

IN THE CONSTITUTIONAL COURT

Case No: 245/21

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

FREEDOM UNDER LAW (RF) NPC

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

**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

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PROVINCIAL GOVERNMENT OF THE NORTHERN CAPE** Eighth Respondent

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SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION Eleventh Respondent

**NOTICE OF MOTION:
APPLICATION BY FREEDOM UNDER LAW TO BE ADMITTED
AS *AMICUS CURIAE***

TAKE NOTICE THAT Freedom Under Law (RF) NPC (“**FUL**”) intends to apply to this Honourable Court, on a date to be determined by the Court, for an order:

1. Dispensing with the forms and service, in accordance with Rule 12 of the Constitutional Court Rules, and directing that this matter be dealt with as one of urgency;
2. Admitting FUL as *amicus curiae* in the proceedings under case number 245/21;

3. Directing that FUL deliver its written submissions on Wednesday, 18 August 2021, *alternatively*, at any other time and date determined by the Court;
4. Directing that the other parties to the proceedings deliver any written submissions in response to FUL's submissions at a time and on a date determined by the Court;
5. Granting FUL leave to make oral submissions at the hearing of the matter, subject to any directions issued by the Court;
6. Directing that those parties who oppose this application pay FUL's costs jointly and severally, the one paying the other to be absolved;
7. Granting further and / or alternative relief.

TAKE NOTICE FURTHER that the affidavit of **JOHANN KRIEGLER** and the annexures thereto will be used in support of this application.

TAKE NOTICE FURTHER that the applicant has appointed the offices of Nortons Incorporated set out below as the address at which it will accept notice and service of all documents in these proceedings and that the applicant consents to accepting services of all documents and notices in this application by email at the addresses listed below.

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

1. By 10am on **Friday, 13 August 2021** give notice to FUL'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

2. By 10am on **Monday, 16 August 2021** file such answering affidavit as it may desire in answer to the allegations made by FUL and/or oppose the relief sought in this application.

DATED AT JOHANNESBURG ON THIS 12th DAY OF AUGUST 2021.



NORTONS INCORPORATED

Attorneys for the Amicus Curiae:

Freedom Under Law

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Tel: 011 666 7560

E-mail: anton@nortonsinc.com /

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Ref.: Mr Anton Roets /

Ms M Rawlinson

**TO: THE REGISTRAR
CONSTITUTIONAL COURT**
1 Hospital Street
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Email: generaloffice@concourt.org.za

**AND TO: ELECTORAL COMMISSION OF SOUTH AFRICA
MOETI KANYANE INCORPORATED**
Attorneys for the Applicant
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Die Hoewes
Centurion

Tel: 012-003 6471
 Fax: 086 416 2255
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C/O RAMS INCORPORATED
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AND TO: MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS

First Respondent
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BY EMAIL

AND TO: MEC RESPONSIBLE FOR LOCAL GOVERNMENT IN THE PROVINCIAL GOVERNMENT OF THE EASTERN CAPE

Second Respondent
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BY EMAIL

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

Third Respondent

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Fourth Respondent

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BY EMAIL

**AND TO: MEC RESPONSIBLE FOR LOCAL GOVERNMENT IN THE
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Fifth Respondent

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sanele.zondi@kzncogta.gov.za

BY EMAIL

**AND TO: MEC RESPONSIBLE FOR LOCAL GOVERNMENT IN THE
PROVINCIAL GOVERNMENT OF LIMPOPO**

Sixth Respondent

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BY EMAIL

**AND TO: MEC RESPONSIBLE FOR LOCAL GOVERNMENT IN THE
PROVINCIAL GOVERNMENT OF MPUMALANGA**

Seventh Respondent

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mkhwanazizf@mpg.gov.za

BY EMAIL

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

Eighth Respondent

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mmadyo@ncpg.gov.za /
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mmanyeneng@ncpg.gov.za /
pseane@ncpg.gov.za

BY EMAIL

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

Ninth Respondent

Telkom Building
3366 Bessemmer Street
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Mafikeng
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tlerefolo@nwpg.gov.za

BY EMAIL

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

Tenth Respondent

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BY EMAIL

AND TO: THE SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION

Eleventh Respondent

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175 Corobray Avenue
Waterkloof Glen
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BY EMAIL

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Eleventh Respondent

**FOUNDING AFFIDAVIT IN THE
APPLICATION TO BE ADMITTED
AS *AMICUS CURIAE***

I, the undersigned

JOHANN KRIEGLER

do hereby make oath and state that:

- 1 I am the Chair of Freedom Under Law (RF) NPC (“FUL”) and am duly authorised to represent FUL in relation to its application to be admitted as a friend of the court (*amicus curiae*) in this application.
- 2 From 1994 to 2002 I was a Judge of the Constitutional Court. In addition, I was appointed to the position of Chair: Independent Electoral Commission for South Africa’s first



democratic elections in 1994 and subsequently chaired the Electoral Steering Committee (from 1996-1997) and the Electoral Commission of South Africa (from 1997 — 1999). I have also been extensively involved in numerous other electoral processes in various capacities including as an observer, chair, member and consultant in a number of jurisdictions around the world (including in Mexico, East Timor, Egypt, Afghanistan, Iraq, Liberia, Sierre Leone, Pakistan, Kenya, Libya, the Maldives and Somalia). I attach hereto my detailed curriculum vitae marked “JK1” which sets out my experience in more detail.

- 3 FUL is a public interest organisation registered and incorporated as a non-profit organisation under the laws of the Republic of South Africa. FUL’s objectives are “*the promotion of democracy and the advancement of the rule of law and the principle of legality, understanding these to be the foundation for constitutional democracy in Southern Africa*”.¹ Primarily, FUL uses litigation before the courts as its defining method of promoting and defending the rule of law and democracy across the region.
- 4 The facts deposed to in this affidavit are within my personal knowledge save where otherwise stated or where the converse appears from the context, and are to the best of my knowledge and belief both true and correct.
- 5 Where I make submissions of law I do so on the advice given by the legal representatives instructed by FUL.

¹ FUL website: <https://www.freedomunderlaw.org/about-us/our-mission/>



A: **INTRODUCTION AND PURPOSE OF THIS APPLICATION**

6 This is an application in terms of Rule 10 of the Rules of the Constitutional Court for the admission of FUL as *amicus curiae* in the above proceedings instituted by the Electoral Commission of South Africa ("***Electoral Commission***"). The Electoral Commission seeks, *inter alia*, an order declaring that it may hold the forthcoming local government elections outside the five year and 90 day period required by section 159(2) of the Constitution and section 24(2) of the Local Government: Municipal Structures Act, and that it be directed to hold the forthcoming local government elections before 28 February 2022. Furthermore, the Electoral Commission seeks an order declaring that the current municipal councils remain competent to function until the newly elected councils have been declared elected and that the Commission is to file reports with this Court on various dates (15 October 2021, 15 November 2021, 15 December 2021 and 14 January 2022), setting out the steps taken (and to be taken) by the Electoral Commission to allow for forthcoming local government elections to be held before 28 February 2022. It also requests the Court to assume supervisory jurisdiction over the matter, "*to cater for the inherent uncertainty of the future*".

