

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CCT CASE NO: 245/21**

In the application for intervention of:

**ECONOMIC FREEDOM FIGHTERS**

Intervention Party

and

**MINISTER OF COOPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS**

First Respondent

**THE PRESIDENT OF THE REPUBLIC OF  
SOUTH AFRICA**

First Respondent

**THE NATIONAL CORONAVIRUS COMMAND COUNCIL**

Third Respondent

**ELECTORAL COMMISSION OF SOUTH AFRICA**

Fourth Respondent

In the matter between:

**ELECTORAL COMMISSION OF SOUTH AFRICA**

Applicant

and

**MINISTER OF COOPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS**

First Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT**

Second Respondent

**AND TRADITIONAL AFFAIRS, EASTERN CAPE**

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
AND TRADITIONAL AFFAIRS, FREE STATE**

Third Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
AND TRADITIONAL AFFAIRS, GAUTENG**

Fourth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
AND TRADITIONAL AFFAIRS, KWAZULU-NATAL**

Fifth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
AND TRADITIONAL AFFAIRS, LIMPOPO**

Sixth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
AND TRADITIONAL AFFAIRS, MPUMALANGA**

Seventh Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
AND TRADITIONAL AFFAIRS, NORTHERN CAPE**

Eighth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
AND TRADITIONAL AFFAIRS, NORTH-WEST**

Ninth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
AND TRADITIONAL AFFAIRS, WESTERN CAPE**

Tenth Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION**

Eleventh Respondent

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**NOTICE OF MOTION**

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**BE PLEASED TO TAKE NOTICE THAT** the Intervening Party, the Economic Freedom Fighters (“EFF”) applies to this Court in terms of Rule 8 of the Constitutional Court’s Rules, for an order in the following terms:

1. Dispensing with the rules of forms and service in accordance with Rule 12.
2. The EFF is granted leave to intervene in the main application.
3. The EFF is granted leave to make submissions in the main application.
4. Subject to this Court not granting the orders sought by the Applicant (“IEC”) in paragraphs 3–5, alternatively 8.1 and 8.2 of its Notice of Motion, the Minister of Cooperative Governance and Traditional Affairs, the President of the Republic of South Africa and the National Coronavirus Command Council are directed to amend the current, or promulgate new, Regulations in order to allow political gatherings of more than 100 persons for the sole purpose of enabling the affected political parties to complete their Nomination Lists. This must be done by not later than 7 days of this Court having delivered its orders in the main application.
5. Subject to this Court granting the order in paragraph 4 above, the IEC is directed to extend the date for submissions of the party nomination lists as envisaged in IEC’s Election Timetable (as well as the consequential changes thereto) to a date that the IEC will determine, which date shall be consonant with, and accommodative of, prayer

4 above. This must be done by not later than 2 days of the relevant parties having fulfilled their obligations in terms of prayer 4 above.

6. Any party opposing this application is ordered to pay the EFF's costs; and

7. Further and/or alternative relief.

**PLEASE TAKE FURTHER NOTICE THAT** the affidavit of Marshall Dlamini, annexed hereto, will be used in support of this application.

**PLEASE TAKE FURTHER NOTICE THAT** the EFF has appointed the address of its attorneys described below as the address at which it will accept notice and service of all process and documents in these proceedings.

**PLEASE TAKE FURTHER NOTICE THAT** in terms of Rule 8 of the Rules, any party wishing to oppose the relief sought in this application, shall do so after directions have been issued by the Chief Justice as to the further disposal of the matter.

**PLEASE TAKE FURTHER NOTICE THAT** the EFF's attorneys are operating remotely and will accept service of process electronically.

**KINDLY SET THE MATTER DOWN ACCORDINGLY.**

**DATED AT JOHANNESBURG ON THIS 16 DAY OF AUGUST 2021.**



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**IAN LEVITT ATTORNEYS**

Intervening Party's Attorneys  
The Leonardo, Office Level 12,  
75 On Maude Street  
Sandton, 2196  
DX 54 Sandton Square  
Tel: 011 784 3310  
Fax to email : 086 579 5368  
Email: [angelike@ianlevitt.co.za](mailto:angelike@ianlevitt.co.za)

**TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT**

**AND TO: MOETI KANYANE INCORPORATED**

Attorneys for the Applicant (in the main application)

First Floor, Block D  
Corporate 66 Office Park  
269 Von Willich Street  
Die Hoewes

**CENTURION**

Tel: 012 003 6471

Email: [moeti@kanyane.co.za](mailto:moeti@kanyane.co.za) / [mashudu@kanyane.co.za](mailto:mashudu@kanyane.co.za)

Ref: M Kanyane/BC/M00232

**c/o RAMS INCORPORATED**

Ninth Floor, Fredman Towers  
13 Fredman Drive  
Sandton

Tel: 011 883 2234/6

Ref: Mr W Moeketsane

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

First Respondent (in the main application)

87 Hamilton Street

Arcadia

**PRETORIA**

**c/o THE STATE ATTORNEY**

SAAU Building

316 Thabo Sehume Street

**PRETORIA**

Email: [ichowe@justice.gov.za](mailto:ichowe@justice.gov.za) / [stateattorneypretoria@justice.gov.za](mailto:stateattorneypretoria@justice.gov.za)

