the proclamation of an election date may vote in the election concerned."*

112. The DA accepts that – unless this Court intervenes – the effect of s 6(1A) is that names cannot be added to the voters roll for an October election. The DA also accepts that failing to allow voters a reasonable opportunity to register would constitute a limitation of the right to vote. While voters were able to register online, the DA accepts that many South Africans traditionally register in person, and that many are unable to register online.



113. Fortunately, it is possible for this Court to enable voters to register in time for an October 2021 election.
114. Section 6(1A) does not prohibit the Commission from holding a voter registration weekend. The Chief Electoral Officer is entitled – under the Voter Registration Regulations, GN R1340 in GG 19388 (16 October 1998) as amended – to determine when and where a person may register to vote. This is not limited by a proclamation of an election date.
115. The Commission states that it plans to hold a voter registration weekend on 18-19 September 2021 (for purposes of its planned February 2022 election). Because of s 6(1A), those voters who are registered on that weekend will only be added to the voters roll for the proposed February 2022 election.
116. I note that, in terms of the Commission's approach:
- 116.1. It is able to organize a voters' registration weekend on approximately three weeks' notice; and
- 116.2. It believes it can conduct a voter registration weekend by middle September safely.
117. The registration is purely a technical legal obstacle, not a substantive obstacle. The obstacle to holding a voter registration weekend before the October 2021 election is the Minister's Proclamation read with s 6(1A). There are two solutions to this problem that are far less drastic than suspending the Constitution and postponing the election.



118. First, this Court has held that it has the power to suspend the operation of statutes when it is necessary to permit a lawful election. In *Mhlope*, it suspended the Commission's obligation under s 16(3) of the Electoral Act to collect voters' addresses in the voters' roll. This was necessary to allow the 2016 local government election to proceed lawfully.
119. A similar solution can be used here. This Court can suspend the operation of s 6(1A) of the Municipal Electoral Act to allow a voter registration weekend to be held before the required October 2021 election. That would allow the Commission to register voters in late August or early September and add them to the voters' roll. This will still afford parties sufficient time to canvass those voters.
120. The DA proposed this solution to the Commission on the same day it launched this application. Our attorneys wrote a letter to the Commissions' attorneys' (DA4) proposing that:
- 120.1. The Commission organize a voter registration weekend in late August.
- 120.2. It amends its relief to ask this Court to suspend the operation of s 6(1A) so that voters who register on that weekend can be added to the voters' roll for the October 2021 election.
- 120.3. Whatever this Court ultimately decided on both the postponement of the election and the suspension of s 6(1A), the voter registration weekend would be absolutely essential for an October election and valuable for later elections:



120.3.1. If the Court refuses the postponement and suspends s 6(1A), the names will be added for the October 2021 election.

120.3.2. If the Court grants the postponement, the names will still be added for the February 2022 election.

120.3.3. If the Court grants the postponement, but refuses to suspend s 6(1A) the names will be added for the 2026 election.

121. The Commission's attorneys responded on 6 August 2021 refusing this practical proposal (DA5). While claiming to be "*willing to consider any and all suggestions that would enable it to comply with its constitutional duties*" it refused to organize an earlier voter registration weekend. It mistakenly claimed that a court order is necessary to hold a registration weekend. It is not. A court order is required only to add the names from that registration weekend to the voters' roll for the October 2021 election.

122. Second, there is another way to ensure – despite the Commission's tardiness – that voters can be registered before an October 2021 election. The Minister proclaimed the date of the election in terms of s 24(2) of the Municipal Structures Act on 3 August 2021. Section 24(2) reads: "*Whenever necessary, the Minister, after consulting the Electoral Commission, must, by notice in the Government Gazette, call and set a date for an election of all municipal councils, which must be held within 90 days of the date of the expiry of the term of municipal councils. The notice may be published either before or after the term of municipal councils expires in terms of subsection (1).*"

123. There is no deadline by when the election must be proclaimed. The date of proclamation is important because it not only closes the voters' roll, but also triggers the Commission's obligation to publish the election timetable. The Minister – after consulting the Commission – chose to proclaim a date for the election even though there had been no voter registration weekend.
124. That decision is unconstitutional. It inhibits people's right to vote because it removed the opportunity for those who cannot register electronically to register to vote. It limits the right to vote. It is also plainly irrational to proclaim a date for an election before voters have had an opportunity to register. It must be declared invalid.
125. If it is declared invalid, then the date on which the election is called, and the date the voters roll closes, can be altered. That will allow the Commission to organize a voters registration weekend before the October 2021 election.
126. Accordingly, part of the relief the DA seeks in this application is to:
- 126.1. Declare the Commission's failure to hold a voter registration weekend for the October 2021 election unconstitutional and invalid. As a just and equitable remedy in terms of s 172(1)(b), to:
- 126.1.1. Instruct the Commission to hold a voter registration weekend on either 27-29 August 2021, or 3-5 September 2021; and
- 126.1.2. Suspend s 6(1A) of the Municipal Electoral Act to allow the names of people registered on that weekend to be added to the voters' roll for the October 2021 election.



126.2. In the alternative, declare the Minister's proclamation of the election date on 3 August 2021 unconstitutional and invalid and, as a just and equitable remedy:

126.2.1. Instruct the Commission to hold a voter registration weekend on either 27-29 August 2021, or 3-5 September 2021;

126.2.2. Instruct the Minister to proclaim the date of the election as 27 October 2021, the day after the voter registration weekend; and

126.2.3. Declare that, notwithstanding the declaration that the Minister's proclamation is invalid, the election timetable published by the Commission on 4 August 2021 will be the timetable governing the 27 October 2021 election.

127. The DA believes the Commission can and should hold a voter registration weekend as soon as possible. But even if the registration weekend is held on the date that the Commission proposes for a February 2022 election – 18-19 September 2021 – the names can still be added to the voters' roll for the October election.

128. There are two reasons there needs to be a gap between registration and voting: (a) the Commission needs enough time to certify the voters' roll; and (b) candidates and parties need enough time to canvass voters on the voters' roll. Both can be achieved if registration occurs on 18-19 September 2021, and the election is on 27 October 2021.

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129. To certify the voters' roll, the Commission needs to open it for inspection, allow and consider objections to the roll, and then produce a certified roll. On the current timetable, that occurs as follows:

129.1. The roll is opened for inspection for six days from 5 August 2021 to 11 August 2021;

129.2. The Commission will finalise objections within seven days by 18 August 2021; and

129.3. The Commission will certify the voters' roll and make the roll available within 14 days, by 1 September 2021.

130. The total time period is 27 days. If the voter weekend is held on 18 and 19 September 2021:

130.1. The new voters' roll can be opened for inspection the next day on 20 September 2021, and close six days later on 26 September 2021.

130.2. The Commission can finalise objections within seven days, on 3 October 2021; and

130.3. The Commission can certify the updated voters' roll within 14 days, on 17 October 2021.

131. This will still afford parties enough time to canvass for those votes. Importantly, parties will already have had the vast majority of the voters' roll which the Commission will certify on 1 September 2021. It will only be the additional names that will be added to the new voters' roll.




132. Of course this is not ideal. An earlier registration would be preferable as it would afford the parties more time. But it is manifestly better than postponing the election contrary to the Constitution.

THE ELECTION WILL BE FREE AND FAIR DESPITE RESTRICTIONS ON GATHERINGS

133. The third reason the Commission contends that an election in October 2021 cannot be free and fair is that, as a result of restrictions imposed under the DMA, parties and independent candidates will not be able to campaign. For example, it contends that *"candidates and political parties have been and will be unable to campaign and advertise effectively"* (FA para 169). It dramatically claims that the existing Level 3 restrictions are *"a bar to free and fair elections"* (para 180). The concern here is not that campaigning will be unsafe, but that it will be ineffective.
134. This concern is manifestly misplaced for eight reasons:
- 134.1. The restrictions apply equally to all parties and candidates;
- 134.2. The level 3 restrictions only prevent large gatherings;
- 134.3. There are numerous other effective measures of campaigning that remain lawful;
- 134.4. If any party believes the restrictions prevent free and fair elections, they can challenge them;
- 134.5. It is likely the restrictions will be reduced prior to the election;



139. In short, the only restriction is on the size of gatherings. Every other form of campaigning remains completely lawful. In the DA's view even stricter restrictions on gatherings would not render the election unfree or unfair. It would support restrictions on election-based gatherings of 20 or even 10 people. This would allow the elections to go ahead without any significant risk of spreading Covid-19.
140. Third, there remain a wide range of mechanisms for parties and candidates to campaign for votes that are consistent with the DMA regulations. Parties and candidates can still:
- 140.1. Hold gatherings of up to 100 people outside and 50 people inside;
 - 140.2. Canvass voters door-to-door;
 - 140.3. Put up posters;
 - 140.4. Distribute pamphlets;
 - 140.5. SMS voters;
 - 140.6. Phone voters;
 - 140.7. Advertise in newspapers;
 - 140.8. Advertise on radio;
 - 140.9. Advertise on television; and
 - 140.10. Advertise on social media and online.

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- 134.6. There is no guarantee there will be lower restrictions in February 2022;
- 134.7. The Commission has failed to take any steps it now advocates for the February 2022 election to ensure a free October 2021 election; and
- 134.8. Comparative experience provides no support for the notion that reasonable restrictions render an election unfree or unfair.
135. First, the limitations imposed by the DMA regulations provide a level playing field for all candidates and political parties. All those seeking election must grapple with how to reach voters under these new circumstances. No party is directly privileged by those restrictions.
136. Of course, some candidates or parties may respond more effectively to the restrictions than others. They may come up with more innovative ways of convincing voters than their competitors. And some parties may have more resources and so may be able to reach more voters. But that is always the case:
- 136.1. There are always restrictions on how parties may campaign – these are contained in the Electoral Code of Conduct. Some parties work better within those restrictions than others. As long as the restrictions apply uniformly to all, the election is fair.
- 136.2. It is always the case that those parties with more resources will be able to reach more voters. There is no evidence that the DMA regulations exacerbate that distinction in a way that would render the elections unfair.

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137. This is not just the DA's view. It is also EISA's view. In its submission to the Moseneke Inquiry, it wrote: *"As long as any restrictions on campaigning are applied universally to all competing political parties, and are reasonable in their scope and severity, there is enough evidence from other country experiences to justify this limitation without negatively impacting on the fairness of the elections."* (p 12)

138. Second, the current level 3 DMA Regulations permit sufficient political activity to allow parties and candidates to reach and seek to convince voters. The relevant restrictions the Commission relies on are:

138.1. The curfew from 22:00 to 4:00. But the Commission does not explain why this affects parties' or candidates' ability to campaign. Very little campaigning is likely to occur at 3 in the morning.

138.2. There are limits on the conduct of political gatherings. The Commission mentions two:

138.2.1. *That attendees must wear masks, physically distance and adhere to Covid-19 safety protocols. This can hardly inhibit free campaigning.*

138.2.1.1. Political parties can still campaign to people who are wearing masks and standing 1.5 metres apart. South Africans have become well-adjusted to doing all manner of public things – from shopping, to going to school, to picketing and demonstrating – while wearing masks and physically distancing. It cannot seriously be

suggested that politicians and the electorate are somehow less robust when it comes to political campaigns.

138.2.2. *There are limits on the size of gatherings – 50 people indoors and 100 people outdoors. In addition, if a venue cannot accommodate those numbers with the necessary physical distancing, then only 50% of the venue's capacity may be used.*

138.2.2.1. This does require a departure from traditional electioneering. It rules out large rallies. But parties and candidates can and must adapt. They must hold more, smaller gatherings. They must rely on other ways of getting their message across – one-on-one canvassing, posters and pamphlets, TV and radio advertising and social media. The limitation on large gatherings does not, on its own, render an election unfree or unfair; little more than any other large-scale and continuing inconvenience (for example, a series of rolling load-shedding disruptions).

138.3. Gatherings that contravene the above restrictions can be forced to disperse. If a person does not disperse, they commit an offence. In addition, those who organize them may be guilty of an offence. These criminal provisions merely enforce the substantive restrictions. They do not further restrict campaigning.



141. All of these mechanisms are highly effective at motivating voters to vote, and trying to convince them to vote for a particular party or candidate. The DA pointed out in its submission to the Moseneke Inquiry that:

141.1. 91.2% of adult South Africans have access to a smartphone;

141.2. 82% of households have a television and 28.7 million people watch the SABC free-to-air channels each month;

141.3. 36 million people listen to radio each week, with an average listening time of 3 hours and 36 minutes.

142. Fourth, if the Commission or any candidate or party believes that the restrictions imposed limit the right to free and fair elections, they are free to bring a constitutional challenge to the regulations. They could argue that, while the regulations are generally justifiable, they should be relaxed in the lead up to the election to ensure free campaigning. Neither the Commission nor any other party has brought such a challenge.

143. Fifth, the restrictions in the next three months before the 27 October 2021 election may be reduced. The third wave is currently on a downward trajectory. There is every possibility that the Minister – acting on the advice of Cabinet and the NCCC – will move South Africa to Level 2 restrictions before the election. If that occurs, the current restrictions may be loosened even further.

144. Sixth, there is no way to know that the restrictions will be any lower for an election in February 2022. As I have set out above, there are good reasons to believe that South Africa will be in a fourth wave in February 2022, and that the

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Minister will place the country under Level 4 or Level 3 restrictions. In short, postponing the election will not solve the problem.

145. Seventh, the Commission itself identifies a number of steps it plans to take to promote free campaigning for its planned February 2022 election:

145.1. It will *“engage with the Minister to ensure that the Regulations promulgated in terms of the [DMA] include a chapter on campaigning for the local government elections”* (FA para 235.1);

145.2. It will *“encourage political parties and independent candidates to ensure adherence with Covid-19 health protocols at campaign activities”* (FA para 235.2);

145.3. It will *“endeavour to put in place measures to ensure equal opportunities for political parties and independent candidates to contest the local government elections in light of the restrictions on traditional methods of campaigning”* (FA para 235.3);

145.4. Finally, *“[t]he Commission intends to engage with the Independent Communications Authority of South Africa and public and private broadcasters about the possibility of providing increased and equitable broadcasting access to all political parties and candidates”* (FA para 235.3).

146. The DA welcomes all these proposals. But the Commission fails to explain why it has not taken, and cannot still take, any of these measures to ensure free campaigning for the October 2021 election.

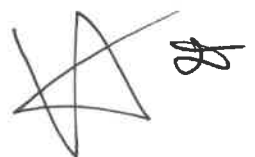


147. This omission by the Commission is inexplicable and indefensible. The Commission has known since March 2020 that it will likely have to hold a local government election during a pandemic. Yet it has taken none of the measures that would have made campaigning easier.
148. Perhaps most incomprehensibly, the Commission does not even commit to take these measures now for the October 2021 election. There is more than enough time to engage with the Minister to alter the DMA regulations for the elections. This country has seen the willingness and speed of the government to introduce and alter DMA regulations over the course of the pandemic. It is obviously able to encourage compliance with Covid-19 protocols. If it believes they are necessary – the DA does not – it can put in measures to ensure equal opportunities. And it can now engage with ICASA to increase broadcasting opportunities.
149. Yet the Commission has done absolutely nothing. Instead, the Commission's modus operandi is to force this Court to violate the Constitution and suspend the elections. Such conduct by a Chapter 9 institution is most unfortunate.
150. Eighth, the Moseneke Report and the Commission point to comparative experience of holding elections. Yet they point to no foreign case, or international commentary that elections held in those countries were not free and fair because of restrictions on campaigning. While there were numerous legal challenges in the United States about the mechanisms introduced to ensure safe elections, no court held that election was not free and fair.



VOTING

151. The Commission seems to implicitly suggest that voting for the October 2021 election will not be safe, and that therefore there will be a low voter turnout. Although it never says so expressly, the implication seems to be that low voter turnout is an indication that people were not free to vote.
152. This argument, if the Commission intends to advance it, has no merit.
153. First, the evidence from by-elections held during the pandemic show only a very small reduction in turnout. This is dealt with in Annexure B to the DA's submission to the Moseneke Inquiry. The average turnout in by-elections during the pandemic was 35%. The average turnout in by-elections in the 12 months prior to the 2016 local government elections had a turnout of 39.56%. That is a difference of less than 5%.
154. Second, the comparative evidence is variable. Some countries had reduced turnout (France and Brazil) while others had increased turnout (India and the United States). Turnout is not only driven by the pandemic, but also by electoral issues.
155. Third, as Prof Abdool Karim explained, it is possible to ensure that voting itself will be safe. The real risks concern gatherings, not voting. While some people may be deterred from voting because of that risk, when that risk is small – no greater than going to a grocery store – it is not a reason to suspend the Constitution to postpone an election.
156. Fourth, the Commission lists a range of measures it will take to ensure that voting can be safer in February 2021. It will expand special voting by increasing



the eligibility requirements to include those isolating or at risk of severe illness from Covid-19. It will expand the period to apply for a special vote. It will consider varied voting hours. It will create "*mandatory sub-stations based on registered voter surname dis-aggregation in high-density districts*". It will create special queues for more vulnerable voters.

157. These are all welcome measures that the DA supports. However, for the reasons already given – particularly the expert medical evidence and comparative experience – voting will be safe even without them.
158. But what is missing is any explanation for why these measures cannot be applied for the October 2021 election. If the answer is that there is not enough time, then the Commission provides no explanation at all for why it only realized that these would help to ensure safe voting in August 2021, 16 months after the pandemic started, and less than three months before the election.
159. Fifth, it is still possible to expand the use of special votes. Voters can be encouraged to apply for special votes. Voters who register at the new registration weekend can, at the same time, apply for a special vote. The Commission could inform voters about their ability to get a special vote. None of this requires legislative or even regulatory amendment.

DELAY BY THE COMMISSION AND THE MINISTER

160. The Commission comes to this Court, cap in hand, claiming free and fair elections are impossible and there is nothing it could have done to avoid this position. It is the victim of circumstance, it pleads.

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161. But the facts show the opposite. The Commission – and the Minister – have had more than enough time to take the measures they now claim can only be taken before elections in February 2022.
162. The Commission has known since March 2020 that there was a global pandemic that would affect its ability to hold free and fair elections in October. It has been postponing by-elections since March 2020 precisely because of the pandemic.
163. Yet on its own version, there are multiple steps it should take to enhance the freeness and fairness of elections, which it cannot or will not take before the October 2021 election, but will implement for a February 2022 election. These concern both campaigning and voting. But the Commission never explains why it has not taken those steps for the October 2021 election.
164. It is no excuse to say that it was waiting for the Moseneke Inquiry. It appointed the Moseneke Inquiry. If it was unable to determine what was necessary for free and fair elections without an inquiry – which would suggest it lacks the capacity to perform its constitutional task – then it should have appointed it early enough that it could still implement the Inquiry's proposals.
165. Of course, the precise stage of the pandemic could only be determined closer to the elections. But the Commission and the Minister knew from March 2020 that we would likely still be in a pandemic in October 2021, and that it should start taking the necessary steps – including possible legislative or regulatory amendments – to ensure that the election could be free and fair. That is what happened in other countries. US states passed numerous legislative amendments to permit safer forms of voting.

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166. The uncomfortable truth is that the Moseneke Inquiry was appointed at a point so close to the elections that many of the proposals it may have made to ensure free and fair elections could not be implemented in time. Why that appointment was made so inexcusably late is for the Commission to answer.

167. The failure to register voters and the proclamation of the election reveals a particularly disturbing pattern.

167.1. Registration was initially meant to occur in June 2021, but was postponed because of the slow pace with which the Commission finalized the procurement, delivery, the loading of software, and training of its officials, on the new software of the Voter Management Devices. This was the main reason why July was decided as the final date for the registration weekend.

167.2. The voter registration weekend in July was cancelled because the Minister promulgated regulations under the DMA that made the registration weekend impossible. But what is missing from the Commission's affidavit is an explanation of whether it sought to engage with the Minister on this issue. It was clear for several weeks before the Country moved to Level 4 on 27 June 2021 that a third wave was starting and there would likely be additional restrictions. The Commission should have engaged with the Minister to either:

167.2.1. Obtain an exemption for the registration weekend; or

167.2.2. Ensure that the weekend could be postponed to when restrictions were loosened and the weekend could be held.

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170. In the absence of an explanation, it appears that either the Minister or the Commission tried to prevent the registration of voters for an October 2021 election. The Commission has then claimed to this Court that the failure to register voters was a reason to suspend the Constitution and postpone the election.

IV CONCLUSION

171. The Commission seeks unprecedented and dangerous relief – the suspension of the Constitution to postpone an election. This relief is not competent. This Court cannot suspend the Constitution.
172. But even if it was, the Commission has failed to show that this extreme option is necessary. The evidence shows that the Commission can hold safe, free and fair elections within the constitutionally prescribed deadline. It can still register voters. It has the power to prevent mass gatherings, and ensure safety when people register and vote. Candidates and parties can still campaign freely and fairly. The Commission can enable voting and there is no evidence there will be significantly depressed turnout.
173. In short, the Commission is seeking to use a nuclear bomb – and asking this Court to detonate it. It should employ ordinary mechanisms to run a free and fair election on 27 October 2021.
174. This Court should:
- 174.1. Allow the DA to intervene;

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174.2. Grant the relief the DA seeks to ensure registration of voters; and

174.3. Dismiss the Commission's application with costs, including the costs of two counsel.

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WERNER HORN

Signed and sworn before me at Bloemfontein on Wednesday, 11 August 2021, the deponent having acknowledged that he knows and understands the contents of the affidavit, that he has no objection to taking the prescribed oath and that he considers it binding on his conscience.

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COMMISSIONER OF OATHS

COMMISSIONER OF OATHS
GIDEON JACOBUS VAN TONDER
ATTORNEY ADMITTED & ENROLLED
I.T.O. ACT 28/2014 R.S.A.
12 BARNES STREET, BLOEMFONTEIN

SUBMISSION BY THE DEMOCRATIC ALLIANCE TO THE MOSENEKE INQUIRY INTO ENSURING FREE AND FAIR LOCAL GOVERNMENT ELECTIONS DURING THE COVID-19 PANDEMIC

BACKGROUND

1. The Independent Electoral Commission ("the Commission") of South Africa has appointed Judge Dikgang Moseke to prepare a report in terms of section 14(4) of the Electoral Commission Act, Act 73 of 1998, which provides that: "The Commission may, if it deems it necessary, publish a report on the likelihood or otherwise that it will be able to ensure that any pending election will be free and fair."
2. Political parties were consequently invited on 7 June 2021 to make submissions to the Inquiry. In this notice the "salient" features of the terms of reference of the Inquiry are identified as:
 - To enquire into, make findings and report on, and make recommendations concerning the likelihood that the Electoral Commission would be able to ensure that the forthcoming 2021 general local government elections will be free and fair, in view of (i) the challenges posed by the COVID 19 pandemic, and (ii) the measures promulgated by the government to curb the continued spread of the pandemic; and
 - To indicate additional measures that the Electoral Commission may be required to implement in order to realise free and fair elections within the context of the COVID-19 pandemic."
3. The invitation called specifically for submissions on the following issues:
 - Whether the current conditions under the COVID-19 pandemic are conducive or not to the holding of free and fair local government elections during October 2021;
 - The constraints, if any, that the measures in place to prevent and combat the spread of COVID-19 have imposed or will likely impose on political activity and



campaigning in the lead-up to the local government elections earmarked to be held in October 2021;

- The constraints, if any, that the measures in place to prevent and combat the spread of COVID-19 are likely to impose on the proper and effective monitoring, by political party agents and independent electoral monitoring bodies, of the freeness and fairness of the local government elections earmarked to be held in October 2021; and

- Whether your party participated in by-elections that took place during the period of the COVID-19 pandemic and, if so, what was your party's experience of the by-election(s) and did you consider them to be free and fair?

In addition, you may make any other submissions that you deem necessary and appropriate, provided that they are connected to the proper conduct of local government elections."