7 FUL has had an opportunity to consider the nature and scope of the application filed by the Electoral Commission and, based on what is set out below, is of the view that it is in a position to assist this Court and therefore wishes to be admitted as *amicus curiae* to make submissions which are material, do not repeat any matter set out in the application filed by the Electoral Commission and which raise new issues which may be useful to the Court. FUL's legal team has also considered the applications for intervention filed by the African



National Congress, the Democratic Alliance, the Inkatha Freedom Party the Makana Independent New Deal, the Forum 4 Service Delivery and the African Transformation Movement, which had been filed at the time that this affidavit was finalised. FUL also believes that the submissions which it wishes to make are distinguishable from the submissions of these parties.

8 In essence, the Electoral Commission asks the Court to grant it a court-sanctioned mandate to infringe the Constitution, in advance of its intended infringement. FUL will submit that the relief sought is neither competent nor justified. I am advised and submit that it would not only set an incorrect precedent, but a dangerous and far-reaching one, were it to be granted.

9 This affidavit is deposed to in support of FUL's application for leave to be admitted as *amicus curiae* in these proceedings. It is structured as follows:

9.1 In Part B, I summarise FUL's submissions and the nature of the constitutional crisis currently before this Court;

9.2 In Part C, I deal with FUL's request for admission as *amicus curiae* and the responses thereto;

9.3 In Part D, I deal with why the Electoral Commission's application is impermissible *in law*;

9.4 In Part E, I deal with why the Electoral Commission's application is unsustainable *on the facts*; and



9.5 Finally, in Part F, I deal with FUL's submissions regarding the appropriate relief.

B: THE MAKING OF THE CONSTITUTIONAL CRISIS

- 10 This is an extraordinary application which has been brought by the Electoral Commission and which implicates a number of fundamental constitutional rights. It is extraordinary because the Electoral Commission requests the Constitutional Court to permit it, upfront, to breach unequivocal constitutional obligations and to absolve it from the consequences of this breach.
- 11 The Electoral Commission is a Chapter 9 institution which is tasked with one function, being to conduct free and fair elections in terms of the Constitution.² It comes to this Court acknowledging that the constitutional provision from which it wants to be exempted, section 159, provides for definitive time periods within which municipal elections must be held.³
- 12 I am advised that the provisions of the Bill of Rights may permissibly be subject to limitation in terms of the Constitution, in the circumstances described in section 36 thereof. Section 159 of the Constitution is not a provision of the Bill of Rights. The Electoral Commission cannot point to any provision of the Constitution which confers an express power on this Court to excuse non-compliance with this provision. Nor can such power be

² Section 190 of the Constitution provides that the Electoral Commission must (a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation; (b) ensure that those elections are free and fair; and (c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.

³ Section 159 provides that "*the term of a Municipal Council may be no more than five years, as determined by National Legislation*".



implied.⁴ This the more so in a highly detailed constitutional instrument, one moreover which makes circumscribed provision for states of emergency and contemplates natural disasters and even wars befalling South Africa, as they have in the years preceding its framing.

- 13 The Electoral Commission resorts to common law principles as a route to a judicial amendment of the Constitution, and it requests that the Court effectively condone the proposed unconstitutional path which it intends taking. However, in accordance with section 2 of the Constitution, I am advised and submit that it is the Constitution, and not the common law that is supreme.
- 14 The Electoral Commission says that there is no alternative to the Court excusing it from complying with its constitutional duty of holding an election within the specified period in section 159.
- 15 This is not correct. There is a clear alternative. This Court can (and must) not grant the relief sought by the Electoral Commission.
- 16 This Court is the apex tribunal in the judicial branch of three branches of government that the Constitution enshrines. In the language of the doctrine of the separation of powers, the Court is not the source of the Constitution. Rather, the Court is its ultimate guardian. As such, I respectfully submit that it lacks the jurisdiction to suspend the Constitution's operation either under the primary relief or under the alternative formulation of the Electoral Commission's relief. This is a matter of grave national importance, which

⁴ As the Preamble recognises, the Constitution is the "*supreme law of the Republic*".



urgently requires this Court to fulfil its constitutional role and not to undermine immutable requirements in the manner proposed by the Electoral Commission.

17 In the event that the Court does not grant the relief sought, the Electoral Commission is, admittedly, in a difficult position. But that is clear and unfortunate reason: the entirely avoidable consequence of its own tardiness. Since March last year South Africa has been under a state of disaster of uncertain and potentially indefinite duration. At least by late last year the Commission might have been expected to devise a contingency plan to meet the obvious risk, widely stated by medical experts and widely reported, that the pandemic might well impact on the scheduled elections. On its own papers, it was only in May however that it recognised that risk. Why at least then it did not put a contingency plan in place, entailing a timeous seeking from Parliament (in terms of section 74 of the Constitution) relating to the impending election, it does not explain. The Commission has been admonished before by this Court regarding the timeous and scrupulous meeting of its vital obligations.

18 Nor does the Commission now factually establish its contention of a supervening impossibility. The Commission is invited to disclose to the Court whether it has failed, at least since May, to prepare (whether on a contingency basis or otherwise) the necessary elements for s74 compliance, and its explanation for not doing so, if as seems, that is the case. If that is not the case, the Commission is invited to confirm that at least now it has made those necessary preparations, liaised with the Speaker and that Parliament could indeed convene and decide prior to 27 October 2021.



- 19 Of course, wastage of public expenditure is to be decried, particularly at this time. But seeking the Court's dispensation for the Commission to be freed from what section 159 spells out as foundational to democracy cannot be set off. And for any cost-driven decision to set expenditure off against constitutional compliance the Commission should in the first instance be answerable for its actions and inactions to Parliament itself, not the courts.
- 20 The Commission thus faces a choice between constitutional compliance on one or other of two bases: proceeding with the scheduled election in 10 weeks; or triggering section 74 of the Constitution. It cannot seek to impose on or attribute to the Court a dispensing power the Constitution does not give it.

C: THE PARTIES AND CONSENTS

- 21 The parties to these proceedings have been described in the founding affidavit of the Electoral Commission. In the interests of brevity and in order not to burden the Court with information that is already before it, I shall not repeat the description of the parties.
- 22 The Electoral Commission has launched this application on very short notice and seeks urgent relief from this Court.
- 23 On 9 August 2021, FUL addressed a letter to the parties to these proceedings in which it sought their consent to FUL's admission as *amicus curiae*. Copies of the letter and proof of transmission to the other parties to the litigation are attached marked "JK2". FUL requested in the letter that the parties indicate by the close of business on 10 August 2021 whether they consent to the admission of FUL as *amicus curiae* in these proceedings. On

A handwritten signature in black ink, appearing to be a stylized 'S' or 'J' followed by a horizontal line.

11 August 2021, the Electoral Commission consented to FUL's admission as *amicus*. A copy of the email from the attorneys of the Electoral Commission consenting to FUL's admission is attached marked "JK3". However, no response was received from the First to Eleventh Respondents as at the time this affidavit was finalised. Their position in this litigation is unknown (other than the first respondent who has filed a notice of intention to abide) and, as far as FUL is aware, none of them have indicated an intention to be actively involved in the litigation as at the time of finalising this affidavit.

24 As at the time of deposing to this affidavit I am aware that certain other parties might also wish to be admitted to these proceedings as *amici curiae* in the light of the important issues at stake in these proceedings.

