

**IN THE CONSTITUTIONAL COURT**

**CASE NO: CCT245/21**

In the matter between:

**ELECTORAL COMMISSION OF SOUTH AFRICA**

Applicant

and

**MINISTER OF COOPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS & OTHERS**

Respondents

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**REPLYING AFFIDAVIT TO 10<sup>TH</sup> RESPONDENT'S ANSWERING AFFIDAVIT**

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I, the undersigned,

**VUMA GLENTON MASHININI**

do hereby make oath and state that:

- 1 I am the Chairperson of the Electoral Commission of South Africa ("the Commission"), duly appointed as such as contemplated in section 8(1) of the Electoral Commission Act 51 of 1996 ("the Commission Act"). I depose to this supplementary replying affidavit on the Commission's behalf.
- 2 The facts that I depose to are true and correct and are within my personal knowledge.

## THE NEED FOR THIS AFFIDAVIT

- 3 The answering affidavit of the tenth respondent was, in terms of this Court's directions, due to be filed on 11 August 2021.
- 4 It was instead filed on 16 August 2021. This was after the Commission's replying affidavit had already been filed on 13 August 2021. It was accompanied by a condonation application.
- 5 The Commission abides the condonation application. However, in the event that the condonation application is granted and the tenth respondent's affidavit stands, I submit that the Commission is entitled to file this brief replying affidavit to the tenth respondent's answering affidavit. Insofar as is necessary, the Commission asks for permission to do so.

## RESPONSE TO THE TENTH RESPONDENT

- 6 Much of what the tenth respondent raises in its answering papers have already been refuted in the Commission's founding and replying affidavits. The Commission therefore does not intend to address each and every allegation. Any allegations made by the tenth respondent that do not accord with what has been set out in the founding and replying affidavit should be taken to be denied.
- 7 There is, however, one claim the tenth respondent makes which must be addressed. The tenth respondent claims that the Commission has misstated facts that it placed before the Court and that it failed to disclose a PowerPoint

presentation made by it to the Western Cape Provincial Legislature on 21 May 2021 regarding its preparatory steps for local government elections in October 2021. This is attached to the tenth respondent's papers as "AB1".

8 There is no basis for these accusations and it is unfortunate that they have been made.

9 The Commission's founding affidavit in this Court made quite clear that it was preparing to run the elections in October 2021 if this application was refused.

9.1 As recorded in the Justice Moseneke's Report<sup>1</sup>, and the confirmatory affidavit of Mr Sy Mamabolo to the founding affidavit before this Court,<sup>2</sup> and annexure FA2.1 before this Court<sup>3</sup>, the Chief Electoral Officer ("CEO"), provided submissions on the Commission's election readiness to the Inquiry on 4 June 2021.

9.2 The Commission's "election readiness" (headed as such) was set out in the CEO's submissions to the Inquiry and attached to his confirmatory affidavit to the founding affidavit before this Court.<sup>4</sup> It was accepted in Justice Moseneke's Report.<sup>5</sup>

9.3 The Commission has never alleged there was a lack of preparation or readiness for holding local government elections. On the contrary, in

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<sup>1</sup> Paragraph 16 of the Report p 130

<sup>2</sup> Para 3 p 244

<sup>3</sup> FA2.1 p 247

<sup>4</sup> Starting from p 257; See FA para 30 p 24

<sup>5</sup> Paragraphs 22 to 37 of the Report, pp 134 – 139; See FA paras 26, 30 pp 23-24; See also FA para 35.2 fn 10 p 27.



the founding affidavit, it has repeatedly stated that it is technically in a position to run the elections. See for example paragraphs 98.5.1; 98.5.2; 98.5.9; 98.6; 104.3; 181; and 182 of the founding affidavit.

- 9.4 At paragraph 184 of the founding affidavit, after setting out the October timetable I explicitly state:

*“I set out the above to demonstrate that if elections must go ahead in October, then the Commission is in a position to run the elections. However, running an election is not the same as running a constitutionally compliant election. For the reasons I have given, I deny that an election organised according to the above timetable would be constitutionally compliant.”*

- 9.5 When one of the intervening amici curiae then complained that the Commission had not prepared properly for the October local government elections, the Commission dealt with this at length in its replying affidavit. That affidavit set out extensively the steps it had taken to prepare for the October elections – in case they had to be run. The replying affidavit was filed on 13 August 2021 – well before the tenth respondent’s answering affidavit of 16 August 2021.

- 9.6 In the circumstances, the allegation that the Court has been kept in the dark as to the fact that the Commission was preparing for October local government elections from as far back as 21 May 2021 is without any foundation. There is no basis to make this claim.

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10 Further factual allegations are made in the answering affidavit which lack proper context and are therefore misleading. It is not possible to deal with all of them at this stage but by way of example I deal with the following.

11 The tenth respondent states at paragraphs 72 to 73 that *“by the time the by-elections were held on 11 November 2020 and 9 December 2020 in the Western Cape, the second wave had already begun in the Western Cape. Yet [the Commission] did not see fit to postpone the by-elections held in the 17 wards in the Western Cape on those dates”* and *“similarly the third wave was well under way in the Western Cape when the by-elections were held on 30 June 2021.”*

12 But the tenth respondent omits the following:

12.1 On 11 November 2020, the country was on Alert Level 1 – the least restrictive alert level. It is therefore hardly surprising that the by-elections proceeded.

12.2 On 9 December 2020, the country still remained on Alert Level 1, with the only exception being the additional regulations to Nelson Mandela Bay Metro which had been designated a Covid-19 “hotspot” on 3 December 2020.<sup>6</sup>

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<sup>6</sup> See Government Notice No 1291 dated 03 December 2020.

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- 12.3 The Western Cape Government itself expressly stated as late as 25 November 2020 that it did not want another lockdown<sup>7</sup> and there were no restrictions in the Western Cape beyond Alert level 1 at this stage.
- 12.4 The Health Minister announced that South Africa had entered the second wave on 9 December 2020 by which time the by-elections for that day were already under way.<sup>8</sup>
- 12.5 The by-elections scheduled to take place on 30 June 2021 were postponed as the country on 28 June 2021 had been placed under Adjusted Alert Level 4.
- 13 All of the above is consistent with the Commission's claims that it was constrained from administering constitutionally compliant by-elections under Alert Levels 2 - 5. The Commission does not deny that these by-elections were followed by increasingly severe second and third Covid-19 waves in the Western Cape. The Commission does not purport to express any expert opinion on this correlation but fails to see how these examples support a contention that the local government elections could safely be held countrywide in the present circumstances.

  
**VUMA GLENTON MASHININI**

<sup>7</sup> <https://coronavirus.westerncape.gov.za/news/covid-19-resurgence-western-cape-urgent-public-response-required>.

<sup>8</sup> <https://sacoronavirus.co.za/2020/12/09/sa-enters-covid-19-second-wave/>

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's both true and correct. This affidavit was signed and sworn to before me at Daifarn on this the 19<sup>th</sup> day of **August 2021**, and that the Regulations contained in Government Notice R.1258 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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