4. We have noted, with appreciation, that the Inquiry understands its mandate merely as advisory in nature. However, it is nonetheless important to confirm that the remit of the Inquiry should not be construed in any way or form, by anybody, as meaning that the Inquiry is to advise whether the Local Government Elections, scheduled for 27 October 2021 (LGE2021), may and/or should be postponed or not.

5. In light of the above, we deem it necessary to firstly deal with the decision of the Commission to embark on a process to publish a report as contemplated by section 14(4) of the Electoral Act.

6. Secondly, submissions will also be made in respect of the meaning of the term "free and fair elections"

7. Thirdly, submission will be made in answer to the specific issues identified in the request for submissions, as quoted above.

We also confirm our availability to make oral submissions to the Inquiry, should it be deemed necessary by the Inquiry.

THE DECISION OF THE COMMISSION TO EMBARK ON A PROCESS TO PUBLISH A REPORT AS CONTEMPLATED BY SECTION 14(4) AND RELATED MATTERS

8. The existence, functionality and independence of the Electoral Commission is one of the requirements for and safeguards of free and fair elections. This was confirmed by the Constitutional Court in *Electoral Commission v Inkatha Freedom Party 2011 (9) BCLR 943 (CC)* para 55, in which the Court also confirmed that in order to maintain the trust of voters in the Commission no party should be treated different to others:

'It is necessary that the integrity of the electoral process be maintained. Indeed, the acceptance of the election as being free and fair depends upon that integrity. Elections must not only be free and fair but they must be perceived as being free and fair. Even-handedness in dealing with all political parties and candidates is crucial to that integrity and its perception by voters.'

9. From the aforesaid passage it is clear that the duty to treat all political parties in a fair and equal manner is a duty not only aimed at ensuring the public trust and confidence in the independence of the Electoral Commission, but more importantly a duty that is aimed at ensuring the integrity of the electoral process as an essential element of free and fair elections.

10. In light hereof the decision of the Commission to embark on a process to publish a report as contemplated by section 14(4) of the Electoral Act must be scrutinised.

11. The Commission has confirmed on a number of occasions, both during meetings of the National Party Liaison Committee (NPLC) and in public, that it is not only under a Constitutional obligation to conduct LGE2021 on/before 1 November 2021, but that it is ready, willing and able to discharge this duty. We submit that this is a matter of public record, but have noted that the Commission again confirmed this in its submission to this inquiry.

12. We submit that this stance of the Commission is the result of a detailed and well-considered process in which the Commission consulted not only with political

parties (as can be seen in the minutes of the NPLC meetings attached to the submissions made by the Commission to this inquiry), but also received briefings from stake holder departments (specifically the Department of Health) and in which the Commission obtained an external legal opinion from senior counsel.

13. The position of the Commission, after this process, was that as a Constitutional amendment would be necessary in order to either extend the current term of municipal councils or to allow for LGE2021 to take place after 1 November 2021 it was under a Constitutional obligation to proceed with all preparations for LGE2021. The Commission formed the view that it would only be entitled to approach the Constitutional Court for permission to hold LGE2021 outside of the constitutionally determined timeframe in the event of an “unmanageable spike” of infections of the Covid-19 virus occurring. This position was informed, or at least confirmed, by the abovementioned legal opinion of senior counsel, the gist of which was shared by the Commission with the NPLC on 22 April 2021. We attach hereto as Annexure “A” copies of the slideshow which the Commission presented to the NPLC at said meeting.

14. We agree with the Commission that the Constitutional demand for regular elections and the requirement that elections should be free and fair do not constitute a binary choice in which one could be cast aside in order to comply with the other.

15. However, it is clear that the Commission is satisfied that it “has taken reasonable steps to ensure the delivery of free and fair elections and that the measures currently underway are on track for that purpose.” (see paragraph 32 of the submission of the Commission to this inquiry)

16. Given that the Commission has exercised due diligence in dealing with concerns raised regarding whether LGE2021 should proceed or not, and has reached a rational and Constitutionally compliant conclusion on the issue, and has satisfied itself that it has done and will be doing the necessary to ensure a free and fair election, the question must be asked why it has nonetheless chosen to embark on the current process?

17. The answer to this question is found in the media statement the Commission issued on 20 May 2021 when it announced its decision to embark on this process. The statement confirms that "it emerged that some political parties were concerned that with the trajectory of the pandemic and the holding of elections under those conditions." (sic)
18. In this regard it is important to remember that none of the Party Liaison Committees which have been established by the Commission, as required by the Electoral Act, have any decision-making powers regarding any matters that fall within the purview and responsibility of the Commission.
19. These Liaison Committees are essentially forums to enable the Commission to consult with political parties and to convey information to political parties. The concurrence of political parties is not a prerequisite for any decision that is to be taken by the Commission.
20. In terms of the regulatory framework, applicable to decision-making by the Commission, it should therefore be stressed that the Commission is to take decisions "after consultation" with stakeholders and not "in consultation" with them. The fact that the Commission has concluded, after consultation, that it is obligated to deliver LGE2021 on/before 1 November 2021 and that it should ensure that it is free and fair, is therefore consistent with and in compliance with all of its Constitutional obligations.
21. While the Liaison Committees simultaneously enable some oversight over the Commission by political parties, it is strongly submitted that to allow a political party, or a group of political parties, undue influence in the decision-making of the Commission, will invariably undermine the independence of the Commission.
22. The danger posed by the decision of the Commission to embark on the current process is therefore both clear and serious. In having made the decision to embark on this process the Commission clearly elevates those political parties who espouse the view that LGE2021 should be postponed above those who hold the view that LGE2021 should proceed within the Constitutionally determined timelines and are prepared to

allow the Commission to proceed with the preparations for LGE2021 in order to discharge its Constitutional duty to ensure free and fair elections successfully.

23. As a Constitutional body operating in a Constitutional democracy a decision that it is "necessary" to investigate whether it is likely or not to ensure a free and fair election should never have been made on the ground that some political parties hold the view that the election should not take place within the Constitutionally prescribed timeframe. Specifically not in the circumstances where none of those political parties have attempted to initiate any process, via their representatives in Parliament, to amend the Constitution in order for LGE2021 to take place at a later stage, in a Constitutionally compliant manner.

24. Therefore, the decision to formalise a process that will further entertain the arguments of some political parties, aimed at ensuring a postponement of LGE2021, in the face of the Commission having taken a decision on the matter, after proper consultation, is at best ill-advised, and at worst a failure on the part of the Commission to uphold its own independence and the requirement to not treat some political parties differently to others (as confirmed in *Electoral Commission v Inkatha Freedom Party*, as quoted above).

25. From a legal point of view it may even be argued that if all the relevant information about the process already followed by the Commission, the information it obtained and the conclusion it reached (i.e. that it is on track to deliver LGE2021 in a free and fair manner), is taken into account, the decision to embark on this process could possibly even be viewed as unreasonable, flawed and irrational in nature.

26. In addition, any process to further entertain arguments which are either in contradiction to the relevant Constitutional provisions pertaining to the obligation of the Commission to arrange LGE2021 to take place on/before 1 November 2021, or which seeks to subvert, undermine or circumvent the Constitution and the supremacy it enjoys, must be viewed as questionable Constitutional conduct. As a Constitutional body the Commission should not have opened the door to such a process.

THE FUTURE TRAJECTORY OF THE PANDEMIC

27. It has been noted that this Inquiry have been tasked to also ask for and consider submissions from health experts on the “anticipated trajectory of the pandemic”. We hold the view that this information, although by its very nature speculative, may enable the Commission to plan optimally for LGE2021. However, not only has the Commission already sourced and considered information on this issue, but of course it would have been able to continue to source and consider new information on the anticipated trajectory of the pandemic in the absence of this inquiry.

28. Nonetheless, we have received advice that a number of unlikely events and occurrences will have to materialise in order for an “unmanageable spike” in infections to be present in the run-up to 27 October 2021. We were further advised that most scientific models, at this stage, predict that there is a very good possibility that infection rates will be stable and even low in the period immediately before and on 27 October 2021.

29. The fact that government's vaccination programme is now finally showing some progress, also works against the possibility of an “unmanageable spike” in infections even though it is accepted that the number of people that will in all likelihood have been vaccinated by Election Day will not meet the threshold that will establish so-called “herd immunity”.

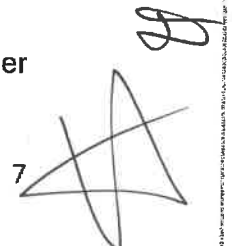
WHAT MAKES A FREE AND FAIR ELECTION?

30. Section 19(2) of the Constitution reads: “*Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.*”

31. What is the legal standard to determine whether an election is free and fair? There is no simple answer, but the Constitutional Court has identified the following pointers in *Kham and Others v Electoral Commission and Another* [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC).

32. First, the Constitutional Court has cautioned against applying a standard other than the Constitutional one of freeness and fairness.

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33. Second, there is no checklist of requirements that must be met for an election to be free and fair. The assessment is contextual and holistic. *"The nature of the irregularities and their impact on the conduct, as well as the result of the election, so far as that can be assessed, must be measured against the Constitutional standard."* A court *"must weigh all the evidence and, in that light, determine whether the Constitutional requirement was satisfied."* Flaws that may render one election not free and fair may not have that effect in a different election.

34. Third, the demand for free and fair elections *"is a single requirement, not a conjunction of two separate and disparate elements."* It encompasses *"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"*.

35. Fourth, a mere doubt about freeness and fairness is inadequate. *"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 – not speculative or imaginary – grounds for concluding that they were not free and fair."*

36. Fifth, the irregularities need not affect the outcome of the election in order to conclude that the election was not free and fair.

37. Sixth, compliance with the legislative requirements for the conduct of elections is an indicator of whether they are free and fair but are not determinative. The Courts have the power to suspend the operation of legislation if it is necessary to avoid a Constitutional crisis.

38. Finally, while elections must be free and fair, they must also be regular. Section 19(2) guarantees *"free, fair and regular elections"*. Regular elections are also a founding value protected in s 1(d) of the Constitution. Regular elections are vital to ensure accountability. If those in power can postpone elections, they can retain power without a mandate from the people. They can also manipulate the timing of elections in order to suit themselves. That is why the Constitution imposes an absolute limit on

the time within which elections must be held. Free and fair elections lose much of their value if they are not regular.

39. We submit that these passages indicate that the manner in which the term “free and fair elections” is approached by our courts is consistent with international developments. The Inter-parliamentary Union, a global organisation first established in 1899 and which boasts nearly 200 members, has over the years analysed and deliberated at length on what constitutes “free and fair” elections.

40. In 2006 it published “Free and Fair Elections”, authored by Guy S. Goodwin-Gill, Senior Research Fellow, All Souls College, Oxford. In this publication it determines the following as the essential pre-requisites of free and fair elections:

40.1 Electoral law and system

The need for a country to have clear laws of general application which regulates all matters related to elections and the system of elections of the country.

40.2 Constituency delimitation

In the event that elections take place in geographical constituencies a fair administrative process needs to be in place to determine the boundaries of constituencies.

40.3 Election management

The management of elections is to be entrusted to an electoral commission or body that is independent from government.

40.4 The right to vote

Formal Constitutional or statutory recognition of the citizen's right to vote, limited by only reasonable restrictions.

40.5 Voter registration

Legislative, administrative and practical arrangements to enable anyone who are entitled to register to vote to do so.

40.6 Civic education and voter information

Voter education and information programmes not to be undertaken by only the state, but also by the Election Management Body.

40.7 Candidates, political parties and political organisation

The right to contest elections as a candidate and to form political parties and take part in the activities of political parties are recognised as being firstly human rights, which are to be protected and regulated.

40.8 Electoral campaigns

A number of rights or freedoms underpin this element: Freedom of speech, freedom of association, freedom of movement and freedom of assembly.

40.8.1 Human rights and the election environment

Specific provisions to ensure that discrimination does not impede or prevent certain (groups of) people from participation.

40.8.2 Media access and coverage

No party or candidate should be prevented from disseminating party policies and programmes through the media. All parties should have equal and equitable access to public media.

40.8.3 Codes of Conduct

Parties and candidates should be required to commit to an Electoral Code of Conduct.

40.9 Balloting, monitoring and results

Parties and independent observers should be allowed to oversee voting, counting and the announcement of results.

40.10 Complaints and dispute resolution

The legislative framework of the country should provide for a proper system for complaints regarding any of these elements to be filed and dealt with, including but not limited to the courts.

41. Furthermore, it is convincingly pointed out that these markers are not only accepted by the Inter-parliamentary Union as essential to free and fair elections, but are individually and as a whole firmly rooted in a number of internal treaties and instruments aimed at the protection of the human rights of voters, going as far back as the 1948 Universal Declaration of Human Rights and including the African Charter on Human and Peoples' Rights of 1981.

42. It is submitted firstly that both our legislative framework, as well as the Bill of Rights contained in our Constitution, give proper effect to the elements calling for legislative regulation and the formal protection of rights and freedoms. Both the right to vote, the right to form and participate in the activities of political parties and the right

of individuals and political parties to contest elections are properly protected and regulated in South Africa. The management of our elections is entrusted to the Commission in terms of specific laws.

43. Furthermore, a cursory reading of the submission filed by the Commission makes it clear that it (as well as other statutory bodies like the Municipal Demarcation Board) has either already discharged its duties in order to ensure the presence of some of the elements of free and fair elections (e.g. ward delimitations), or is favourably positioned to do so (e.g. Voter Education and Registration). The Commission is on record that it will, once again, call on all political parties to sign and commit to the Electoral Code of Conduct. Our system of complaints and complaint resolution (inclusive of the right to have our courts adjudicate disputes) is still in place.

DOES THE COVID-19 PANDEMIC POSE ANY DANGER TO LGE2021 BEING FREE AND FAIR?

44. Despite our abovementioned reservations about the decision of the Commission to institute this inquiry, the balance of our submissions will deal with the issues raised in the request for submissions, as well as related matters.

THE RIGHT TO CAMPAIGN

45. It has been argued by some political parties that the Regulations issued by government in terms of the Disaster Management Act, in order to manage and limit the impact of the Covid-19 pandemic on the lives of South Africans, will unduly limit the right to political campaigning and that this will render the election to be not free and fair.

46. On a conceptual level it is pointed out by Goodwin-Gill in “Free and Fair Elections” (page 142) that the need for free and fair campaigning is underpinned by the idea that elections is an expression of the will of the people. Therefore, it is very important that the electorate are able to cast an informed vote.

47. From this it must follow that the right to campaign is ultimately not a right that exists for the benefit of political parties or candidates, but rather for the benefit of voters. Therefore, any assessment of limitations on political campaign events cannot centre on what is convenient for political parties and candidates, or what the views of parties and candidates are on restrictions and limitations.

48. It is strongly submitted that no political party can claim that it is unduly restricted from campaigning solely on the basis that one form of campaigning (i.e. larger and mass meetings) is prohibited by the disaster Regulations.

49. Our Constitution determines that any of the rights contained in the Bill of Rights may be lawfully limited in terms of section 36 of the Constitution. It is to be noted that it is the view of government that all restrictions imposed as part of the Disaster Regulations have been aimed solely at the management of the pandemic and limiting the spread of the corona virus.

50. It is submitted that while there is not necessarily an approving consensus around the necessity and efficacy of all of the measures that has been introduced as part of the Disaster Regulations, there is in fact a general agreement among scientists, and an acceptance by the general populace, that larger meetings do serve as what has become known as "super spreader events" of the corona virus.

51. Therefore, it is submitted that there can be no doubt that there is rational relationship between the management of the pandemic and the prohibition of mass meetings and that the imposition of this prohibition is a reasonable measure in the fight against the virus.

52. As a consequence, there is no real risk, in our view, that the prohibition on larger gatherings during the campaign period prior to LGE2021 will be viewed by any reasonable voter as a clampdown on political rights and an attempt to influence the outcome of the election in one way or the other.

53. It is accepted that some political parties will strongly argue that they rely heavily on bigger meetings as an electioneering platform. We however submit that none of the

bigger political gatherings that has been seen over the last few years have been achieved in an organic manner. Big political meetings are essentially staged events with political organisers of the relevant political parties tasked with ensuring that enough of the known supporters of a party attend in order for the attendance figures to be used to create the impression of mass support.

54. It is however submitted that even if it is accepted that this electioneering tool has been used in recent elections by some political parties to convince some voters to vote for the party in question, the limitation of the right to convene and attend mass gatherings can clearly not be deemed as a measure aimed at those political parties who make use of mass gatherings as an electioneering tool.

55. Similarly it is our submission that in this context it cannot be adjudged (by either election observers, or a court, or a political party) in a reasonable and rational manner that this prohibition will render the elections not to be free and fair given that the purpose of these Regulations are to assist in the management of the pandemic and not to restrict political campaigning.

56. Furthermore, it cannot be argued in a reasonable manner that the limitation of one of the methods that some political parties use during campaigning can objectively constitute an undue infringement on the right to campaigning. Apart from the fact that this is a general limitation which is applicable to all political parties, it is to be remembered that a magnitude of other campaign methods remain available to political parties and candidates.

57. Depending on the Regulations that are in place during the campaign period smaller indoor and outdoor meetings may still be permissible and parties and candidates will in all likelihood be able to engage voters during one on one meetings (the so-called "door to door"-visits or at so-called "information tables"), through telephone canvassing, poster messaging, leaflets and printed manifestos, as well as via the media (print media, radio and television, electronic media and communication and social media).

58. It is submitted that even if in-person political activities are prohibited for some period from now until 27 October 2021 as part of the Disaster Regulations, it will not necessarily follow that a conclusion can be reached that voters will not be able to access information on the policies and proposals of parties and candidates in order to make an informed choice on Election Day, or that political parties and candidates did not have equal and sufficient access to voters in order to try and persuade them to vote for them.

59. Importantly it is to be considered that some of the platforms which will assist voters to source information on the policies and platforms of political parties and candidates are, for all practical purposes, only available in the run-up to general elections. These platforms include free election broadcasts, as well as paid for election advertisements on public radio and television. Political parties and voters will also enjoy the benefit of election discussions and debates on all of these platforms in the run-up to LGE2021.

60. The reality is that nearly all, if not all, voters will be able to source information relevant to the choice they have to make in the run-up to LGE2021 through means that are not dependent on in-person contact with a political party or candidate. In fact it stands to be reasoned that the vast majority of voters in any event make their political choice on the basis of the information they obtain through a variety of sources and mediums, rather than depending solely on in-person contact.

61. It is submitted that all political parties and candidates are aware of these points of access to voters and have in past elections already all made use of these methods (or a combination of some of these methods) in order to try and convince voters to vote for them.

62. It is expected that some political parties, in their submissions, will argue that not all of these platforms are available to all voters and that this should lead to a conclusion that some voters, and by extension political parties, will be treated unfairly if only these platforms are available in the run-up to LGE2021. We disagree and submit that the information below indicates that the overwhelming majority of potential voters are accessible to political parties through these platforms.



63. According to the 2020 State of the ICT Sector-report, put together by the Independent Communications Authority of SA (ICASA), SA's smartphone penetration reached 91.2% in 2019, up from 81.7% in 2018. ICASA recorded 53.4 million smartphone subscriptions as at 30 September 2019, a few million shy of the country's total population size. South Africa's estimated population stood at 58.78 million, according to the 2019 mid-year population figure released by Statistics SA. As all smartphones contain browsers of the internet it must be accepted that the internet connectivity of South Africans is now in excess of 90%.

Source: <https://www.itweb.co.za/content/xA9PO7NZRad7o4J8>

64. The *State of the Broadcasting Industry Report*, released late in 2019, indicates that 14.4 million households in South Africa have a television set, with just more than half of these households having only access to the "free to air" channels provided by the public broadcaster, the SABC. The General Household Survey of Statistics SA in 2017 revealed that by then 82% of households in South Africa had television sets.

Sources: <https://themediainline.co.za/2020/06/broadcasting-by-the-numbers/> and <https://www.statssa.gov.za/publications/P0318/P03182017.pdf>

65. The official viewer numbers of the television channels of the public broadcaster, the SABC, according to its 2019-20 Annual Report indicate that the free to air channels of the public broadcaster (SABC1, SABC2 and SABC3) attract on average 28, 7 million viewers per month.

Source: <https://www.sabc.co.za/sabc/wp-content/uploads/2020/11/SABC-AR-2020.pdf>

66. The *State of the Broadcasting Industry Report*, mentioned above in paragraph 47, also revealed that the daily listening time on radio averaged out at 3h36 in 2018. A weekly audience of almost 36 million people tune into radio via a variety of devices, listening to 24 commercial stations (21 private and three SABC public/commercial), 16

SABC public service broadcasting stations (including Channel Africa) and 264 community stations.

Source: <https://themediainline.co.za/2020/06/broadcasting-by-the-numbers/>

ACCESS TO THE MEDIA

67. It is accepted that the Commission has very little authority over the way, and extent to which, media outlets give political parties and candidates access to readers, viewers and listeners for campaign purposes.

68. However, it is important to remember that in all instances the relevant complaints and dispute mechanisms, to address disputes with media outlets, are in place in the event that a party feels aggrieved about the manner in which a media outlet reports on campaigning or manages political discourse (discussions and debates).

69. The role of the public broadcaster, the SABC, will be very important in the run-up to LGE2021. Much scepticism remains among specifically opposition parties, based on past experiences, about whether they will receive even-handed and fair treatment from the public broadcaster, both in terms of news coverage and during election programming and debates.

70. It is however acknowledged that some independent analysts seem to be of the view that the editorial management of the public broadcaster now seem to indicate a greater willingness than in recent years to perform its duties and functions in an objective and impartial manner, for the benefit of the public, rather than the governing party.

Source: Herman Wasserman: The state of South African media: a space to contests democracy: <https://link.springer.com/article/10.1007/s11616-020-00594-4>



PARTICIPATION AND "FREE AND FAIR" ELECTIONS

71. The finding by the Constitutional Court in *Kham*, as discussed above, stressed that an investigation into the freeness and fairness of an election should happen in a contextual manner. It is our submission that in the context of an election affected by a pandemic the question is not whether the election is identical to an election conducted in ordinary times. The election may look very different but still be free and fair.

72. While it is clear that "free and fair" elections do not depend only on what happens on Election Day, it is accepted that serious shortcomings on Election Day will ordinarily enforce a finding that an election cannot be deemed as "free and fair".

73. We submit that the submission of the Commission to this Inquiry convincingly illustrates that it is poised to be operationally ready to conduct elections successfully on 27 October 2021, without any serious shortcomings. This should be communicated by the Commission to potential voters in clear and unambiguous terms.

74. We accept that a widespread belief amongst voters that they will be unduly exposed to infection with the corona virus and a consequential very low turnout may cause a situation where the question will be asked whether the results of LGE2021 can be viewed as an accurate and true expression of the will of the people.

75. It is however our strong submission that no conclusion to the effect that a vast majority of voters intend not to vote in LGE2021 because of a fear of infection can be reached in a logical and reasonable manner, based on the available and relevant information.

76. As pointed out above, we believe that any doubt on whether it will be safe to vote in LGE2021 could be successfully addressed by a proper communication strategy which can form part of the communication and education to be undertaken by the Commission in the coming weeks and months.

77. The Commission, in its submission to this Inquiry, made available information on the turnout figures for each of the previous elections arranged and managed by the

Commission. It is to be noted that, for a variety of reasons, turnout in local government elections has always been lower than turnout in national and provincial elections.

78. An analysis of the by-elections held since the beginning of the start of the State of Disaster on 15 March 2020, provided by the Commission, (attached hereto as Annexure "B") shows that the average turnout in these by-elections was 35, 35%, compared to 58, 05% turnout in the same wards during the general local government elections of 2016.

79. An analysis done by ourselves of the turnout in the by-elections that were held in the same period, more or less the last twelve months, before LGE2016 (and which is also attached hereto as Annexure "C") shows that the average turnout in those by-elections was 39, 56 %, in contrast to the average turnout in the same wards in the preceding local government elections of 2011 of 58, 77%.

80. From this it must follow that no indication can be found in the manner in which voters have been participating in by-elections that a widespread scepticism exists around the Covid-19 protocol that has been put in place by the Commission for by-elections and which is intended to stay in place for LGE2021.