25 FUL accordingly makes this application in accordance with the Rules of this Honourable Court, seeking admission as *amicus curiae* and summarising FUL's submissions in regard to the relief sought. One of the requirements for an *amicus* to demonstrate is that its submissions are different to those of other parties. FUL will file this affidavit on 12 August 2021, once the time for the respondents to file their opposing affidavits has passed in terms of the Directions issued on 6 August 2021 in order to ensure that its submissions are not repetitive of those of other parties.

D: THE ELECTORAL COMMISSION'S APPLICATION IS IMPERMISSIBLE IN LAW

26 FUL's position is simply stated thus: Nobody, not even this Court, has the power to allow departures from the clear limits set by section 159(2) of the Constitution. Either the

A handwritten signature in black ink, consisting of a stylized 'A' or 'E' shape with a horizontal line extending to the right.

Constitution must be amended – which can only be effected through the Parliamentary process set out in section 74 of the Constitution – or it must be complied with.

- 27 Moreover, even if this Court *could* bend the Constitution, as a matter of constitutional principle this Court dare not permit departures, when convenient or even pressing, from time limits ensuring regular elections in compliance with the fundamental constitutional value enshrined in section 1(d). Hundreds of elections, it will be shown, have been held around the world during the pandemic. It has not been demonstrated that it is impossible for the Electoral Commission to hold elections in October, but even if it had been demonstrated, there is no warrant, if power to postpone there be, to depart from a bedrock principle of our grand pact.

Relevant constitutional framework

- 28 The Republic of South Africa is one, sovereign, democratic state founded, *inter alia*, on the values of “(u)niversal adult suffrage, a national common voter’s roll, **regular elections** and a multi-party system of democratic government, to ensure accountability, responsiveness and openness”.⁵ (my emphasis)
- 29 The constitutional right lying at the heart of this case is the guarantee of political rights in section 19(2) of the Bill of Rights. It provides that:

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

⁵ Section 1(b) of the Constitution.

- 30 The Electoral Commission has the constitutional mandate to manage elections at all three levels of government. In relation to municipal elections, section 159 of the Constitution is clear and unequivocal:

(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 119, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected.

- 31 In its original form, section 159 of the Constitution provided that the term of a municipal council was 4 years. This section was amended by Parliament in 1998 in the Second Amendment to the Constitution, and came into force on 7 October 1998.

- 32 The requirement in section 159 that the term of a municipal council is “no more than five years” and that elections must be held within 90 days thereafter, is finite and unqualified. There is no scope for interpreting section 159 as meaning “no more than five years unless the Constitutional Court orders otherwise”, or “unless exceptional circumstances exist...”. If the drafters of the Constitution or if Parliament in considering the Constitution Second Amendment Act had intended the time period to be mutable, they would and could have said so.

- 33 Importantly, the Electoral Commission could have approached Parliament to amend the provisions of the Constitution to empower the Court to allow for the postponement of the



elections in appropriate circumstances, at any time from the outbreak of the pandemic, over a year ago. Section 74 of the Constitution deals with the process for amending the Constitution before Parliament and the National Council of Provinces and provides a mandatory 30-day public participation process after the intended amendment is gazetted, and that an amendment may not be passed within a further 30 days after tabling.⁶

34 There were a number of opportunities for the Electoral Commission to approach Parliament timeously to effect the required constitutional amendment prior to the launching of this application. Covid-19 was declared a national state of disaster in March 2020, and the second wave hit South Africa in around December 2020. From May 2021, when former Deputy Chief Justice Moseneke was appointed to undertake the Report, the Electoral Commission was aware (or ought to have been aware) that the Report might come to the conclusion that an election in October 2021 would not be free and fair. Yet the Electoral Commission did not approach Parliament at that stage.

35 Nor did it do so even upon the urging of a number of political parties which made submissions to former Deputy Chief Justice Moseneke that a postponement could not be achieved without a constitutional amendment. Even after the launch of this application the Electoral Commission could have done so. However, it chose not to do so and has allowed the clock to run down on this option. No doubt, when this matter is argued, the Electoral Commission will argue that it is now too late to approach Parliament – a situation that is entirely of its own making. But, in fact, there is no reason why section 74 proceedings set in train even now could not be accomplished.

⁶ Because the proposed amendment effects the requirement of “regular” elections in section 1 of the Constitution, FUL submits that a 75% majority would be required in terms of section 74(1).



- 36 Having failed timeously to approach Parliament, the Electoral Commission approaches this Court and asks it to accede to its unconstitutional request for the Court to arrogate to itself the power to amend the Constitution or upfront provide a permission for a Chapter 9 institution to breach the Constitution. Indeed, it goes further, it asks the Court to assume the ultimate responsibility by way of supervisory jurisdiction it would seem potentially to determine when the unconstitutional election will take place (given its submissions regarding the “*inherent uncertainty of the future*” and that “*there can be no guarantee that new mutations or variants will not arise before then undermining the efficacy of vaccines or that there will not be a crisis in vaccine supply to South Africa*”). This places the Court in an invidious position and not one which is contemplated by or competent under the Constitution.
- 37 The stance of the Electoral Commission before this Court is an entirely inappropriate approach for a Chapter 9 institution to take. It cannot make a virtue of its failure to take steps which would have meant that it would not have had to treat the Court as the holder of the proverbial “*get out of gaol free card*”. One of the fundamental principles of the constitutional order is accountability. If the Electoral Commission acts in a manner which is unconstitutional, it will have to account to Parliament for having acted in such a fashion.⁷
- 38 It cannot approach the Court on an extremely urgent basis and effectively ask the Court to absolve it of the consequences of failing to take the necessary steps to ensure that it is able

⁷ In terms of section 181(5) of the Constitution, the Electoral Commission is “*accountable to the National Assembly and must report on [its] activities and the performance of [its] functions at least once a year*”.



to discharge the constitutional duties which it bears. This is an abuse: it is to seek to make the Court an accomplice to the Electoral Commission's unconstitutional conduct.

39 Asking the Constitutional Court to amend (or suspend) the Constitution is deeply subversive of the constitutional order as it requests the guardian of the Constitution to excuse compliance with the Constitution. This cannot be countenanced. *Ubi ius, ibi remedium* is the principle on which the Electoral Commission relies for this extraordinary and dangerous request. However, an equally important principle is that unconstitutional conduct has consequences for the institution concerned, and this Court cannot wave such consequences away by condoning conduct which is antithetical to the constitutional order.

40 If the Electoral Commission forms the view that the holding of the elections in October cannot occur, it will have to take the unconstitutional step of postponing the elections. And it will then have to account for having done so.

41 There are situations where an organ of state needs to live with the consequences of its actions and in FUL's submission, this is such a situation.

42 For all these reasons, FUL submits that the Electoral Commission's application does not get out of the starting blocks because it is impermissible in law: the Constitutional Court does not have the power to grant the relief sought. As I now show, the Electoral Commission's application is also unsustainable on its own facts.

E: THE ELECTORAL COMMISSION'S APPLICATION IS UNSUSTAINABLE ON ITS OWN FACTS

A handwritten signature in black ink, consisting of a stylized, cursive script that appears to be the initials 'JL' followed by a flourish.

