

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 245/21

In the application for admission as *amicus curiae* of:

**COUNCIL FOR THE ADVANCEMENT
OF THE SOUTH AFRICAN CONSTITUTION**

Applicant

In the matter of:

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

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THE FREE STATE**

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Sixth Respondent

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THE WESTERN CAPE** Tenth Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
ASSOCIATION** Eleventh Respondent

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**NOTICE OF MOTION – APPLICATION BY CASAC
FOR ADMISSION AS *AMICUS CURIAE***

PLEASE TAKE NOTICE THAT the Applicant, the Council for the Advancement of the South African Constitution ("**CASAC**"), intends to apply, at the hearing of this matter, for an order –

1. Dispensing with the rules of forms and service, in accordance with Rule 12 of the Constitutional Court Rules, 2003 and any directions that the Honourable Chief Justice may give; and granting leave for this application to be dealt with as one of urgency.

2. Admitting CASAC as *amicus curiae* in the matter of *Electoral Commission of South Africa v Minister of Cooperative Governance and Traditional Affairs and Others* (CCT 245/21).
3. Directing those parties who oppose this application to pay CASAC's costs, jointly and severally, each absolving the other.
4. Granting CASAC leave to file written submissions, and to make oral submissions at the hearing of this matter, subject to any directions issued by this Court.
5. Granting CASAC such further and/or alternative relief as this Court deems fit.

TAKE FURTHER NOTICE THAT CASAC appoints the address of Legal Resources Centre, appearing below, as the address at which it will accept notice and service of all documents in this application.

TAKE FURTHER NOTICE THAT CASAC consents to accepting service of all documents and notices in this application by email at the email addresses appearing below.

TAKE FURTHER NOTICE THAT the accompanying affidavit of **PARMANANDA LAWSON NAIDOO**, together with the annexures thereto will be used in support of this application.

TAKE NOTICE FURTHER THAT any party who wishes to oppose this application must:

- a. By 10H00 on Wednesday 11 August 2021, give notice to CASAC's attorneys of its intention to oppose the application and in such notice appoint an address within 15 kilometres of the office of the Registrar and/or an electronic mail address where it will accept service of documents; and
- b. By 10H00 on Friday 13 August 2021, file such answering affidavit as it may desire in answer to the allegations made by CASAC and/or oppose the relief sought in this application.

DATED at DURBAN on this the 10th day of AUGUST 2021.



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SOUTH AFRICAN LOCAL GOVERNMENT
ASSOCIATION Eleventh Respondent

FOUNDING AFFIDAVIT

**APPLICATION BY CASAC
FOR ADMISSION AS *AMICUS CURIAE***

I, the undersigned,

LAWSON PARMANANDA NAIDOO

make the following statement under oath:



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INTRODUCTION AND DEPONENT

- 1 I am an adult male employed as the Executive Secretary of the applicant, the Council for the Advancement of the South African Constitution ("**CASAC**"), a public benefit organisation with its business address at Unit 7, Olympia Court, 85 Durban Road, Mowbray, Cape Town. I am duly authorised by CASAC to depose to this affidavit.
- 2 The facts contained herein are within my personal knowledge, save as it may appear otherwise from the context, and are to the best of my knowledge and belief, both true and correct. Where I make legal submissions, I do so on the advice of my legal representatives in this matter.
- 3 On 4 August 2021, the Electoral Commission of South Africa ("**Commission**") launched an urgent application for direct access to this Court in which it seeks the relief as set out in its Notice of Motion aimed at securing a postponement of the October 2021 local government elections.
- 4 CASAC seeks admission as *amicus curiae* in the Commission's application. On 6 August 2021, this Court issued filing directions for the matter and directed that it be set down for hearing on 20 August 2021.

STRUCTURE OF THIS AFFIDAVIT


- 5 This affidavit is structured as follows –
 - 5.1 First, I outline the nature and purpose of CASAC's application;
 - 5.2 Second, I set out CASAC's interest in the proceedings; and


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5.3 Third, I summarise CASAC's intended submissions in the proceedings.

NATURE AND PURPOSE OF THE APPLICATION

- 6 This is an application, in terms of Rule 10(4) of the Rules, for CASAC's admission as an *amicus curiae* in the above matter. Because the principal application is urgent, CASAC's present application is necessarily also brought on an urgent basis.
- 7 Given the truncated timelines as set out in the directions of 6 August 2021, CASAC has instructed its attorneys of record in the present matter, simultaneous with the filing of this application with the Registrar, to seek the parties' written consent for CASAC's admission as *amicus curiae* (by no later than 10:00 on 11 August 2021), in line with Rule 10(1) of the Rules. A copy of the correspondence is attached hereto as annexure "LN1".
- 8 At the time of filing this affidavit, CASAC is awaiting the parties' responses to the letter. In light of the time constraints and the Court's directions to the parties, CASAC has elected to file this application alongside seeking consent from the parties to this litigation.
- 9 CASAC seeks leave of this Court to be admitted as an *amicus curiae* in these proceedings. It seeks to assist this Court as an *amicus curiae* by making three discrete arguments regarding the Commission's application:
- 9.1 Firstly, that this Court lacks the jurisdiction to grant the Commission the relief that it seeks. In this regard, CASAC will argue that the Commission seeks a remedy that is impossible without doing great violence to the provisions of the Constitution. CASAC will argue that the Commission