81. In light of this analysis we submit that while the turnout in the by-elections held since the start of the State of Disaster has been lower than the average turnout in LGE2016, this is not indicative of any general intention on the part of the electorate not to vote in LGE2021 because of the Corona virus pandemic.

82. We have noted that the Inquiry has *inter alia* requested the views of political parties on whether the aforesaid by-elections were "free and fair".

83. In this regard, it is to be noted from the minutes of the meetings of the NPLC that were held after these by-elections (as attached to the submission of the Commission to this Inquiry) that both the Commission and political parties, in assessing these by-elections, were unanimous in the view that the by-elections were conducted successfully in all respects.

84. Apart from the fact that no political party expressed any view to the effect that these by-elections were not free and fair in the meetings of the NPLC, no party has aired such a view in public either immediately after the events or since then.

85. While we accept that the views of political parties, as stakeholders in elections, are of some relevance in determining whether elections were free and fair, it is strongly submitted that any arguments that these by-elections were not free and fair which are raised only now, in submission to this Inquiry, should be properly scrutinised before any reliance is placed thereon.

86. It is our strong submission that the protestations of political parties that LGE2021 should be postponed because it will lead to the infection and death of many South Africans are irresponsible and emotional statements which are not founded in any way on the analysis of these by-elections or the proposed protocol of the Commission for LGE2021.

87. We accept that exceptional care must be taken by any person or institution which performs a public function not to add in an undue manner to the exposure of South Africans to possible infection with the corona virus. But, we hold the view that an objective assessment of the manner in which the Commission has conducted the by-elections in question indicates that, if the same protocol is implemented for LGE2021, the event will not unduly expose voters to infection or lead to an increased infection rate.

88. In as far as international experiences could be relevant to determine whether elections and campaigning significantly increase potential exposure of voters to the virus, we submit that we have been advised that the only election, among a large number of elections that have taken place globally since the start of the pandemic, in respect of which there seems to be a growing consensus that campaign events have contributed to a spike in infections, is the state and council elections of India which took place in 2021. However, it is to be noted that the analyses indicate that the spike in infections was caused by mass rallies of political parties and not voting.

89. The attention of the Inquiry is however drawn to the events that has transpired on Youth Day, 16 June 2021, when the Economic Freedom Fighters (EFF) held a public gathering that did not adhere in any way or form to the prohibition on large gatherings. We submit that this is an irresponsible act that will defeat the purpose of the prohibition imposed on larger gatherings and is of relevance to this inquiry in that a failure to adhere to the Regulations could contribute to the trajectory of the pandemic. While the enforcement of Regulations is not within the authority of the Commission we are of the view that the Electoral Code of Conduct for LGE2021 should nonetheless be amended to allow for the Commission to deal with transgressions of the law that will be unique to LGE2021.


THE STATE OF READINESS OF POLITICAL PARTIES

90. Furthermore, it is submitted that while the minutes of meetings of the NPLC do not serve as a verbatim record of discussions the recordings of these meetings, which should be available to this Inquiry, will reveal that those political parties who argue for a postponement of LGE2021 have, in as many words, admitted that a major reason for their position is their own state of unpreparedness for the election.

91. However, neither the Commission nor this Inquiry are, in our view, authorised to take into account, in performing its functions, the state of readiness of political parties.

92. We submit that while the Commission initially could have created the impression that it was possibly in favour of a postponement of LGE2021, the fact that it is under a Constitutional obligation to arrange and conduct LGE2021 as prescribed by the Constitution and legislative framework and was preparing to do so, was made very clear to political parties during the meeting of the NPLC of 22 April 2021.

93. At this meeting the Commission not only presented a summary of the legal opinion it obtained from senior counsel, discussed above, but in clear and simple terms informed the NPLC that it was to continue with the ordinary preparations for LGE2021. This meeting of course followed the announcement of the election date by the



President on 21 April 2021, which also gave a clear indication that government accepted that LGE2021 was to proceed as Constitutionally required.

94. The draft timetable for LGE2021 was released by the Commission on 12 May 2021, which was yet another significant step in the formal preparations for LGE2021. A copy of the mail to all members of the NPLC and to which this draft timetable was attached is attached hereto as Annexure "D".

95. We submit that it cannot be argued in any reasonable manner by any political party that it was, after these events, either under any misapprehension about the Constitutional duty of the Commission and its intention to proceed to conduct LGE2021 on 27 October 2021, or the concomitant responsibility of political parties to ensure that their own internal arrangements are made in a timely manner in order to enable them to comply with the legally prescribed deadlines set by the Commission.

96. It is important to also note that the Disaster Regulations relevant to this process at no stage made it impossible for political parties to attend to these internal matters.

97. The attention of the Inquiry is drawn to the following passages from the judgement of the Electoral Court in the case of *National Freedom Party v Electoral Commission and Another (006/2016 EC) [2016] ZAEC 2* which, in our view, give very clear guidance in respect of any arguments from those parties who are ill-prepared for LGE2021 that the election should be postponed, as well as any arguments that their possible absence from the ballot for LGE2021, must lead to a postponement of the election failing which the election will not be free and fair:

"[29] The NFP finally advised that the relief as set out in the heads of argument would be competent due to the provisions of s 11(2)(b) of the Municipal Electoral Act in that by the inclusion of the NFP in the elections it would lead to a free and fair election but that its exclusion would not. I do not agree. The freeness and fairness of elections commence when it is first called. From that date the prospective participants are required to observe the prescripts. Individuals or parties who fail to act fairly and correctly may pay the price by

exclusion. Those who did act according to the prescripts acted fairly. They are entitled to complain of an unfair election should non-compliant candidates and parties be allowed to join in the process despite their failure to comply with the prescripts. If those who disregarded the prescripts are allowed to join in on the basis contended for by the NFP I am of the view that the inclusion would be unfair vis-à-vis those participants who acted lawfully. The election timetable being law, the NFP is not pursuing the application for condonation as there is no provision for such condonation, it is asking for the law to be bent in its favour so that it need not have complied with the relevant prescripts.

[30] The election timetable is a regulatory mechanism to ensure free and fair elections. It cannot and should not be changed at the whim of an individual or party – if it is changed to suit individuals, the timetable becomes an inefficient electoral tool.

[31] The electoral process as a whole must be free and fair. It must be free and fair for all parties and not advance the interests of one party only.

[32] The ad hoc amendment of the election timetable will unfairly prejudice those parties who complied with its provisions.”

ELECTION OBSERVATION AND MONITORING

98. The Inquiry has also invited submissions on “the constraints, if any, that the measures in place to prevent and combat the spread of COVID-19 are likely to impose on the proper and effective monitoring, by political party agents and independent electoral monitoring bodies, of the freeness and fairness of the local government elections earmarked to be held in October 2021”.

99. It is our submission that the protocol put in place by the Commission for the abovementioned by-elections and which is to apply to LGE2021 in no way unduly prohibits the monitoring and oversight of either political parties or independent election monitors.

100. The authority given in this protocol to Presiding Officers to determine that party agents and monitors, in specific circumstances, may be asked to be present in the voting station on a rotational basis is not new or unique to this protocol. It has always been within the authority of Presiding Officers to make such a determination in the event that the available space in a voting station makes it difficult or impossible to allow all party agents to observe the work of the electoral officials.

101. We submit that it is of greater importance for the sake of free and fair elections that all Presiding Officers properly understand and embrace the rights of party agents and election observers to properly observe certain key events in the voting station – specifically whether every aspirant voter who arrives to vote is in fact the person whose ID is presented and the voter whose details are scratched from the voters' roll.

102. Historically many Presiding Officers have refused party agents to be positioned in such a way in voting stations that will enable proper observation of this activity. If the Commission could ensure that this right is properly respected and allow for one party agent at a time, on a rotational basis, to observe this event, observation of voting will be enhanced in LGE2021 despite the restrictions caused by the Covid-19 protocol.

POSSIBLE ADDITIONAL MEASURES TO ENSURE FREE AND FAIR ELECTIONS AMIDST THE PANDEMIC

103. This Inquiry is also tasked "to indicate additional measures that the Electoral Commission may be required to implement in order to realise free and fair elections within the context of the COVID-19 pandemic."

104. We are of the view, for the reasons set out above, that no additional measures to the measures already announced by the Commission will be necessary to conduct LGE2021 in a safe and free and fair manner. Additional measures that are to be proposed in order to further safeguard the elections, should therefore be made mindful of the additional financial burdens it may place on the Commission.

105. We have noted that a proposal has been made that the Commission should consider to add Sunday, 24 October 2021 as an additional special voting day on which



all voters over the age of 50 years and all other voters who have so-called "co-morbidities" should be allowed to vote. The proposers of this proposal mentioned that, in their analysis, this would mean that as many as 30% of those voters who will ultimately cast their ballot in LGE2021 will then do so before the "main" voting day of 27 October 2021.

106. As has become standard practice special votes for the infirm, who are dependent on being visited at home by the Commission, and those who are unable to vote on 27 October 2021, but who are able to vote on the day before, will then be allowed on 25 October 2021 and 26 October 2021 respectively.

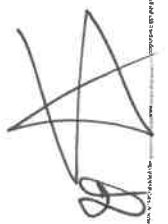
107. We are of the view that this proposal should not be implemented unless the Commission is of the view that it, within its current budgetary allowance, will be able to absorb the additional expenses that implementation of this proposal will cause, including the additional costs to ensure safe storage of the larger number of cast ballots than would ordinarily be the case on the special voting days.

108. It is our submission that it is to be considered that although the turnout in LGE2021 will in all likelihood be higher than during the by-elections that have been conducted since the start of the State of Disaster, Election Day, 27 October 2021 will most probably – as has become the custom – be declared as a public holiday.

109. This would mean that the time of day during which voters typically arrive at voting stations to cast their ballots will be spread out more evenly than during a typical by-election, when many voters only have the opportunity to cast their ballot after working hours.

110. In addition, we submit that in order to ensure an even spread of voters throughout Election Day, the Commission may request voters of specific age groups to preferably vote during specific time slots.

111. However, it needs to be pointed out, as can be seen from the analysis of the turnout figures for the by-elections that have been conducted since the start of the State of Disaster and which is attached hereto as an annexure, that in some of the by-



elections turnout figures have been attained similar to what was achieved, on average, during LGE2016. Despite this there is no indication that these by-elections in any way or form contributed to the spread of corona virus infections.

112. However, if it is contemplated by the Inquiry to recommend to the Commission that more effective measures need to be introduced to spread out the arrival of voters at voting stations, we submit that rather than adding Sunday, 24 October 2021 as another voting day, it should be considered to allow for all voters above 50 years of age and those with “co-morbidities”, to vote on 26 October 2021 which historically would have been the special voting day for all those who are unable to vote on Election Day.

113. In respect of the possibility that some parties may choose not to adhere to the limitation on larger public gatherings that have been imposed as part of the Disaster Regulations, we submit that this Inquiry should consider proposing that the Electoral Code of Conduct and the ability of the Commission to enforce this Code of Conduct should be amended and strengthened for the purposes of LGE2021 in order to enable the Commission to effectively and timely deal with the failure of parties and candidates to adhere to the Code.

CONCLUDING REMARKS

114. These submissions are made mindful of the difficulties facing this Inquiry. Ordinarily the value judgement that is necessary in order to determine whether an election has been “free and fair” is made after the fact. In such circumstances it remains a complex evaluation, despite having the benefit of being able to analyse all aspects relevant to an election, after it has taken place and therefore being able to properly consider and contextualise all of these elements.

115. The provisions enabling this inquiry of course contemplated the type of circumstances that would typically and clearly bring into question whether an election could be “free and fair”: Intimidation and suppression of the rights of some political parties and candidates to either register to contest elections and/or to nominate candidates, or to campaign on a relatively equal platform.



116. This inquiry is to be completed more than three months before LGE2021 and calls for a determination of what the likelihood is of the Commission being able to ensure a free and fair election amidst the relative uncertainty caused by the Covid-19 pandemic and the Disaster Regulations government has introduced in order to try and manage the pandemic and the infection rate of the corona virus.

117. In light of the fourth consideration regarding an assessment of elections to determine whether it has been free and fair (identified above, on the basis of *Kham*), that mere doubt about the freeness and fairness is not sufficient to sustain a finding, after an election, that the election was not free and fair, we submit that the same approach is to be followed during this inquiry.

118. The use of the word "likelihood" in section 14(4) of the Electoral Act makes it clear that while this inquiry is not performing a judicial function it nonetheless needs to determine and weigh probabilities in the same manner than would be applicable in civil proceedings.

119. In the final analysis we are of the view that the Inquiry is constrained to find that no reliable information is available at this stage to indicate that the Commission will not be able to ensure that LGE2021 is free and fair, specifically if the measures that the Commission has introduced during the by-elections that have been conducted since the State of Disaster are taken into account. We believe that in fact, the information relevant to the inquiry indicates a finding that the likelihood is that the Commission will be able to ensure a free and fair election.

120. We submit that the limitation on larger public meetings, that has been part of the Disaster Regulations since March 2020, has neither led to any allegation of the by-elections that have taken place since then not having been free and fair, nor can it properly substantiate a pre-emptive finding that this limitation will cause LGE2021 not to be free and fair.

121. Sufficient alternative methods of communicating with voters are still freely at the disposal of political parties and candidates, which will be supplemented in the run-up to LGE2021 with additional ones (free election broadcasts on TV and radio as well



as election programming and debates facilitated and broadcast by the public broadcaster) which was not available to political parties and candidates in the run-up to any of the said by-elections.

122. If the likelihood of ensuring free and fair elections is dependent on the assessment of whether voting will expose voters to an undue or unreasonable risk of contracting the virus, it is our view that no reliable information to point to such a situation is available. A proper evidence-based assessment of the risk involved will not only take into account that the vast majority of, if not all, possible voters have, since the lifting of the so-called "hard lockdown", which was in place for the month of April 2020, continued with most of their day to day activities.

123. Voting in elections should be considered as an important, but ordinary activity in a Constitutional democracy and it should be accepted, based on a proper analysis of the turnout figures in recent by-elections, that voters in fact do see voting as an ordinary activity which do not expose them to possible infection with the virus in any way different to other ordinary activities.

125. Simultaneously, it is to be remembered that the obligation to ensure a free and fair election is systemic, not individual. An election is not rendered not free and fair because some people feel unwilling to cast their votes if the risks are objectively reasonable. A contextual analysis of the likelihood or not of LGE2021 amidst the Covid-19 pandemic is to be cognisant of the following passage from "**Free and Fair Elections**" (as referred to in detail above) on page 144:

"Just as democracy is not founded on a single ballot, so an election does not become unfree or unfair solely by reason of one or more breaches of international standards. In many cases, too, the observer's task will be to help establish the range of permissible variation from the standard norm, applying the relevant international standards to particular local circumstances."

Drafted and submitted on behalf of the Democratic Alliance by Werner Horn MP
18 June 2021

Annexure "A"

BACKGROUND

- Section 24 (1) of the Local Government: Municipal Structures Act 117 of 1998 states that the term of municipal councils is five years calculated from the day following the date set for the previous election of all municipal councils.
- The date of LGE 2016 was 3 August 2016. The current terms of office of municipal councils thus expire on 3 August 2021, with the 90 day period ending on 1 November 2021.

CONSTITUTIONAL FACTORS

- Section 159 (2) of the Constitution requires that, when the term of a municipal council expires or if it is dissolved in terms of national legislation, an election must be held within 90 days.
- The constitutional provisions must be read with section 24 of the Local Government: Municipal Structures Act 117 of 1998 (MSA). Section 24 (1) of MSA provides that the term of a municipal council is five years. Section 24 (2) stipulates that municipal elections must be held whenever necessary and in any event within 90 days of expiry of the term of a municipal council.

CONSTITUTIONAL FACTORS

- While the constitutional rules that govern municipal elections are slightly more flexible (compared with Constitutional rules for National and Provincial Elections) in that they allow greater scope for regulation by national legislation, the Constitution nonetheless, imposes an outer limit of five years on the term of municipal councils.
- It is evident from the foregoing that the life of municipal councils cannot be extended beyond the deadline of five years without amending the Constitution and section 24 (1) of the MSA.



CONSTITUTIONAL FACTORS

- It is notionally possible to amend the Constitution to lengthen the permissible term of office of municipal councillors and thus extend the actual terms of office of incumbent councillors.
- Such amendments and extension of term will also constitute a "limitation of the founding value of regular elections" guaranteed under section 1 (d) of the Constitution.
- Amending the Constitution to enable elections to be held beyond 90 day period has the effect of extending the term of incumbents in an undemocratic manner and to the exclusion of mandate givers.



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CONCLUSION

- The Electoral Commission is constrained by the constitutional scheme to stand ready to administer elections whenever, they are lawfully called.
- This is the basis of the planning by the Electoral Commission. If however, mechanisms are derived to facilitate an election lawfully beyond the 90 day period, the Electoral Commission will adjust its plans accordingly.
- In case of unmanageable spike in Covid-19 infections, it may be possible for an application to be made to the Constitutional Court for authorisation to hold elections beyond the constitutionally determined timeframe. The postponement would have to be for a limited duration and as close to the 90 days as possible.



CONCLUSION

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- This is the basis of the planning by the Electoral Commission. If however, mechanisms are derived to facilitate an election lawfully beyond the 90 day period, the Electoral Commission will adjust its plans accordingly.
- In case of unmanageable spike in Covid-19 infections; it may be possible for an application to be made to the Constitutional Court for authorisation to hold elections beyond the constitutionally determined timeframe. The postponement would have to be for a limited duration and as close to the 90 days as possible.



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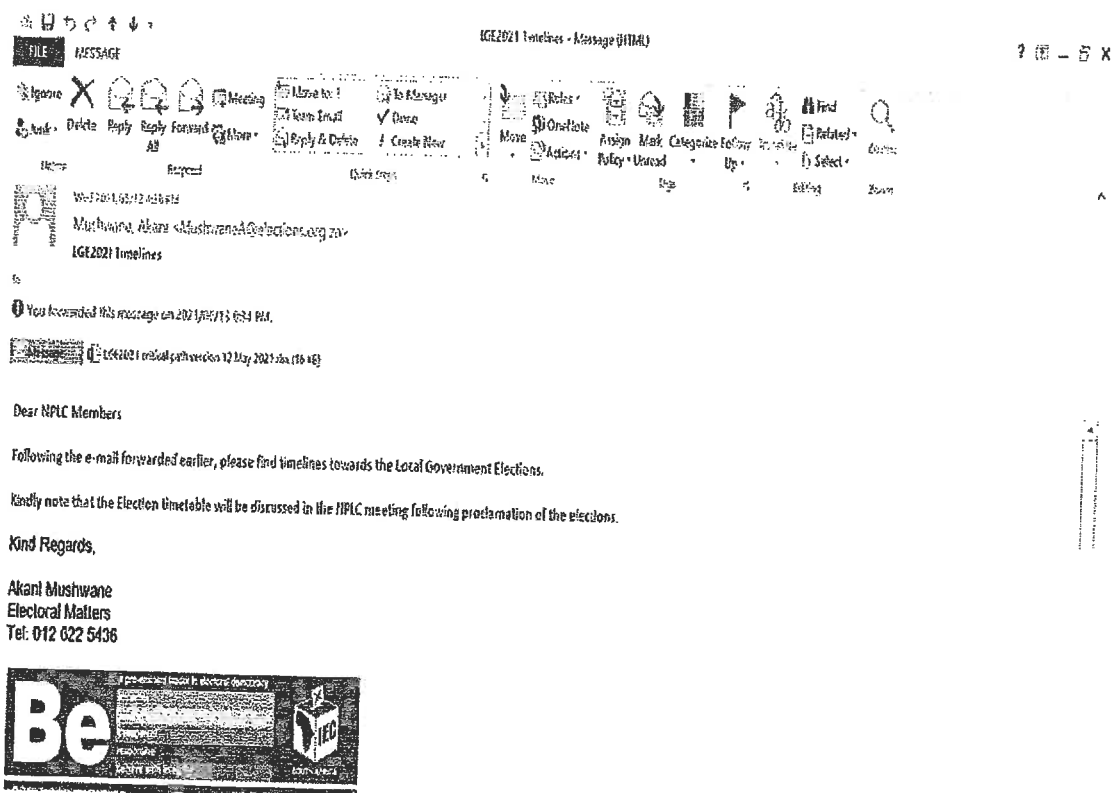
Annexure "B"

Attached as a separate excel spreadsheet

Annexure "C"

Attached as a separate excel spreadsheet

Annexure "D"