- 43 In the light of the extraordinary relief sought by the Electoral Commission in these proceedings to postpone the election, one would have expected at a minimum that the Electoral Commission would have to show what steps it took in order to ensure that a free and fair election could take place and why it was able to conduct by-elections in the Covid-19 era but it is not able to conduct a general local election. The Electoral Commission has failed to address these questions.
- 44 As I elaborate in this section, the position that the Electoral Commission finds itself in is not actually the result of Covid-19. It is a result of the Electoral Commission again failing to take the necessary steps to ensure that it is prepared to discharge its constitutional obligations.
- 45 The framers of the Constitution were aware of the fact that there are a range of circumstances which could arise such as wars, floods, pandemics, etc. None of these tragic milestones are new or unprecedented, even in our own history. The high degree of conflict and instability preceding the 1994 elections are just one graphic example. Yet, despite this, the Constitution sets immutable timelines within which an election must be held. And it does so for good reason. The requirement of “*regular elections*” is a cornerstone of South Africa’s constitutional democracy.⁸ The right to vote and to hold representatives to account in regular elections is a crucial aspect of the constitutional order. It is a foundational right and one can say without hyperbole, it is one for which people died.
- 46 The Electoral Commission has also not set out in its justification for the relief sought why it could not take less drastic steps (such as applying for the suspension of statutory

⁸ Section 1(d) of the Constitution.



provisions that do not allow for voters' registration weekends after the date for an election has been proclaimed given that this prohibition is a statutory rather than a constitutional one). It also does not explain why other countries (indeed it would appear from the Electoral Commission's papers that the majority of elections were held in this period) were able to ensure free and fair elections but that it is not able to do so. And the Electoral Commission's Founding Affidavit is selective regarding the expert evidence placed before the Court.

The Electoral Commission as a serial defaulter

47 This Court has repeatedly emphasised that it will not countenance an organ of state such as the Electoral Commission failing to comply with its Orders and then seeking an extension of time as if it were for the asking.⁹ Yet the Electoral Commission is a persistent defaulter, and this is at least the third time in as many election years that this Court has had to grapple with how to deal with the Electoral Commission's failures:

47.1 In *Kham*,¹⁰ this Court declared that certain by-elections which had taken place in the Tlokwe Local Municipality were not free and fair because the Electoral Commission had failed to obtain sufficient particularity of the voter's address to enable it to ensure that the voter is at the time of registration ordinarily resident in that voting district as required in the Electoral Act 73 of 1998. The Electoral

⁹ See for example: *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children and Another* [2015] ZACC 16; *Minister of Transport and Another v Mvumvu and Others* 2012 (12) BCLR 1340 (CC); *Ex Parte Minister of Social Development and Others* 2006 (4) SA 309 (CC); *Minister of Agriculture, Forestry and Fisheries v National Society for the Prevention of Cruelty to Animals* (CCT 122/15) [2015] ZACC 27; 2015 (11) BCLR 1387 (CC) (28 August 2015).

¹⁰ *Kham and Others v Electoral Commission and Another* (CCT64/15) [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC) (30 November 2015).



Commission was directed, in all future municipal elections “to *provide all candidates in municipal elections, on the date on which they are certified, with a copy of the segment of the national voters’ roll to be used in that ward in that election including the addresses of all voters, where these addresses are available.*”

47.2 The Electoral Commission failed to obtain the addresses as directed. Accordingly, after just a few months, it was back before this Court seeking condonation for its failure to comply with the order in *Kham*.

47.3 In *Mhlophe*,¹¹ this Court held that the Electoral Commission’s failure to record all available voters’ addresses of voters registered on the national common voters’ roll after 17 December 2003 was unconstitutional, a violation of the rule of law and invalid. However, in order to allow the Commission to rectify the situation, the Court suspended the declaration of invalidity for a period of more than two years, until 30 June 2018.¹²

48 Now, in 2021, the Electoral Commission seeks a further indulgence from the Court, but this time it is not a statutory obligation that the Electoral Commission has breached, but the most fundamental constitutional principle of regular elections.

49 The Electoral Commission’s conduct as a serial offender of its constitutional obligations is regrettable and falls far short of the requirements of a Chapter 9 institution. For these

¹¹ *Electoral Commission v Mhlope and Others* (CCT55/16) [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC) (14 June 2016).

¹² The order does not apply to local government by-elections.



reasons, even if the Constitutional Court finds that the relief sought is competent in law (which is denied for all the reasons set out above), I am advised and submit that it should in any event decline to condone the Electoral Commission's failures on the facts.

Other countries' experience

50 At paragraphs 195 to 207 of its founding affidavit, the Electoral Commission outlines the manner in which it contends that elections, globally, have been dealt with during the pandemic. In particular, the Electoral Commission seeks to draw *inter alia* on the following evidence that served before former Deputy Chief Justice Moseneke:

50.1 In Africa, at least 14 countries and territories postponed national and subnational elections due to Covid-19;¹³

50.2 France, England and Brazil initially postponed elections due to the Covid-19 pandemic, but later held elections after the period of postponement;¹⁴ and

50.3 The United States and India did not postpone their elections at all, despite the risks posed by the pandemic.¹⁵

51 FUL takes no issue with these facts. Indeed, FUL agrees with the Electoral Commission's support of former Deputy Chief Justice Moseneke's concerns regarding the deaths associated with elections in the United States, India and Brazil, and that this is indeed "*something we should not wish for ourselves*". Whenever the elections take place, it is

¹³ Paragraph 197 of the Electoral Commission's founding affidavit.

¹⁴ Ibid at paragraph 200.

¹⁵ Ibid at paragraph 204.



critical that the Electoral Commission take steps to minimise the risk of deaths arising from the election. However, it is obvious that this risk cannot be eliminated, any more than it is possible to eliminate the risks associated with the physical payment of social grants to large numbers of South Africans in the time of the Covid pandemic.

52 These considerations, I am advised and submit, do not justify an order subverting our constitutional order, as the Electoral Commission seeks. Moreover, even if this were not so and this Court were minded to consider the manner in which the global community has approached elections during the pandemic, I am advised and submit that the process actually adopted by the countries referred to by the Electoral Commission should be properly scrutinised. When this is done, I am advised and submit that the approach followed by the countries referred to by the Electoral Commission are entirely distinguishable. That is so because, in each instance, the purported exemplars of the relief sought here were not the Court, as in this instance, but rather the respective legislatures of those nations. Put differently, none of *these* countries succeeded in postponing the elections on the basis that a Court ordered such postponement, as I shall presently explain.

53 The Electoral Commission correctly states that in order for France to postpone its second round of voting, the French parliament passed new legislation which announced a state of health emergency and permitted the postponement.¹⁶

54 Similarly, it was by way of emergency primary legislation in the form of the Coronavirus Act 2020 that England was able to postpone its local government elections.¹⁷

¹⁶ Ibid at paragraph 201.5.



- 55 Like South Africa, the length of time between local government elections is prescribed in Brazil's Constitution. In order to postpone its government elections, I am advised that Brazil did not approach its highest court asking for an order permitting the infringement of that constitutional provision. Rather, it passed a constitutional amendment, in order to postpone the local government elections.¹⁸
- 56 The Electoral Commission asserts that this Court ought to take account of the global approach to elections during the pandemic. It expressly asks this Court to take cognisance of the legal approach that has been followed in other countries, and FUL has no objection to this approach. Every single one of the countries purportedly relied upon by the Electoral Commission appears to have resorted to parliamentary processes in order to successfully postpone the respective elections in each of the countries. None of these countries (as far as FUL is aware) approached a court asking for relief in violation of the express language of the Constitution in a constitutional democracy, as the Electoral Commission now does.
- 57 Of further significance is the motive of the two countries which, as the Electoral Commission correctly notes, did not postpone their elections, being the United States and India.¹⁹ I summarise as follows:
- 57.1 India's Election Commission was placed under severe scrutiny for not postponing the elections. This scrutiny culminated in a High Court judge commenting that the Commission is responsible for murder as a result of the second wave of Covid-19

¹⁷ Ibid at paragraph 202.1.