D.F.


seeks an impermissible amendment of section 159(2) through an interpretation of the provision, by this Court, that would insert an "impossibility exception" to the absolute and unqualified constitutional obligation to conduct regular free and fair local government elections. CASAC will also argue that the Commission's alternative remedy, a declaration of constitutional invalidity that is suspended for six months, is a mischievous attempt to achieve the same constitutionally impermissible result.

9.2 Secondly, that in our law the doctrine of impossibility is a narrow doctrine, one of last resort, and that it should remain so.

9.3 Thirdly, that the Commission has, in any event and on its own version, not made out a case for the relief that it seeks in that it has not met the threshold to successfully invoke impossibility in the current circumstances. In this regard, CASAC will argue that what the Commission essentially seeks is an opportunity to conduct "non-pandemic" elections and that it has not adequately explored what free and fair elections under pandemic circumstances look like or considered what it would be able, within its available resources, to achieve under said conditions.

CASAC'S INTEREST AND ROLE AS *AMICUS CURIAE*

10 CASAC is a non-profit, public benefit organisation that is constituted of a group of people who seek to advance the South African Constitution as a platform for democratic politics and the transformation of society. It is managed by an


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executive committee, guided by an advisory council which includes advocates of the High Court of South Africa (including senior counsel), academics (including current and former university vice-chancellors), activists and former Justices of this Court.

- 11 As an organisation, CASAC believes in the advancement of a society whose values are based on the core principles of the Constitution, namely the promotion of socio-economic rights, judicial independence, the rule of law, public accountability and open governance. CASAC also believes that the greatest threat to our Constitution is a complacent citizenry. Accordingly, CASAC engages in active campaigns, using different platforms and programmes, to realise the rights enshrined in the Constitution.
- 12 In this vein, it is evident that the substantive issues in the principal matter fall squarely within CASAC's organisational objectives and focus areas as it raises issues relating to the rule of law, the interpretation of the Constitution, and public accountability (by state actors).
- 13 Accordingly, CASAC submits that it has a direct interest on this basis.

CASAC's History with this matter and the Section 14(4) Inquiry chaired by former Deputy Chief Justice Moseneke

- 14 On 18 June 2021, CASAC made written submissions on whether there was a reasonable likelihood that the upcoming local government elections would be free and fair to the Inquiry following an invitation to do so from Justice Moseneke. The invitation and submissions are attached hereto as annexures "LN2" and "LN3" respectively.


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- 15 Briefly, CASAC's submissions were that regular free and fair local government elections are a foundational value under our Constitution and a departure from constitutionally prescribed term limits would be a derogation from democratic norms; that the Commission should explore ways in which it could minimise the risk of spreading COVID-19 at voting stations including by introducing longer voting hours, requesting the prioritisation of poll workers in the vaccination programme, increasing the number of voting stations, and ensuring strict adherence to health protocols; and finally, that CASAC opposed the postponement of the local government elections past 1 November 2021 and that if such a postponement were to be done, it would require a constitutional amendment.
- 16 Following the release of the Inquiry's report by Justice Moseneke ("**Report**") and the unanimous adoption thereof by the Commission and having considered the Report, its findings and recommendations, and the Commission's announcement of 23 July 2021 that it would approach this Court to seek the postponement of the local government elections, CASAC addressed a letter to the Chief Electoral Officer, Mr Sy Mamabolo, on 27 July 2021 in which CASAC raised several concerns about the Report's findings and advising the Commission to reconsider its decision to seek the postponement of the local government elections. CASAC received a response to our letter from Mr Mamabolo's office on 2 August 2021 and I attach this correspondence as annexure "**LN4**".
- 17 As the above history shows, CASAC has an additional direct interest in the issues raised in the present application to the extent that they relate to the Commission's



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decision to approach this Court seeking a postponement of the local government elections.