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SOUTH AFRICA

Electoral Commission

BY-ELECTIONS 11 November 2020 to 19 May 2021 COMPARISON REPORT

Ward Details				Local Government/Elections				By-Elections			
NC	Province	Municipality	Ward	Ward Number	Party	% Votes	% Poll	Ward Winner	Party	% Votes	Date
1	EASTERN CAPE	EC122 - INKQUMA	21202028	MONWABISI MOKHO	AFRICAN NATIONAL	88,39%	56,13%	PHUMKILE MICHAEL	AFRICAN NATIONAL	90,13%	#####
2	EASTERN CAPE	EC124 - AMANLATHI	21204011	SIPHIWO GODFREY	AFRICAN NATIONAL	72,28%	50,41%	SZEKA CYNTHIA MATINI	AFRICAN NATIONAL	33,47%	#####
3	EASTERN CAPE	EC135 - INTSIKA YETHU	21305017	REGAL NOLINSET	AFRICAN NATIONAL	58,14%	55,76%	THULISWA MGIJULWA	AFRICAN NATIONAL	87,00%	#####
4	EASTERN CAPE	EC154 - PORT ST JOHNS	21504038	ZOLILE MACHINA	AFRICAN NATIONAL	88,76%	53,54%	MAKHOSANDILE BENNI	AFRICAN NATIONAL	91,53%	#####
5	EASTERN CAPE	EC154 - PORT ST JOHNS	21504039	KNOWLEDGE MKUSELI	AFRICAN NATIONAL	73,11%	56,87%	SIPHIWO NDABENI	AFRICAN NATIONAL	87,83%	#####
6	EASTERN CAPE	EC157 - KING SABATA	21507034	SAPHO SIKKENYA	AFRICAN NATIONAL	84,37%	47,14%	LEMAKATSO	AFRICAN NATIONAL	76,03%	#####
7	EASTERN CAPE	EC441 - MATATIELE	24401011	MOKHAMELE ELIAS	AFRICAN NATIONAL	83,66%	58,28%	NONTOMBI ANNASTACIA	AFRICAN NATIONAL	90,31%	#####
8	EASTERN CAPE	NMA - NELSON MANDELA	29300017	ROSSVELDT NEDISO	AFRICAN NATIONAL	76,84%	55,54%	LUDWIE BRIAN MNYANDU	AFRICAN NATIONAL	91,52%	#####
9	FREE STATE	FS184 - NATJHABENG	41804035	NGOSINATHI REGINALD	AFRICAN NATIONAL	48,02%	53,34%	WOGOMOTISI IRVIN RIET	AFRICAN NATIONAL	48,98%	#####
10	FREE STATE	FS184 - NATJHABENG	41804035	MANTEBOHENG	AFRICAN NATIONAL	48,98%	53,34%	MATHAPELO EMILY	AFRICAN NATIONAL	40,11%	#####
11	GAUTENG	EKU - EKURHULENI	79700043	BRUCE REID	DEMOCRATIC ALLIANCE	57,28%	70,42%	CAROLANA MARAIS	DEMOCRATIC ALLIANCE	86,07%	#####
12	GAUTENG	EKU - EKURHULENI	79700059	NOMSA MARGARET	AFRICAN NATIONAL	76,81%	54,01%	NOMONDE CYNTHIA	AFRICAN NATIONAL	85,98%	#####
13	GAUTENG	JHB - CITY OF	79900007	DANIEL MARTIN NETNOW	DEMOCRATIC ALLIANCE	51,16%	61,76%	AMELIA AUGUSTA	AFRICAN NATIONAL	40,81%	#####
14	GAUTENG	JHB - CITY OF	79900018	PETER DEON RAFFERTY	DEMOCRATIC ALLIANCE	84,89%	61,80%	PETER DEON RAFFERTY	PATRIOTIC ALLIANCE	28,97%	#####
15	GAUTENG	JHB - CITY OF	79900018	FAZEL JAFFER	DEMOCRATIC ALLIANCE	81,24%	65,73%	JUWARIYA SMITH	PATRIOTIC ALLIANCE	92,24%	#####
16	GAUTENG	JHB - CITY OF	79900023	SARAH TERESA JUNE	DEMOCRATIC ALLIANCE	81,04%	72,30%	TYRELL MEYERS	DEMOCRATIC ALLIANCE	89,46%	#####
17	GAUTENG	TSH - TSHWANE METRO	79900003	CARLO ROBERT ELGIN DE	DEMOCRATIC ALLIANCE	42,55%	54,80%	MANDLA SEDRICK	DEMOCRATIC ALLIANCE	31,78%	#####
18	GAUTENG	TSH - TSHWANE METRO	79900009	SIPHO EMMANUEL	AFRICAN NATIONAL	83,02%	57,98%	PATRICIA LERATO	AFRICAN NATIONAL	78,51%	#####
19	GAUTENG	TSH - TSHWANE METRO	79900034	MARBLE MALEBO	AFRICAN NATIONAL	78,92%	54,27%	CHRISTOPHER	AFRICAN NATIONAL	88,17%	#####
20	GAUTENG	TSH - TSHWANE METRO	79900026	NOMSA GRACE JACKSON	AFRICAN NATIONAL	37,43%	54,89%	THULANG JOSEPH	AFRICAN NATIONAL	72,84%	#####
21	GAUTENG	TSH - TSHWANE METRO	79900030	ERNEST ADRIAN	DEMOCRATIC ALLIANCE	62,28%	55,16%	VIOLET PHALWANE	AFRICAN NATIONAL	37,88%	#####
22	GAUTENG	TSH - TSHWANE METRO	79900044	JABULANI PAULUS	DEMOCRATIC ALLIANCE	88,84%	77,48%	CHRISTIAN MAURITZ	DEMOCRATIC ALLIANCE	85,38%	#####
23	GAUTENG	TSH - TSHWANE METRO	79900066	MELITHINA NOMBULELO	AFRICAN NATIONAL	42,61%	41,21%	MALESELA PHOLO	AFRICAN NATIONAL	62,24%	#####
24	GAUTENG	TSH - TSHWANE METRO	79900088	CHARLES SANNYBOY	AFRICAN NATIONAL	98,51%	54,58%	THEPANG SAGIOUS	AFRICAN NATIONAL	81,85%	#####
25	GAUTENG	TSH - TSHWANE METRO	79900092	ABEL MATSHIDISO TAU	DEMOCRATIC ALLIANCE	44,94%	45,14%	LEANNIE JENNIFER DE	DEMOCRATIC ALLIANCE	58,92%	#####
26	KWAZULU-NATAL	KN241 - ENDUENI	69500110	PETER JOHN	DEMOCRATIC ALLIANCE	40,73%	59,50%	BONGUMUSA SELEY	AFRICAN NATIONAL	54,20%	#####
27	KWAZULU-NATAL	KN242 - NQUTU	69500102	THULANI MAXWELL	AFRICAN NATIONAL	45,61%	60,59%	AMINA ZODWA SADECK	AFRICAN NATIONAL	57,62%	#####
28	KWAZULU-NATAL	KN242 - NQUTU	69500111	SIYABONGA MABILABILA	AFRICAN NATIONAL	78,11%	62,17%	ZANDILE NDOLOVI	AFRICAN NATIONAL	52,78%	#####
29	KWAZULU-NATAL	KN242 - NQUTU	69500111	NOMUSA ELIZABETH	AFRICAN NATIONAL	54,16%	57,41%	MIDUJIZI MBONGENI	AFRICAN NATIONAL	49,06%	#####
30	KWAZULU-NATAL	KN242 - UMHLATHUZE	69500115	SIKHUMBUZO GLADIAN	AFRICAN NATIONAL	82,38%	82,81%	THOBILE CYNTHIA DUBE	AFRICAN NATIONAL	58,75%	#####
31	KWAZULU-NATAL	KN242 - UMHLATHUZE	69500222	HAMILTON NKOSINATHI	AFRICAN NATIONAL	75,30%	81,57%	ZITHA KENAS MTHEMBU	AFRICAN NATIONAL	63,20%	#####
32	KWAZULU-NATAL	KN242 - UMHLATHUZE	69500230	MUZI SYLVESTER CYRIL	AFRICAN NATIONAL	84,67%	38,80%	RICHARD PHAKAMANI	AFRICAN NATIONAL	87,82%	#####
33	LIPOPO	LM344 - MAKHADO	93404038	AVHAFUMANI GERMINAH	AFRICAN NATIONAL	73,89%	47,81%	RUZANZI MUKHUBA	AFRICAN NATIONAL	53,75%	#####
34	LIPOPO	LM354 - POKORWANE	93504003	LEJILE REINEFET SETATI	AFRICAN NATIONAL	80,10%	53,21%	KGANEJEDI BELLA	AFRICAN NATIONAL	83,57%	#####
35	LIPOPO	LM357 - MGBALAKWENA	93607023	LESIBA NATHANIEL	AFRICAN NATIONAL	83,85%	45,77%	MOKGAETJI REBECCA	AFRICAN NATIONAL	74,23%	#####
36	MPUMALANGA	MP304 - DR PIKLEY KA	83004007	OBED THULANI	AFRICAN NATIONAL	82,66%	62,54%	RUTIPUTI FRANS	AFRICAN NATIONAL	87,12%	#####
37	MPUMALANGA	MP312 - EMALAHLENI	83102033	NARITHA NAIDU	DEMOCRATIC ALLIANCE	75,65%	62,54%	TSHEPO HOPE THWALA	AFRICAN NATIONAL	64,35%	#####
38	MPUMALANGA	MP313 - STEVE TSHWETE	83103022	THABO PATRIC MOTAU	AFRICAN NATIONAL	78,06%	62,66%	PATRICIA KIM FADUK	DEMOCRATIC ALLIANCE	54,91%	#####
39	MPUMALANGA	MP325 - BUSHBUCKCRIDGE	83205021	ELSINA TREFE MASHILE	BETTER RESIDENTS	52,89%	56,35%	CACIUS SHILE	AFRICAN NATIONAL	66,63%	#####
40	MPUMALANGA	MP325 - BUSHBUCKCRIDGE	83205021	BAFEDILE FESTA	AFRICAN NATIONAL	83,70%	83,70%	BAFEDILE FESTA	AFRICAN NATIONAL	83,70%	#####

* Uncen = Uncertified



SOUTH AFRICA

Electoral Commission

BY-ELECTIONS 11 November 2020 to 19 May 2021 COMPARISON REPORT

Ward Details			Local Government Elections			By-Elections		
No	Province	Municipality	Ward	Ward Winner	Party	% Votes	% Poll	Date
41	KWAZULU-NATAL	ETH - ETHERKINI	59000008	LUCKY NLANHLA	AFRICAN NATIONAL	82,75%	59,85%	23.95% #####
42	KWAZULU-NATAL	KZN92 - KWADUKUZA	52902005	JABULANI LOBI TIMOTHY	INKATHA FREEDOM PARTY	84,80%	71,46%	38,59% #####
43	KWAZULU-NATAL	KZN93 - MAPHUMULO	52904003	NTANDOVENKOSI	AFRICAN NATIONAL	82,23%	57,28%	47,86% #####
44	KWAZULU-NATAL	KZN94 - MAPHUMULO	52904007	DINGENI BETTY LUTHULI	AFRICAN NATIONAL	98,89%	59,85%	52,87% #####
45	KWAZULU-NATAL	KZN94 - UBUHLI BEZWE	54304004	ZAMO KWAKHE MICHAEL	AFRICAN NATIONAL	79,90%	62,05%	41,59% #####
46	KWAZULU-NATAL	KZN95 - UMZIMKHULU	54305000	ZOYISE SIPHWE	AFRICAN NATIONAL	89,75%	62,05%	89,65% #####
47	LIMPOPO	KZN93 - GREATER LETABA	93902015	PHETHEDI WALTER	AFRICAN NATIONAL	73,22%	52,83%	67,67% #####
48	MPUMALANGA	MP305 - LEKWA	83005011	MILLION MANKOBA	AFRICAN NATIONAL	85,49%	56,35%	83,18% #####
49	NORTH WEST	NW472 - MADIBENG	63702040	OTHNIEL PALO MOSIELE	AFRICAN NATIONAL	87,16%	47,45%	21,82% #####
50	NORTHERN CAPE	NC082 - NAMA KHOI	30802002	DAPHNE ALEXIS MARKUS	AFRICAN NATIONAL	43,07%	57,23%	86,32% #####
51	NORTHERN CAPE	NC452 - GA-SEGONYANA	34502002	ETHEL BOTHOBOILE	AFRICAN NATIONAL	80,76%	62,24%	54,26% #####
52	WESTERN CAPE	CPT - CITY OF CAPE TOWN	18102020	COURTNEY HENRY	DEMOCRATIC ALLIANCE	62,03%	59,37%	80,84% #####
53	WESTERN CAPE	WC048 - KUYISNA	10408011	DONOVAN MARK CHARLES	DEMOCRATIC ALLIANCE	43,35%	63,23%	50,73% #####
54	WESTERN CAPE	WC063 - BEAUFORT WEST	10503004	SINKI MICHAEL	AFRICAN NATIONAL	56,55%	63,48%	48,87% #####
55	EASTERN CAPE	EC133 - RAYMOND	21209023	MHLOBO DOUGLAS DYWILI	AFRICAN NATIONAL	48,47%	53,72%	84,93% #####
56	EASTERN CAPE	EC137 - ENCCOBO	21307013	NOLUTANDO PATRICIA	AFRICAN NATIONAL	90,75%	51,90%	93,41% #####
57	FREE STATE	FS182 - DIDLABENG	41902020	PONTSHO DAVID	AFRICAN NATIONAL	50,82%	58,09%	85,50% #####
58	FREE STATE	MAN - MANGAUNG	49400011	AMANDA MAPOTA	AFRICAN NATIONAL	77,55%	49,10%	76,58% #####
59	GAUTENG	EKU - EKURHULENI	78700027	JACQUES WEIRING	DEMOCRATIC ALLIANCE	91,89%	72,40%	74,25% #####
60	GAUTENG	EKU - EKURHULENI	78700028	MALANIE HAGGARD	DEMOCRATIC ALLIANCE	90,82%	69,64%	78,72% #####
61	GAUTENG	EKU - EKURHULENI	78700042	EVA SEPHEWE NGCWAMA	AFRICAN NATIONAL	44,03%	59,87%	40,58% #####
62	KWAZULU-NATAL	ETH - ETHERKINI	59500086	JEAN-PIERRE PRINSLOO	DEMOCRATIC ALLIANCE	80,45%	91,85%	20,19% #####
63	LIMPOPO	LM341 - MUSINA	83401001	SIMON MFO PHIRI	AFRICAN NATIONAL	64,14%	52,44%	85,03% #####
64	LIMPOPO	LM351 - BLOUBERG	83501020	MMAPISI SIMON	AFRICAN NATIONAL	74,42%	53,77%	63,46% #####
65	MPUMALANGA	MP324 - NKOMAZI	83204005	BAPANYANA ENOCK	AFRICAN NATIONAL	90,78%	59,81%	74,57% #####
66	MPUMALANGA	MP324 - NKOMAZI	83204015	THOKOZILE MARY	AFRICAN NATIONAL	76,04%	54,89%	73,44% #####
67	MPUMALANGA	MP325 - BUSHBUCKRIDGE	83205016	MILLION MKHEIT	BETTER RESIDENTS	56,11%	63,01%	85,57% #####
68	MPUMALANGA	MP325 - BUSHBUCKRIDGE	83205018	RAYMOND TAFOLA SEDIBE	BETTER RESIDENTS	53,51%	59,35%	30,17% #####
69	MPUMALANGA	MP325 - BUSHBUCKRIDGE	83205022	DUDU CONSTANCE	BETTER RESIDENTS	47,19%	57,60%	84,45% #####
70	NORTH WEST	NW301 - RATLOU	83901010	MOSADIMAMAROE	AFRICAN NATIONAL	55,80%	59,08%	98,27% #####
71	NORTH WEST	NC078 - THEMBEHLE	30706003	BENJAMIN TSHANGELA	AFRICAN NATIONAL	54,16%	94,93%	89,05% #####
72	NORTH WEST	NC084 - IKHEIS	30804003	ABRAHAM TOBAS	AFRICAN NATIONAL	51,71%	72,91%	51,57% #####
73	WESTERN CAPE	CPT - CITY OF CAPE TOWN	18100019	DAVID WILLIAM BRYANT	DEMOCRATIC ALLIANCE	84,17%	60,46%	82,30% #####
74	WESTERN CAPE	WC026 - LANGEBERG	10206009	NICKLAAS JOHANNES	DEMOCRATIC ALLIANCE	60,35%	57,87%	11,72% #####
75	WESTERN CAPE	WC082 - OVERSTRAND	10302012	VUYANI COLBERT	AFRICAN NATIONAL	88,99%	57,87%	45,75% #####
76	WESTERN CAPE	WC045 - OUDTSHOORN	10405004	EMMA FORTUIN	DEMOCRATIC ALLIANCE	43,96%	48,22%	37,99% #####
77	WESTERN CAPE	WC045 - OUDTSHOORN	10405005	HENDRIK RUTERS	DEMOCRATIC ALLIANCE	35,58%	56,17%	49,46% #####
78	WESTERN CAPE	WC045 - OUDTSHOORN	10406010	NELLIE SOMAN	DEMOCRATIC ALLIANCE	43,35%	61,06%	42,76% #####
79	EASTERN CAPE	EC101 - BUFFALO CITY	29200043	ZUKISWA YVONNE	AFRICAN NATIONAL	68,05%	49,61%	41,73% #####
80	EASTERN CAPE	EC101 - BUFFALO CITY	29200045	GEDION THOZAMILE	AFRICAN NATIONAL	48,96%	58,75%	70,47% #####
81	EASTERN CAPE	EC104 - MAKANA	21004014	ERNEST LOUW	AFRICAN NATIONAL	63,74%	58,29%	84,06% #####
82	EASTERN CAPE	EC108 - KOUGA	21008002	TIMOTHY NCEDELE MELENI	AFRICAN NATIONAL	59,91%	58,95%	75,15% #####
83	EASTERN CAPE	EC121 - MBHASHE	21201019	STEMBISO DAKANYO	AFRICAN NATIONAL	68,79%	48,89%	32,51% #####
84	EASTERN CAPE	EC124 - AMAHLATHI	21304001	DUMISANI MZILI	AFRICAN NATIONAL	87,27%	47,87%	70,34% #####
85	EASTERN CAPE	EC124 - AMAHLATHI	21204019	SIYABULELA MALAWU	AFRICAN NATIONAL	65,27%	46,23%	38,44% #####
86	EASTERN CAPE	EC139 - ENOCH MGLIMA	21308011	XOLISWA PIA MBASANA	AFRICAN NATIONAL	66,57%	47,26%	64,98% #####
87	EASTERN CAPE	EC145 - WALTER SISULU	21405008	ZUZANI ERNEST MASINA	AFRICAN NATIONAL	84,94%	59,54%	61,17% #####
88	EASTERN CAPE	EC145 - WALTER SISULU	21405007	MXOLISI MCHUMISA	AFRICAN NATIONAL	81,02%	53,28%	81,38% #####

* Uncontested



SOUTH AFRICA

Electoral Commission

BY-ELECTIONS 11 November 2020 to 19 May 2021 COMPARISON REPORT

Ward Details				Local Government Elections				By-Elections			
No	Province	Municipality	Ward	Ward Winner	Party	% Poll	% Votes	Ward Winner	Party	% Votes	% Poll
89	EASTERN CAPE	EC145 - WALTER SISULU	21405003	XOLANI MABUSELA	AFRICAN NATIONAL	59,99%	89,58%	BUTSE KEVIN GEORGE	AFRICAN NATIONAL	49,99%	44,61%
90	EASTERN CAPE	EC145 - WALTER SISULU	21405011	KHOLEKILE SAMUEL	AFRICAN NATIONAL	59,92%	59,37%	EVIN THERON	DEMOCRATIC ALLIANCE	44,78%	38,33%
91	EASTERN CAPE	EC154 - PORT ST JOHNS	21604004	ZAMILE TOTMANA	AFRICAN NATIONAL	55,48%	89,37%	NONTSHA MEDIANA	AFRICAN NATIONAL	75,18%	39,77%
92	EASTERN CAPE	EC155 - NYANDENI	21605003	ZOLA MINGI	AFRICAN NATIONAL	56,62%	72,78%	GCINIBANDLA	AFRICAN NATIONAL	87,09%	39,90%
93	EASTERN CAPE	EC156 - MHLONTLO	21505010	PATRICK MDIWA	AFRICAN NATIONAL	52,02%	71,13%	SINDILE RAYMOND	AFRICAN NATIONAL	68,51%	36,28%
94	EASTERN CAPE	EC441 - MATATIELE	24401021	CHRISTOPHER LULAMILE	AFRICAN NATIONAL	43,99%	43,99%	THANDANANI	AFRICAN NATIONAL	75,58%	55,93%
95	EASTERN CAPE	EC442 - UMZIMVUBU	24402018	ANDILE MGANGATO	AFRICAN NATIONAL	37,31%	75,87%	TEMBELA EUPHONIA	AFRICAN NATIONAL	88,35%	10,14%
96	EASTERN CAPE	EC442 - UMZIMVUBU	24402025	AGNES NKHWE	AFRICAN NATIONAL	44,90%	68,07%	MPENDULO PATRICK	AFRICAN NATIONAL	90,85%	32,29%
97	EASTERN CAPE	EC443 - MBIZANA	24403024	NTLALHA HLEBO	AFRICAN NATIONAL	63,45%	85,03%	RANALDO PAUL MEYER	AFRICAN NATIONAL	78,45%	33,85%
98	FREE STATE	FS163 - MOHOKARE	41803006	MOKETA ISHMAEL	AFRICAN NATIONAL	59,19%	42,61%	NTOMVUZODWA SEBATI	DEMOCRATIC ALLIANCE	33,19%	48,25%
99	FREE STATE	FS164 - MATJHABENG	41804003	CHOKETA ISHMAEL	DEMOCRATIC ALLIANCE	51,34%	78,67%	VUMILE EDWIN NIKOLO	AFRICAN NATIONAL	83,84%	32,41%
100	FREE STATE	MAN - MANGALING	49400028	NTENNE AUGUSTINA	AFRICAN NATIONAL	80,24%	55,09%	KOEBE SAMUEL BOROLE	AFRICAN NATIONAL	71,68%	31,25%
101	FREE STATE	MAN - MANGALING	49400033	RAMAKATSA JANIE	AFRICAN NATIONAL	50,77%	80,24%	PRINCESS PHINDWE	AFRICAN NATIONAL	52,20%	23,80%
102	GAUTENG	EKU - EKURHULENI	79700060	EUGEN NKOSINATHI	AFRICAN NATIONAL	57,63%	77,63%	ALBERT MAKHUBELA	AFRICAN NATIONAL	78,00%	17,07%
103	GAUTENG	EKU - EKURHULENI	79700089	GREGORY RAYMOND	AFRICAN NATIONAL	57,63%	77,63%	ILLIAN NTOMBIKAYIBE	AFRICAN NATIONAL	48,39%	33,50%
104	GAUTENG	EKU - EKURHULENI	79700103	SADRICK THULANE	DEMOCRATIC ALLIANCE	64,16%	57,57%	DODA PETRUS	AFRICAN NATIONAL	63,10%	16,89%
105	GAUTENG	GT421 - EMFULENI	74201016	LEKHOANYANA ANANIAS	AFRICAN NATIONAL	53,77%	77,90%	SIPHO MDANYANE	AFRICAN NATIONAL	75,62%	14,23%
106	GAUTENG	GT421 - EMFULENI	74201021	OBEY VUSI MNUNE	AFRICAN NATIONAL	74,67%	74,67%	THABANG SIMON	AFRICAN NATIONAL	68,47%	22,01%
107	GAUTENG	GT422 - MIDVAAL	74202006	JOHANNES MABASO	AFRICAN NATIONAL	45,50%	45,50%	PETER KGCITLAETSE	AFRICAN NATIONAL	74,52%	28,84%
108	GAUTENG	GT444 - MOGALE CITY	74801011	MOLEBATSI JEREMIAH JIM	AFRICAN NATIONAL	47,21%	59,79%	LUNGILE MONGEISI	AFRICAN NATIONAL	31,14%	24,71%
109	GAUTENG	GT484 - MERAPONG CITY	74804023	MAREFILLE JO FRANCHINAH	DEMOCRATIC ALLIANCE	71,75%	71,75%	IRRAANI ISMAIL-MOOSA	AFRICAN NATIONAL	68,47%	22,01%
110	GAUTENG	JHB - CITY OF	79600009	KISHORE BADAL	AFRICAN NATIONAL	45,00%	45,00%	LUKCA XUMA	AFRICAN NATIONAL	36,83%	36,87%
111	GAUTENG	JHB - CITY OF	79600041	PRINCE MBONGO	DEMOCRATIC ALLIANCE	47,87%	47,87%	FIJAO ERENTZEN	PATRIOTIC ALLIANCE	45,13%	24,35%
112	GAUTENG	JHB - CITY OF	79600068	BASIL MARK DOUGLAS	DEMOCRATIC ALLIANCE	79,75%	79,75%	CELESTINA NZIMANDE	AFRICAN NATIONAL	88,13%	21,33%
113	GAUTENG	JHB - CITY OF	79600120	VINAY ANBAN CHOOHIE	DEMOCRATIC ALLIANCE	83,49%	83,49%	THULANI DOLSON	AFRICAN NATIONAL	92,48%	12,51%
114	GAUTENG	JHB - CITY OF	79600130	DAVID MONAMODI	DEMOCRATIC ALLIANCE	80,78%	80,78%	SHONTLE VERONICA DE	DEMOCRATIC ALLIANCE	91,59%	25,07%
115	GAUTENG	JHB - CITY OF	79600032	MPUMELELO	DEMOCRATIC ALLIANCE	70,74%	70,74%	THAMISANDI DESMOND	AFRICAN NATIONAL	73,44%	13,62%
116	KWAZULU-NATAL	ETH - ETHERKWINI	59500036	SHAUN RYLEY	AFRICAN NATIONAL	88,04%	88,04%	ALAN BOSCH	DEMOCRATIC ALLIANCE	73,58%	34,42%
117	KWAZULU-NATAL	ETH - ETHERKWINI	59500081	NOMUSA EJUNA MTHEMBU	AFRICAN NATIONAL	83,29%	83,29%	DAVID FRANCIS RYDER	DEMOCRATIC ALLIANCE	93,37%	53,98%
118	KWAZULU-NATAL	ETH - ETHERKWINI	59500094	BHEKITHEMBA PAULUS	AFRICAN NATIONAL	83,29%	83,29%	WONDERBOY MUSA	AFRICAN NATIONAL	50,87%	55,55%
119	KWAZULU-NATAL	KZN215 - RAY NKONYENI	52106002	DAVID IAN WATSON	DEMOCRATIC ALLIANCE	44,87%	44,87%	BLISSING	AFRICAN NATIONAL	46,49%	53,08%
120	KWAZULU-NATAL	KZN225 - NSUNDUZI	52205025	MELIKA SINGH	DEMOCRATIC ALLIANCE	51,40%	51,40%	NKATHA FREEDOM PARTY	AFRICAN NATIONAL	50,47%	53,54%
121	KWAZULU-NATAL	KZN242 - NGUTU	52402015	AUGUSTINE SIMPHIVE	AFRICAN NATIONAL	67,49%	67,49%	INKATHA FREEDOM PARTY	AFRICAN NATIONAL	60,75%	59,37%
122	KWAZULU-NATAL	KZN245 - UMVOTI	52405007	VUKANI BONGINKOSI	AFRICAN NATIONAL	84,86%	84,86%	INKATHA FREEDOM PARTY	AFRICAN NATIONAL	77,11%	50,65%
123	KWAZULU-NATAL	KZN282 - UPHONGOLO	52502004	EMMANUEL NKOSINATHI	AFRICAN NATIONAL	76,86%	76,86%	ENOCK FUNTANI NYATHI	AFRICAN NATIONAL	32,10%	32,10%
124	KWAZULU-NATAL	KZN275 - MTUBATUBA	52705010	ROBERT MANDLA	AFRICAN NATIONAL	52,24%	52,24%	THOMAS RAYMOND	AFRICAN NATIONAL	62,87%	34,02%
125	KWAZULU-NATAL	KZN285 - MTJHABENI	52805006	MIABULISEN SDUDUZO	DEMOCRATIC ALLIANCE	83,79%	83,79%	XOKETISO MAXGALEMA	AFRICAN NATIONAL	78,04%	48,18%
126	KWAZULU-NATAL	KZN286 - NKANDLA	52806013	VUSI SIPHIVHE LUSHOZI	AFRICAN NATIONAL	76,39%	76,39%	TERRY-LEE KLEYPHANS	DEMOCRATIC ALLIANCE	95,46%	31,11%
127	KWAZULU-NATAL	LIM331 - GREATER GIYANI	93301001	TYANI LAWRENCE	AFRICAN NATIONAL	84,86%	84,86%	KLAAS MAKERENG	AFRICAN NATIONAL	41,79%	20,85%
128	LIMPOPO	LIM334 - BAPHALABORWA	93304019	PULENG BELINAH DIKGALE	AFRICAN NATIONAL	76,86%	76,86%	FREDY SWEDEYI MNISI	AFRICAN NATIONAL	64,90%	35,85%
129	LIMPOPO	LIM354 - POLOKWANE	93504014	STEVEN MONAMPANE	AFRICAN NATIONAL	57,05%	57,05%	ALLIANCE WELCOME	AFRICAN NATIONAL	78,71%	38,89%
130	LIMPOPO	LIM478 - FETAKGOMO	94706034	RAMAABELE EYINDAH	AFRICAN NATIONAL	52,24%	52,24%				
131	MPUMALANGA	MP307 - GOVAN MBEKI	83007030	TIMOTHY MARK DENNY	DEMOCRATIC ALLIANCE	83,79%	83,79%				
132	MPUMALANGA	MP312 - EMLAHLENI	83102018	JOLANDI SCHNEIDER	DEMOCRATIC ALLIANCE	76,39%	76,39%				
133	MPUMALANGA	MP312 - EMLAHLENI	83102023	TBOGO GODFREY	AFRICAN NATIONAL	74,55%	74,55%				
134	MPUMALANGA	MP325 - BUSHBUCKRIDGE	83205031	MADALA JAN MGIWENA	AFRICAN NATIONAL	81,56%	81,56%				
135	MPUMALANGA	MP325 - BUSHBUCKRIDGE	83205036	LINDWE SITHOLE	AFRICAN NATIONAL	81,56%	81,56%				
136	MPUMALANGA										