¹⁸ Ibid at paragraph 203.1.

¹⁹ Ibid at paragraph 204.



cases in India.²⁰ However, not even such dire circumstances justified interventions by the Indian courts into decisions by the Election Commission. In terms of Indian law, it was held that this would amount to overreach by the judiciary into a separate, independent constitutional institution. Similarly to the position I am advised is applicable in South Africa, Indian courts exercise mutual respect and restraint in accordance with the principle of the separation of powers, where issues give rise to the duties of separate branches of government.

57.2 The United States also required an intervention by the legislative branch of government in order to postpone its elections. Article II of the US Constitution gives Congress (being a branch of the legislature) the power to set the date of the presidential election. Further, general elections in the US are subject to federal law. In order to amend that law, legislation would need –

57.2.1 first, to be enacted by Congress;

57.2.2 secondly, to be signed by the President as the appropriate member of the executive branch; and

57.2.3 thereafter, and thirdly, only be subject to challenge in the courts.

57.3 It is widely known that the former United States President, Mr Donald Trump sought to postpone the presidential elections, notwithstanding the fact that this was not within the purview of the executive branch of government. Even so, former

²⁰ See <https://www.businessinsider.in/politics/india/news/the-election-commission-should-be-booked-on-murder-charges-for-the-second-wave-of-covid-19-in-the-country-according-to-a-high-court-in-india/articleshow/82260926.cms> accessed on 11 August 2021.



President Trump did not approach a court seeking relief of the nature sought by the Electoral Commission, because the United States law, as is the case with the Constitution in my respectful submission, is clear and explicit: an amendment to the date of elections lies solely with legislative branch of government.

- 58 The Electoral Commission relies on the above jurisdictions as examples that commend themselves for acceptance and transplanting by this Court, on the basis that the purported examples of these jurisdictions are aligned with the approach that the Electoral Commission wishes to follow. I am advised and submit that the purported examples are not examples at all: the elections referred to, without exception, were postponed by the legislative branches of the jurisdictions referred to, or by way of an amendment to the supreme law of the relevant jurisdiction. I am advised and submit that this is not in any way analogous to the relief sought in the application of the Electoral Commission, as the Electoral Commission contends. In fact, I am advised and submit that it is anything but.

F: CONCLUSION


- 59 In the circumstances, FUL prays for orders:

- 59.1 admitting FUL as *amicus curiae* for the purpose of making oral and written legal submissions, and
- 59.2 dismissing the Electoral Commission's application.

A handwritten signature in black ink, located in the bottom right corner of the page. The signature is stylized, with a large, sweeping initial 'A' or 'E' followed by several strokes.


JOHANN KRIEGLER

The deponent has acknowledged that he/~~she~~ knows and understands the contents of this affidavit which was signed and sworn to before me at Cape Town this the 12th day of August 2021 the regulations contained in Government Notice No. 1258 of 21 July 1972, as amended and Government Notice No. R 1648 of 17 August 1977, as amended having been complied with.



COMMISSIONER OF OATHS

EMMANUEL MATIMBA MASHELE

COMMISSIONER OF OATHS

PRACTISING ATTORNEY R.S.A

8th FLOOR, CONVENTION TOWER

CNR. HEERENGRACHT & WALTER SISULU AVE

CAPE TOWN CITY CENTRE, CAPE TOWN

CURRICULUM VITAE

Judge JOHANN KRIEGLER

JUDICIAL CAREER

1984-1991	Judge: provincial court
1991-1994	Judge: appellate court
1994-2002	Justice: newly-established Constitutional Court of South Africa
2003-2004	Extraordinary appointment as judge (special judicial projects)
2005 to date	Extensive arbitration practice

ELECTORAL INVOLVEMENT: DOMESTIC

1994	Chair: Independent Electoral Commission (<i>temporary body</i>) for South Africa's first democratic elections
1994-1995	Chair: Presidential commission of inquiry into election-related violence in prisons
1996-1997	Chair: Electoral Steering Committee (<i>interim body</i>)
1997-1999	Chair: Electoral Commission of South Africa (<i>permanent body</i>)

INTERNATIONAL INVOLVEMENT

In addition to lecturing in recent years on electoral and judicial matters in Belgium, Canada, the Netherlands, Spain, St Lucia, Sudan, Switzerland, the United Kingdom and the United States:

Legal / Judicial:

2000	Member: International Commission of Jurists (ICJ) mission: Palestine
2001	Member: UNDP judicial training mission: Namibia
2001	Member: Bar of England & Wales advocacy training team: Highgate House, Northamptonshire, UK



- 2 -

- 2001 Member: General Council of the Bar (GCB) of South Africa advocacy training team: Maseru, Lesotho
- 2002 Member: International Commission of Jurists (ICJ) mission on judicial independence: Malaŵi
- 2004 Trial observation for International Bar Association (IBA) and General Council of the Bar (GCB) of South Africa: Harare, Zimbabwe
- 2004 Keynote speaker: Penal Reform International Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa, which resulted in the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa: Lilongwe, Malaŵi
- 2005 Lecturer: International Bar Association (IBA) judicial training seminar for Iraqi judges: Dubai, UAE
- 2005 Lecturer: International Bar Association (IBA) judicial training seminar for Swazi judges: Mbabane, Swaziland
- 2006 Member: Bar of England & Wales / General Council of the Bar (GCB) of South Africa advocacy training team for Hong Kong judiciary: Hong Kong
- 2006 Keynote speaker: International Bar Association (IBA) Bar Leaders Conference: London, UK
- 2006 to date Honorary Benchers: Gray's Inn: London, UK
- 2006 Keynote speaker: Zimbabwe Lawyers for Human Rights Conference: Harare, Zimbabwe
- 2007 Chair: International Bar Association (IBA) mission on judicial independence: Uganda
- 2007 Keynote speaker: Zimbabwe Law Society Summer School: Nyanga, Zimbabwe
- 2007 Keynote speaker: Southern African Development Community Lawyers Association (SADC LA) Symposium on the Rule of Law, Human Rights and Constitutionalism: Harare, Zimbabwe
- 2008 Bar of England & Wales Council Second Annual Rule of Law Lecture: London, UK