**AND TO: THE MEC FOR LOCAL GOVERNMENT  
FOR THE EASTERN CAPE**

Second Respondent (in the main application)

Tyamzashe Building

Phalo Avenue

Civic Centre

**BHISHO**

Email: [mzwake.clay@eccogta.gov.za](mailto:mzwake.clay@eccogta.gov.za) / [nnothoko@gmail.com](mailto:nnothoko@gmail.com)

[Noncedo.nothoko@ecogta.gov.za](mailto:Noncedo.nothoko@ecogta.gov.za) / [sivuyisiwe.mayoyo@eecoqta.gov.za](mailto:sivuyisiwe.mayoyo@eecoqta.gov.za)

**AND TO: THE MEC FOR LOCAL GOVERNMENT  
FOR THE FREE STATE**

Third Respondent (in the main application)

OR Tambo House, Seventh Floor

Cnr St Andrews & Markgraaf Streets

**BLOEMFONTEIN**

Email: [hod@fscogta.gov.za](mailto:hod@fscogta.gov.za) / [temebin.lobe@fscogta.gov.za](mailto:temebin.lobe@fscogta.gov.za)

[lesleyk@fscogta.gov.za](mailto:lesleyk@fscogta.gov.za)

**AND TO: THE MEC FOR LOCAL GOVERNMENT  
FOR GAUTENG**

Fourth Respondent (in the main application)

37 Pixley ka Isaka Seme Street

Marshalltown

**JOHANNESBURG**

Email: [quinton.kuhn@gauteng.gov.za](mailto:quinton.kuhn@gauteng.gov.za) / [fred.mokoko@gauteng.gov.za](mailto:fred.mokoko@gauteng.gov.za)

[zukiswa.ncunyana@gauteng.gov.za](mailto:zukiswa.ncunyana@gauteng.gov.za) / [simon.masisi-letete@gauteng.gov.za](mailto:simon.masisi-letete@gauteng.gov.za)

[anthony.moomsamy@gauteng.gov.za](mailto:anthony.moomsamy@gauteng.gov.za)

**AND TO: THE MEC FOR LOCAL GOVERNMENT  
FOR KWAZULU-NATAL**

Fifth Respondent (in the main application)

330 Langalibalele Street

**PIETERMARITZBURG**

Email: [lalani.vanderberg@kzncogta.gov.za](mailto:lalani.vanderberg@kzncogta.gov.za) / [kerry.turner@kzncogta.gov.za](mailto:kerry.turner@kzncogta.gov.za)

[nokwanda.mchunu@kzncogta.gov.za](mailto:nokwanda.mchunu@kzncogta.gov.za) / [sanele.zondi@kzncogta.gov.za](mailto:sanele.zondi@kzncogta.gov.za)

**AND TO: THE MEC FOR LOCAL GOVERNMENT  
FOR LIMPOPO**

Sixth Respondent (in the main application)  
Hensa Tower Building  
28 Market Street

**POLOKWANE**

Email: [ngobenidd@coghsta.limpopo.gov.za](mailto:ngobenidd@coghsta.limpopo.gov.za) / [dumalisile@coghsta.limpopo.gov.za](mailto:dumalisile@coghsta.limpopo.gov.za)  
[mathyem@coghsta.limpopo.gov.za](mailto:mathyem@coghsta.limpopo.gov.za)

**AND TO: THE MEC FOR LOCAL GOVERNMENT  
FOR MPUMALANGA**

Seventh Respondent (in the main application)  
Samora Machel Building  
Ext 2, 7 Government Boulevard  
Riverside Park

**MBOMBELA**

Email: [lvdwalt@mpg.gov.za](mailto:lvdwalt@mpg.gov.za) / [mvdmerwe@mpg.gov.za](mailto:mvdmerwe@mpg.gov.za)  
[sam@mpg.gov.za](mailto:sam@mpg.gov.za) / [skunene@mpg.gov.za](mailto:skunene@mpg.gov.za) / [mkhwanazizf@mpg.gov.za](mailto:mkhwanazizf@mpg.gov.za)

**AND TO: THE MEC FOR LOCAL GOVERNMENT  
FOR THE NORTHERN CAPE**

Eight Respondent (in the main application)  
JS du Plooy Building  
9 Cecil Sussman Street

**KIMBERLEY**

Email: [bvass@ncpg.gov.za](mailto:bvass@ncpg.gov.za) / [bslenkoe@ncpg.gov.za](mailto:bslenkoe@ncpg.gov.za)  
[mmadyo@ncpg.gov.za](mailto:mmadyo@ncpg.gov.za) / [gbotha@ncpg.gov.za](mailto:gbotha@ncpg.gov.za)  
[mmanyeneng@ncpg.gov.za](mailto:mmanyeneng@ncpg.gov.za) / [pseane@ncpg.gov.za](mailto:pseane@ncpg.gov.za)