SYNOPSIS OF SUBMISSIONS TO BE MADE BY CASAC

This Court lacks jurisdiction to grant the relief sought


- 18 CASAC submits that the Commission's application should be dismissed on the basis of this Court's want of jurisdiction.
- 19 The Commission seeks a declarator that it may hold the forthcoming local government elections beyond the 90-day period required by section 159(2) of the Constitution, as well as an order directing the Commission to hold said elections after 1 November 2021 but before 28 February 2022. Such an order would be at variance with the clear constitutional text and therefore unconstitutional.
- 20 To justify the remedy it seeks, the Commission alleges an impossibility on its part to conduct free and fair elections on 27 October 2021, the gazetted election date, or 1 November 2021, the expiry of the 90-day period. The Commission alleges that this impossibility arises as a result of the conditions created by the COVID-19 pandemic and the restrictions imposed as a result. To this end, the Commission submits that this Court should recognise an exception to the section 159(2) obligation by finding that it is "impossible to hold constitutionally compliant local government elections in October 2021 because of objective facts entirely beyond the Commission's control".
- 21 CASAC will show that such a finding would amount to an amendment by this Court of section 159(2) in circumstances where Parliament is vested with the exclusive constitutional authority to amend the Constitution. CASAC will submit



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that the section imposes an absolute obligation which this Court does not have the power to suspend and that this Court should not accept the Commission's invitation to do so.

- 22 CASAC will also show how the Commission seeks to achieve this constitutionally impermissible result by asking this Court, in the alternative, for a declaration of constitutional invalidity in respect of its failure to hold local government elections before 1 November 2021. First, the Commission seeks a declaration of invalidity in respect of a future event, indicating its unwillingness to even attempt to meet its constitutional obligation. Second, the Commission also seeks a suspension of such a declaration of invalidity until the end of February 2022, presumably to enable it to cure the invalidity.
- 23 In reality, however, the Commission's alternative remedy would also amount to an amendment of section 159(2) disguised as an exercise of this Court's remedial jurisdiction under section 172 of the Constitution. To illustrate this, the Commission seeks, in addition to the declaration of invalidity, an order preserving the legal authority of incumbent municipal councils beyond 1 November 2021 (whose terms expired on 3 August 2021), which section 159(2) expressly disallows.
- 24 As it appears from the preceding discussion, central to the Commission's proposed remedies is the wholesale suspension or amendment of section 159(2) of the Constitution by this Court. CASAC will submit that this Court simply lacks the power to do so.


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The doctrine of impossibility is a narrow doctrine

- 25 CASAC will show that in our law the doctrine of impossibility as a justification for the non-performance of contractual and statutory obligations, even as previously developed by this Court and others, is a narrow doctrine to which the Commission is not entitled on the facts and under the circumstances of this case.
- 26 CASAC will show, with reference to existing authority on intervening and supervening impossibility, that the test for objective impossibility is a stringent one and ought to remain so. It is a contractual law doctrine that ought not to be imported into our constitutional law in the manner sought by the Commission.
- 27 ~~Expanding the doctrine~~ in such a manner would set a dangerous precedent, permitting the avoidance of constitutional obligations in circumstances where it is not objectively impossible to meet them, but merely difficult or onerous to do so.

Commission has not made out a case for invoking impossibility

- 28 CASAC will show that the Commission has not made out a case for impossibility in the present matter on the basis of the following:
- 28.1 The Commission has been aware of the conditions created by the COVID-19 pandemic, the restrictions imposed on normal activity as a response thereto and their impact on its activities as an electoral management body since March 2020. It therefore would not be open to the Commission to plead the requirement that the impossibility relied on was unforeseeable in the present circumstances.



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- 28.2 The Commission has in the previous year successfully managed to conduct a large number of by-elections in different parts of the country under relatively safe conditions.
- 28.3 The Commission has not presented alternative ways in which it has sought (and failed) to fulfil its constitutional obligation, stating merely that it would not be able to conduct constitutionally compliant local government elections under the present circumstances.
- 28.4 The Commission has not placed before this Court evidence of objective impossibility nor has it shown how the present circumstances establish clear objective impossibility or how the pleaded impossibility was not self-created or its fault.
- 29 Lastly, the Commission asks this Court to establish an undesirable precedent that it has the power to suspend constitutional obligations or condone non-compliance with constitutional obligations. The Constitution places term limits on municipal councils and mandates regular elections as a way of ensuring accountability in government and does so as an absolute requirement for a well-functioning constitutional democracy.

CONCLUSION

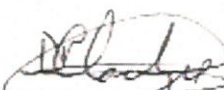
- 30 In order to assist the Court with an amplification of the submissions set out above, and legal research supportive of those submissions, CASAC seeks the relief contained in the notice of motion.