Curriculum Vitae Judge Johann Kriegler January 2021



- 2009 Speaker: First Joint Judicial & Legal Practitioners Colloquium (Law Society of Zimbabwe): Victoria Falls, Zimbabwe
- 2011 Lecture on socio-economic rights: Law Society of Botswana: Gaborone, Botswana
- 2011 to date Leader: The Justice Audit, The Governance and Justice Group (GJG) (based in Monchique, Portugal)
- 2011 Member: Bar of England & Wales / General Council of the Bar (GCB) of South Africa advocacy training team: Harare, Zimbabwe
- 2012 Chair: Justice Audit Working Meeting, The Governance and Justice Group (GJG): Wilton Park, Sussex, UK
- 2012 Member: Bar of England & Wales / General Council of the Bar (GCB) of South Africa advocacy training team: Mutare and Bulawayo, Zimbabwe
- 2012 President: International Tribunal for Iran – 1980s Massacre of Political Prisoners: The Hague, Netherlands
- 2014 Lead presenter: Justice Audit Presentation to Government of Bangladesh (The Governance and Justice Group [GJG]): Dhaka, Bangladesh
- 2014 Keynote speaker: 2014 Annual Jurists Conference (International Commission of Jurists [ICJ] Kenyan Section): Cape Town, South Africa
- 2015 Facilitator: Dialogue with the judges of the African Court on Human and Peoples' Rights: Arusha, Tanzania
- 2016 to date Acting judicial appointment: Lesotho Court of Appeal: Maseru, Lesotho
- 2016 Consultant: Interparty dialogue on strengthening justice, the Rule of Law and the constitutional process (Max Planck Foundation for International Peace and the Rule of Law): Pretoria, South Africa (April); Khartoum, Sudan (May; September)
- 2017 Chair: Justice Audit Working Meeting, The Governance and Justice Group (GJG): Monchique, Portugal



- 2017 Observation for International Commission of Jurists (ICJ) at Pre-Trial Chamber hearing: International Criminal Court (ICC): The Hague, Netherlands
- 2018 Keynote speaker: Law Society of Kenya Colloquium on the 2017 Presidential Election Petitions: Nairobi, Kenya
- 2018 Consultant: Interparty dialogue on strengthening justice, the Rule of Law and the constitutional process (Max Planck Foundation for International Peace and the Rule of Law): Khartoum, Sudan
- 2019 Presenter and panellist: XXVI Biennial Congress of the World Jurist Association (WJA) (World Law Congress): Madrid, Spain
- 2019 *May-June; June-July*: Senior Consultant: Justice Sector Reform Proposals (Government of Maldives/UNDP): Malé, Maldives
- 2020 Covid19-necessitated virtual international conferences included:
- 20 August Independent Lawyers' Association of Myanmar: "Establishing the Constitutional Court of South Africa"
 - 21 August Bar of Malaysia: "Experience as a South African advocate" (advocacy training)

Electoral:

- 1994 Observer: presidential election: Mexico
- 1999 Chair: UN Electoral Commission: East Timor referendum
- 1999 Member: National Democratic Institute (NDI) mission: Angola
- 2001 Chair: UN audit of electoral roll: East Timor
- 2003 Chair: UN electoral preparedness audit: Afghanistan
- 2004 Chair: UN selection panel: Electoral Commission: Iraq
- 2004 Consultant on electoral preparedness: Electoral Commission: Botswana
- 2004 Speaker: Free & Fair Elections roundtable (Inter-Parliamentary Union / Ford Foundation): Geneva, Switzerland
- 2004 Keynote speaker: seminar on comparative electoral law and politics (Mexican Federal Electoral Institution / Spanish Institute Jose Ortega y Gasset): Madrid, Spain



- 2004-2005 Senior Consultant:
- UNMIL electoral unit: Liberia
 - UNAMSIL electoral unit: Sierra Leone
 - UNDP electoral support: Pakistan
- 2005 Keynote speaker: electoral reform conference: Zimbabwe
- 2005 UN Electoral Needs Assessment Mission: East Timor
- 2006 Keynote speaker: Seminar on cultural diversity and democracy:
Oaxaca, Mexico
- 2006 Keynote speaker: International Conference on post-electoral
reconciliation: Kinshasa, Democratic Republic of Congo
- 2006 Keynote speaker: Judicial seminar on electoral adjudication:
Livingstone, Zambia
- 2008 *February-September*: Chair: Independent Review Commission (IREC)
inquiring into the failed Kenyan elections of 2007 for the African
Union (AU): Kenya
- 2008 Speaker: Fifth International Congress on Electoral Law: Vera Cruz,
Mexico
- 2008-2013 Member: Executive Advisory Council, International Foundation for
Electoral Systems (IFES)
- 2008 Speaker: IFES seminar on United States presidential election:
Washington, DC
- 2009 Keynote speaker at workshop and facilitator: electoral preparation,
Forum for Dialogue and Peace: Lilongwe, Malaŵi
- 2009 Follow-up conference to IREC (Kenya, see above): Kofi Annan
Foundation: Geneva, Switzerland
- 2009 Speaker: Woodrow Wilson Center Africa Program: Washington, DC
- 2010 Speaker: Judiciary of Southern Sudan workshop on electoral offenses
and appeals: Juba, Southern Sudan
- 2010-2011 *April 2010-January 2011*: Commissioner, Electoral Complaints
Commission: Kabul, Afghanistan



- 2010 Speaker: Sixth International Congress on Electoral Law and Democracy: Morelia, Mexico
- 2011 Speaker: UNDP Global Practice Meeting on Electoral Cycle Support: Gaborone, Botswana
- 2011 Senior consultant to and representative of UNEAD (United Nations Electoral Assistance Division): Fifth GEO (Global Electoral Organization) Conference: Gaborone, Botswana
- 2011 Charles T. Manatt Democracy Award, International Foundation for Electoral Systems (IFES): Washington, DC
- 2011 Speaker: Southern African Development Community (SADC) Electoral Advisory Council (SEAC) workshop: Kinshasa, Democratic Republic of Congo
- 2011 Keynote speaker: “Kenya National Dialogue and Reconciliation: Building a Progressive Kenya” conference (Kofi Annan Foundation / AU): Nairobi, Kenya
- 2012 Keynote speaker: International Conference on Electoral Law Reform (National Elections Commission of Liberia): Monrovia, Liberia
- 2013 Electoral Dispute Resolution Senior Advisor: Senior judges’ course on EDR (International Foundation for Electoral Systems [IFES]): Tripoli, Libya
- 2013 Speaker: Seventh EISA Annual Symposium: “Two Decades of Election Observation in Africa” (Electoral Institute for Sustainable Democracy in Africa [EISA]): Johannesburg, South Africa
- 2013 *April-December:* Senior Governance Advisor for UN Resident Coordinator and UNDP Resident Representative: Malé, Maldives
- 2014 Presenter: Roundtable on Election Observation and Accreditation Procedures in Egypt (Electoral Institute for Sustainable Democracy in Africa [EISA]): Cairo, Egypt
- 2014 Electoral Dispute Resolution (EDR) consultant (International Foundation for Electoral Systems [IFES] / High National Election Commission [HNEC]): Tripoli, Libya



- 2014 Keynote speaker: Sixth Ibero-American Conference on Electoral Justice / Second International Dialogue for Electoral Judicial Ethics: Cancún, Mexico
- 2014 Keynote speaker: General Elections National Stakeholders Workshop (Independent Electoral and Boundaries Commission [IEBC]): Nairobi, Kenya
- 2014 Speaker: Forum on Electoral Dispute Resolution: international comparative perspectives (United Nations Development Programme [UNDP] / International Foundation for Electoral Systems [IFES]): Cairo, Egypt
- 2014 Presenter: BRIDGE training course on Electoral Dispute Resolution for Electoral Commission of Pakistan leadership (International Foundation for Electoral Systems [IFES]): Lahore, Pakistan
- 2015 Keynote speaker: Launch of the African Electoral Integrity Ranking Report, Electoral Integrity Conference on Detecting and Deterring Electoral Fraud and Malpractice in Africa: The Role of Political Parties (Hanns Seidel Foundation/Institute for Public Policy Research): Cape Town, South Africa
- 2018 Keynote speaker, panellist and facilitator: Senior Level Exchange “Elections to Peace – E2P” (Swiss Federal Department of Foreign Affairs in collaboration with the Graduate Institute and swisspeace): Geneva, Switzerland
- 2018 Plenary speaker and panellist: Second Plenary Assembly of the Global Network on Electoral Justice: Cancún, Mexico
- 2019 *April; November-December:* Senior Adviser on Electoral Integrity (United Nations Assistance Mission in Somalia [UNSOM]): Mogadishu, Somalia
- 2020 Covid19-necessitated virtual international conferences etc included:
- 27 August: University of Nairobi School of Law / African Network of Constitutional Lawyers [ANCL] “Reflecting on the Ten Years of the Kenyan Constitution”
 - 4 December: World Jurist Association “Declaration of International Jurists on the Venezuelan Election”