**AND TO: THE MEC FOR LOCAL GOVERNMENT  
FOR NORTH-WEST**

Ninth Respondent (in the main application)  
Telkom Building  
2266 Bessemmer Street  
Industrial Site

**MAFIKENG**

Email: [mmotlogelwa@nwpg.gov.za](mailto:mmotlogelwa@nwpg.gov.za) / [tlerefolo@nwpg.gov.za](mailto:tlerefolo@nwpg.gov.za)

**AND TO: THE MEC FOR LOCAL GOVERNMENT  
FOR THE WESTERN CAPE**

Tenth Respondent (in the main application)  
9 Wale Street  
**CAPE TOWN**  
Email: [graham.paulse@westerncape.gov.za](mailto:graham.paulse@westerncape.gov.za)

**AND TO: THE SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION**

Eleventh Respondent (in the main application)  
Block B, Corporate Park  
175 Corobray Avenue  
Waterkloof Glen  
**PRETORIA**  
Email: [ugopichund@salga.org.za](mailto:ugopichund@salga.org.za)

**AND TO: THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

First Respondent (in this application)  
**THE STATE ATTORNEY**  
SAAU Building  
316 Thabo Sehume Street  
**PRETORIA**  
Email: [president@presidency.gov.za](mailto:president@presidency.gov.za) / [ichowe@justice.gov.za](mailto:ichowe@justice.gov.za) /  
[stateattorneypretoria@justice.gov.za](mailto:stateattorneypretoria@justice.gov.za)

**AND TO: THE NATIONAL CORONAVIRUS COMMAND COUNCIL**

Second Respondent (in this application)  
**THE STATE ATTORNEY**  
SAAU Building  
316 Thabo Sehume Street  
**PRETORIA**  
Email: [ichowe@justice.gov.za](mailto:ichowe@justice.gov.za) / [stateattorneypretoria@justice.gov.za](mailto:stateattorneypretoria@justice.gov.za)



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**THE NATIONAL CORONAVIRUS COMMAND COUNCIL** Second Respondent

**MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS** Third Respondent

**ELECTORAL COMMISSION OF SOUTH AFRICA** Fourth Respondent

in the matter between:

**ELECTORAL COMMISSION OF SOUTH AFRICA** Applicant

and

**MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS** First Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, EASTERN CAPE** Second Respondent

*JM*  
*17/10*

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
AND TRADITIONAL AFFAIRS, FREE STATE**

Third Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
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Tenth Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION**

Eleventh Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**MARSHALL DLAMINI**

do hereby make oath and state:

*MMD*

- 1 I am a member of Parliament and the Secretary-General of the intervening party, the Economic Freedom Fighters ('EFF'), a registered political party
- 2 I am duly authorised to bring this application and to depose to this affidavit on behalf of the EFF.
- 3 The facts to which I depose are true and correct and are within my personal knowledge except where it is apparent from the context that they are not.
- 4 The submissions of law I make in this affidavit are made on legal advice.

#### **INTRODUCTION**

- 5 I will deal with the following three topics:
  - 5.1 briefly, the preliminary issues of (i) directions and submissions (ii) urgency, direct access and direct and substantial interest of the EFF and (iii) parties;
  - 5.2 relevant factual background to the EFF's prayers; and
  - 5.3 why the EFF seeks the prayers it does.
- 6 I know turn to deal with each.

*Handwritten signature*

## PRELIMINARY ISSUES

### Directions and Submissions

- 7 Due to the truncated timeframes, the EFF undertakes to file and serve its written submissions by no later than Tuesday, 17 August 2021. This is subject to (i) this Court granting the EFF intervention status and permitting it to make submissions (ii) as well as any directives it may give.

### Urgency, Direct Access and Direct and Substantial Interest

- 8 This is an application brought in terms of Rules 8 and 12.
- 9 I humbly submit that the urgency of this application and the EFF's prayer to be granted direct access to this Court is contingent upon, and flows from, *fait accompli*, the IEC being granted urgency and direct access status
- 10 I make this submission on the bases that the EFF has clear direct and substantial interest in the main application and should have been so joined. This has been duly acknowledged by the IEC in its application. The EFF has however not been joined to the proceedings for reasons outlined in the IEC's Founding Affidavit. This has necessitated this application.

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- 11 Owing to the nature of these proceedings, the truncated timeframes, the number of parties and considerations of not unduly burdening this Court with voluminous papers, I take the above preliminary points no further in this affidavit. Submissions in this regard will be canvassed on behalf of the EFF in due course, to the extent necessary.
- 12 Suffice at this point to merely note the above and the fact that the subject-matter in the main application directly and substantially affects the EFF, and for present purposes the IEC's 2021 Local Government Election Timetable ("**Election Timetable**") which the EFF seeks to challenge in its application.
- 13 I now turn to set out the parties.