* Uncon = Uncontested



Electoral Commission

BY-ELECTIONS 11 November 2020 to 19 May 2021 COMPARISON REPORT

Ward Details				Local Government Elections				By-Elections				
No	Province	Municipality	Ward	Ward Winner	Party	% Votes	% Poll	Ward Winner	Party	% Votes	% Poll	Date
137	NORTH WEST	NW071 - MORETELE	63701008	SALOME MATHATHO	AFRICAN NATIONAL	64,63%	43,17%	GLADYS NONTHEBISO	AFRICAN NATIONAL	50,51%	41,97%	#####
138	NORTH WEST	NW072 - MADIBENG	63702028	ABRAM DIBE RATLOU	DEMOCRATIC ALLIANCE	61,34%	61,90%	MAKOBELE CHRISTINAH	AFRICAN NATIONAL	46,11%	35,21%	#####
139	NORTH WEST	NW073 - RUSTENBURG	63703002	ABRAM SELLO HABI	AFRICAN NATIONAL	48,62%	46,13%	ERIC LANGENI	AFRICAN NATIONAL	49,43%	30,85%	#####
140	NORTH WEST	NW005 - JB MARKS	64005005	JASPER MAARTEN	DEMOCRATIC ALLIANCE	78,28%	68,41%	MATTHYS JACOBUS VAN	VRYSFEDSPRONT PLUS	58,98%	38,06%	#####
141	NORTH WEST	NW005 - JB MARKS	64005009	BENJAMIN LEBURU	AFRICAN NATIONAL	70,95%	53,60%	ISAAC PHANZI	AFRICAN NATIONAL	73,08%	28,53%	#####
142	NORTHERN CAPE	NW005 - JB MARKS	64005018	SABATA JOHANNES	AFRICAN NATIONAL	81,06%	55,78%	WILLIAM	AFRICAN NATIONAL	83,82%	33,34%	#####
143	NORTHERN CAPE	NC065 - HANTAM	30605003	FRIK JOHN STERKSE	AFRICAN NATIONAL	55,36%	69,03%	ROELF VAN WYK	AFRICAN NATIONAL	63,70%	58,97%	#####
144	NORTHERN CAPE	NC087 - KALAHARI	30607004	STEPHEN QUINCY	AFRICAN NATIONAL	46,49%	49,06%	SAMATHA MICHELLE	AFRICAN NATIONAL	86,13%	24,04%	#####
145	NORTHERN CAPE	NC071 - UBUNTU	30701001	JOHN LOUWANA	DEMOCRATIC ALLIANCE	52,74%	68,66%	ANDRE JULIAN	AFRICAN NATIONAL	83,48%	53,78%	#####
146	NORTHERN CAPE	NC075 - RENOSTERBERG	30705001	ELFREDE GERALDINE	DEMOCRATIC ALLIANCE	57,14%	71,57%	ANDREW IVAN SAMSON	AFRICAN NATIONAL	46,39%	68,72%	#####
147	NORTHERN CAPE	NC075 - RENOSTERBERG	30705002	MARY ELIZABETH	AFRICAN NATIONAL	64,52%	68,76%	THELMA NICHOLSON	AFRICAN NATIONAL	55,77%	67,95%	#####
148	NORTHERN CAPE	NC075 - RENOSTERBERG	30705003	JOHANNES MATTHEUS	DEMOCRATIC ALLIANCE	47,88%	81,08%	ELFREDE GERALDINE	DEMOCRATIC ALLIANCE	46,84%	75,29%	#####
149	NORTHERN CAPE	NC075 - RENOSTERBERG	30705004	JOHANNES NIKLAAS	AFRICAN NATIONAL	59,95%	60,63%	CONSTANCE SIPHOKAZI	AFRICAN NATIONAL	48,00%	58,59%	#####
150	NORTHERN CAPE	NC082 - KALIGARIB	30802008	DESEY WELLEN PIENIES	AFRICAN NATIONAL	55,37%	57,89%	MARIANA JULIANA	AFRICAN NATIONAL	60,70%	58,09%	#####
151	NORTHERN CAPE	NC085 - TSANTSABANE	30805004	KEABAKA DAVID MODISE	AFRICAN NATIONAL	78,02%	85,71%	KGOCHETSELE GEORGE	AFRICAN NATIONAL	44,52%	60,65%	#####
152	NORTHERN CAPE	NC087 - DAVID KRUIPER	30807010	BARRY LUCAS BENJAMIN	AFRICAN NATIONAL	59,87%	61,35%	SALOME CLOETE	AFRICAN NATIONAL	57,22%	51,62%	#####
153	NORTHERN CAPE	NC094 - PHOKWANE	30904001	KGOCHOTSEGO STOFFEL	AFRICAN NATIONAL	71,61%	58,93%	NDIBELE RICHARD	AFRICAN NATIONAL	62,24%	41,57%	#####
154	NORTHERN CAPE	NC094 - PHOKWANE	30904002	KEHLWE DOROTHY	AFRICAN NATIONAL	62,98%	55,70%	TSOLOPELO	AFRICAN NATIONAL	54,77%	33,44%	#####
155	NORTHERN CAPE	NC094 - PHOKWANE	30904003	THABANG MOSES	AFRICAN NATIONAL	57,73%	57,53%	OLEGONGEN SAMUEL	AFRICAN NATIONAL	89,91%	41,47%	#####
156	NORTHERN CAPE	NC094 - PHOKWANE	30904004	NIPO LUCAS MAGAGANE	AFRICAN NATIONAL	52,07%	54,07%	TEREGO BERNARD	AFRICAN NATIONAL	43,39%	37,35%	#####
157	NORTHERN CAPE	NC094 - PHOKWANE	30904005	LIZA WAGERMAN	AFRICAN NATIONAL	62,83%	63,95%	WILLEM HARPISE	AFRICAN NATIONAL	54,21%	53,12%	#####
158	NORTHERN CAPE	NC094 - PHOKWANE	30904006	STANLEY JAMES RUDMAN	DEMOCRATIC ALLIANCE	50,13%	56,55%	TSOLOPELO GLADYS	AFRICAN NATIONAL	32,71%	45,45%	#####
159	NORTHERN CAPE	NC094 - PHOKWANE	30904007	CRONETTE JOHANNES	AFRICAN NATIONAL	72,20%	58,17%	RENAKATSE PORTIA	AFRICAN NATIONAL	56,60%	42,53%	#####
160	NORTHERN CAPE	NC094 - PHOKWANE	30904008	JACKSON PAPATYE	AFRICAN NATIONAL	70,41%	68,76%	ERNEST MEYER	AFRICAN NATIONAL	50,09%	36,19%	#####
161	NORTHERN CAPE	NC094 - PHOKWANE	30904009	JOHNNY SIBULELE MUSIE	AFRICAN NATIONAL	58,26%	56,48%	MOTLAGOSEBATHO	AFRICAN NATIONAL	42,39%	29,58%	#####
162	NORTHERN CAPE	NC094 - PHOKWANE	30904010	SELCHUELA SHADRACK	AFRICAN NATIONAL	62,89%	66,84%	KARIENA MARE	AFRICAN NATIONAL	53,57%	50,93%	#####
163	WESTERN CAPE	CPT - CITY OF CAPE TOWN	19100014	ROELOF PETRUS	DEMOCRATIC ALLIANCE	80,85%	66,64%	SAMSON MARUPING	DEMOCRATIC ALLIANCE	73,04%	19,18%	#####
164	WESTERN CAPE	CPT - CITY OF CAPE TOWN	19100051	NOMTHA NOKUZOLA	AFRICAN NATIONAL	72,23%	55,98%	ZINGISILE NKANGANA	AFRICAN NATIONAL	47,25%	22,93%	#####
165	WESTERN CAPE	WC014 - SALDANHA BAY	19100088	SIPHWO PATRICK	AFRICAN NATIONAL	71,08%	82,02%	VUYOLWETHU MQADI	AFRICAN NATIONAL	48,55%	14,89%	#####
166	WESTERN CAPE	WC023 - DRAKENSTEIN	10203003	SUCILLA LILIAN VAN TURA	DEMOCRATIC ALLIANCE	71,50%	51,98%	MICHAEL HENRY	DEMOCRATIC ALLIANCE	44,62%	47,11%	#####
167	WESTERN CAPE	WC044 - GEORGE	10404008	WILHELMINA ELIZABETH	DEMOCRATIC ALLIANCE	84,30%	84,86%	DAMON MINTOOR	DEMOCRATIC ALLIANCE	68,38%	38,83%	#####
168	WESTERN CAPE	WC044 - GEORGE	10404009	ANTHONY DAVID	DEMOCRATIC ALLIANCE	53,65%	54,85%	BAZIL PETRUS	DEMOCRATIC ALLIANCE	36,20%	43,23%	#####
169	WESTERN CAPE	WC044 - GEORGE	10404014	EDMUND CELESTINE	DEMOCRATIC ALLIANCE	53,16%	66,87%	MELVIN ASH-WILL	DEMOCRATIC ALLIANCE	32,85%	46,38%	#####
170	WESTERN CAPE	WC044 - GEORGE	10404017	VINCENTIUS MARKUS	DEMOCRATIC ALLIANCE	62,90%	55,92%	BRENDON MEGAN	DEMOCRATIC ALLIANCE	37,69%	42,55%	#####
171	WESTERN CAPE	WC044 - GEORGE	10404021	BELENA MAGDELENA	DEMOCRATIC ALLIANCE	55,82%	54,53%	RICHARD JOHN HECTOR	DEMOCRATIC ALLIANCE	37,63%	50,50%	#####
172	WESTERN CAPE	WC048 - KNYSNA	10408009	MARK SYDNEY WILLEMS	DEMOCRATIC ALLIANCE	53,35%	70,61%	SHARON THERESA	DEMOCRATIC ALLIANCE	76,07%	48,94%	#####
173	WESTERN CAPE	WC048 - KNYSNA	10408010	PETER JOSEPH MYERS	DEMOCRATIC ALLIANCE	85,95%	87,78%	PETER JOHAN BESTER	DEMOCRATIC ALLIANCE	67,86%	38,30%	#####
Average % Poll Local Government Elections								Average % Poll By-Elections				
								35,35%				

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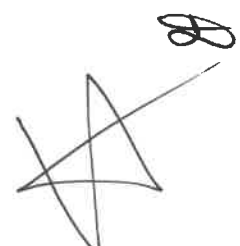


Submission to the Independent Electoral Commission Moseneke Task Team

"Ensuring Free and Fair Local Government Elections During COVID-19".

THE ELECTORAL INSTITUTE FOR SUSTAINABLE DEMOCRACY IN
AFRICA (EISA)

11 JUNE 2021





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EISA, 2021



www.eisa.org

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Section 1: Elections and COVID-19

Elections are mass-based, inclusive events that include several activities that the World Health Organisation (WHO) and African Union Centre for Disease Control (AU-CDC) advise constitute high-risk behaviours for the transmission of the COVID-19 virus. Since the outbreak of the pandemic in 2020, elections have been held across the world in more than 130 countries. The experience of individual countries holding elections has varied considerably, based on a wide-ranging number of variables in the conduct of election management bodies (EMBs) stakeholder groups, state institutions and voters. In Africa, 16 elections were held in 2020, and a further 26 African elections are scheduled for 2021 (www.eisa.org/calendar2021). While experiences have varied between countries, the data is broadly encouraging that with sufficient precautions and mitigation measures in place, elections can take place without unduly and negatively impacting on either the health or democratic rights of citizens and stakeholder groups. EISA bases this submission on its research and expert analysis of electoral processes since the start of the pandemic, as well as its field observation in several African states since the beginning of March 2020.

At the outset it should be noted that nearly 100 countries around the world held more than 130 national and local elections in 2020, during the early months of the COVID pandemic when global understanding of the virus was far more limited than is now the case. In Africa, 16 countries held elections in 2020. Globally, at least 30 elections were postponed, cancelled or rescheduled as a result of the pandemic. While EISA is not qualified to pronounce on epidemiological matters, the graphs below indicate the reported infection rates in selected countries from the start of a country's campaign period until 30 days after election results were announced. No coherent picture emerges of any discernible patterns relating to post-campaign or post-election "surges" or spikes in infection rates reported. This does not necessarily mean that elections do not constitute a risk to the rate of infections, as many of the country examples analysed deployed mitigation strategies during campaigning or limited the ordinary activities of campaigning in some form because of COVID-19. What this analysis does indicate is that countries have successfully held elections that allow for democratic participation while still safeguarding the larger population against increased infection rates.

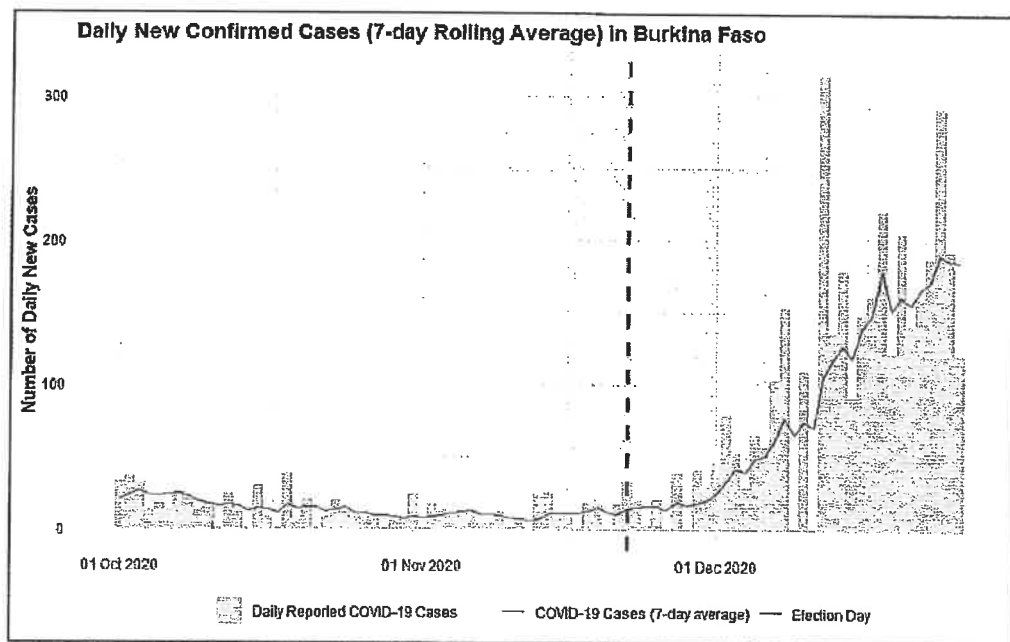
Reported COVID-19 infections during the electoral period

For the figures below, EISA plotted the pre-election period from the official launch of campaigning in a country until 14 days after the announcement of the results of the election. This period is shaded in blue. The grey bars indicate the number of COVID-19 infections reported on that day, while the black trendline indicates the 7-day rolling average for infections. The exact date of a country's election is delineated by a red line. COVID-19 infection rate data was drawn directly from the website <https://ourworldindata.org/>, and election campaign periods were supplied by EISA.



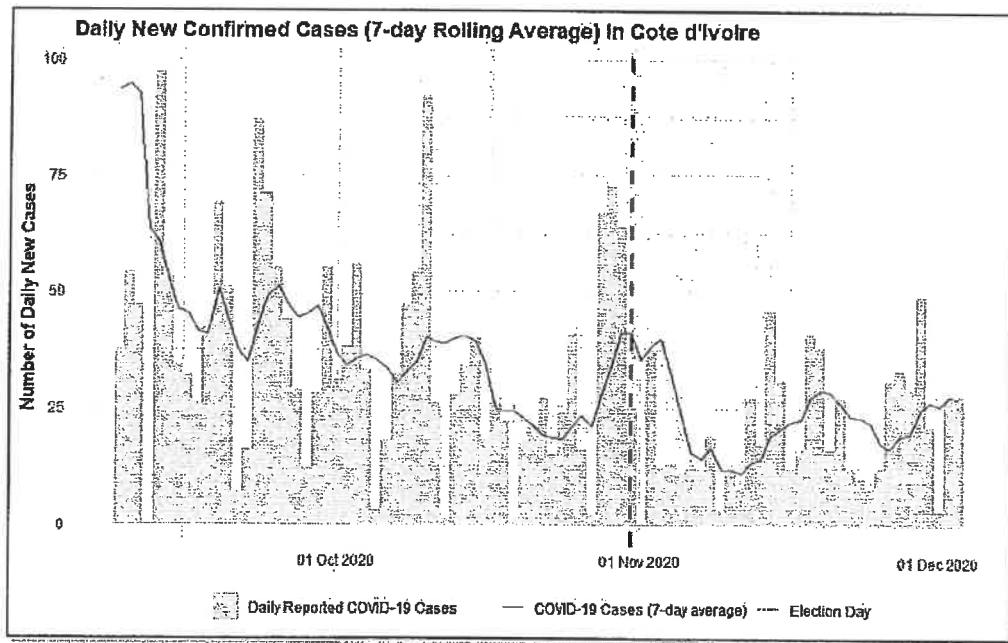
Burkina Faso

Campaigning began in Burkina Faso on 31 October 2020. The election was held on the 22 November 2020. Final results were announced on the 26 November 2020. During the campaign period, daily infections reached a high of 80 persons. Voter turnout on election day was 2,972,590 (Burkinabe Constitutional Court, 2020). COVID-19 mitigation measures were in place at all stations, including limiting the number of persons casting their ballot at a single time, as well as hand sanitiser and social distancing. COVID-19 challenges were overshadowed during the election by a broader environment of insecurity and human displacement, although the novel coronavirus aggravated these challenges further. Weaknesses during the election can be attributed more directly to the human security issues in the country rather than as a direct result of COVID-19.



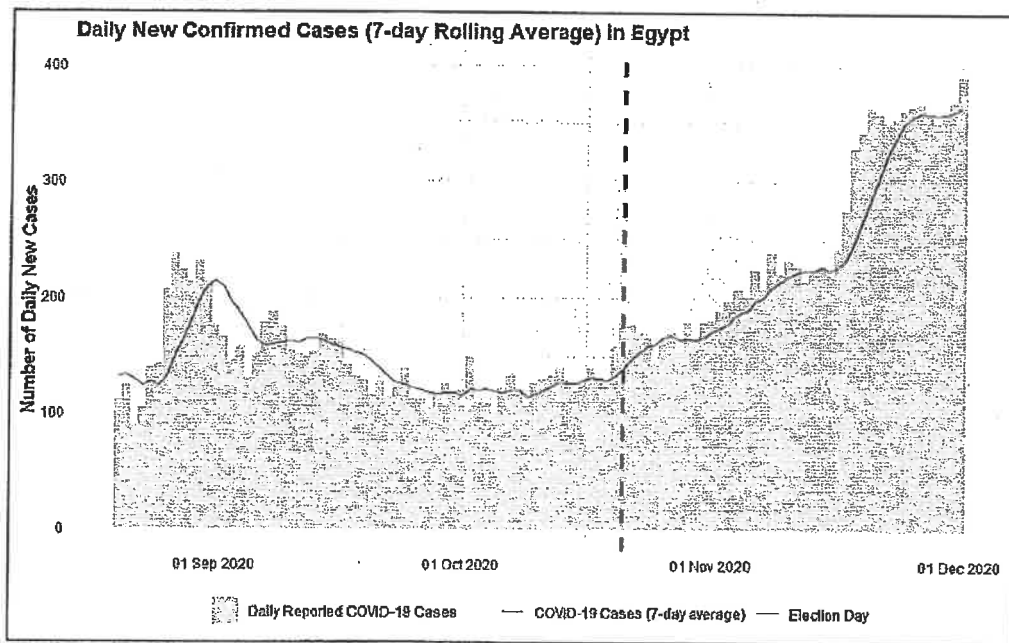
Cote d'Ivoire

Campaigning in Cote d'Ivoire ahead of its Presidential Elections began on the 9 October 2020. The election took place on 31 October 2020, and results were announced on 3 November 2020. The election was boycotted by many opposition leaders, including the main opposition candidates in protest against what they termed elections marred by many irregularities. Measures taken to reduce the risk of COVID-19 during the electoral period included: the reduction of voters in a voting station from 600 per station to 400 per station; development of an online platform for voters to check their registration details online without need to visit polling stations in person; and the procurement of large quantities of sanitizer and protective equipment for the election day. As a result, the 3,269,813 votes cast was a low turnout of 53,9% (Constitutional Court of Cote d'Ivoire, 2020). In addition to political protests against the incumbent President, Alassane Outtara, running for a 3rd term, Cote d'Ivoire also saw attacks on COVID-19 testing centres in the months preceding the election (BBC, 2020). Cote d'Ivoire's 7-day rolling average remained around 25-30 infections per day prior to, during and after the election period.



