

In the Constitutional Court of South Africa

Case CCT 245/21

In the application of

Makana Independent New Deal

Intervening Party

In re:

ELECTORAL COMMISSION OF SOUTH AFRICA

Applicant

And

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

First Respondent

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

Second Respondent

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

Third Respondent

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

Fourth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF THE
KWAZULU-NATAL**

Fifth Respondent

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

Sixth Respondent

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

Seventh Respondent

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

Eighth Respondent

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

Ninth Respondent

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

Tenth Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
ASSOCIATION**

Eleventh Respondent

Notice of motion

TAKE NOTICE THAT Makana Independent New DEAL (**MIND**) hereby applies to this court in the following terms:

1. granting leave to the intervener to intervene as a respondent in terms of Rule 8 of this Court's Rules;
2. MIND is granted the right to present written submissions and oral argument at the hearing of this matter; and
3. directing that the affidavit of PHILIP MACHANICK be admitted as founding papers on behalf of the twelfth respondent.

TAKE FURTHER NOTE THAT in view of the short timelines, MIND simultaneously applies for an alternative order in the following terms:

1. All parties and candidates campaigning during any elections held during the Covid-19 pandemic should adhere to Covid-19 regulations then applicable;
2. the Applicant should update the Electoral Code of Conduct to make explicit extreme sanctions for any party or candidate violating Covid-19 safety regulations;


3. the Applicant should immediately set in motion steps to ensure free data and local radio station access as outlined in the Founding Affidavit (paragraph 29); and
4. this Court assume ongoing supervisory jurisdiction, requiring the Applicant to report to the Court periodically on its progress in arranging pandemic-safe and constitutionally-compliant local government elections by the currently-gazetted date.

TAKE FURTHER NOTE THAT The Founding Affidavit of PHILIP MACHANICK will be used in support of this application and if granted will serve as an affidavit in these proceedings.

TAKE NOTICE FURTHER that the applicant will accept notice and service of all documents in these proceedings at the address set out below.

KINDLY ENROL THE MATTER FOR HEARING ACCORDINGLY

SIGNED AT MAKHANDA ON 11 AUGUST 2021



PHILIP MACHANICK
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TO: THE REGISTRAR OF THE CONSTITUTIONAL COURT,
JOHANNESBURG

AND TO: MOETI KANYANE INCORPORATED

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C/O RAMS INCORPORATED

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(SERVICE BY EMAIL)

**AND TO: THE MINISTER OF COOPERATIVE GOVERNANCE AND
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In the Constitutional Court of South Africa

Case CCT 245/21

In the application of:

Makana Independent New Deal (MIND)

Intervening Party

to intervene as a respondent in the matter between:

ELECTORAL COMMISSION OF SOUTH AFRICA

Applicant

and

**MINISTER OF COOPERATIVE GOVERNANCE
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WESTERN CAPE

**SOUTH AFRICAN LOCAL GOVERNMENT
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AFFIDAVIT

I, the undersigned,

PHILIP MACHANICK

declare under oath that:

1. I am an adult male resident of Makhanda in the Makana Local Municipality in the Eastern Cape.
2. I am the leader of the political party Makana Independent New Deal (MIND) registered with the Applicant for purposes of contesting the local government elections in the Makana Local Municipality and therefore have a direct interest and therefore standing to intervene in this matter.
3. I have contested elections in South Africa and abroad, as well as being a frequent contributor to political debate locally and abroad and hence have broad experience in politics and alternative modes or campaigning.
4. I am an associate professor at Rhodes University, Makhanda, and hence have sufficient expertise in epidemiology, having published a paper in the field¹ since the Covid-19 pandemic broke out, to interpret expert opinion critically, though I do not claim to be an expert myself.
5. The facts and circumstances as set out in this affidavit fall within my personal knowledge and are to the best of my knowledge both true and

¹ Machanick P. Revisiting early-stage COVID-19 strategy options [version 3; peer review: 2 approved]. F1000Research 2021, 9:327 (<https://doi.org/10.12688/f1000research.23524.3>)

correct, except where the context indicates otherwise. Where I answer to legal aspects, I request the indulgence of the Court where I may be in error as the shortness of time and lack of financial resources to employ counsel require that I rely on my own inexpert legal knowledge.