#### Parties

- 14 The EFF seeks potential remedies against the President of the Republic of South Africa ("**President**") and the National Coronavirus Command Council ("**Command Council**"), amongst two other parties already party to the main application viz. the Minister of Cooperative Governance and Traditional Affairs ("**Minister**") and the Independent Electoral Commission ("**IEC**").
- 15 The intervening party is the EFF, a registered political party in terms of the Electoral Commission Act, 1996 with representation in all spheres of government. Its headquarters are at 78 De Korte Street, Braamfontein, Johannesburg. The EFF

*[Handwritten signature]*

will receive service and correspondence at the following email address:  
angelike@ianlevill.co.za

- 16 The first respondent is the President, care of the State Attorney, SAAU Building, 316 Thabo Sehume Street, Pretoria. The President is cited by virtue of being the Head of the National Executive, his role as the convenor of the Command Council and his interest in the Disaster Management Regulations ("Regulations"). We will serve the President at the following email addresses:  
president@presidency.gov.za / ichowe@justice.gov.za /  
stateattorneypretoria@justice.gov.za.
- 17 The second respondent is the Command Council, care of the State Attorney, SAAU Building, 316 Thabo Sehume Street, Pretoria. The Command Council's further particulars in relation its establishment, offices, powers, functions and role are unknown to me save the fact that it plays an integral role in the formulation of the Regulations and accordingly cited. We will serve the Command Council at the following email addresses: ichowe@justice.gov.za /  
stateattorneypretoria@justice.gov.za.
- 18 The remainder of the parties are as set out in the IEC's Notice of Motion.
- 19 Having dealt with the preliminary issues I will now narrate the factual matrix that gives rise to this application.



## FACTUAL BACKGROUND

- 20 The IEC published its Election Timetable in terms of which it, amongst other things, set 23 August 2021 (before 17 00) as the date at which registered parties that intend to contest the Local Government Elections ("LGE") must submit a party list of their election candidates. The EFF seeks to participate in the LGE and thus is bound by the Election Timetable
- 21 The EFF supports the IEC's application subject to the following, which is the essence of this application.
- 22 The EFF compiles its Nomination List in the manner set out in its document named "2021 Victory Manual", which was adopted in October 2021. The Victory Manual provides:

*"A Branch General Assembly (BGA) meeting will nominate Ward Councillor Candidates of the EFF for the purpose of the 2021 LGE. EFF Ward Councillor Candidates will be confirmed after security, criminal record check and suitability by Ward Council and adoption of CCT, after the CCT has satisfied itself that the nomination is in accordance with the EFF Constitution and Guidelines*

*Further:*

*The following will be the process upon which the Branch General Assemblies are convened to nominate EFF Ward Councillor Candidates:*

*4 Branch General Assemblies that do not reach a quorum of 50%+1 members will not nominate a Ward Councillor Candidate.*

*6 All BGAs shall have two attendance registers and all members shall sign both attendance registers before they get admitted to a BGA and submission of each branch Ward Councillor Candidate shall only be accepted if submitted with the attendance register of branch members.*

*7 The BGA shall have the following items on the Agenda - political overview of issues affecting the Branch and Ward*

*M/10*  
*[Signature]*

- 23 From the above, it is clear that the processes for candidate nomination are at the heart of the EFF's democratic representation ethos. It is equally clear that such processes are protracted and require member gatherings.
- 24 The EFF members are largely persons of limited resources. They have limited access to electronic platforms. Absent such resources for each of its members, the BGAs are a *'virtual'* impossibility. This matters for the following reasons.
- 25 The EFF has branches across all provinces. The number of its members in each branch varies, but average more than 100 members in each branch. It also has well over of 100 members in a substantial number of its branches. All these branches have to hold the BGAs envisaged above. The practical difficulty with the above political process is borne of the Regulations.
- 26 The Regulations permit political gatherings but limits attendees to 50 persons for indoor venues and 100 for outdoor venues, subject to other prescripts.
- 27 The difficulty faced by the EFF, and as we understand it, by other political parties as well, is that the candidate nomination gatherings could not be held as a result. This renders it impossible to provide the IEC with the Nomination Lists, certainly under the prevailing circumstances and the Nomination List submission deadline set in the Election Timetable.





28 The challenges with the Election Timetable are exacerbated by other related challenges that relate to free and fair elections as mandated by not least the Constitution. These include the parties' ability (or lack thereof) to campaign in preparation for the LGE. This point has been canvassed in the main application and will take the point no further save to record our support for those submissions.

29 This brings me to the remedies that the EFF seeks.

### REMEDIES

30 I have already stated that the EFF aligns itself with the remedies that the IEC seeks in the main application. To the extent that either of them (prayed for in the alternative) is granted, then the EFF accepts such orders. The EFF prayers are only relevant to the extent that the IEC prayers are not granted. In this event, the EFF seeks the remedies as set out in this application.

31 In such event, the EFF in essence prays that the Nomination List deadline of 23 August 2021 is extended as set out in our Notice of Motion. The essence of the prayers is that the IEC is directed to extend this deadline in line with the EFF's second substantive prayer.