EXTRA-CURRICULAR: DOMESTIC

1978-1988	Founding Trustee: Legal Resources Centre (public-interest law) (<i>non-governmental</i>)
1981-1984	Trustee: Urban Foundation (Transvaal) (<i>non-governmental</i>)
1981-1984	Founding Chairman: Lawyers for Human Rights (human-rights advocacy) (<i>non-governmental</i>)
1984 to date	Member: Editorial Advisory Committee: <i>Journal of South African Law</i>
1986	Author: 5 th edition of Hiemstra <i>Suid-Afrikaanse Strafproses (South African Criminal Procedure)</i>
1986-1997	Board Member: University of South Africa Law Faculty
1987 to date	Advisory Board Member: University of Pretoria Centre for Human Rights (<i>non-governmental</i>)
1988-2012	Trustee: Project Literacy (adult basic education and training) (<i>non-governmental</i>)
1989-1991	Council Member: Pretoria Technikon
1994 to date	Founding Trustee: Nelson Mandela Children's Fund (<i>non-governmental</i>)
1994 to date	Honorary Consulting Editor: <i>Butterworths Constitutional Law Reports</i>
1998-2004	Visiting Lecturer, Justice College of South Africa
2000	Co-drafter: Judicial Code of Conduct
2001 to date	Patron: Advocacy Training, General Council of the Bar (GCB) of South Africa
2002	Co-author: 6 th edition of Hiemstra <i>Suid-Afrikaanse Strafproses (South African Criminal Procedure)</i>
2002-2010	Chairperson: Constitutional Court Trust (<i>non-governmental</i>)
2003-2004	Co-ordinator, judicial education: South Africa



2003-2020	Extraordinary Professor: Centre for Human Rights, University of Pretoria Law Faculty
2006-2019	Founding Trustee, Vice-Chairperson, Chairperson: AIDS Law Project [reconstituted as SECTION27 in 2010] (<i>non-governmental</i>)
2006 to date	Honorary life member: Johannesburg Bar
2008 to date	Founding Chairperson: Freedom Under Law (FUL) (rule of law advocacy) (<i>non-governmental</i>)
2011-2020	Member: Bar of England & Wales / General Council of the Bar (GCB) of South Africa advanced advocacy training team (annual course): Stellenbosch, South Africa
2013 to date	Non-voting member: Project Literacy (reconstituted nonprofit: adult basic education and training)) (<i>non-governmental</i>)
2017-2020	Legal Practitioner in the Mental Health Review Board: Johannesburg
2020	<p>Covid19-necessitated virtual conferences etc included:</p> <ul style="list-style-type: none"> • 21 September Afrikaanse Taalraad: "Language diversity in court proceedings" • 9 October International Labour Organization / University of Pretoria: "The role of business in South Africa's transition" • 21 November Johannesburg Society of Advocates: Advanced Advocacy Training Programme



Mr M Kanyane
Moeti Kanyane Incorporated
By Email: moeti@kanyane.co.za / mashudu@kanyane.co.za

Cc: The Respondents

9 August 2021

Dear Sirs / Mesdames

**Re: The Electoral Commission of South Africa v The Minister of Co-operative Governance
and Traditional Affairs and 10 others [Case Number: CCT 245/21]**

1. We represent Freedom Under Law NPC ("FUL"), which is a public interest organisation, registered as a non-profit company in South Africa. It is actively involved, inter alia, in the promotion of democracy and the advancement of respect for the rule of law in South Africa. Both its board of directors and its advisory board are composed of respected lawyers, judges and other leading figures in society.
2. FUL has had an opportunity to consider the application which has been brought by the Electoral Commission of South Africa ("IEC") filed on 4 August 2021 as well as the urgent directions issued by the Constitutional Court in relation to this application. FUL considers that, standing aside from institutional and political interests engendered by the matter, it can assist the Court with a valuable and particular contribution regarding the issues at stake in these proceedings. It accordingly seeks the consent of the parties to its intervention in these proceedings as an *amicus curiae*.
3. The application by the IEC implicates a number of the foundational values of the Constitution, including the supremacy of the Constitution and the rule of law, and the requirement for regular elections to ensure accountability, responsiveness and openness. There is moreover a cardinal

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jurisdictional question as to whether or not the Constitutional Court has the power either to grant what amounts to an ad hoc dispensation from the very explicit requirements of the Constitution or condone non-compliance by the IEC of an express constitutional obligation.

4. FUL is in a position to assist the Court and to make relevant submissions on these questions, as an independent organisation in civil society primarily concerned with the principles of democracy and constitutionalism, as well as the rule of law. In addition, it draws through on the particular expertise of its chair. Justice Kriegler chaired the Independent Electoral Commission in the most difficult circumstances prevailing through the country's first democratic elections in 1994, and subsequently headed South Africa's first permanent independent electoral agency.
5. While it is apparent at this early stage that a number of political parties are likely to seek to be joined to the proceedings, FUL believes that the Court will benefit from the views of an *amicus* which is not actuated by self-interest in relation to the upcoming local elections, unlike any of the political parties which may intervene. The FUL's submissions will accordingly be both useful to the Court and different from those of the other parties.
6. FUL wishes to make the following oral and written submissions.
7. FUL will submit that the constitutional imperatives that "*regular*" elections be held and that the term of a provincial legislature and municipal council is "*no more than five years*" are finite and unqualified requirements. The Constitutional Court does not have jurisdiction to allow departures from the clear limits set by section 159(2) of the Constitution. Either the IEC must approach Parliament to amend the Constitution, which would require a supermajority of 75%, or it must comply with it. There is no suggestion that Parliament is incapacitated such that it could not pass the relevant amendment, should it receive the requisite support.
8. The proper constitutionally compliant approach for any potential postponement of the upcoming local election is accordingly that the matter should be considered by Parliament, which has the competence to take the necessary steps to permit the postponement of a constitutionally-mandated election. The approach by the IEC to the judicial branch of



Government before the Legislative branch has even considered the matter is both premature and impermissible. It is not consonant with the rule of law for the court to be approached at this stage, or when it is not the applicant's case that Parliament could not and cannot now be approached.