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DEPONENT

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me at R/BOSCH on **10 August 2021**, the regulations contained in Government Gazette Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

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Legal Resources Centre

Our Ref. S Samuel

10 August 2021

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AND TO: THE MEC FOR LOCAL GOVERNMENT FOR THE WESTERN
CAPE
TENTH RESPONDENT

Graham.Paulse@westerncape.gov.za

AND TO: THE SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION
ELEVENTH RESPONDENT

ugopichund@safga.org.za

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**ELECTORAL COMMISSION OF SOUTH AFRICA / MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS AND OTHERS (CCT CASE 245/21):
ADMISSION OF THE COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION AS *AMICUS CURIAE***

1. We represent the Council for the Advancement of the South African Constitution ("CASAC").
2. We address this letter to you in terms of Rule 10 of Rules of the Constitutional Court, to seek your agreement that CASAC be admitted as an *amicus curiae* in the above matter.
3. CASAC is a non-profit, public benefit organisation that is constituted of a group of people who seek to advance the South African Constitution as a platform for democratic politics and the transformation of society. It is managed by an executive committee, guided by an advisory council, which includes advocates of the High Court of South Africa (including senior counsel), academics (including current and former university vice-chancellors), activists and former Justices of this Court.
4. As an organisation, CASAC believes in the advancement of a society whose values are based on the core principles of the Constitution, namely the promotion of socio-economic rights, judicial independence, the rule of law, public accountability and open governance. CASAC also believes that the greatest threat to our Constitution is a complacent citizenry. Accordingly, CASAC engages in active campaigns, using different platforms and programmes, to realise the rights enshrined in the Constitution.
5. Given CASAC's knowledge and insight available to it regarding the advancement of the values and core principles of the Constitution, CASAC has an interest in the core issue of the matter, namely whether this Court has the necessary jurisdiction to grant the applicant in the main application ("the Commission") the relief that it seeks.
6. Pursuant to its consideration of the papers filed to date, CASAC is of the view that it can present a different perspective to that of the Commission, and thereby to assist

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the Court in the determination of the matter. If admitted, CASAC broadly wishes to advance the following position:

- 6.1. First, that this Court lacks the jurisdiction to grant the Commission the relief that it seeks. In this regard, CASAC will argue that the Commission seeks a remedy that is impossible without doing great violence to the provisions of the Constitution. CASAC will argue that the Commission seeks an impermissible amendment of section 159(2) through an interpretation of the provision, by this Court, that would insert an "impossibility exception" to the absolute and unqualified constitutional obligation to conduct regular free and fair local government elections. CASAC will also argue that the Commission's alternative remedy, a declaration of constitutional invalidity that is suspended for six months, is a mischievous attempt to achieve the same constitutionally impermissible result.
 - 6.2. Second, that in our law the doctrine of impossibility is a narrow doctrine, one of last resort, and that it should remain so; and
 - 6.3. Third, that the Commission has, in any event and on its own version, not made out a case for the relief that it seeks in that it has not met the threshold to successfully invoke impossibility in the current circumstances. In this regard, CASAC will argue that what the Commission essentially seeks is an opportunity to conduct "non-pandemic" elections and that it has not adequately explored what free and fair elections under pandemic circumstances look like or considered what it would be able, within its available resources, to achieve under said conditions.
7. If admitted, CASAC will seek leave to file written submissions, as well as an opportunity to present brief oral submissions at the hearing of this matter.
 8. In light of the shortened time-frames in this case, CASAC intends to file its application for admission as an *amicus curiae* on 10 August 2021 and will file its written submissions as directed by the Constitutional Court. We therefore request that you indicate your consent to the admission of CASAC as an *amicus curiae* by no later than noon on Wednesday 11 August 2021.

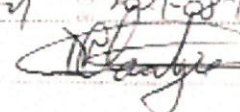
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9. We trust that we can rely on your reasonable co-operation in this matter and look forward to your soonest response.

Yours faithfully,

PP 

SHARITA SAMUEL
LEGAL RESOURCES CENTRE
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 70162537
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FREE



FAIR

1 June 2021

MR LAWSON NAIDOO
EXECUTIVE DIRECTOR
COUNCIL FOR THE ADVANCEMENT OF
THE SOUTH AFRICAN CONSTITUTION
Email: info@casac.org.za

Dear Mr Lawson Naidoo

**REPORT ON ENSURING FREE AND FAIR LOCAL GOVERNMENT ELECTIONS
DURING COVID**

On Thursday, 20 May 2021, the Chairperson of the Electoral Commission of South Africa and I announced that I have accepted the invitation from the Electoral Commission to lead the Inquiry into Ensuring Free and Fair Local Government Elections During COVID-19 ("Inquiry").

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

- 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

Report on Ensuring Free and Fair Elections during COVID

Justice Dikgang Moseneke
Tugela House, 1303 Flewett Avenue, Centurion, 0157
Tel (012) 622 9574 | moseneke@elections.org.za

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- 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.

Since accepting the invitation of the Commission, we have begun the work of getting the Inquiry underway. On Monday, 24 May 2021, we established an office from which I will be coordinating all processes related to the Inquiry. On Thursday, 27 May 2021, I had an information session with the political parties represented in the National Party Liaison Committee. In this discussion, representatives of the political parties pledged their support for the Inquiry, and I had the opportunity to convey to them how the Inquiry will be conducted.