32 The prayer is that relevant parties, being the President, the Minister and the Command Council, are directed to amend the current or promulgate new Regulations such that they allow political gatherings for candidate nominations, fully attended by the eligible members and solely for the purposes of nominating

*MM*  
*MM*

such candidates. This would allow the political parties to compile the respective *Nomination List and to do so in a democratic manner.*

- 33 Such amendments or promulgation would still be subject to other regulatory prescriptions such as social distancing and wearing of masks and any other matters that may be decided by the relevant parties at their discretion.
- 34 In absence of this, the political parties are in essence forced to undertake an undemocratic internal process of nominating candidates not chosen by the people they are nominated to represent.
- 35 Grassroot interaction and approval of election candidates for local government is at the heart of true democratic government representation. One would be hard-pressed to find an alternative to give meaning to this proposition outside of the process envisaged in the Victory Manual. It is precisely because of this that most, if not all, political parties undertake this process.
- 36 It is also for this reason that the NPLC, a body established to give effect to the IEC's function under the Electoral Commission Act to "*establish and maintain liaison and co-operation with parties*" unanimously rejected the Election Timetable.
- 37 For avoidance of any doubt, the EFF does not suggest that the Election Timetable and the Regulations should be altered so as to permit nomination processes in the ordinary course. Ours is a nuanced point.

EFF  
MIND

- 38 The EFF is cognisant of the reality of Court-19 and the difficulties government and the IEC face in managing the pandemic and simultaneously continuing to perform their constitutional functions. The EFF further sympathises with the IEC to the extent it has married itself to the current Election Timetable, at least for the time being.
- 39 The EFF asks of this Court to find a proper balance between the election constitutional imperative of regular elections and the need to have them run free and fair. Further, the EFF's argument is premised on the constitutionality recognised imperative that the electorate must have access to information of, and participate in, processes that will allow it to make informed decisions about who it elects to represent them.
- 40 The fulcrum of the opposition to the IEC application seems to be that the Constitution requires regular elections. We accept this principle point. We however submit that this is not a context-free principle. It rather operates within a context that such regular elections must be free and fair. We take the submission further by stating that implied in the idea of regular elections is also a need to have regard to the Bill of Rights implication as argued by the IEC.
- 41 Further in this regard, we were advised that submissions will be made that over and above the foregoing contextual points, the meaning of "regular (elections)" must itself be considered contextually.



- 42 *Regular election* was clearly intended to ensure accountability and democratic governance. Implied in that is the idea that government must reflect the will of the people and be subject to possible change at regular intervals. It cannot have meant rigid and unwavering union to the prescribed five-year period, free of other important considerations such as Covid-19. It is precisely for that reason that various constitutional and legislative prescripts allow for deviation from election timeframes where appropriate. These instances would include where holding of the election would result in them not being free and fair.
- 43 This is moreso in light of the IEC's plea that this Court not direct it to perform that which is impossible.
- 44 Last, the deviation sought from the prescribed 90-day period, is a negligible four month period, give or take. Viewed through that prism, there is minimal, if any real violation of *regular elections* principle. This is particularly if juxtaposed against other fundamental constitutional principles governing the main application.
- 45 With that being said, we readily accept that the Constitution appears to be rigidly prescriptive of the five-year period. This introduces possibly the most important question to this debate – what empowers this Court to deviate from that prescription?
- 46 For purposes of this affidavit, we simply restate our points above, and further state that there is a measure of flexibility afforded to this Court to give effective and just remedies.

*Handwritten signature*  
MMS

- 47 We were advised that affidavits are not intended to deal with legal submissions but should largely confine itself to factual assertions. Accordingly, I was advised that the EFF's legal representative will argue the foregoing submissions at the appropriate stage should our intervention and submission prayers be granted.
- 48 Last on the question of the remedies, we note the IEC's proposed Nomination Lists deadline (24 November 2021). We do not object to this as a matter of principle. The difficulty for the EFF is the uncertain nature in which the issues surrounding it are framed. Specifically, the IEC undertakes to "engage" the Minister to ensure promulgation of Regulations dealing with the LGE, including the issue of the Nomination Lists deadline. The difficulty with this proposition is its uncertainty.
- 49 To build on the proposition rhetorically, what happens when no consensus is reached with the Minister in this regard? The very essence of the main application is a dispute about delays in holding the LGE. Further potential litigation that may be necessitated by failure to put in place definitive remedies would exacerbate this problem. This is the premise upon which the EFF seeks a direct order but still providing flexibility and independence on how the relevant government persons and institutions as well as the IEC exercise their powers.
- 50 Notwithstanding the foregoing and as noted by the IEC, it is of comfort that the Minister made submissions to the Moseneke Inquiry in relation to possible amendments to the Regulations. This bolsters our conviction that the remedies we seek are thus not necessarily offensive to the principle of separation of powers.

MM  
MM

51 Properly construed, "separation of powers" means nothing much more than a proposition that one branch of government should not usurp the decision-making power of another, unless of course permissible. The Minister's submissions were what would have been otherwise a violation of this principle.

52 For these reasons, and as will be argued in due course, we submit that there are valid grounds for the prayers sought by the EFF.

#### CONCLUSION

53 In conclusion, the EFF prays as it does in its Notice of Motion.


54 On costs, we respectfully submit that on the *Biowatch* principle, EFF should not be mulcted with costs should its application be dismissed.