Egypt

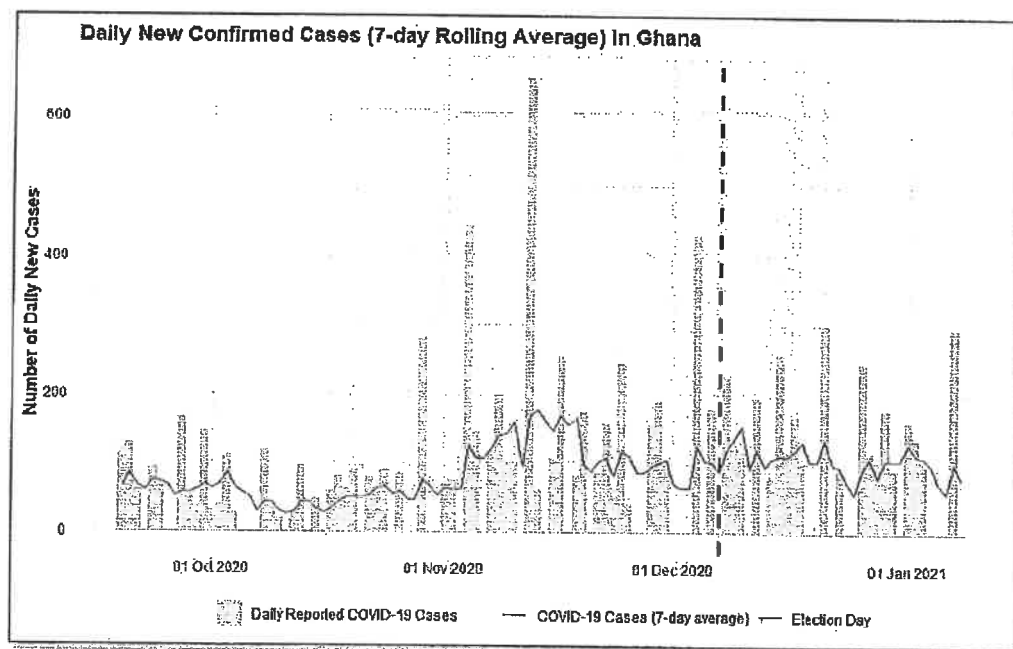
Egypt held parliamentary elections on 24-25 October and 7-8 November 2020. Campaigning began on the 19 September 2020. Results for the elections were announced on 1 November and 12 November 2020. Daily reported infections during the period reached a high of 200 per day in mid-November. Precautionary measures against COVID-19 were strictly enforced, including social distancing, alcoholic sanitizer and mask wearing. Compliance was enforced through a strict security presence at all polling stations.





Ghana

Ghana's official campaign period ahead of its general election began on 19 September 2020. The election took place on 7 December 2020, with the results being announced on the 9 December 2020. During the election period, infections reached a high of 600 reported cases on a single day, although the 7-day rolling average of cases remained and is likely a better indication that there was no meaningful increase in infections during the electoral period. During campaigning, Ghana did not place a limit on the number of people permitted to gather at a venue, but despite this, political parties adapted from large-scale mass events to several smaller 'outdoor events' (Agbele and Saibu, 2021). Prior to the election, special voting accounted for 109,577 votes. In addition to the standard health precautions (sanitizing, mask wearing, social distancing, temperature checks), Ghana deployed 'COVID ambassadors' to monitor and enforce compliance at voting stations on election day. A total of 13,432,857 votes were cast in the election (Ghana Web, 2020).

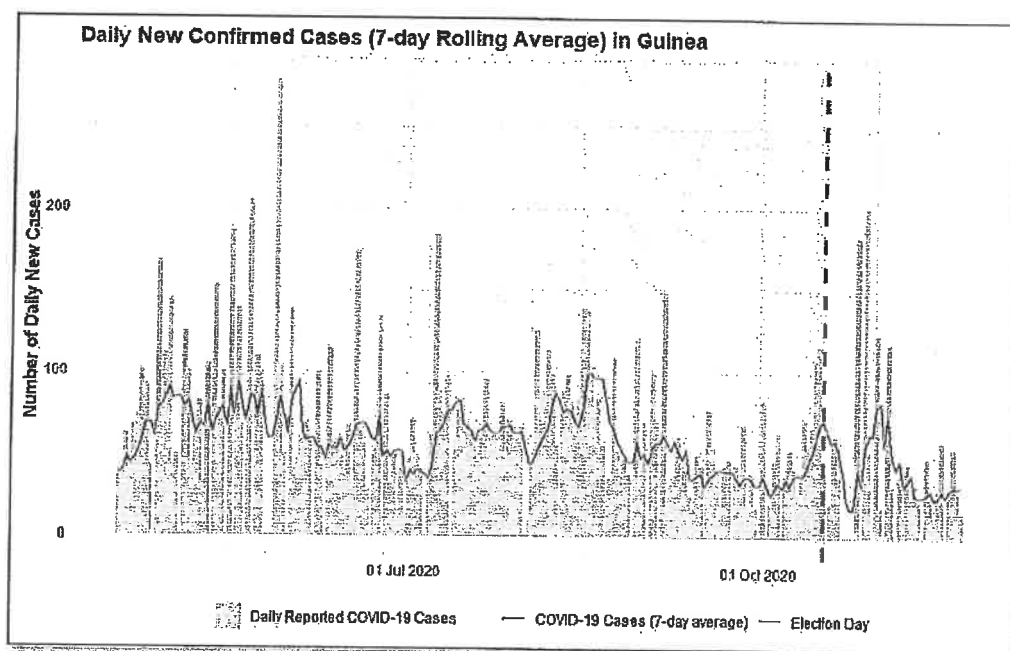


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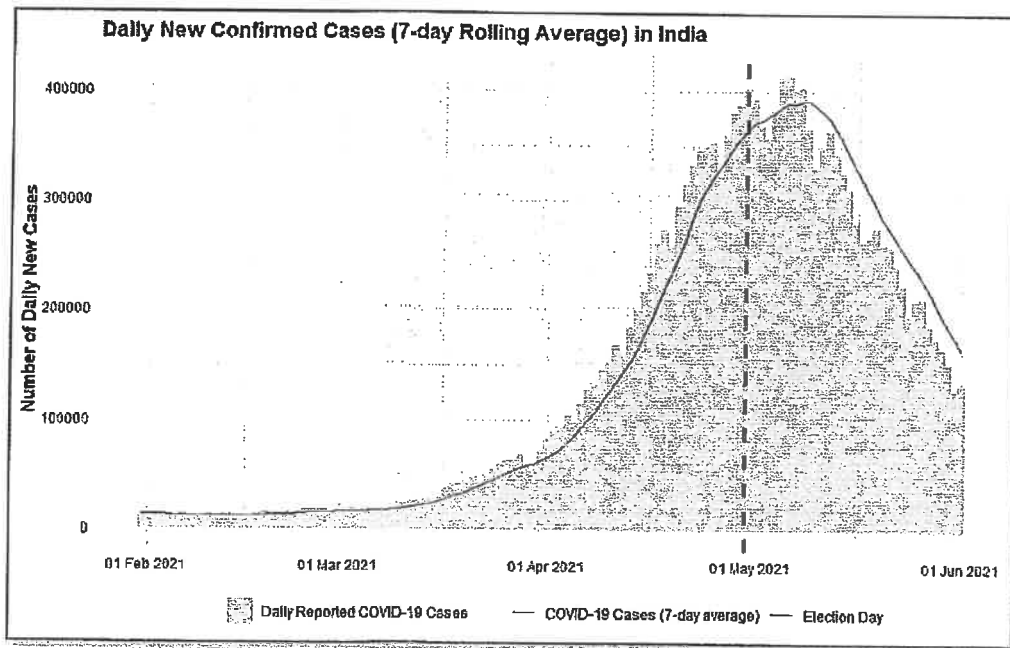
Guinea

Guinea held legislative elections on 22 March 2020, and Presidential elections on 18 October 2020. The graphic below pertains to the Presidential election only, as the legislative elections took place prior to any meaningful reporting on COVID-19 in the country. Results were announced on 24 October 2020. Although Guinea reported a period-high new cases of 283 in June 2020, the 7-day rolling average did not change meaningfully throughout the election period. A total of 4,267,574 voters cast ballots in the election (CENI Guinea 2020).



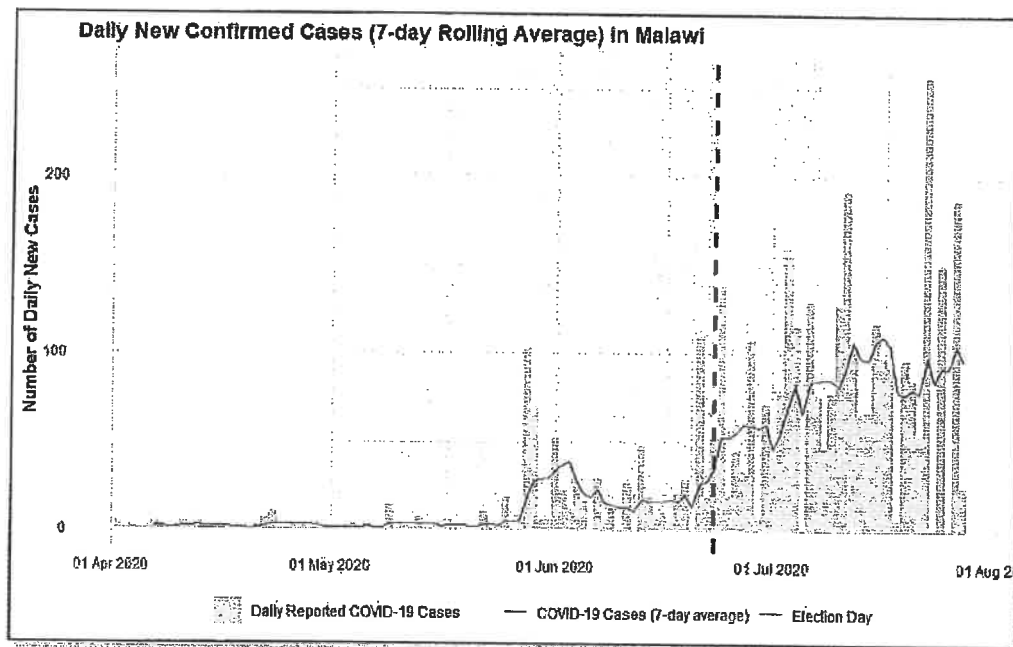
India

India has been included in this set of graphical representations as an example of case study where the data would suggest *correlation* between the election period and the infection rate. EISA is not able or willing to draw any *causality* inferences between the two variables and is not able to offer any insight into measures taken to mitigate the spread of the novel coronavirus or shortcomings. By comparison, the other graphics represented here suggest minimal if any correlation between election periods and the infection rate.



Malawi

Malawi held a historic re-run of its 2019 elections after the Constitutional Court overturned the 2019 results and ordered the election be re-held. Malawi originally scheduled this election for 19 May 2020, and postponed it first to 2 July 2020, before settling on 23 June 2020 as the election date. The result of the election, which overturned the 2019 announcement in favour of opposition candidate Lazarus Chakwera, was made on 27 June 2020. 4,445,699 voters cast their ballots in the 2020 re-run (Malawi Electoral Commission, 2020). Although international observation was not possible in Malawi during this period, as much of southern Africa had closed international borders or severely limited travel, indications from local groups and media indicated that during the campaign period, very few health precautions were adopted during campaign rallies and gatherings, which often included large crowds standing shoulder to shoulder (Brown & Chinele, 2020). Optional wash basins and soap provided on the perimeter of political rallies were not used, and candidates often failed to encourage safe behaviours among their supporters during their speeches.





Section 2: Current conditions for South Africa's Local Government Elections

Electoral processes are complex and require careful and considerable planning and preparation, particularly on the part of an EMB, in order to deliver on a mandate of inclusive and impartial elections to a country's citizens. Electoral processes can be understood as part of an electoral cycle, with lessons drawn from past elections informing adjustments to future preparations. These preparations often begin more than 36 months ahead of an election, first and foremost by the EMB, but also other state institutions and political stakeholders. Preparations for the 2021 South African Local Government Elections have also had to adapt to comply with various orders from the country's courts, including a landmark judgement by the Electoral Court on Tlokwe By-Elections in 2016. This judgement required the Commission to ensure that all registered voters' physical addresses are captured in the voters roll in order to ensure that a voter is casting their ballot in the correct ward and constituency. The 2021 local government elections represent the first countrywide local government elections where this voter's roll must be fully populated with voter addresses. Due to the introduction of Level 5 lockdown measures by South Africa's National Command Council in March 2020, ordinary operations were almost completely suspended, including operations by the IEC such as by-elections and ongoing voter registration drives, as well as preparations for the 2021 elections.

The IEC has stated repeatedly that they are ready to hold the local government elections if they go ahead in October 2021 as scheduled. The IEC has indicated its preparedness to conduct the October polls as planned, so the issue of continuing with the election is therefore not of a technical nature, with the main issue being the weighing of upholding democratic election principles against medical-health practice and guidance available at this time.

In accordance with the Local Government: Municipal Structures Act No. 117 of 1998 'the term of municipal councils is no more than 5 years and elections of all municipal councils 'must be held within 90 days of the date of expiry of the term of municipal councils' (SA Government, 1999: 34). This would mean that November 2021 would be the furthest local elections could be postponed without contravening existing legislation, including the constitution. Thus, from a legal standpoint the elections must go on. Not only because current laws in South Africa requires it, but also because elections form the cornerstone of democracy and their postponement would set a bad precedent (Matlosa, 2021: 2). Any postponement of local elections would 'set a bad, undemocratic and authoritarian precedent' and prolong an illegitimate government (Fakir, 2021).

The Economic Freedom Fighters (EFF) believe proceeding with elections would deny the opposition parties an opportunity to effectively campaign for elections in a free and fair manner and would consequently be undemocratic therefore a postponement until 2024 is required (Brandt, 2021). As a matter of principle, an open campaign environment promotes the rights of voters to make an informed choice at the ballot box. Precautions against the spread of COVID-19 however, will likely place necessary restrictions on the ordinary activities permissible during campaigning, which while regrettable can be justified from a health perspective. As long as any restrictions on campaigning are applied universally to all competing political parties, and are reasonable in their scope and severity, there is enough evidence from other country experiences to justify this limitation without negatively impacting on the fairness of the elections.



Additionally, there exists no mechanism – particularly a constitutional mechanism – that allows for the postponement of an election, meaning that a constitutional amendment would be necessary to create a legal framework for the suspension of local elections (Gerber, 2021). To this end, the Inkatha Freedom Party (IFP) suggest that a shorter postponement – until May 2022 – would ensure a constitutional amendment would not be required but instead parliament can pass a resolution postponing the election (Merten, 2021). Such a proposal could be a ‘workable solution’ according to Ebrahim Fakir (Lepule, 2021). By invoking a doctrine of necessity, the elections could be postponed by six-eight months, provided an agreement between the Independent Electoral Commission (IEC) and parliament can be reached where they set out the ‘rationale, the period for the transitional mechanism, the time limits’ and ‘a potential date for the elections’ (Fakir, 2021). Another option to consider is merging the local elections with the national and provincial elections in 2024. However, this option would also require a constitutional amendment. By merging local elections with national and provincial elections some believe we risk weakening the participatory nature of South Africa’s democracy as the national and provincial level will likely take more importance ahead of issues on a local level, which could render local elections ‘meaningless’ (Grotes, 2020).

While proceeding with elections clearly carries some risks from a health perspective, postponements to elections should wherever possible be avoided. Country experiences where polls were postponed or delayed suggest that once the decision to delay an election is made based on health and safety considerations, it becomes challenging to justify those conditions have improved later to the extent that the elections are now justified. This can and has lead to continuous and protracted delays and further postponements to elections, as has been the case in countries like Ethiopia, where elections have been delayed/postponed on 3 separate occasions (from an original planned May 2020 date to the upcoming 21 June 2021 polls), even after a situational analysis was conducted in November 2020 which indicated that conditions had improved and the election should continue. The impact of protracted delays and unanticipated postponements to electoral processes are often difficult to anticipate, but disruptions to periodic elections can lead to heightened tensions within communities, disaffection with the electoral process (voter turnout), and in severe cases even protests and violence. Ultimately, the decision to delay, postpone or merge elections is in the control of both parliament and the IEC, however, the issue of COVID-19 is something that is out of both organisations’ hands and cannot be controlled (Gilili, 2021). The risk of “wait-and-see” approaches to elections suggest that this is an option that should only be considered under extreme circumstances, and with clear limitations to the waiting period.

Recommendations

1. The IEC must ensure that any decision taken considers both the political and health rights of voters.
2. The IEC and Parliament should be mindful of the risks associated with postponing or delaying elections at the same time as considerations of health risks posed by the COVID-19 pandemic. Evidence from other countries suggests that a first postponement can more easily lead to subsequent further postponements and elevated levels of uncertainty and constitutional incongruence.



Section 3: Potential impact of health restrictions on political activity prior to the Local Government Elections

Between the commissioning of this report by Justice Dikgang Moseneke and the gazetted date for the Local Government Elections, there are three key political activities that will take place.

1. Voter registration weekend: 17-18 July 2021;
2. Campaign period for political parties; and
3. Civic and voter education.

Voter Registration for upcoming Local Government Elections will start on 17th - 18th July 2021 at 23,146 polling stations. New voters will be able to register and existing voters will verify and update their registration details. Also, first time voters and existing voters will be required to provide a full address or detailed description of a place of residence at the polling station (elections.org.za). Experiences from other country voter registration campaigns indicates two key challenges, namely: (1) queue control and management at registration centres; and (2) the use of biometric voter information systems which require contact points (eg. Finger print scanners).

Recommended COVID-19 mitigation measures:

- Deployment of 'COVID ambassadors' or officials tasked with monitoring and enforcing compliance with COVID health protocols;
- Temperature checks outside voter registration centres;
- Mandatory mask wearing for voters, PPE kits for EMB staff and officials;
- Use of alcoholic sanitiser hand wash;
- Queue management outside centres, and stipulated maximum numbers permitted inside centres; and
- Clear and transparent communication about procedures via media and on posters around registration centres.

**Recommendations are based on COVID_19 mitigation measures employed during voter registration periods in other countries*

The political party campaign will follow the registration period. The campaign period plays a key communication role in a democracy, as it conveys electioneering messages, policies strategies of political parties to voters. Political parties in South Africa typically employ a mix of strategies for campaigning such as in-person campaigning (using door to door visits, izimbizo, community gatherings, car parades and rallies), as well as virtual and online campaigning including (telephone campaigning/cold calling, television, print and social media campaigning in platforms like Facebook, Twitter, and WhatsApp. In practice, political campaigning in South Africa has historically been predominantly in-person campaigning, particularly community-based gathering that attract a lot of people. Door-to-door campaigning is also a feature of local government campaigning for some political parties. EISA views the conduct and compliance of political parties and their supporters with prescribed health and safety practices as crucial to determining whether South African voters are protected against a rise in infections.



Fake news and misinformation have become a feature of the election period, with the use and abuse of social media in particular a fertile ground for sharing of false content. Usually, the campaign period has high proliferation of fake news and misinformation and combining this with the miss information around the existence of Covid-19 virus which may endanger citizens' trust in not only the electoral process but potentially in other national processes such as South Africa's vaccination roll out. EISA notes that there has also been extensive conversation both nationally and internationally regarding the sharing of "false facts" on COVID-19 which has prompted the South African government to introduce laws to curb this phenomenon. EISA believes that all stakeholders should be mindful of the fertile ground that both the pandemic and election periods represent for peddlers of misinformation and fake news and take the necessary precautions. These should include:

- Coordination of information put into the public domain between the IEC, National Command Council, the Department of Health, GCIS and other institutions which may communicate with the public about the election and COVID-19;
- Where possible, establish clear, consistent and transparent channels through which information can be shared with the media and the public, as well as refute false information being erroneously or maliciously peddled as fact;
- Engage the support of fact-checking organisations to support the work of the commission in debunking fake news and misinformation about the elections, COVID-19 and the voter.

Recommendations

- The IEC and political parties should be mindful of the necessary balance between informing voters of their choices as well as protecting the health and livelihoods of all those who live in South Africa.
- The Political Party Code of Conduct should explicitly spell out the safety protocols required for all political parties during campaigning, and the IEC should give effect to both monitoring of compliance and mechanisms for censure for those parties that fail to comply as soon as possible.
- The IEC's voter education should focus on giving citizens accurate facts and information about the elections and should also encourage coordination between government department especially the department of health for effective and accurate information about COVID-19 pandemic.



Section 4: Potential impact of health restrictions on the monitoring of the Local Government Elections

Monitoring frameworks

The conduct of elections in South Africa has historically enjoyed the confidence of the electorate, political parties, and international community, with respect to the country's record of holding free and fair elections on a regular basis. South Africa has also been very open in terms of providing access for those interested in monitoring its electoral processes over the years. EISA based on its experience in monitoring and supporting electoral processes across Africa has gathered numerous best practices in creating a conducive environment for effective election monitoring.

- Accreditation requirements should be flexible to accommodate as many interest groups as possible. This is especially important in the context of municipal elections where there is a link between citizens and representatives is stronger and there is more emphasis on service delivery.
- Access to key electoral stakeholders and electoral activities has a huge bearing on the quality of election assessments that election monitors produce. Election monitors should be able to regularly consult with stakeholders and receive updates on electoral preparations, procedures and any other issues throughout the pre, election and post-election phases.
- Election monitors should also be free to deploy monitors across the country. Usually due to resource constraints it is best practice for observers to be allowed to move freely to different polling stations for maximum coverage.

In South Africa, local elections are primarily observed by local observers as opposed to international observers. In COVID-19 times, the norm is unlikely to change and will most likely be exacerbated by the fact that SA is currently facing its third wave of COVID-19, and most countries are advising against travel to South Africa. Therefore, the focus should be on putting in place measures that will allow local civil society groups to monitor the local elections easily, as these are the most likely groups to deploy monitors during the election period.

Monitoring elections during COVID-19

During times of COVID-19, elections have proceeded on schedule in the interest of upholding democratic rights and obligations. Specifically in Africa, most countries except for Somalia and Ethiopia stuck to their electoral calendars as planned. Benin, Togo, Malawi, Benin, Egypt, Cote d'Ivoire, Seychelles, Tanzania and Uganda all held their respective elections in 2020. In each of these elections there were considerable limits in terms of obtaining accreditation and freedom of movement for election monitors due to the risk of COVID-19. Malawi stands out as a country that held elections that were considered a success despite the absence of international election observers. Tanzania and Uganda on the other hand were criticised due to similar administration approaches that made effective election monitoring difficult, for instance both countries imposed internet shutdowns on top of limits to public gatherings that had an impact on key activities such as campaigning and voter registration and voter education. In Uganda, donors that work closely in supporting civil society noted the challenge of international travel restrictions and also the added strain of imposed internet shutdown which impacted the flow of information during the election and immediate post-election period.



Potential adjustments to consider

If South Africa does proceed with municipal elections as planned, the presence and findings of observer groups and monitors will provide both useful perspective on how well the electoral process was managed, as well as how effectively COVID-19 mitigation measures are implemented. The IEC should therefore encourage the deployment of observers, while at the same time providing clear and structured rules and guidelines for these groups to ensure that they comply with necessary health and safety protocols.

Municipal elections require voters to vote in the areas in which they reside and due to socio-economic conditions in the country people travel considerably in between their places of work and residence and there may be an increase in interprovincial travel for voters returning to dwelling outside of urban areas to cast their ballot.

EISA recommends that:

Recommendations

- The IEC should investigate the viability of making rapid antigen covid testing available at polling stations for electoral staff, party agents, election monitors and IEC staff on voting day especially in wards that are known COVID-19 hotspots.
- There should also be dedicated "COVID-19 ambassadors" in each of the voting stations to enforce COVID-19 protocols (as was the case in Ghana). The IEC should also capitalise on special voting to reduce turnout at polling stations. This can be done by targeting the electorate either by age, priority, over 60s, pregnant women and persons living with disabilities to allow these voters to cast their votes prior to election day.
- The IEC should develop clear and practical protocols on how to deal with voters who present at a polling station on election day with a high temperature. The main principle is to ensure that voters are not turned away from a station entirely and are refused the option of casting a ballot due to a temperature reading, as this will undermine confidence in the inclusiveness of the process. Rather, practical measures to record and submit a voter's ballot for counting need to be developed and communicated prior to the election day.
- Digital sensitisation campaigns should be launched early to ensure that people are aware of provisions that the IEC has introduced. In its 2016 EOM report, EISA reported that a lack of information about special voting application process and requirements was observable. The IEC may need to consider limiting the movement of election monitors to a limited number of stations to reduce the risk of infection and to make contact tracing easier in the post-election period.