In order to facilitate the work of the Inquiry, we will be inviting 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. An invitation to make submissions has been issued to the Electoral Commission, whose submissions are due on Friday, 4 June 2021. In addition, invitations to make submissions have been issued to independent medical experts and electoral monitoring bodies, whose submissions are due on Tuesday, 15 June 2021. Invitations have also been issued to the relevant Ministers and government departments and will be issued to political parties, all of whose submissions are due on Friday, 18 June 2021.

All written submissions will be placed on the Inquiry's website before the close of business on the day on which they are due. Stakeholders may wish to read and consider the submissions made by these other stakeholders before finalizing their own. The details of the website shall be made available shortly.

We are seeking submissions from civil society organisations, who have an interest in the upcoming local government elections. To this end, we would like to extend an invitation to you to make submissions to the Inquiry on the following:

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Report on Ensuring Free and Fair Elections during COVID

Juditha Dikgang Moseneke
Tugela House, 1303 Heurwa Avenue, Centurion, 0157
Tel: (012) 622 5674 | moseneke@electoralcommission.org.za


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- 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 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;
- 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
- The experience of the by-elections which the Electoral Commission has conducted during the period of the COVID-19 pandemic.

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.


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It is our plan that the final report will be handed to the Electoral Commission by Wednesday, 21 July 2021, before the date of the proclamation of the local government elections by the Minister of Cooperative Governance and Traditional Affairs.

In order to complete the Inquiry within the obviously tight timeframes, we have produced a schedule of timelines within which the project will be undertaken. Written submissions must be submitted to freeandfairelections.org.za by Friday, 18 June 2021.

The Inquiry will hear oral submissions from invited stakeholders in the week commencing Monday, 28 June 2021. Please indicate whether, in addition to written submissions, you wish to make oral submissions to the Inquiry. If you are invited to make oral submissions, we will send you the date, time and place for your oral submissions.

We anticipate and hope for your assistance with ensuring that the Inquiry is able to deliver on this assignment of constitutional importance.

Yours faithfully,

Dikgang Moseneke

DIKGANG MOSENEKE

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Mobile: 0786062148

Email: MosenekeD@elections.org.za

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COUNCIL
FOR THE ADVANCEMENT OF THE
SOUTH AFRICAN
CONSTITUTION

SUBMISSION TO JUSTICE MOSENEKE

HOLDING FREE AND FAIR ELECTIONS UNDER THE STATE OF
NATIONAL DISASTER

18 JUNE 2021

The Constitution provides in section 1(d) that the Republic of South Africa is founded on the values of "universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government". Regular elections for local government are a foundational value of our constitutional order and should not be departed from lightly. Delaying these elections beyond what is constitutionally permissible would represent a derogation from democratic norms. The holding of regular elections is a cornerstone of the democratic process. Undermining the regularity of elections and depriving the electorate of the ability to express itself when it expected to be able to will damage trust in institutions and the strength of South Africa's democracy. It is in this context that CASAC makes this submission.

Since March of 2020, the spread of Covid-19 has engendered a number of restrictions on personal freedoms in the interest of limiting the impact and transmission of the disease. These restrictions include limits on large gatherings and explicit limits on political activity under most levels of the national state of disaster regulations. Some political parties have understandably questioned the validity and fairness of elections held in this environment, given that their capacity to campaign is constrained. While these parties do have recourse to the non-physical media of political communication (radio, television, posters, social media platforms, pamphleteering and so on), this form of campaigning is costly and disadvantageous to parties lacking resources. In addition, local election campaigns usually include a significant portion of local political activism, given that voters' decisions are often informed by direct local concerns (as well as national political preferences).

It is explicit in the Disaster Management Act regulations that political activity is limited under Alert Levels 2 to 5. However, both larger gatherings and normal political activity are allowed under the Alert Level 1 regulations. The by-elections for 172 wards that have been conducted so far since the declaration of the state of national disaster, with a reasonable window for campaigning, reinforce and underlie the

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significance with which the electorate holds regular local government elections as a constitutional value. Turnout has been low in these polls, but not out of line with the pattern of depressed turnout in all by-elections historically and the lower turnout in municipal elections generally. Voting has generally progressed without any major problems or reports of large queues that may pose transmission risk.

This is in line with electoral participation trends on the continent. According to the Global State of Democracy Report published by the International Institute for Democracy and Electoral Assistance, 19 African countries held successful elections in 2020 with election participation at levels similar to those recorded in 2019. Of the elections that were postponed, the postponements were in the earlier months of 2020 when the pandemic first took root. These include national and municipal or local government elections. Trends are similar elsewhere in the world, but the experience in African countries is a more comparable touchstone for our country.

Finally, while we make use of the Alert Level 1 regulations as a reference point for electoral experiences during the national state of disaster, we do not suggest that the regulations should be a threshold to determine whether or not conditions exist for the conduct of free and fair elections. Instead, and based on further submissions below, the threshold question should always be whether the IEC is able to conduct elections that are credible, free and fair under the conditions that may exist at any given point in time.