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MARSHALL DLAMINI

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at Johannesburg on this the 16 day of August 2021, and that the Regulations contained in Government Notice R 1258 of 21 July 1972, as amended, have been complied with.



**MICHELLE LERATO MARI**  
**COMMISSIONER OF OATHS**  
**EX OFFICIO**  
**PRACTISING ATTORNEY RSA**  
**35 FRICKER ROAD, ILLOVO, SANDTON, 2196**



**COMMISSIONER OF OATHS**

Full Name

Address

Capacity

*M. Mari*

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CCT CASE NO: 245/21**

In the application for intervention of:

**THE ECONOMIC FREEDOM FIGHTERS**

Intervention Party

and

**THE PRESIDENT OF THE REPUBLIC OF  
SOUTH AFRICA**

First Respondent

**THE NATIONAL CORONAVIRUS COMMAND COUNCIL**

Second Respondent

**MINISTER OF COOPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS**

Third Respondent

**ELECTORAL COMMISSION OF SOUTH AFRICA**

Fourth Respondent

In the matter between:

**ELECTORAL COMMISSION OF SOUTH AFRICA**

Applicant

and

**MINISTER OF COOPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS**

First Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT  
AND TRADITIONAL AFFAIRS, EASTERN CAPE**

Second Respondent



<b>MEC RESPONSIBLE FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, FREE STATE</b>	Third Respondent
<b>MEC RESPONSIBLE FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, GAUTENG</b>	Fourth Respondent
<b>MEC RESPONSIBLE FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, KWAZULU-NATAL</b>	Fifth Respondent
<b>MEC RESPONSIBLE FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, LIMPOPO</b>	Sixth Respondent
<b>MEC RESPONSIBLE FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, MPUMALANGA</b>	Seventh Respondent
<b>MEC RESPONSIBLE FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, NORTHERN CAPE</b>	Eighth Respondent
<b>MEC RESPONSIBLE FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, NORTH-WEST</b>	Ninth Respondent
<b>MEC RESPONSIBLE FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, WESTERN CAPE</b>	Tenth Respondent
<b>SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION</b>	Eleventh Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**MARSHALL DLAMINI**

do hereby make oath and state:

- 1 I am a member of Parliament and the Secretary-General of the intervening party, the Economic Freedom Fighters (“EFF”), a registered political party.
- 2 I am duly authorised to bring this application and to depose to this affidavit on behalf of the EFF.
- 3 The facts to which I depose are true and correct and are within my personal knowledge except where it is apparent from the context that they are not.
- 4 The submissions of law I make in this affidavit are made on legal advice.

## **INTRODUCTION**

- 5 I will deal with the following three topics:
  - 5.1 briefly, the preliminary issues of (i) directions and submissions (ii) urgency, direct access and direct and substantial interest of the EFF and (iii) parties;
  - 5.2 relevant factual background to the EFF’s prayers; and
  - 5.3 why the EFF seeks the prayers it does.
- 6 I know turn to deal with each.

## PRELIMINARY ISSUES

### Directions and Submissions

- 7 Due to the truncated timeframes, the EFF undertakes to file and serve its written submissions by no later than Tuesday, 17 August 2021. This is subject to (i) this Court granting the EFF intervention status and permitting it to make submissions (ii) as well as any directives it may give.

### Urgency, Direct Access and Direct and Substantial Interest

- 8 This is an application brought in terms of Rules 8 and 12.
- 9 I humbly submit that the urgency of this application and the EFF's prayer to be granted direct access to this Court is contingent upon, and flows from, *fait accompli*, the IEC being granted urgency and direct access status.
- 10 I make this submission on the bases that the EFF has clear direct and substantial interest in the main application and should have been so joined. This has been duly acknowledged by the IEC in its application. The EFF has however not been joined to the proceedings for reasons outlined in the IEC's Founding Affidavit. This has necessitated this application.

- 11 Owing to the nature of these proceedings, the truncated timeframes, the number of parties and considerations of not unduly burdening this Court with voluminous papers, I take the above preliminary points no further in this affidavit. Submissions in this regard will be canvassed on behalf of the EFF in due course, to the extent necessary.
- 12 Suffice at this point to merely note the above and the fact that the subject-matter in the main application directly and substantially affects the EFF, and for present purposes the IEC's 2021 Local Government Election Timetable ("**Election Timetable**") which the EFF seeks to challenge in its application.
- 13 I now turn to set out the parties.

#### Parties

- 14 The EFF seeks potential remedies against the President of the Republic of South Africa ("**President**") and the National Coronavirus Command Council ("**Command Council**"), amongst two other parties already party to the main application viz. the Minister of Cooperative Governance and Traditional Affairs ("**Minister**") and the Independent Electoral Commission ("**IEC**").
- 15 The intervening party is the EFF, a registered political party in terms of the Electoral Commission Act, 1996 with representation in all spheres of government. Its headquarters are at 78 De Korte Street, Braamfontein, Johannesburg. The EFF

will receive service and correspondence at the following email address:  
[angelike@ianlevitt.co.za](mailto:angelike@ianlevitt.co.za).