Section 5: Reflections on by-election experiences held since the beginning of the pandemic in March 2020

While it is necessary to consider the health risks holding an election might pose given the circumstances of the COVID-19 pandemic, it is also important to note the political ramifications pandemic containment measures may have on the electoral process. Experiences elsewhere on the African continent demonstrate that COVID-19 has created conditions that have worsened the state of insecurity in that country and sometimes the region at large.

Although there were postponements of by-elections in South Africa in 2020, necessitated by the nationwide lockdown announced by President Ramaphosa on 23 March 2020, the electoral commission has since held several by-elections. In total, the IEC has conducted four by-elections for 175 municipal wards since the announcement of a lockdown to mitigate the spread of COVID-19 in March 2020. In all instances, the IEC ensured that the necessary health protocols were observed, and caution was exercised in protecting IEC staff and voters.

Since the start of the Covid-19 pandemic, the IEC conducted by-elections in:

- 96 wards in November 2020;
- 24 wards in December 2020;
- 15 wards in April 2021; and
- 40 wards in May 2020.

As such, 175 municipal wards by-elections have taken place under a minimum of Alert Level 1 of the Disaster Management Act.

No issues were reported regarding COVID-19 during by-elections. The IEC have taken necessary precautionary measures to ensure that the elections do not become super spreader events. The commission upheld the necessary health protocols to curb the virus. These protocols included, strict social distancing practices both outside and inside voting stations, the mandatory wearing of masks over nose and mouth of all persons within the boundaries of the voting station, the application of hand sanitizers to all persons entering and exiting the voting station and the replacement of the traditional indelible ink marker pens with an indelible ink liquid, which was applied from a bottle to the thumb of voters using cotton buds, which were disposed after each use. These protocols were also provided for conducting home visits for those voters who are physically disabled or infirm.

By-elections in other African states during COVID-19

Zimbabwe indefinitely postponed by-elections due to COVID-19 in October 2020. Even though, there has been the easing of the lockdown regulations, by-elections have not taken place since the initial announcement of postponement. Opposition parties have accused the 2nd Vice-President and Health Minister, Constantino Chiwenga, of using the pandemic as an excuse to leave parliamentary and municipal council seats vacant. This accusation is relevant as many of the currently vacant seats to be filled in by-elections were previously held by MDC-Alliance or other opposition candidates. As such, the deadlock between the government and civil society organizations over the holding of by-elections in Zimbabwe remains unresolved and is playing out in the courts. In response, several protests in urban areas by



opposition party supporters have highlighted the contradiction of postponing elections to prevent public gatherings fuelling other public gatherings.

In contrast to Zimbabwe's approach, Kenya suspended by-elections in April 2020, but resumed by-elections in for the county assembly and national assembly in December 2020 . Containment measures were put in place such as wearing of masks, observation of social distance, washing of hands and fumigation of the polling centres. Special clerks were also deployed to ensure that no voter violates the safety measures at the polling stations. The IEBC issued a general caution to all candidates ahead of campaigning for the by-elections to adhere to Ministry of Health protocols. A curfew on campaigning – 7am to 6pm was implemented for the by-elections and enforced by the police. The IEBC acknowledged that such a curfew would likely have an impact on the performance and turnout at the by-elections, but still opted proceed.

At the start of the pandemic, considerable discussions went around in Ghana regarding the constitutional possibility of postponing the elections. However, neither the political parties nor the Electoral Commission (EC) felt there was a pressing need to do so, unlike in South Africa where political parties are divided on the postponement issue. Necessary precautionary actions were taken by EC in the form of; introduction of 5357 new polling stations with a maximum of 700 voters on the station register. In a case where the number exceeded 700, polling station was split into two. COVID-19 ambassadors were trained and deployed in polling stations to ensure the enforcement of social distancing, temperature reading, sanitization and wearing of masks.

Recommendations

- The IEC should review the number of voters at polling stations to reduce the possibility of congestion and crowding in and around the station during elections.
- The IEC should, where possible, hire staff who have received vaccinations for COVID-19, and register those who have not as frontline workers to expedite their access to vaccinations, as these workers will be exposed to the highest risk of infection given their interactions with hundreds of voters. PPE should also be a part of voting station kits for all polling station staff.



Section 6: Conclusion

EISA appreciates the opportunity to contribute to the important work of Justice Moseneke and his research team into the feasibility of conducting elections as planned in October 2021, as well as the importance of the work of the team. The competing rights of South Africans to both health and credible electoral processes need to be weighed with careful consideration and the team has a challenging task ahead of it.

Based on EISA's experience and observations of elections conducted during COVID-19 since March 2020, the Institute believes that while the IEC continues to express confidence in its ability to conduct the elections at a technical level, and all stakeholders demonstrate reasonable levels of caution and care during political activities in relation to the elections, the 2021 Local Government Elections can and should proceed as planned. There is already a large body of evidence to suggest that national elections can and have been conducted under all manner of conditions without unduly harming either the health or the political rights of a country's populace. This should not, however, be used as an excuse for stakeholders to become careless in their preparations and response to holding elections during the pandemic. Ultimately, the success or lack thereof in holding elections under COVID-19 conditions will be determined by stakeholder behaviours and compliance with safety guidelines.

EISA further cautions against a decision to postpone elections in the hope that conditions relating the COVID-19 virus will improve at a later stage. Experience from the African continent indicates that postponements to a planned election have often lead to further postponements and heightened uncertainty in the political space, which introduces its own set of risks. There is also no valid method for accurately predicting future conditions of the COVID-19 pandemic, and this makes any decision to postpone in hope of an improvement in conditions even less credible. It is also important to recognize that the current constitutional framework in South Africa does not describe the conditions under which a postponement is made, and that any decision to postpone elections therefore would require Parliamentary processes to normalize the matter. As different political parties have expressed opinions both for and against a postponement, it is also possible that any decision to postpone would trigger legal proceedings. Such scenarios have the potential to increase acrimony, misinformation, voter apathy, and in extreme cases even lead to protests and violence. The decision to postpone elections should therefore only be taken under conditions where all other reasonable alternatives have been exhausted first.

In the context of COVID-19 it is reasonable to focus on the potential risks posed by a mass event like a local government election campaign, however, EISA also wants to highlight some of the important benefits going ahead with elections provide. The IEC has been preparing for the 2021 local government elections on a timetable that anticipated elections within a specific window period. To this end, the IEC has undertaken electoral reforms and incorporate innovations into its planning for local government that would be to the benefit of all South Africans were the elections to go ahead. While postponement or delays would not necessarily harm these preparations, timing and planning are important when executing on new processes and the introduction of new voter ID devices. The efficacy of the IEC's updated voter register to include addresses also needs to be tested, and proceeding with the 2021 elections is the appropriate moment to do so.

Furthermore, additional benefits may accrue should the 2021 Local Government Elections proceed as planned. By valuing the importance of local government as a part of the state's mechanisms to deliver services to its citizens, proceeding with the 2021 polls emphasizes the importance of this form of



government. To reduce the importance of local government to a process that can be postponed, under any circumstances, implies that local government structures are somehow less important in South Africa than national and provincial structures. This perception is often reinforced by international observers, who tend to prioritize national elections over local government polls. For many South Africans, however, local government is ground zero for the types of services that most directly impact their lives, such as electrification, sanitation, and transport. Postponing elections deprives citizens of the opportunity to hold their local representatives accountable at a time of heightened concern about individual livelihoods, jobs and access to services. Elections provide an outlet for frustrations and an opportunity to renew or refresh mandates, while the alternate is to encourage various forms of protests – a form of political activity that poses as many health risks to protestors as elections, with additional potential risks included. Finally, holding successful and peaceful elections is always a morale boosting experience for a country and contributes meaningfully to a sense of nation building and common purpose. Well managed elections reaffirm nationhood, common purpose and collective achievement in a country's citizens and can strengthen efforts at other national tasks such as tackling COVID-19 or national vaccination rollouts. The task of balancing these positive elements of electoral processes alongside the risks of COVID-19 to South Africans is a precarious balancing act, and EISA reaffirms its support to the IEC and this task team in the important work they are doing to find that balance.



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"DA3"



**Submission to Independent Electoral Commission
Report on ensuring free and fair local government elections
during COVID-19 pandemic.**

**Submission by Right to Care Not for Profit Company
Date: 15th June 2021**

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Background

Justice Dikgang Moseneke accepted an invitation from the Chairperson of the Electoral Commission of South Africa in May 2021 to lead the Inquiry into Ensuring Free and Fair Local Government Elections During COVID-19 ("Inquiry"). ("Inquiry").

The salient features of the terms of reference for the Inquiry are:

- To enquire into, make findings and report on, and make recommendations concerning the likelihood that the Electoral Commission would be able to ensure that the forthcoming 2021 general local government elections will be free and fair, in view of (i) the challenges posed by the COVID 19 pandemic, and (ii) the measures promulgated by the government to curb the continued spread of the pandemic; and
- To indicate additional measures that the Electoral Commission may be required to implement in order to realise free and fair elections within the context of the COVID-19 pandemic.

In order to facilitate the work of the Inquiry, the office coordinating the enquiry invited key stakeholders to make submissions to the Inquiry, which may have a bearing on the freeness and fairness of local government elections earmarked to be held in October 2021.

Right to Care Not-for-Profit Company (RTC NPC), as one of the organizations with medical expertise was requested to make submissions relevant to the potential risks of acquisition and spread of COVID infections posed by the upcoming local government elections. The RTC-NPC submission had to cover the following specific areas:

- Any information, details, or data on or about the current state of the COVID-19 pandemic in South Africa.

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- The projected trajectory of the COVID-19 pandemic in South Africa, and during October 2021 when local government elections are earmarked to be held.
- The nature, extent and features of the vaccination efforts being undertaken in South Africa.
- When the vaccination efforts being undertaken in South Africa are likely to reach community immunity, and the likelihood of community immunity being reached by October 2021, when local government elections are earmarked to take place.
- The risk that might be posed to the lives and health of people in South Africa if the local government elections were to proceed in October 2021.
- Any additional measures that may be taken to reduce the risk posed to the lives and health of people in South Africa in the event that the local government elections were to take place during October 2021; and
- Any epidemiological and statistical material and data that may be relevant to the enquiry whether the 2021 local government elections may be held in a free and fair manner.

In addition, RTC was requested to make any other submissions deemed necessary and appropriate.

Introduction

RTC NPC, a not-for-profit company was founded in 2001. The company has 20 years' experience leading and implementing HIV and TB programmes in Africa and internationally as well as implementing disaster medicine support e.g., Support for Ebola Mitigation in Sierra Leone 2014, Cholera outbreak mitigation in Zambia 2018 and recently mitigation of the COVID-19 pandemic in South Africa, Zambia, and Malawi. The COVID-19 support activities ranged from Support for the South Africa Disaster Management Command Centre and Incident Management Team, Support for in patient bed and testing

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surge capacity, oxygen capacity, supply and surge assessment, health worker training, support on implementation of the Health Care worker Early Access Sisonke vaccine program, support for the launching and rolling-out of the National vaccine initiatives including data systems, site set up, staff training and vaccine roll-out in the Eastern Cape, Free State, Mpumalanga and Northern Cape.

RTC Methodology

RTC expertise did bench top literature reviews, on elections conducted across the world from the onset of COVID-19, looking at studies and or reports on voter turnout, risks, mitigations. We further compiled data and provided some analytics to plot and guide projections in response to the specific areas of interest of the Inquiry. In addition, we reviewed specific information and data relating to the conduction of elections and reviewed CDC, WHO, IIDEA recommendations on mass gatherings, election associated infection risk to enable a response the questions posed by the Inquiry.

RTC NPC Inputs

- *Any information, details, or data on or about the current state of the COVID-19 pandemic in South Africa.*

The current state of the Pandemic cannot be determined with certainty as there are variable areas of high infections as infections continue to spread. The data presented should be referenced to the specific period as by the time the report goes out, there may have been changes to the data being presented. We are dealing with a moving target influenced by unpredictable human behaviour.

As at 6 June 2021, South Africa had 1 696 564 COVID-19 cases, with 61 557 active cases and 56 974 deaths. Daily new case numbers have been rising over the last several weeks, with increases being first seen in the Free State, North West, and the Northern Cape. These increases are being followed by rising case numbers in other parts of the country, with a rapid increase being seen in Gauteng. The graphs of daily new cases provide insights into

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the current COVID-19 situation of each province. In figure 1 below, we are detailing proportions of cases starting from April 2020 to June 2021. The different wave heights are depicting peaks (waves) of infection time period and estimated numbers of infections at each peak. The period May/June 2021 shows the Northern Cape, North West, and the Free state to be having highest numbers (peaks) relative to their second wave, followed by Gauteng and Mpumalanga.

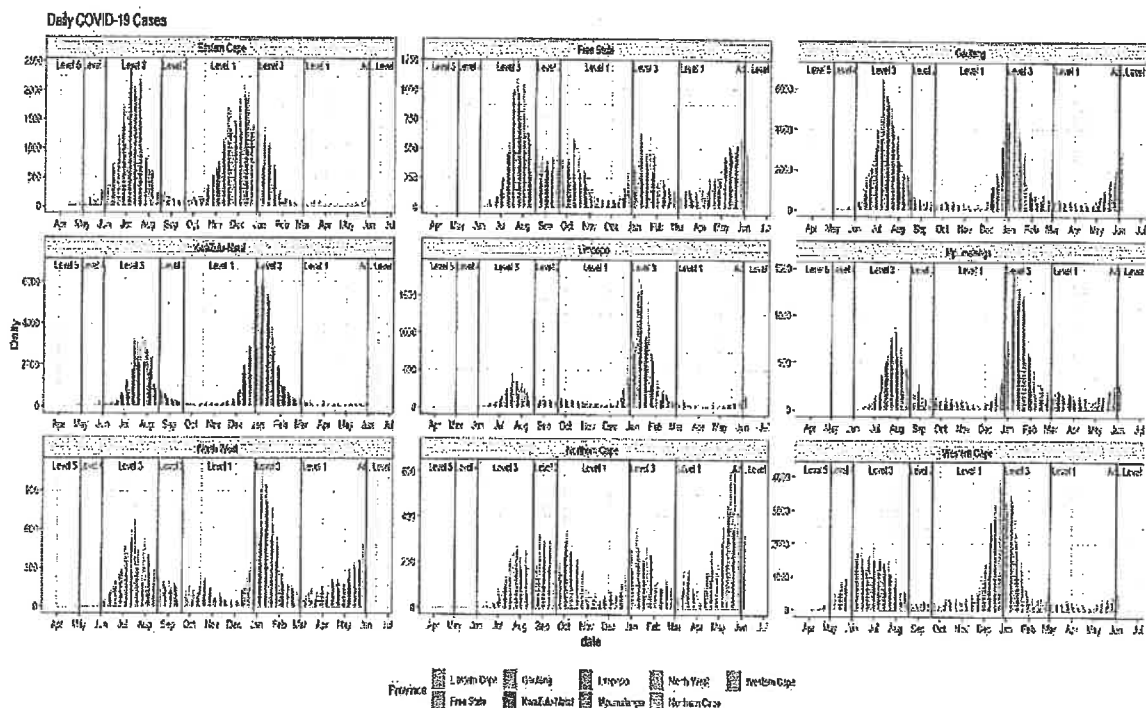


Figure 1: Provincial daily new COVID-19 cases

The Western Cape, Eastern Cape, Limpopo, and KwaZulu-Natal are showing small increases during the corresponding period. Their proximity to high case load areas puts them at risk of resurgence over the upcoming weeks. This trend has been seen in the proxy active case maps (Figure 2), which highlight the movement of cases from areas with high incidence to areas of low incidence.

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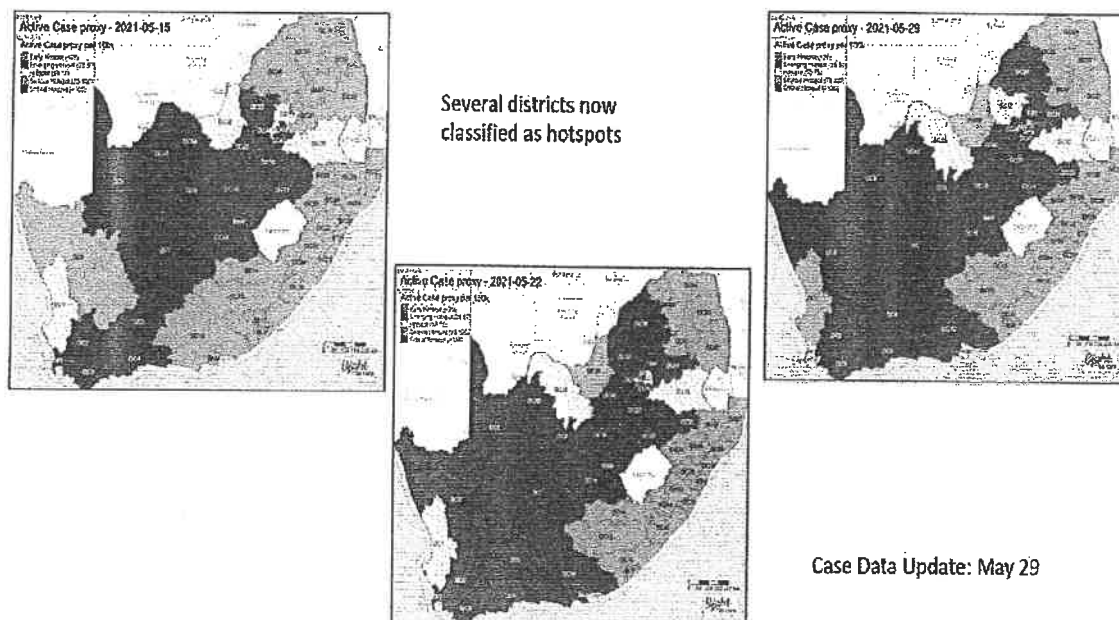


Figure 2: District level active case proxy

- The projected trajectory of the COVID-19 pandemic in South Africa, and during October 2021 when local government elections are earmarked to be held.

Short term projections

Future decision making requires insight into the projected state of COVID-19 at various time-points. While challenging to predict, the South African Modelling consortium provides some estimates of case numbers for both the short and long term. Short term projections show overall increases for both cases and hospital admissions continuing in June (Figure 3). The only provinces expected to see case decreases and limited increases in hospital admissions are North West, the Free State, and the Northern Cape; those who had the third wave surge first (figure 1) above.

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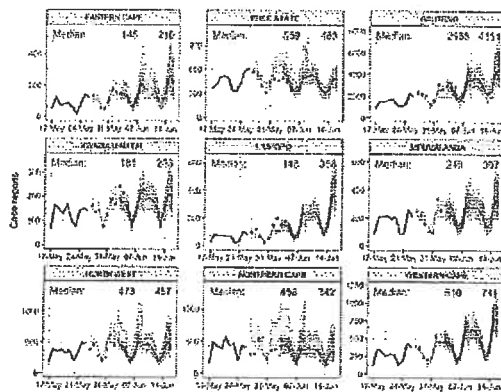


Figure 1: Case forecast.

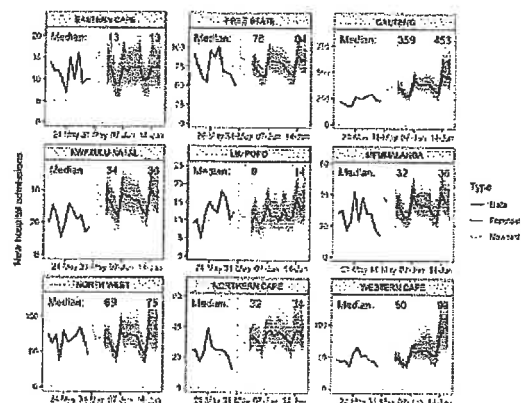
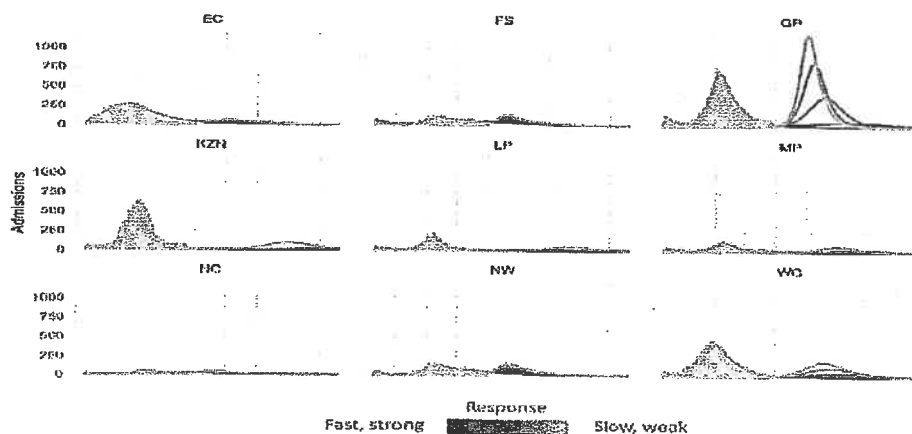


Figure 2: Hospital admissions forecast.

Figure 3: Short Term projection by SA modelling consortium

Long term projections

Long term projections of hospital admissions made by the modelling consortium assume a set of scenarios and the *absence of a new variant*. Under these conditions the potential magnitude of the third wave admissions is estimated. From these graphs, Mpumalanga, the Free State and North West are expected to have third waves of similar magnitudes to the second wave seen earlier in the year, while Gauteng is projected to have a larger third wave (Figure 4).



Source: Orange bars: second wave data from DATCOV/ NICD; blue curves: Model projections

Figure 4: Third wave scenarios: Impact on hospital admissions, by province (comparing 2nd and 3rd wave)

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The projections above provide an approximation of the magnitude of the third wave, however it becomes useful to estimate when these third waves may occur and what may come after. Given the great uncertainty around COVID-19 it is not easy to accurately predict what will happen in several months time, however rough estimates can be made based on historical data and the estimated peak dates of the third wave. Figure 5 below assumes a 3 month period of high case numbers, indicated in red, when cases may be high for each province. This shows that there is a potential for cases to be low in the October period, assuming the onset of the third wave in each province within the next month.

This, of course, is heavily reliant on the following assumptions:

1. That patterns will be similar to previous time periods in South Africa, and
2. That lockdown restrictions will occur and
3. That similar timepoints with equally strict measures are put in place.

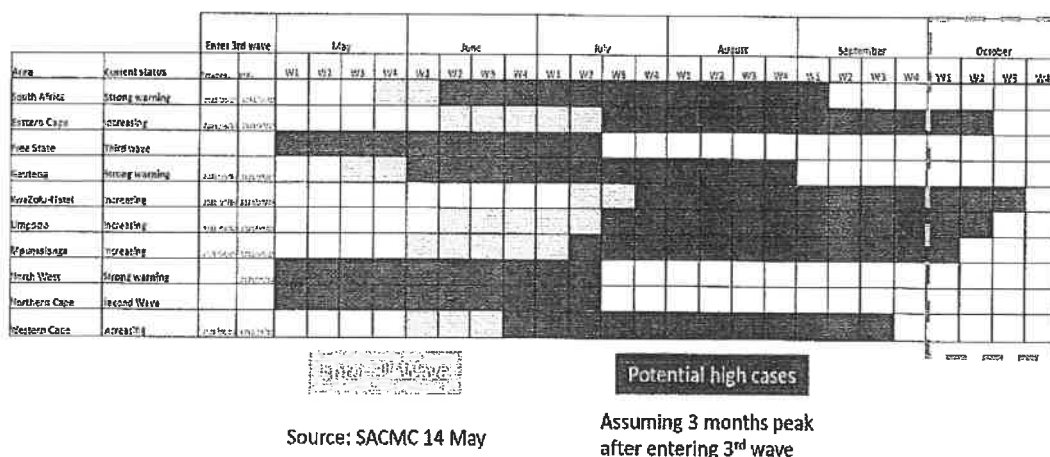


Figure 5: Potential timeline for high COVID-19 cases



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- *The nature, extent and features of the vaccination efforts being undertaken in South Africa*

South Africa aims to vaccinate 40 million (67%) of the current population, to obtain herd immunity, through the rollout of the national COVID-19 vaccine programme in 2021. The vaccination rollout has 3 phases according to a national prioritisation framework. All South Africans that wish to be vaccinated must register on the NDOH central vaccine registration system, Electronic Vaccination Data System (EVDS). Once registered on the EVDS, the system allocates the registered individual and generates an SMS with a vaccine code and the location of the vaccination site for administration.