Before making a recommendation on the possibility of running elections on October the 27th, it is appropriate to consider the legal and practical issues inherent in not holding the Local Government Elections within the constitutionally mandated period of 90 days after the 5-year term expires.

Section 159 of the Constitution prescribes that new elections must be held within a period of 90 days after the expiry of the term of a municipal council. Section 21 of the Electoral Act does provide for the postponement of a proclaimed date if this is "necessary for ensuring a free and fair election". However, s 21(1)(b) stipulates that the new date must still fall within the period prescribed by the Constitution. Therefore, it is highly likely that a postponement outside of the 90-day period would require a constitutional amendment, even if this is a single-election change. The introduction of legal mechanisms that allow for indefinite postponement of elections outside of the schedule set out in the Constitution is highly undesirable in principle and practice. The degree of limitation on the freeness and fairness of the election would have to be significant to justify such an infringement on normal democratic practice. Therefore, it is CASAC's submission that while postponement should remain an option open to the IEC, it must only be as a matter of last resort where the conditions are such that, guided by expert evidence, the IEC is unable to conduct credible, free and fair elections without putting the lives of the electorate and electoral staff at risk.

Some practical considerations also render an electoral postponement undesirable. The suggested 27th October date is already later than usual, and further delays would likely have an impact on policymaking and implementation, as well as budgeting, in municipalities. Should the terms of councils be artificially extended, the


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decisions made by these councils may also be subject to constitutional challenge. The IEC's preparations for the elections will also be affected, which would come at a financial and logistical cost.

CASAC is thus opposed to the postponement of the Local Government Elections beyond the constitutionally mandated period. It seems evident that the IEC has taken the position already that Alert Level 1 regulations allow for the necessary free and fair conditions to hold valid elections, a position with which CASAC concurs. While it is beyond CASAC's expertise, it has been suggested by experts that the emergent third wave will likely have passed by some point in August. Should this be established during the Inquiry's consultations with medical and scientific experts, and with a sufficiently expansive vaccination drive to protect the vulnerable from severe disease by the date of the election, there should be no obstacle to a free and fair election in late October or early November. We emphasise that the views of scientific and medical experts must be considered, including their prognosis on the future trajectory of the pandemic.

However, there may be some changes in practice and guarantees necessary to ensure that a free and fair voting environment obtains. The major guarantee required is that the government commit itself to allowing political activity and a minimum number of public gatherings from the date of proclamation of the elections in the gazette onwards. Changes in the campaigning environment would be detrimental to the holding of free and fair elections, especially given that authority over the campaigning environment would be controlled by one of the interested parties.

To this end, CASAC recommends that regulations specific to the Local Government Elections be gazetted under the Disaster Management Act and/or the Electoral Act. These regulations should be in place for a minimum period of 3 months, up to and including October 27th. The purpose of the regulations should be made clear, i.e., to secure free and fair elections. This will necessitate consultations between the Minister of Cooperative Governance and Traditional Affairs and the IEC, and possibly the Minister of Home Affairs, who is responsible for administering the Electoral Act, on the content of the regulations and a delineation of responsibility at Cabinet level, on their enforcement.

Further, CASAC recommends that the Electoral Court be in session at all times for as long as the special regulations are in place. All disputes relating to the regulations should be speedily resolved by the Electoral Court, which should also be responsible for determining whether or not they are adequate to secure an environment in which free and fair elections may be conducted. This would necessitate consultations between the IEC and the Judge-President of the Electoral Court, to issue directives and rules for the conduct of its proceedings in line with existing legislation.

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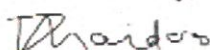
Other guarantees required for campaigning should be agreed during the IEC's consultations with the party liaison committee and included in the minimum guaranteed freedoms that must exist for the period including the election and leading up to it. It would be desirable for this period to be as long as possible within the constraints of the public health conditions the country faces, but it should at the very least obtain for 3 months prior to the elections. Parties need to be certain of an election date and an adequate environment if they are to engage in the costly exercise of scaling up their campaigns and selecting candidates.

Other modalities to ensure the safety of the elections will have to be considered by the IEC to ensure the well-being of the elections for voters. Potential initiatives could include a greater number of voting stations, and / or greater staffing of voting stations to allow for faster processing of voters. The government should also prioritise the vaccination of electoral staff in order to minimise risks both to voters and officials themselves. Government, the IEC and the public broadcaster should be encouraged to communicate effectively on Covid-19 protocols that need to be observed during the election campaign as well as on voting day.