9. FUL will also present submissions on the comparative approach which has been adopted in other countries in relation to the conducting of elections in the context of the COVID-19 pandemic.
10. It will also make submissions regarding the argument by the applicant that resort can be had to common law doctrines for the purpose of overriding the express language of the Constitution: FUL will submit that this approach is impermissible.
11. FUL intends further to submit that the suggestion that the Constitutional Court should assume supervisory jurisdiction which will place an obligation on the Court to determine when and how the election should be held (in the event that there are further COVID-spikes) is also constitutionally problematic as it would mean that the Constitutional Court becomes the arbiter of when elections should be held. This also trenches on the doctrine of separation of powers.
12. FUL believes that, given its position as a public interest organisation with a particular focus on the rule of law, it has a different perspective to any of the other parties and that it is in a position to advance relevant submissions which will be useful to the Court.
13. It, therefore, requests (given the urgency of the matter) that you indicate by close of business on 10 August 2021 whether or not you consent to its intervention as an amicus in these proceedings.
14. If it is permitted to intervene, FUL will file its heads of argument at the same time as the respondents who are opposing the application in line with the directive of the Constitutional Court.



Kind regards

[Unsigned due to electronic transmission.]

Anton Roets / Michelle Rawlinson
Nortons Incorporated

A handwritten signature in black ink, appearing to be 'A. Roets' or similar, located in the bottom right corner of the page.

From: Michelle Rawlinson <michelle@nortonsinc.com>
Sent: Monday, August 9, 2021 6:58 PM
To: moeti@kanyane.co.za; mashudu@kanyane.co.za; avrilw@cogta.gov.za;
 ichowe@justice.gov.za; stateattorneypretoria@justice.gov.za;
 mzwake.clay@eccogta.gov.za; nnothoko@gmail.com;
 noncedo.nothoko@eccogta.gov.za; sivuyisiwe.mayoyo@eccogta.gov.za;
 hod@fscogta.gov.za; tembeni.lobe@fscogta.gov.za; lesleyk@fscogta.gov.za;
 quinton.kuhn@gauteng.gov.za; fred.mokoko@gauteng.gov.za;
 simon.masisiletele@gauteng.gov.za; simon.masisi-letele@gauteng.gov.za;
 anthony.moonsamy@gauteng.gov.za; lelani.vandenberg@kzncogta.gov.za;
 kerry.turner@kzncogta.gov.za; nokwanda.mchunu@kzncogta.gov.za;
 sanele.zondi@kzncogta.gov.za; ngobenidd@coghsta.limpopo.gov.za;
 dumalisilen@coghsta.limpopo.gov.za; mathyem@coghsta.limpopo.gov.za;
 lvdwalt@mpg.gov.za; mvdmerwe@mpg.gov.za; sam@mpg.gov.za;
 skunene@mpg.gov.za; mkhwanazizf@mpg.gov.za; bvass@ncpg.gov.za;
 bslenkoe@ncpg.gov.za; mmadyo@ncpg.gov.za; gbotha@ncpg.gov.za;
 mmanyeneng@ncpg.gov.za; pseane@ncpg.gov.za; mmotlogelwa@nwpg.gov.za;
 tlerefolo@nwpg.gov.za; graham.paulse@westerncape.gov.za;
 ugopichund@salga.org.za
Cc: Anton Roets
Subject: URGENT : Electoral Commission of south Africa // Minister of cooperative
 Governance and Traditional Affairs & 10 others : Case number 245/21
Attachments: Letter to the parties 9 August 2021.pdf

Dear all

We refer to the above matter and attach hereto a letter for your urgent attention.

Kind regards

Michelle Rawlinson



From: Ms Mashudu Rambau <mashudu@kanyane.co.za>
Sent: Wednesday, August 11, 2021 11:09 AM
To: Anton Roets
Cc: Moeti Kanyane; Keletso Bolani; Michelle Rawlinson
Subject: RE: URGENT : Electoral Commission of south Africa // Minister of Cooperative Governance and Traditional Affairs & 10 others : Case number 24 5/21

Dear Anton

Our recent telephone conversation refers and confirm that our instruction is that our client consents to the request.

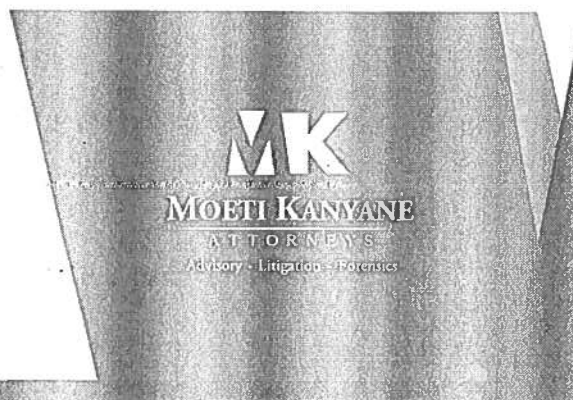
A copy of the papers and other applications submitted to date can be accessed at the following DropBox link:
<https://www.dropbox.com/sh/soct54n857if3t4/AADKrSh6ExwFh6JHDmCqbGcha?dl=0>

In addition to all the respondents cited in the notice of motion kindly also copy the following email address:
generaloffice@concourt.org.za

Kind regards,

Ms Mashudu Rambau | Senior Associate

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 269 Von Willich Avenue, Die Hoewes,
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 🌐 www.kanyane.co.za
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From: Michelle Rawlinson <michelle@nortonsinc.com>
Sent: Monday, 09 August 2021 18:58
To: Moeti Kanyane <moeti@kanyane.co.za>; Ms Mashudu Rambau <mashudu@kanyane.co.za>;
 avrilw@cocta.gov.za; ichowe@justice.gov.za; stateattorneypretoria@justice.gov.za; mzwake.clay@eccogta.gov.za;
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 bslenkoe@ncpg.gov.za; mmadyo@ncpg.gov.za; gbotha@ncpg.gov.za; mmanyeneng@ncpg.gov.za;
 pseane@ncpg.gov.za; mmotlogelwa@nwpg.gov.za; tlerefolo@nwpg.gov.za; graham.paulse@westerncape.gov.za;
 ugopichund@salga.org.za
Cc: Anton Roets <anton@nortonsinc.com>
Subject: URGENT : Electoral Commission of south Africa // Minister of cooperative Governance and Traditional Affairs & 10 others : Case number 245/21

Dear all

We refer to the above matter and attach hereto a letter for your urgent attention.

Kind regards

Michelle Rawlinson

Michelle Rawlinson

Consultant

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Disclaimer: 1) Confidentiality: This email, sent from michelle@nortonsinc.com to mashudu@kanyane.co.za on Mon, 9 Aug 2021 16:58:26 +0000, is confidential and may contain privileged or copyright information. You may not present this message to another party without consent from the sender. If you are not mashudu@kanyane.co.za please notify michelle@nortonsinc.com and delete this email, and you are notified that disclosing, copying, distributing or taking any action in reliance on the contents of this information is strictly prohibited. 2) Liability: This email is not a binding agreement and does not conclude an agreement without the express confirmation by the sender's superior or a director of the Company. 3) Viruses: The Company does not certify that this email is free of viruses or defects. 4) Requested: The Company does not consent to its employees sending un-asked for emails which contravene the law. In the event that you feel this email is such, please notify the Company in order for the appropriate corrective action to be taken. 5) Advice: Any views or opinions presented in this email are solely those of the author and do not necessarily represent those of the company. Any actions taken on the basis of this email are at the reader's own risk. 6) Other: The sender of this email is expressly required not to make any defamatory statements. Any such communication is contrary to company policy and outside the scope of the employment of the individual concerned. The company will not accept any liability in respect of such communication, and the employee responsible will be personally liable for any damages or other liability arising.