Phase 1: Healthcare Workers (Sisonke clinical trial): Began on 17 February 2021. 96% (479,768) of the targeted 500,000 in this phase had been successfully vaccinated by 14 May 2021 using the Johnson and Johnson, 1 jab vaccine. The remaining 770,232 of the estimated 1.25 million healthcare workers will be vaccinated during phase 2 of the vaccine rollout.

Phase 2: Population Over 60 years and Healthcare Workers: Began on 17 May 2021 with 16.5 million South Africans prioritised for vaccination based on age using the Pfizer/BioNtech 2 jab vaccine. As at 11th June 2021, 1,207,852 people had received the 1st dose. The 2nd dose will be provided 42 days following the 1st dose. **This phase is scheduled to be completed by October 2021.** To facilitate this, over 2000 vaccination sites have been identified across the country, and include general practitioners' rooms, community clinics and pharmacies, retail outlets and in some instances, larger facilities like stadiums and conference centres.

Phase 3: Remaining 22.6 million of the adult population will be vaccinated: 5,9 million Pfizer/BioNTech doses are expected to be delivered in weekly shipments of 325,260 until May 31, there after 636,480 doses weekly. An additional 1.4 million doses are expected from Covax. Another 10 million doses are expected between July and September 2021.

Of the 1,1 million Johnson and Johnson vaccine doses that were expected to be delivered

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in May 2021 and two deliveries of 900,000 doses expected by end of June 2021. A large quantity of vaccines has been put on hold relating to possible non GMP practices at the Baltimore plant. this will clearly result in massive delays of the vaccination plans. Further information regarding how government will source other products is still to be released.

- *When the vaccination efforts being undertaken in South Africa are likely to reach community immunity, and the likelihood of community immunity being reach by October 2021, when local government elections are earmarked to take place*

The national vaccination rollout has been hampered by several challenges with new variants resulting in vaccination commencement delays. The third wave of infections which started as early as April, plus delays in vaccine delivery will result in further interruptions to the vaccination plans for the year.

As of 11 June 2021, there were 3,491,399 vaccine registrations on the EVDS, with 951,861 being health care workers and 2,539,538 people over 60 years and others. To date there have been 1,766,572 vaccinations including 479,768 health care workers vaccinated through the Sisonke trial (JnJ) and 1,286,804 Pfizer 1st dose vaccinations. This reflects a current cumulative daily vaccination rate of 64,340. A total of 1,587 vaccination sites have been activated between 17 May and 11 June 2021. Based on the national vaccination rollout plan projections, a total of 17,4 million people over the age of 40 should be vaccinated by 1st October 2021. The remaining 22,6 million people aged 18-39 years who are eligible to vote, will not be vaccinated by October as they will only have access to vaccines from November 2021.

To successfully vaccinate 17,4 million people by October 2021, the following vaccination targets will have to be met:

- 3,48 million people aged 40+ vaccinated per month (current estimate is 1,2 million per month)

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- 4,350 vaccinators, vaccinating 40 people per day for 20 consecutive days (current estimate 3 148 vaccinators available for an average 12 consecutive days)

Due to limited vaccine availability, load shedding affecting vaccine cold chain management, communication delays and time required for additional site onboarding, to date, only one third of the target has been met. If current vaccination performance prevails, 14,358 572 people will have been vaccinated by October 2021 which is only 36% of the population required to reach herd immunity. South Africa is therefore unlikely to reach community immunity by October 2021, when local government elections are earmarked to take place.

- *The risk that might be posed to the lives and health of people in South Africa if the local government elections were to proceed in October 2021*

According to CDC to date, there have been very few reports linking voting arrangements with community transmission. However, some studies have been carried out and are at times contradictory. For example, in one study, focusing on the Wisconsin, USA, primary election showed “statistically and economically significant association between in-person voting density and the spread of Covid-19 two to three weeks after the election”; whereas another study focusing on the City of Milwaukee from Wisconsin, CDC found no clear increase in cases, hospitalizations, or deaths.

Beyond the US, health authorities in South Korea concluded that no local transmission occurred from the Parliamentary election held in April 2020, and a scientific article published in August substantiated this claim.

In contrast, a French study on municipal elections in March 2020 suggested an increase in numbers of hospitalizations due to the polls, but mainly in areas already showing high transmission levels. They however found that the election did not contribute to virus transmission in areas with already low levels of Covid-19.

There thus needs to be caution in interpreting this evidence. Without a consistent and

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robust estimation methodology which can link voting arrangements directly as a cause of transmission to individual voters, separate to ordinary community transmission, it is difficult to know when and where the virus was in fact caught. Variations in data availability between countries, and different methods and approaches among studies, make it very difficult to come to general conclusions.

Media reports could also be less reliable in this respect; focusing on the anecdotal rather than aggregate picture-and may have the potential to spread misinformation. Nonetheless, Vote beat, a nonpartisan reporting project, provides some anecdotal evidence that many US poll workers tested positive during the November 2020 Presidential election.

Although risks remain, it appears that countries are more willing to hold elections because of an improved understanding of the virus. Time has also elapsed since the pandemic started, which has enabled lesson drawing from overseas, risk management plans to be adapted, and election planning to take place.

Potential Contributors to increased Spread of COVID 19 at the time of Elections

➤ During Campaigning

Mass meetings during campaigns by political parties - CDC continues to recommend avoiding large events and gatherings. Currently, CDC does not provide numbers to define small and large events. Political gatherings bring together many people from multiple households in a private or public space. Large gatherings are often planned events with a large number of guests and invitations. They sometimes involve lodging, event staff, security, and long-distance travel.

➤ Behavior of attendees during an event

Events where people engage in interacting with others from outside their own household, singing, shouting, not maintaining physical distancing, or not wearing masks consistently and correctly, can increase risk.

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Researchers¹ in India found that each of the four election-bound states (Assam, Kerala, Tamil Nadu, and West Bengal) in the period March – May 2021 showed a distinct increase in the effective contact rate and the effective reproduction number during the election-bound time and continued to increase just after that, as compared to the pre-election time. Using epidemiological modelling, the impact of pre-election activities including political rallies, movements, and over-crowded gatherings was demonstrated in the change of effective reproduction number, with the states that held single-phase elections comparatively less affected than the states where the election was conducted in multiple phases.

➤ *Transport to and from Election Sites*

Public transport with all its incipient risks - exposure during travel (Airports, airplanes, bus stations, buses, train stations, trains, public transport, petrol stations, and rest stops) are all places where physical distancing may be challenging, and ventilation may be poor.

➤ *Queuing at the polling stations*

Lack of physical distancing and people not wearing masks, Long time spent in queues, could increase risk.

➤ *Inside the polling stations themselves*

Lack of adequate ventilation, physical distancing and people not wearing masks could increase risks.

Deciding to postpone or continue with holding an election

According to International Institute for Democracy and Electoral Assistance (IIDEA) proceeding with an election or postponing an election entails risks for a government, an Election Monitoring Body such as the IEC and health authorities. While postponing elections may be the most feasible and responsible option from the public health perspective, there are several risks associated with such a decision:

¹ medRxiv preprint doi: <https://doi.org/10.1101/2021.05.30.21258040>; this version posted June 1, 2021.

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- reputational risks (for an organization that makes decisions, for trust in democratic processes and institutions, for international relations).
- political risks (disturbing the level playing field and undermining the incumbent or opposition).
- financial risks (budgetary implications, e.g., money invested that cannot be recovered).
- operational risks (alternative dates are not feasible because of other risks, e.g. monsoon season, winter, other events); and
- legal risks (the decision can be legally challenged).
- If postponing an election, pathways for addressing the electoral issue at hand and stringent guidelines for caretaker arrangements; and
- Public communication about the issues at stake, the reasons for the decision and the processes in place to safeguard democracy.

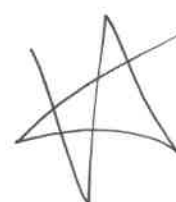
To address the above risks and considerations, IIDEA recommends that interagency consultation and communication mechanisms should be sought, and these should include both electoral authorities and public health authorities, this is the process being followed by this Inquiry.

*(Source: International IDEA. Elections and COVID-19. International Institute for Democracy and Electoral Assistance (International IDEA); 2020.
doi:10.31752/idea.2020.11.)*

- *Any additional measures that may be taken to reduce the risk posed to the lives and health of people in South Africa if the local government elections were to take place during October 2021*

If proceeding with an election, health and safety measures will clearly require further investment in elections to protect the safety of staff, campaigners, and votes. They will also be needed to assure citizens that voting is safe—so that turnout is not affected. The early publication of guidelines will help them to be implemented—and mechanisms for

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enforcement need to be considered by policy makers.

Risk mitigation measures:

WHO has recommendations for individual and community safety from COVID-19

Individual measures:

- With well-known and effective COVID Preventive measures. Individual measures are *maintaining at least a 1-metre distance between oneself and others* to reduce risk of infection from coughing and sneezing,
- Hand washing and keeping unwashed hands away from the face.
- Use of sanitizer at every step of the process by both IEC officials and the voters
- The physical distance should even be greater when indoors.
- The use of face masks or coverings has been recommended in public settings to minimise the risk of transmissions.
- Masks should be covering both nose and mouth all through the process and interactions

Environmental measures:

- **Avoid the 3Cs** - spaces that are closed, crowded, or involve close contact.
 - Outbreaks have been reported in places where people have gathered, often in crowded indoor settings where they talk loudly, shout, breathe heavily or sing.
 - The risks of getting COVID-19 are higher in crowded and inadequately ventilated spaces where infected people spend long periods of time together in proximity.
- **Meet people outside**
 - Outdoor gatherings are safer than indoor ones, particularly if indoor spaces are small and without outdoor air coming in.
- **Avoid crowded or indoor settings if not possible then:**

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- **Open a window.** *Increase the amount of 'natural ventilation' when indoors.*
- **Wear a mask**

The above measures are general measures which have been shown to reduce the risk of infection acquisition and spread and, if practiced generally, will result in lowered infection rates.

International IDEA has suggested specific guidelines to following at election polling stations during the COVID-19 pandemic.

Actions for election officials in advance of election day:

- Logistical considerations for alternative voting arrangements.
- Voters should be offered voting methods that minimize direct contact with other people and reduce crowd size at polling stations.
- Postal voting should be encouraged if allowed and feasible in the jurisdiction.
- Early voting should be encouraged, to reduce crowds throughout the day.
- Voters planning to vote in person on election day should be encouraged to arrive at off-peak times.
- Mass gatherings to be regulated with all participants adhering to IPC

Preventive actions polling workers can take for themselves and voters

Voters:

- *All voters to wear masks/cloths covering the mouth and nose properly*
- Incorporate social distancing strategies, as feasible: more than 1.5 m between voters,
- A limited number of voters allowed to enter the polling station at the same time.
- Provide an alcohol-based hand sanitiser with at least 60 per cent alcohol for use before and after using the pencil, the voting machine, or the final step in the voting process.

Polling workers

- Consider the use of COVID-19 queue marshals at all polling stations.

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- Clearly display instructions to distance, wearing of mask and hand sanitization inside the polling station.
- Consider placing the alcohol-based hand sanitiser in visible, frequently used locations such as registration desks and exits.
- Wash hands frequently with soap and water for at least 20 seconds.
- If soap and water are not available, use an alcohol-based hand sanitiser that contains at least 60 per cent alcohol.
- Avoid unnecessary handling of voter identification documents.
- Routinely clean frequently touched surfaces with household cleaning spray, including tables, doorknobs, light switches, handles, desks, toilets, taps and sinks.
- Clean and disinfect voting-associated equipment routinely, such as pencils, voting machines, laptops, tablets, and keyboards.

(Source: International IDEA. Elections and COVID-19. International Institute for Democracy and Electoral Assistance (International IDEA); 2020. doi:10.31752/idea.2020.11)

- *Any epidemiological and statistical material and data that may be relevant to the enquiry whether the 2021 local government elections may be held in a free and fair manner.*

Epidemiological impact

Elections in COVID-19 hotspots could enhance the spread of the pandemic significantly, this risk is lower in areas with reduced infection levels [1]. If the above WHO recommendations and the IDEA recommendations are followed and adhered to, elections could be conducted safely with the possibility to avoid adding to the spread.

However, measures are needed to alleviate spread in the face of challenges such as cold weather or rain – where crowding indoors may facilitate spread amidst insufficient ventilation [2]. Despite many preventative measures in place, the contrasting evidence has concluded in some countries such as Germany and New Zealand with offering alternative

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methods of casting votes that do not require physical contact such as postal-voting and online-voting for citizens abroad who can upload their documents online [3].

To lower the risk of election polling the following are advised by the CDC [4]:

- A wide variety of voting options (to minimize direct contact)
- Longer voting periods (more days and/or more hours)
- More voting stations (to prevent overcrowding) or other means to reduce the number of voters gathering indoors
- Stations should have handwashing/disinfection readily available

Free and fair elections

Data shows that participation in elections (turnout) during the COVID-19 pandemic was historically low (in France) in March 2020. The turnout of the elderly and vulnerable populations was particularly low, especially in geographical areas with elevated prevalence [5].

The voter considers the cost of voting (standardly comprising voter's time for vote decision and a low cost of action of voting inclusive of time to travel, queuing, etc.); if the cost is affordable then voters will cast. During COVID-19 the cost of voting increases for:

1. Infected and fatigued or altruistic individuals choosing to avoid spread by not participating,
2. Individuals at higher risk (such as serious heart conditions, weakened immune systems, obesity, sickle cell disease, etc.)

The resultant turnout of the pandemic can have an impact on the outcome of elections, with about 4% increase in vote shares for dominant parties, to the disfavor of smaller factions which may widen the gap between dominant party and oppositions as was demonstrated in Germany [6]. African countries, similarly, to France, may not have alternative voting options such as by mail or online voting, and without surprise, voter turnout has decreased significantly in African countries such as Guinea and Mali.

A handwritten signature in black ink, consisting of a stylized 'A' shape with a horizontal line extending to the right and a small loop at the top right.



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With overview of 71 countries that held elections, 30 have experienced an increase in the turnout of voters while 41 have experienced a decrease (Figure 6 below). Although the infection levels in each of the countries when elections took place is not described here.

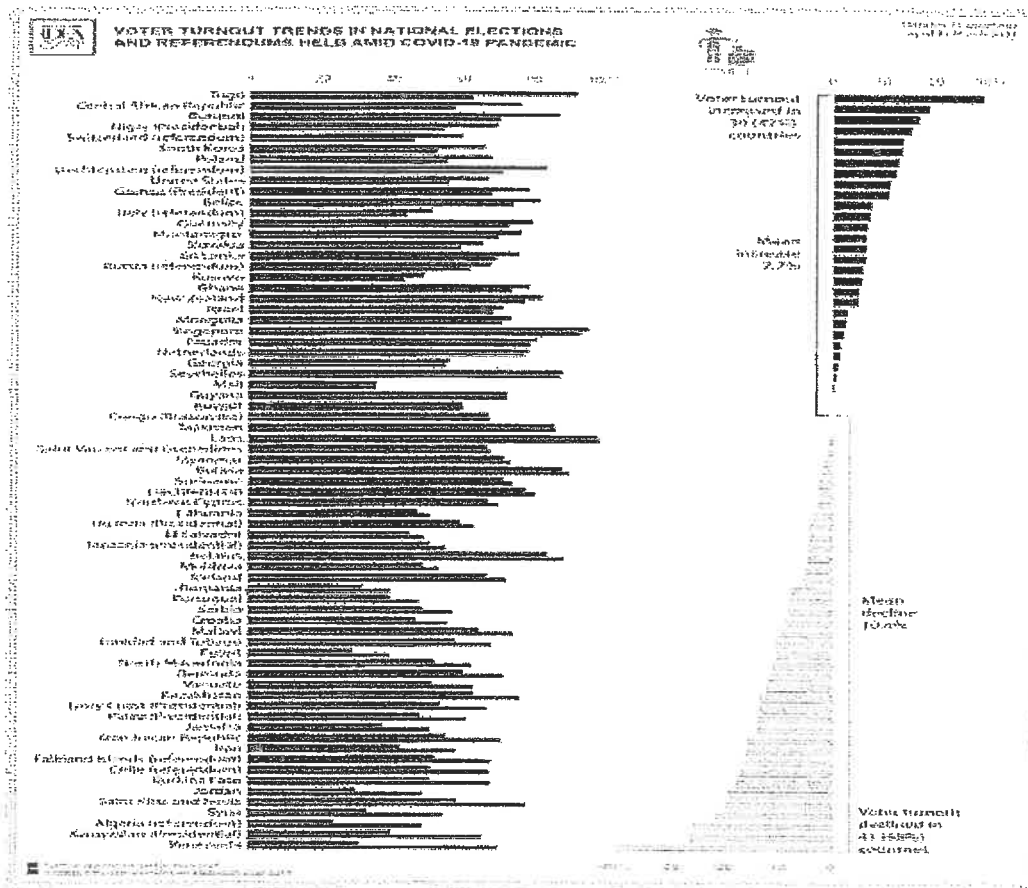


Figure 6: Voter turnout



Conclusion

The data shows that South Africa is in the midst of the third wave of the COVID-19 pandemic. The challenges of ongoing infections, fueled by spread because of human behaviour, makes the prediction of the trajectory of infections very difficult.

Some modelling has been done based on some assumptions to inform the infection trajectory. Using this data, and assuming the onset of the third wave in each province within the next month, and a 3 month period of high case numbers, indicates that there is a potential for cases to be low in the October period. Although the country has made some strides with roll-out of vaccinations, a myriad of challenges have delayed the National roll-out schedule making it impossible to reach Community Immunity by October.

Conducting elections during a pandemic poses inherent challenges of people movement, the risk of infection, fear of turning up and thus, low polling rates. Several countries have however conducted elections between March 2020 and March 2021. Studies emanating from these have had mixed reactions pertaining to risks of infection. Most of these, however, indicate that if risk mitigation measures are put in place, and there is adherence to these measures, that the risks of acquiring infections from election polling can be reduced.

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"DA 4"

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Our Ref: DEM16/0781/ELZANNE JONKER/ks | Your Ref: | Date: 4 August 2021

MOETI KANYANE ATTORNEYS
PER EMAIL: moeti@kanyane.co.za

Dear Sir

**CONCOURT APPLICATION: ELECTORAL COMMISSION // MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS & 10 OTHERS – CCT 245/21**

1. We represent the Democratic Alliance.
2. Our client is still considering your client's Application requesting the Constitutional Court to suspend the Constitution.
3. In order for our client to assess its position, we wish to raise the following urgent issue with your client.
4. One of the reasons your client contends that an election on 27 October 2021 cannot be free and fair is because insufficient eligible voters have been registered, and it cannot hold another registration weekend before the October election.
5. Your client appears to be operating under the incorrect assumption that it is not possible to hold a registration weekend before the elections in October. But it is possible, albeit with the assistance of the Constitutional Court.
6. Although s 6 of the Municipal Electoral Act 27 of 2000 (the Act) prevents names being added to the voter's roll after the election timetable has been published, there is no prohibition on registering voters after that time. Put differently, your client is entitled to hold a registration weekend whenever it pleases, but it cannot place the names of those who register on a roll for an election if the timetable has been published.
7. Our client therefore proposes the following:

Minde Schapiro & Smith Incorporated | Attorneys Notaries & Conveyancers since 1929 | Registration number 2010/025182/21

Directors: Heinrich Crous BA LLB | Elzanne Jonker BA LLB | *Jonathan Rubin B Comm LLB LLM | Venesen Reddy LLB
Senior Associates: Gerhard Lourens FPSA® BA LLB | Andre van Breda B Comm LLB
Associates: Jhané Bezuidenhout LLB | Lauren Jacobs LLB
Consultants: Louis Meyer B Juris LLB | Marianne Olivier B Comm LLB LLM | Marais Hoon BA LLB

Val registration number: 4580257428 | *Al Greenacres, Gqeberha (previously Port Elizabeth)

member of
phatshoanehenney
CONSTITUTIONAL ATTORNEYS

Handwritten signature and a large 'X' mark.



MINDE SCHAPIRO & SMITH

- 7.1 Your client arranges a registration weekend for 27-29 August 2020. On your own timeline of 18 days' notice, there is more than enough time to arrange that weekend. Your client then proceeds with the registration regardless of whether the Constitutional Court suspends the Constitution to allow a February 2022 election.
- 7.2 Instead, your client amends the relief it seeks to ask the Court to suspend the operation of s 6 of the Act to allow the names collected on that weekend to be added to the voters roll for the constitutionally-scheduled October 2021 election. While there is no precedent for suspending the Constitution, there is precedent for suspending the operation of a statute (*Electoral Commission v Mhlope and Others* [2016] ZACC 15; 2016 (5) SA 1 (CC)).
- 7.3 Whatever the Court does, those people will be registered for either the October 2021 election (if the Court requires the election to go ahead and suspends s 6), or the proposed February 2022 election (if the Court suspends the Constitution to permit that), or the next local government election (if the Court requires the October 2021 election to go ahead and does not suspend s 6). It will not be wasted.
8. We trust that your client will welcome this proposal as it will allow your client to ensure that the next local government elections are free and fair, no matter when they are held.
9. Kindly let us know by close of business on Friday 6 August 2021 whether your client intends to amend its relief as proposed. If not, my client reserves the right to approach the Constitutional Court to pursue that relief as clearly just and equitable in the circumstances.

Yours faithfully
MINDE SCHAPIRO & SMITH INC.

per:

Minde Schapiro & Smith Incorporated | Attorneys Notaries & Conveyancers since 1929 | Registration number 2010/025182/21

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Vat registration number: 4580257428 | *At Greenacres, Gqeberha (previously Port Elizabeth)

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Your Ref: DEM16/0708/Elzanne Jonker/ks

Date: 06 August 2021

MINDE SCHAPIRO & SMITH
TYGER VALLEY OFFICE PARK
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CNR WILLIE VAN SCHOOR 7 OLD OAK ROADS
BELLVILLE

By Email : elzanne@mindes.co.za

Dear Ms Jonker,

**CCT 245/21: ELECTORAL COMMISSION // MINISTER OF COOPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS & 10 OTHERS**

- 1 Thank you for your letter of 4 August 2021.
- 2 Our client is willing to consider any and all suggestions that would enable it to comply with its constitutional duties, including to ensure free and fair elections.
- 3 However, our client does not believe it would be appropriate for it to engage in discussions with or provide undertakings to any particular political party.
- 4 We note that your client accepts, correctly, that holding a registration weekend on the weekend of 27 - 29 August 2021 would require an appropriate court order. If your client considers that such a registration weekend should be held, it should seek an appropriate order from the Constitutional Court. This will allow our client and all other interested parties to consider and respond to the request for an order.

Yours faithfully,

TM Kanyane
Director
Moeti Kanyane Inc.

(Transmitted electronically and thus not signed)

Moeti Kanyane Incorporated
Director: Thlouyatiba Moeti Kanyane B Proc., LLB (UNIN); Cert Competition Law (UP)
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 MOETI KANYANE
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