In summary, the postponement of local government elections represents a significant practical and legal impediment to the proper administration of South Africa's municipalities as well as the reliability of our democratic process. CASAC is of the view that the elections should not be postponed, but rather that the concerns raised by political parties should be addressed to the degree that the Covid-19 pandemic allows. Furthermore, the government must guarantee that the environment will exist to allow for political campaigning, even though this campaigning will not be the same as it would under normal non-pandemic circumstances.

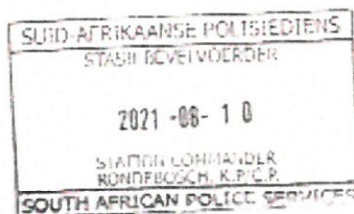
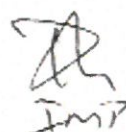
Finally, should a postponement be necessary CASAC submits that such a postponement should not exceed 8 months and that any constitutional or legislative amendment necessary to secure a postponement should be subject to a sunset clause-type mechanism in order to maintain the regularity of elections as required by the Constitution.

Yours sincerely,

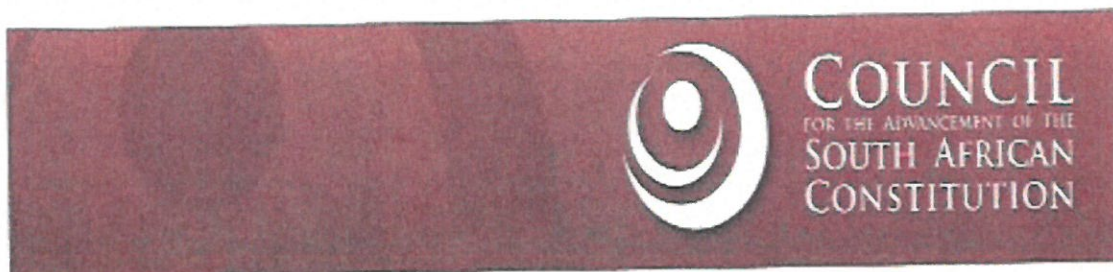


Lawson Naidoo
Executive Secretary

Council for the Advancement of the South African Constitution

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27 July 2021

Chief Electoral Officer
Electoral Commission of South Africa
Riverside Office Park
Elections House
1303 Heuwel Avenue
Centurion
0157

by email: info@elections.org.za

Dear Mr Mamabolo

ADOPTION OF MOSENEKE REPORT AND RESOLUTION TO SEEK POSTPONEMENT OF LOCAL GOVERNMENT ELECTIONS

1. The Commission's media statement of 23 July 2021 and the media briefing of the same date refer.
2. The Council for the Advancement of the South African Constitution (CASAC) writes to you in our capacity as one of the civil society organisations that made submissions to Justice Dikgang Moseneke during his inquiry into whether or not the Commission would be able to conduct free and fair local government elections under the current conditions caused by the COVID-19 pandemic.
3. The result of the inquiry was the publication by Justice Moseneke of the report titled 'A report to the Electoral Commission of South Africa in terms of Section 14(4) read with Section 5(2)(a) of the Electoral Commission Act' ("the Report") which was released to the public on 20 July 2021 and formed the basis for the Commission's media statement and media briefing on the 23rd of July 2021.

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4. The key outcome of the Report by Justice Moseneke, was the conclusion that having considered the expert medical, scientific and legal opinion, the local government elections scheduled for 27 October 2021 would not be reasonably possible or likely to be free and fair, and the recommendation that they be deferred to a later date, preferably no later than the end of February 2022.
5. The importance of this proposed later date is that it falls outside of the 90-day window prescribed for the dissolution of local government structures which is calculated from the fifth anniversary of the previous cycle of local government elections. In this case, the 2016 local government elections were held on 3 August 2016 and hence the 90-day grace period during which local government elections must be held expires on 1 November 2021.
6. The Commission has since unanimously adopted the Report and has taken steps to seek judicial authorisation for the postponement of the elections past this 90-day window period set by the Constitution.
7. While we express no view on the legality or constitutionality of such an approach here, we do request to be provided with the Commission's application for judicial authorisation when it is launched in order to consider our participation in those proceedings. At this stage we seek only to highlight some factual considerations of which the Commission should be aware that we regard as strongly persuasive in favour of not postponing the elections beyond the 90-day window period.
8. The Report based its conclusions on the medical expert data submitted to the inquiry on the trajectory of the pandemic, and the projections of infection, hospitalisation, and mortality rates in October 2021.
9. The report concluded that, based on the trajectory of the waves of infection, the current third wave of infections would "peak and thereafter decline during August and September 2021". This, according to the report, would mean that October 2021 would be a period of relatively low transmission.

