

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

CASE CCT 245/21

In the matter between:

ELECTORAL COMMISSION OF SOUTH AFRICA
and

Applicant

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

First Respondent

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

Second Respondent

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

Third Respondent

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

Fourth Respondent

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

Fifth Respondent

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

Sixth Respondent

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

Seventh Respondent

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

Eighth Respondent

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

Ninth Respondent

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

Tenth Respondent

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION

Eleventh Respondent

**MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS'
EXPLANATORY AFFIDAVIT**

I, the undersigned,

NKOSAZANA DLAMINI ZUMA

1. I am the incumbent Minister of Cooperative Governance and Traditional Affairs.
2. I am cited as the first respondent in this application. I depose to this affidavit in my official capacity.
3. The contents of this explanatory affidavit fall within my personal knowledge, save where the context indicates to the contrary, and are true and correct.

4. I have read the founding affidavit deposed to by Mr Vuma Glenton Mashinini (and the annexures thereto) on behalf of the Independent Electoral Commission of South Africa ("Commission").
5. I do not oppose the Commission's application or the relief it seeks.
6. Accordingly, I shall not respond to the Commission's affidavit *seriatim*. The purpose of this affidavit is simply to set out the obligations imposed on me by the Constitution and the applicable legislation and my compliance with those obligations.

ABSENT A COURT ORDER, THE MINISTER IS CONSTRAINED

7. The Commission is constitutionally enjoined to *inter alia* ensure that national, provincial and municipal elections are free and fair (section 190(1)(a) and (b) of the Constitution).
8. The complications presented by the COVID-19 pandemic is unprecedented in our constitutional democracy.
9. Our democracy is founded on the values of *inter alia* "universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness" (section 1(d) of the Constitution). This application calls for a delicate

balance between the need to hold regular “free and fair” elections and the constitutional imperative to protect the rights to life, bodily and psychological integrity, and access to healthcare services – in a context where public finances and the health care system (both public and private) are under severe strain, as COVID-19 rages across our land.

10. The Commission, accepting the recommendations of retired Deputy Chief Justice Moseneke, has determined that as a result of the Covid-19 pandemic, the holding of municipal elections within the constitutionally mandated timeframe would result in an election that is not free and fair. I have not been presented with facts (nor am I aware of any) to gainsay the Commission’s determination.
11. In the absence of a Constitutional amendment, the Constitution and the current legislative scheme does not permit an election to be held beyond the constitutionally mandated timeframe.
12. As such, and absent an order of a court with competent jurisdiction, I am legally constrained by the Constitution and the applicable electoral legislation, namely the Local Government Municipal Structures Act, 32 of 2000 (“Municipal Structures Act”) and the Local Government: Municipal Electoral Act 27 of 2000 (“Electoral Act”) to ensure that the municipal elections take place not later than 1 November 2021. I have no legal authority to delay the municipal elections beyond 1 November 2021. This means that any act required of me for purposes of the municipal elections had to be taken in time to ensure that the municipal elections could take place before 1 November 2021.

13. I agree with the Commission that this application is extremely urgent and that the application for direct access to the Constitutional Court is warranted.

14. Section 159 of the Constitution prescribes the term of office of municipal councils, as well as the timeframe within which elections are to be held upon expiry of such term of office. It states:

- “(1) The term of a Municipal Council may be no more than five years, as determined by national legislation.*
- (2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.*
- (3) A Municipal Council, other than a Council that has been dissolved following an intervention in terms of section 139, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected.”*

15. The relevant national legislation for purposes of section 159(2) of the Constitution is the Municipal Structures Act and the Electoral Act.

16. Section 24 of the Municipal Structures Act provides for the term of municipal councils and confers on me the power to proclaim a date for local government elections. It states:

- “(1) The term of municipal councils is five years, calculated from the day following the date set for the previous election of all municipal councils in terms of subsection (2).*
- (2) Whenever necessary, the Minister, after consulting the Electoral Commission, must, by notice in the Government Gazette, call and set a date for an election of all municipal councils, which must be held within 90 days of the date of the expiry of the term of municipal councils. The notice may be published either before or after the term of municipal councils expires in terms of subsection (1).”*

17. The legislative scheme does allow for the postponement of elections generally, as well as at a particular voting station. But there are constraints to this.

18. The Electoral Act regulates municipal elections. Section 8 of the Electoral Act, which provides for the postponement of elections, states:

“(1) The Commission may request the Minister or, in the case of a by-election, the MEC, to postpone the voting day determined for an election if the Commission is satisfied that it is not reasonably possible to conduct a free and fair election on that day.

(2) On receipt of such a request, the Minister by notice in the Government Gazette, or the MEC by notice in the Provincial Gazette, must postpone the voting day for the election to a day determined in the notice, but that day must fall within a period of 90 days of the applicable date mentioned in section 24(2) or 25 (3) of the Municipal Structures Act.”

19. Albeit that I am empowered to postpone a proclaimed date for elections, I am not empowered to do so for a period that extends beyond 90 days after the expiry of the term of municipal councils. Thus, the exercise of this power does not assist the Commission nor grant it adequate or substantive redress.

20. The previous local government elections were held on 3 August 2016. Therefore, on the basis of section 24(1) of the Municipal Structures Act, the current term of municipal councils expires on 3 August 2021 (which is a period of five years, calculated from the day following the date set for the previous elections). Thus, in light of the 90 day timeframe prescribed in section 24(2) of the Municipal Structures Act, read with section 159 of the Constitution, the elections must be held by no later than 1 November 2021 (which is 90 days calculated from the expiry of the term of municipal councils).

21. In line with legal advice that I have received, and in compliance with the constitutional and legislative obligations imposed on me, on 3 August 2021, I proclaimed the election date for the local government elections as 27 October 2021. In normal circumstances, this would allow the Commission to conduct the municipal elections before 1 November 2021 in accordance with the Constitution and the legislation discussed above.
22. The Commission's founding affidavit deals with the practical considerations in light of the recently proclaimed date. I have no reason to contradict the Commission's submissions in this regard.
23. I fully appreciate the Commission's predicament and would support the postponement of the elections to a date not later than the end of February 2022, were this court to find that it is permissible under the Constitution to do so, including in terms of the supervisory order sought in the notice of motion. The postponement of the municipal elections entails extending the term of office of municipal councils beyond the period permitted by section 159 of the Constitution. If this is not done there could be a crisis of governance in the local government sphere. This is wholly undesirable.
24. I reiterate the contents of my correspondence referred to at paragraph 98.3 of the Commission's founding affidavit (and marked "FA11").
25. I have made arrangements for counsel to be briefed to appear on my behalf on 20 August 2021, primarily to respond to any questions the Court may have relating to issues concerning my core areas of responsibility. Subject to the

Court's directions, counsel may present written and oral argument on the appropriateness of the proposed remedies.

Nkuma

NKOSAZANA DLAMINI ZUMA

SIGNED and sworn to before me at _____ on the _____ day of **AUGUST 2021**, the deponent having acknowledged that she knows and understands the contents of this affidavit and all the provisions of Act 16 of 1963 and the Regulations promulgated in terms thereof concerning the taking of the oath having been complied with in my presence and within the area for which I have been appointed as Commissioner of Oaths.



COMMISSIONER OF OATHS

Capacity: *LT COL.*

Full names: *PATRICIA LUNGISILE DLAMINI*

Physical address: *07 CECIL STREET
SAPS BULWER*

SOUTH AFRICAN POLICE
VEHICLE CLEARANCE OFFICE
2021-08-11
BULWER
KWAZULU-NATAL