6. The two prayers of the Applicant in essence request that this Court either overrule the Constitution (paragraph 13) or that it confirm that it cannot do so but that it allows a grace period to put right the unlawfulness of violating the Constitution (paragraph 14).
7. It is my understanding that this Court has employed the logic of the second prayer in correcting constitutional violations that require legislative redress; the violation in other words is *retrospective* – existing legislation is in conflict with the Constitution either in error if it was enacted since the current Constitution was in force or because it was legislated prior to the current constitutional order.
8. In the present circumstances, the Applicant is requesting condonation of a *prospective* violation: the Applicant admits it is capable of running the election under current circumstances but is advised by the Justice Moseneke report that free and fair elections cannot be held under pandemic conditions (paragraph 9).
9. The argument therefore is for filling a constitutional lacuna: that the Constitution does not allow for such an exceptional event and this Court must therefore apply its mind to varying from the explicit wording of the Constitution while fulfilling its intent.
10. The bar to such a ruling must be high and far beyond reasonable doubt as the precedent thereby set cannot be applied willy-nilly to any circumstance where adhering to the Constitution is inconvenient.

11. I need not remind this Court of how its recent finding of contempt against a former president [Case CCT 52/21] may have resulted in the extreme inconvenience of massive unrest that caused sadly extensive loss of life, disrupted many lives and caused enormous economic damage². Inconvenience alone therefore cannot be an argument. However I do accept that a balance of rights argument – the right to life versus the right to vote – needs to be applied. However, this argument must be very carefully considered.
12. In the remainder of this affidavit I set out arguments against delaying the election so the Court may have a full picture of the options open to it.
13. My argument relies on one observation: both the Applicant and the Justice Moseneke report on which they relied have incorrectly implicitly assumed that there is either an election campaign, or no political activity.
14. If you accept that there is other political activity, then the risks of running an election campaign during a pandemic can be weighed against the risks of those other forms of political activity.
15. In the Makana Local Municipality, the Unemployed People's Movement won a judgement on 14 January 2020 to place the municipality under administration [553/2019]. The government has since fought tooth and nail to avoid implementing this judgement, opposing two Section 18 applications to implement it pending appeal.
16. In the meantime a city of approximately 100,000 residents suffers water availability at best every second day, numerous sewer leaks and a general breakdown of services.

² <https://www.dailymaverick.co.za/article/2021-07-20-imf-study-suggests-civil-unrest-will-have-a-significant-economic-impact-on-south-africa/>

17. Our experience is not atypical; this Court is I am sure aware of the parlous state of municipal finance. The latest Auditor-General report shows that only 8% of all municipalities had totally unqualified audits³.
18. Municipal financial dysfunction is part of a broader picture of failed service delivery and collapsing infrastructure.
19. Absent elections and given the government's extreme reluctance to accept legal sanction for dysfunction, the only other option for calling government to account is protest. In May and June 2021, our municipality and several others in the Eastern Cape were shut down by protests. These were more disciplined than the July unrest and did not result in significant property damage or looting⁴.
20. The unrest of July 2021 has been variously attributed to a number of causes, including the implementation of this Court's contempt judgement against the former president. The full extent of the impact of this unrest could not have been known when the Justice Moseneke report was drafted.
21. I do not wish to traverse the reasons for the July 2021 unrest because that is still under investigation and I have no direct experience of that unrest. However I do want to make the point that whoever orchestrated this unrest did so when the hardest-hit provinces, Gauteng and KwaZulu-Natal, were suffering a surge of Covid-19 infections and massive crowds without masking or distancing could only have added to illness and death.
22. Political activity does not cease simply because elections are not in progress.

³ Auditor-General of South Africa. *2019-20 Integrated Annual Report*, p 79. online: <https://www.agsa.co.za/Reporting/AnnualReport.aspx>

⁴ <http://psam.org.za/news/call-for-urgent-action-after-protests/>

23. Another example is a rally the EFF held in Phoenix on 5 August 2021. I saw this live on television and news reports confirm my impression that a large number of people were present without masking or distancing⁵.
24. Political actors who regard their following as expendable cannon fodder will continue to campaign recklessly even if there is no election.
25. Part of the evidence supporting the case for postponement relates to the United States 2020 elections (paragraph 82.4). The Trump campaign is likely to have resulted in numerous infections and deaths through its irresponsible use of mass rallies.
26. However, not given in evidence is the fact that the Biden campaign eschewed risky strategies and conducted its campaign largely on social media and by phone canvassing⁶ – and won.
27. As has been illustrated by the rapid mobilising during the July 2021 unrest, social media can reach a lot of people fast.
28. Even so in, the South African context, where much of the voting population is data-poor, the limitations of social media campaigning need to be proactively addressed.
29. Universities have addressed the problem of data-poor students by negotiating free-data access to academic content; the government could do likewise for political campaigning. Such an approach should include:
 - 29.1 All political parties and independent candidates should be able to nominate one media web site that is unique to their campaign (i.e., not a general service like YouTube);