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10. Another conclusion reached by the Report is that the low rate of vaccinations meant that community immunity to the virus would not be reached by October 2021. Community immunity would only be reached if South Africa administered "300 000 doses of vaccines daily", according to the Report.
11. In deciding between recommending that elections proceed in October 2021 or be deferred to February or March 2022, the report considered the opinions of Professors Salim Abdool Karim and Shabir Madhi. Both experts agreed that October 2021 would be a period of "relative calm" in the pandemic. Prof Karim's opinion was that it would be preferable to have the elections in October 2021 as opposed to March 2022 because there would likely be new variants of the virus at the latter date, which would roll back the efforts achieved by the vaccination drive. Prof Madhi also expressed the opinion that there would be a resurgence of the virus in December 2021 and onwards.
12. The report then found that, while the data pointed to the Delta variant of COVID-19 possibly subsiding by October 2021, the risk of infection, serious illness, hospitalisation and death would remain "remarkably high". On this finding, the report stated that the choice between holding elections in October 2021 or February-March 2022 would have to be informed by "community immunity through vaccination". It concluded that, while the risk of a fourth wave of infections was present at both dates, "there will be far less risk of hospitalisation and death" in February-March 2022 than there would be in October 2021 due to increased vaccination levels.
13. Subsequent to the publication of the Report and the resolution by the Commission to seek judicial authorisation for the postponement of the elections, some fundamental assumptions on which the Report's findings and recommendations were made have changed or may no longer exist. Consequently, it may no longer be necessary for the Commission to follow the course recommended by Justice Moseneke:
 - 13.1. First, as of 26 July 2021 the country operates under Adjusted Alert Level 3 Regulations which are permissive of, among others, limited physical gatherings, and generally allow for political activity to take place.



- 13.2. Second, the daily rate of vaccine doses administered currently stands at $\pm 240\,000$ as announced by the President. This number is likely to increase over the next few weeks as vaccination capacity improves and the target of 300 000 vaccine doses per day is attainable. Coupled with the vaccination of adults between ages 18-34 from 1 September 2021, the risk of hospitalisation, serious illness and death will have likely significantly decreased by October 2021.
- 13.3. Third, on the data provided by the medical experts and alluded to in the President's address of 25 July 2021, we have likely reached or passed the peak of the third wave of infections (this is marginally ahead of the August/September estimation in the Report), and, if the trajectory of previous waves is anything to go by, a fourth wave (if any) is likely to begin sometime in December 2021. In all likelihood, any elections scheduled for February or March 2022 would occur in the midst of that next wave of infections, aggravated by the increased risk of emergence of new variants resistant to existing vaccines.
-
14. The easing of the restrictions imposed by the regulations in light of declining infection and hospitalisation rates signals the beginning of a period of relative safety for the conduct of local government elections in the coming few months. We expect these restrictions to be eased further as vaccinations ramp up and more people receive protection from severe illness or death from the virus.
15. Postponing the elections to February or March 2022 poses a far greater risk of the election date coinciding with a wave of increased new infections in light of these facts. It is now foreseeable that the Commission would have to seek a further postponement should a fourth wave or further variants emerge during December 2021 or the usual year-end holiday period. Seeking another extension beyond February 2022 would be constitutionally untenable and further erode our country's democratic norms.
16. We therefore request the Commission to reconsider its decision to seek the postponement of the local government elections in light of these new facts.

Council for the Advancement of South African Constitution

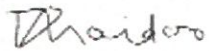
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Yours sincerely,



Lawson Naidoo

Executive Secretary

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OFFICE OF THE CHIEF ELECTORAL OFFICER

SOUTH AFRICA

Mr. Lawson Naidoo
Executive Secretary
COUNCIL FOR THE ADVANCEMENT
OF THE SOUTH AFRICAN CONSTITUTION
By email: info@casac.org.za

2 August 2021

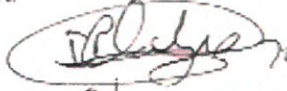
Dear Mr Naidoo,

**RE: ADOPTION OF MOSENEKE REPORT AND RESOLUTION TO SEEK POSTPONEMENT OF
LOCAL GOVERNMENT ELECTIONS**

1. The Electoral Commission of South Africa (IEC), acknowledges receipt of your letter dated 27 July 2021 and notes the contents thereof. Due to the obvious exigencies of time pertaining to the subject matter under reply, the IEC is not mindful to respond to each and every concern that CASAC have expressed in its letter.
2. However, CASAC can be assured that its concerns expressed in the letter under reply, will be traversed in the IEC's Constitutional Court application which it intends to issue during the course of the next week. The substantive court application will be published on the IEC's website after same having been duly issued by the Constitutional Court.
3. I trust you will find the above in order.

Yours sincerely,


Sy Mamabolo, Mr.
Chief Electoral Officer


R/BOSCH 5A05
CHURCH STREET
#130504

Electoral Commission

Ensuring Free and Fair Elections

Commissioners: Mr V.G. Mashinini (Chairperson) | Ms J.Y. Love (Vice Chairperson) | Dr N.P. Masuku | Mr M. Moepys | Judge D. Pillay
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