16 The first respondent is the President, care of the State Attorney, SAAU Building, 316 Thabo Sehume Street, Pretoria. The President is cited by virtue of being the Head of the National Executive, his role as the convenor of the Command Council and his interest in the Disaster Management Regulations (“**Regulations**”). We will serve the President at the following email addresses:  
[president@presidency.gov.za](mailto:president@presidency.gov.za) / [ichowe@justice.gov.za](mailto:ichowe@justice.gov.za) / [stateattorneypretoria@justice.gov.za](mailto:stateattorneypretoria@justice.gov.za).

17 The second respondent is the Command Council, care of the State Attorney, SAAU Building, 316 Thabo Sehume Street, Pretoria. The Command Council’s further particulars in relation its establishment, offices, powers, functions and role are unknown to me save the fact that it plays an integral role in the formulation of the Regulations and accordingly cited. We will serve the Command Council at the following email addresses: [ichowe@justice.gov.za](mailto:ichowe@justice.gov.za) / [stateattorneypretoria@justice.gov.za](mailto:stateattorneypretoria@justice.gov.za).

18 The remainder of the parties are as set out in the IEC’s Notice of Motion.

19 Having dealt with the preliminary issues, I will now narrate the factual matrix that gives rise to this application.

## FACTUAL BACKGROUND

- 20 The IEC published its Election Timetable in terms of which it, amongst other things, set 23 August 2021 (before 17:00) as the date at which registered parties that intend to contest the Local Government Elections (“LGE”) must submit a party list of their election candidates. The EFF seeks to participate in the LGE and thus is bound by the Election Timetable.
- 21 The EFF supports the IEC’s application subject to the following, which is the essence of this application.
- 22 The EFF compiles its Nomination List in the manner set out in its document named “2021 Victory Manual”, which was adopted in October 2021. The Victory Manual provides:

*“A Branch General Assembly (BGA) meeting will nominate Ward Councillor Candidates of the EFF for the purpose of the 2021 LGE. EFF Ward Councillor Candidates will be confirmed after security, criminal record check and suitability by Ward Council and adoption of CCT, after the CCT has satisfied itself that the nomination is in accordance with the EFF Constitution and Guidelines.*

*Further;*

*The following will be the process upon which the Branch General Assemblies are convened to nominate EFF Ward Councillor Candidates:*

*...*

*4. Branch General Assemblies that do not reach a quorum of 50%+1 members will not nominate a Ward Councillor Candidate.*

*...*

*6. All BGAs shall have two attendance registers and all members shall sign both attendance registers before they get admitted to a BGA, and submission of each branch Ward Councillor Candidate shall only be accepted if submitted with the attendance register of branch members...*

*7. The BGA shall have the following items on the Agenda...political overview of issues affecting the Branch and Ward.”*

- 23 From the above, it is clear that the processes for candidate nomination are at the heart of the EFF's democratic representation ethos. It is equally clear that such processes are protracted and require member gatherings.
- 24 The EFF members are largely persons of limited resources. They have limited access to electronic platforms. Absent such resources for each of its members, the BGAs are a "*virtual*" impossibility. This matters for the following reasons.
- 25 The EFF has branches across all provinces. The number of its members in each branch varies, but average more than 100 members in each branch. It also has well over of 100 members in a substantial number of its branches. All these branches have to hold the BGAs envisaged above. The practical difficulty with the above political process is borne of the Regulations.
- 26 The Regulations permit political gatherings but limits attendees to 50 persons for indoor venues and 100 for outdoor venues, subject to other prescripts.
- 27 The difficulty faced by the EFF, and as we understand it, by other political parties as well, is that the candidate nomination gatherings could not be held as a result. This renders it impossible to provide the IEC with the Nomination Lists, certainly under the prevailing circumstances and the Nomination List submission deadline set in the Election Timetable.

- 28 The challenges with the Election Timetable are exacerbated by other related challenges that relate to free and fair elections as mandated by not least the Constitution. These include the parties' ability (or lack thereof) to campaign in preparation for the LGE. This point has been canvassed in the main application and will take the point no further save to record our support for those submissions.
- 29 This brings me to the remedies that the EFF seeks.

## **REMEDIES**

- 30 I have already stated that the EFF aligns itself with the remedies that the IEC seeks in the main application. To the extent that either of them (prayed for in the alternative) is granted, then the EFF accepts such orders. The EFF prayers are only relevant to the extent that the IEC prayers are not granted. In this event, the EFF seeks the remedies as set out in this application.
- 31 In such event, the EFF in essence prays that the Nomination List deadline of 23 August 2021 is extended as set out in our Notice of Motion. The essence of the prayers is that the IEC is directed to extend this deadline in line with the EFF's second substantive prayer.
- 32 The prayer is that relevant parties, being the President, the Minister and the Command Council, are directed to amend the current or promulgate new Regulations such that they allow political gatherings for candidate nominations, fully attended by the eligible members and solely for the purposes of nominating



such candidates. This would allow the political parties to compile the respective Nomination List and to do so in a democratic manner.