⁵ For example: <https://www.iol.co.za/news/politics/watch-eff-descends-on-phoenix-to-protest-over-vigilante-killings-a749fb98-bff3-47f8-ab6a-0fa7e08b9dc9>

⁶ This article captures the difference in attitude <https://www.politico.com/news/2020/09/14/joe-biden-bubble-coronavirus-412306>

- 29.2 All content from that site including live streaming should be free;
- 29.3 Free airtime on regional radio should be offered as an alternative for campaigns that lack the means to set up Internet-based services.
30. In the context of an election, the Applicant is in a position to sanction any parties that do not campaign according to the rules through the Electoral Code of Conduct even to the extent of having their votes invalidated⁷; wild protest actions, while theoretically also subject to the law can be very hard to control as we saw in July.
31. The Applicant can amend the Electoral Code of Conduct to make explicit that campaigning in violation of Covid-19 safety regulations as applicable at the time can result in extreme sanctions including but not limited to invalidating their votes.
32. Whatever views one may have on the mode of protest, the motivation of political actors who stoked up the July unrest or the ostensible causes, the parlous state of municipal dysfunction is fertile ground for further unrest.
33. The form of sanction that applies during an election cannot control unrest outside of an election period. The need to comply with the Electoral Code of Conduct, as amended to ensure Covid-19 safety, will force campaigns not only to comply but gives them an incentive to educate their campaign teams on Covid-19 safety.
34. It is unfortunate that the Applicant did not hold a general registration weekend (paragraph 98.5.7). However, any eligible voter is entitled to register at any time and a registration weekend is a convenience, not a legal requirement.

⁷ <https://www.elections.org.za/pw/Parties-And-Candidates/The-Electoral-Code-Of-Conduct>

35. It is a puzzle to me that all high schools do not offer those who turn 18 in that school year the opportunity to register at the very start of the academic year. This is a step that the Applicant can and should implement in future, to preclude any event disrupting registration of the biggest group of new voters.
36. I agree that the more people are vaccinated, the lower the overall risk (paragraph 72). However that has to be weighed against the risk of undisciplined protests if the normal political process is stalled, a factor not taken into account at all in the application.
37. The view that we will be somewhere near herd immunity (“community immunity” – paragraph 82.3.2) by the end of February is optimistic. The latest research on the delta variant suggests that the herd immunity level could be as high as 85% of the population⁸. So another major wave of infections early in 2022 cannot be ruled out.
38. I note also that the experts consulted for the Justice Moseneke report do not agree; Prof Abdool Karim (report paragraph 288) is of the view that October 2021 will be better than February 2022: I strongly recommend that the Court weight his views highly as he is the country’s top expert on the pandemic.
39. The Applicant has not adequately considered mitigation measures to minimise the risk of spread. These include but are not limited to:
- 39.1 Prioritising public-facing election staff for vaccination, ideally ensuring that the final dose is at least two weeks before the election⁹;

⁸ Burki TK. Lifting of COVID-19 restrictions in the UK and the Delta variant. The Lancet Respiratory Medicine. 2021 Jul 12. Online: [https://www.thelancet.com/journals/lanres/article/PIIS2213-2600\(21\)00328-3/fulltext](https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(21)00328-3/fulltext)

⁹ <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html#vaccinated>

39.2 Extending the voting period, to minimize queue lengths, to more than one day.

40. Weighing up the relative risks leads me to conclude that delaying the elections does not solve a problem worthy of the extreme step of overruling the Constitution and that:

40.1 alternatives were not fully explored; and

40.2 the factual matrix excludes the important fact that in the absence of an election, far less regulated political activity will continue, posing greater risks of Covid-19 spread than a highly-regulated election campaign.

41. MIND accordingly prays for the alternative Order in our Notice of Motion.


DEPONENT

SWORN TO ME ON THIS 11TH DAY OF AUGUST 2021.

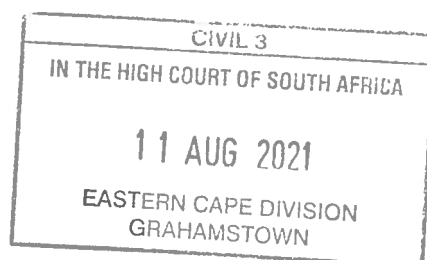
The Deponent acknowledged that:

1. He knows and understand the contents of this affidavit;
2. He has no objection to taking the prescribed oath;
3. He considers the prescribed oath to be binding on his conscience.



COMMISSIONER OF OATHS

Morrison P Toyisi
Snr Registrar Clerk
Eastern Cape
Division, Grahamstown



9 