33 Such amendments or promulgation would still be subject to other regulatory prescripts such as social distancing and wearing of masks and any other matters that may be decided by the relevant parties at their discretion.

34 In absence of this, the political parties are in essence forced to undertake an undemocratic internal process of nominating candidates not chosen by the people they are nominated to represent.

35 Grassroot interaction and approval of election candidates for local government is at the heart of true democratic government representation. One would be hard-pressed to find an alternative to give meaning to this proposition outside of the process envisaged in the Victory Manual. It is precisely because of this that most, if not all, political parties undertake this process.

36 It is also for this reason that the NPLC, a body established to give effect to the IEC's function under the Electoral Commission Act to "*establish and maintain liaison and co-operation with parties*" unanimously rejected the Election Timetable.

37 For avoidance of any doubt, the EFF does not suggest that the Election Timetable and the Regulations should be altered so as to permit nomination processes in the ordinary course. Ours is a nuanced point.

- 38 The EFF is cognisant of the reality of Covid-19 and the difficulties government and the IEC face in managing the pandemic and simultaneously continuing to perform their constitutional functions. The EFF further sympathises with the IEC to the extent it has married itself to the current Election Timetable, at least for the time being.
- 39 The EFF asks of this Court to find a proper balance between the election constitutional imperative of regular elections and the need to have them run free and fair. Further, the EFF's argument is premised on the constitutionality recognised imperative that the electorate must have access to information of, and participate in, processes that will allow it to make informed decisions about who it elects to represent them.
- 40 The fulcrum of the opposition to the IEC application seems to be that the Constitution requires regular elections. We accept this principle point. We however submit that this is not a context-free principle. It rather operates within a context that such regular elections must be free and fair. We take the submission further by stating that implied in the idea of regular elections is also a need to have regard to the Bill of Rights implication as argued by the IEC.
- 41 Further in this regard, we were advised that submissions will be made that over and above the foregoing contextual points, the meaning of "*regular (elections)*" must itself be considered contextually.

- 42 “*Regular election*” was clearly intended to ensure accountability and democratic governance. Implied in that is the idea that government must reflect the will of the people and be subject to possible change at regular intervals. It cannot have meant rigid and unwavering union to the prescribed five-year period, free of other important considerations such as Covid-19. It is precisely for that reason that various constitutional and legislative prescripts allow for deviation from election timeframes where appropriate. These instances would include where holding of the election would result in them not being free and fair.
- 43 This is moreso in light of the IEC’s plea that this Court not direct it to perform that which is impossible.
- 44 Last; the deviation sought from the prescribed 90-day period, is a negligible four month period, give or take. Viewed through that prism, there is minimal, if any, real violation of “*regular elections*” principle. This is particularly if juxtaposed against other fundamental constitutional principles governing the main application.
- 45 With that being said, we readily accept that the Constitution appears to be rigidly prescriptive of the five-year period. This introduces possibly the most important question to this debate – what empowers this Court to deviate from that prescription?
- 46 For purposes of this affidavit, we simply restate our points above, and further state that there is a measure of flexibility afforded to this Court to give effective and just remedies.

- 47 We were advised that affidavits are not intended to deal with legal submissions but should largely confine itself to factual assertions. Accordingly, I was advised that the EFF's legal representative will argue the foregoing submissions at the appropriate stage should our intervention and submission prayers be granted.
- 48 Last on the question of the remedies, we note the IEC's proposed Nomination Lists deadline (24 November 2021). We do not object to this as a matter of principle. The difficulty for the EFF is the uncertain nature in which the issues surrounding it are framed. Specifically, the IEC undertakes to "engage" the Minister to ensure promulgation of Regulations dealing with the LGE, including the issue of the Nomination Lists deadline. The difficulty with this proposition is its uncertainty.
- 49 To build on the proposition rhetorically, what happens when no consensus is reached with the Minister in this regard? The very essence of the main application is a dispute about delays in holding the LGE. Further potential litigation that may be necessitated by failure to put in place definitive remedies would exacerbate this problem. This is the premise upon which the EFF seeks a direct order but still providing flexibility and independence on how the relevant government persons and institutions as well as the IEC exercise their powers.
- 50 Notwithstanding the foregoing and as noted by the IEC, it is of comfort that the Minister made submissions to the Moseneke Inquiry in relation to possible amendments to the Regulations. This bolsters our conviction that the remedies we seek are thus not necessarily offensive to the principle of separation of powers.

51 Properly construed, "*separation of powers*" means nothing much more than a proposition that one branch of government should not usurp the decision-making power of another, unless of course permissible. The Minister's submissions wane what would have been otherwise a violation of this principle.

52 For these reasons, and as will be argued in due course, we submit that there are valid grounds for the prayers sought by the EFF.

## CONCLUSION

53 In conclusion, the EFF prays as it does in its Notice of Motion.

54 On costs, we respectfully submit that on the *Biowatch* principle, EFF should not be mulcted with costs should its application be dismissed.

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**MARSHALL DLAMINI**

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at \_\_\_\_\_ on this the \_\_\_ day of August 2021, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

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**COMMISSIONER OF OATHS**

Full names:

Address:

Capacity: