

Free and fair local government elections in light of the COVID-19 pandemic in South Africa

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14 JUNE 2021

1. Summary

The right to vote is an integral right that is entrenched in national, regional and international human rights instruments. This right forms the core of political participation in modern constitutionalism. The right to vote encompasses not only the right to free and fair elections but promotes the exercise of political rights in an environment that boosts public confidence in the whole electoral process. This entails that elections should be conducted in a manner that promotes free and fair elections, ancillary rights such as freedom of assembly, freedom of movement, the right to security of the person, the freedom of political parties and their constituents to freely participate in pre-and post-electoral processes. Taking into account the prevailing COVID-19 pandemic, it is important to consider the right to health and safety of the voters and various stakeholders in the upcoming local government elections (hereinafter "the municipal elections"). This is of paramount importance because failure to adhere to the necessary health and safety protocols can expose the voters and other stakeholders to possible COVID-19 infections and this can have dire consequences in the current situation. Furthermore, the electoral process if not conducted carefully may cast aspersions on whether such elections were indeed free and fair. Thus, an electoral process that is not adequately administered in the current conditions would fall foul of the various fundamental rights that underpin South Africa as a democratic state. In turn, it violates regional and international standards on the right to vote and can mar the integrity of the whole electoral process in respect of the 2021 municipal elections. This opinion examines the content of the notion of free and fair elections, the feasibility of free and fair elections under the current situation and the various measures that could be adopted to ensure human safety and credible elections under the current situation.

KEYWORDS: Democracy, free and fair elections, right to vote, voter turnout,

2. Introduction

The right to vote is one of the core values that underpin South Africa's democracy. Section 1(d) of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution") provides for a 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 19 of the Constitution enshrines the right to political participation and provides that;

- (1) Every citizen is free to make political choices, which includes the right-
 - (a) to form a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; and
 - (c) to campaign for a political party or cause.

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

- (3) Every adult citizen has the right
 - (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - (b) to stand for public office and, if elected, to hold office.

The above-mentioned provisions entail that the right to vote is the backbone of democracy and its exercise must be diligently guarded to ensure the promotion and protection of democratic values and ethos. In *August and Another v Electoral Commission and Others* ((1999 (3) SA 1 (CC) at para 17) the Court held that;

"Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood".

The notion of political rights also extends to regional and international spheres. Article 21(1) of the Universal Declaration on Human Rights, 1948 (UDHR) states that everyone has the right to take part in the government of his country, directly or through freely chosen representatives, while , article 21(3) of the UDHR states that the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting

procedures. The International Covenant on Civil and Political Rights, 1966 (ICCPR) in article 25 provides that

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

Therefore, the right to vote is vital in advancing popular sovereignty. Bazezew (2009: 359) alludes that the election of representatives by the public is the most common form that involves the public in the decision-making process of a nation. Further that such election should be free, open (transparent) and fair. According to Mehdiyev (2019) elections are a crucial tool for democracy and must be arranged in accordance with universally accepted free and fair election criteria. As such the right to vote is a basic human right that require positive obligations on the part of the government to enable the public to influence political decision-making processes (Tuzin & de la Vega 2010:2-4). To this effect the African Charter on Democracy, Elections and Governance, 2007 (African Charter on Elections) has as its objective to promote free, fair, transparent and credible elections (Preamble African Charter on Elections). The Charter imposes an obligation on member states to promote the holding of regular free and fair elections to institutionalise legitimate authority of representative government as well as democratic change of governments (Art 2(3) to the African Charter on Elections). Article 3 (7) of the African Charter on Elections further provides that one of the core principles of the charter is effective participation of citizens in democratic and development processes and in governance of public affairs.

Hence, a positive obligation is imposed on member states to create conditions that allow for free and fair elections and as such any impediment to free and fair elections including the limitation of ancillary rights such as the right to freedom of assembly and association (sections 17 and 18 of the Constitution), movement (section 21 of the Constitution) and safety (sections 12 and 27(1)(a) of the Constitution) should be addressed. This obligation is derived directly from section 7(2) of the Constitution

which states that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. Therefore, the Electoral Commission is also obligated to ensure not only that the elections are free and fair but that the conditions are conducive for free and fair elections to take place (section 5(1)(b) and (c) of the Electoral Commission Act 51 of 1996 as amended). The notion of "*conducive conditions*" cannot be overemphasised in the current situation. Therefore, any decision on whether or not to conduct the 2021 municipal elections should consider holistically the factors that need to be addressed to enable the elections to be seen as free and fair. Douglas (2013: 89-90) asserts that

"There is no need for a guarantee of participation for all. This makes sense if one starts from the premise that the value of voting is primarily about equality, as the government's obligation is simply to foster that equality-and nothing more. But if we more fully embrace the foundational right to vote, then merely providing a reasonable opportunity to participate is not enough. This is because some voters may be left behind in the process-infringing their fundamental right to vote. Instead, there should be a concerted effort to make voting as easy as practicable, consistent with the government's regulatory and administrative needs and economic realities".

Taking into consideration the current situation affording voters an opportunity to vote without addressing the glaring challenges presented by the COVID-19 pandemic may not be sufficient in promoting the right to vote, let alone a free and fair election process. Moreover, the municipal elections are very important as they determine the public's representatives that are suitable in advancing service delivery (s152 of the Constitution). For this reason, the 2021 municipal elections should not only be seen to be free and fair but should be managed and administered in a manner that promotes electoral integrity in the whole election process.

3. The Notion of Free and Fair elections

The preceding section indicated the importance of the right to vote in promoting democracy and the role of elections in enabling the public to influence decision-making processes. This section examines the notion of free and fair elections and the conditions that need to be met for elections to be deemed free and fair.

3.1. *What constitutes free and fair elections?*

In South Africa, elections are managed by an independent institution that has as its objective to promote constitutional democracy. Section 190 of the Constitution outlines the functions of the Electoral Commission as follows;

- (1) 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.

The Electoral Commission also has such additional powers and functions derived from relevant legislation (the Electoral Commission Act 51 of 1996 as amended). This entails that this commission is an Electoral Management Body (EMB) charged with advising the government on what constitutes free and fair elections. The EMB has to ensure that all the conditions that form part of the electoral process (pre-election processes, the election itself and post-election processes) are adhered to (Struwig, Roberts & Vivier 2011:1122-1125; Abuya 2010: 125-128). This entails that the election process is made up of three phases and all these phases should be complied with to ensure that the electoral process is free and fair.

Prior setting out the most relevant requirements for free and fair elections in respect the 2021 municipal elections, the terms free and fair elections are defined. Bishop and Hoeffler (2016:609) aver that '**freeness**' means that all adult citizens must have the right to be registered and to vote and must be free to make their choice. They define '**fairness**' as the equal treatment of equals (every voter is 'entitled to exercise his or her right equally with others', that voters should have equal and effective access to a polling station and that every party should have an equal opportunity of access to the media).

Elklit and Svensson (1997:35) argue that "the notion of free and fair elections are preconditions of democracy and must be translated into specific criteria that can be used to evaluate elections". To this end, '**freedom**' "includes elements relating to voters' opportunity to participate in the election without coercion or restrictions of any kind (with the possible exception of economic limitations)". While '**fairness**' refers to the impartiality of elections (no undue advantage by some people or groups). Some

of the conditions of free and fair elections are tabulated below (Dauda, Ahmad & Keling 2019:5-6)

	Free	Fair
Pre-election conditions (Before polling day)	<ul style="list-style-type: none"> • Freedom of speech • Freedom of assembly • Freedom from fear in connection with the election • Freedom of movement • Absence of impediments to standing for election • Equal and universal suffrage 	<ul style="list-style-type: none"> • A transparent electoral process • An election act and a system for seat allocation which grants no special privileges to any party, group, or person • An independent and impartial electoral commission. • Impartial voter education programmes
		<ul style="list-style-type: none"> • Absence of impediments to inclusion in the electoral register • An orderly election campaign • Equal access to public mass media • No misuse of government facilities for campaign purposes
Election day (on polling day)	<ul style="list-style-type: none"> • Opportunity to participate in the election • Absence of intimidation of voters 	<ul style="list-style-type: none"> • Secrecy of the ballot • Adequate provisions to ensure that voters only vote once • Well-designed ballot papers without serial numbers • Access to the polling stations for accredited party representatives and election observers • Impartial assistance to incapacitated voters • Proper treatment of void ballot papers
Post-election conditions (after polling day)	<ul style="list-style-type: none"> • Legal possibilities of complaint • Adequate possibilities for resolution of election related conflicts 	<ul style="list-style-type: none"> • Proper counting and reporting procedures • Proper precautionary measures when transporting election

		<p>material and securing polling stations</p> <ul style="list-style-type: none"> • Impartial reports by the media on election results • Impartial treatment of election complaints • Acceptance of the election results by all involved
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3.2. Voter turnout and accessibility to polling stations

The above-mentioned conditions on the electoral process have a direct impact on whether an election is free and fair. De Kock and Schutte (1994:28) argue that conditions which may influence a voter to take part in the election or not are two-fold namely; objective-technical conditions which are basically the responsibility of the EMB (these include all technical aspects and administrative duties in managing and administering the elections) and subjective-perceptual conditions (perceptions and evaluations of, and state of mind relating to the election process). Taking into account the prevailing situation brought by the COVID-19 pandemic, it is trite that those factors that can cause a barrier to free and fair elections be addressed. For the purposes of this opinion voter turnout and accessibility of polling stations are important in promoting free and fair elections in the 2021 municipal elections. These factors have a direct bearing on the freedom of assembly, freedom of movement and safety of voters (in the sense of being exposed to COVID-19).

In South Africa, it is well-known that one of the strategies to promote voter turnout is voter mobilisation by political parties. This entails that parties embark on campaigns prior the election day to rally their constituents to participate in the elections. Schulz-Herzenberg (2019:4) observes that exposure to the mobilisation efforts of amongst others political parties and candidates, and interest groups and associations, such as trade unions facilitate turnout. Campaigns are associated with large gatherings and frequent movement by party leaders and constituents. This is necessary to rally the masses and has become part of traditional politics. Therefore, limiting such

campaigns may result in unfairness and give dominant parties leverage in the upcoming elections. Although, De Kock and Schutte (1994:27) argue

"that as long as the reality of incumbent governments and candidates having a decided campaign advantage during an election continues to exist, and as long as there are inequitable financial and material resources among parties and candidates, the reality of absolutely fair elections does not exist".

Despite the sentiments of De Kock and Schutte, it is vital to acknowledge that the pre-election process has a huge impact on voter turnout (Oyedemi & Mahlatji 2016: 9-10; De Kock & Schutte 1994: 29-30).

Accessibility to polling stations is also vital in ensuring that the public participates in the election process. This entails that unnecessary impediments should be addressed prior the 2021 municipal elections. This is consistent with the definition of freeness and fairness as alluded above. De Kock and Schutte (1994:27) referring to the 1994 elections assert that what is a free and democratic election? entails that that each person eligible to vote should have an equal and fair opportunity to vote for the party of his or her choice, or to abstain from voting (*some words omitted*). In other words, conditions or prevailing realities should not prevent a person from voting. Struwig Roberts and Vivier (2011:1132) observe that the IEC places great emphasis on accessibility to polling stations and thus has established voting stations country wide to prevent long queues and travelling distance. The study also indicates that on average travelling to voting stations took 17 minutes and waiting time averaged 23 minutes. It should be noted that this was a 2011 study and depending on varying factors travelling and waiting time at voting stations differ. Furthermore, the issues of curfew, restrictions on gatherings and various safety protocols will definitely impact negatively on both travelling time and waiting time at polling stations in 2021.

The discussion above reveals that voter turnout, accessibility and safety of voters and various stakeholders are important to ensure free and fair elections and to maintain electoral integrity and public confidence in the electoral process. This being said the participation of voters and political parties in pre-election processes such as campaigns will determine the legitimacy of the whole election process leading to the 2021 municipal elections. Zamfir and Fardel (2020:4) state that "a genuine campaign and real public debate are just as important for democratic elections as the

opportunity to vote". The Electoral Commission should also conduct robust educational awareness campaigns to assure eligible voters that the necessary precautions are in place to minimise the likelihood of possible COVID-19 infections so as to encourage eligible voters to participate in the upcoming municipal elections.

4. Is Free and Fair election feasible under the current circumstances?

In *August and Another v Electoral Commission and Others* ((1999 (3) SA 1 (CC) at para 16) the court held that "the right to vote by its very nature imposes positive obligations upon the legislature and the executive". Taking into account section 7(2) of the Constitution, it is clear that the Electoral Commission together with government bears the obligation to guarantee to an acceptable extent that the whole electoral process meets the conditions of a free and fair election in line with the founding values of the Constitution, regional and international standards on the right to vote. To this end, the feasibility of free and fair electoral process is dependent on the variety of factors raised in the preceding discussion. However, the situation that South Africa is currently experiencing is not unique since the COVID-19 pandemic emerged.

Several countries have had to postpone elections since the start of the COVID-19 pandemic in 2020. James and Alihodzic (2020: 345-346) opine that elections may be postponed in instances of public emergency which threatens the life of the nation and existence. Taking their point of departure from article 4 of the ICCPR¹, they argue that elections may be cancelled owing to several factors including on humanitarian grounds (James & Alihodzic (2020: 348-350). This entails that the right to vote is limited under certain circumstances. A point worth noting is that this right is derogable. This is also the case in terms of the Constitution of South Africa (s36 and 37 of the Constitution). Slim (2020: 212-215) asserts that although elections are meant to safeguard democracy, it might be prudent to postpone elections to maintain public order and the safety of the population. At the same time the postponement of elections might be seen as a strategy to hold on to power by incumbent

¹ Article 4(1) to the ICCPR provides that in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

representatives (Slim 2020: 218). A study conducted by Santana, Rama Bértoa (2020: 14-15) indicates that COVID-19 had a negative impact on voter turnout in places where COVID-19 death toll was on the increase. Further that election participation tends to be low in countries of study due to most people's fear of contracting COVID-19 and as such voters chose to refrain from voting than risk their health (Santana, Rama Bértoa (2020: 20).

The discussion above makes it clear that the COVID -19 pandemic has a direct impact on voter turnout. Depending on the measures the government adopt to reassure the eligible voters of relevant safety and health protocols in place voter turnout may be stable. On the other hand, if the public feels uncertain about safety and health protocols at voting stations this may negatively impact voter turnout (Zamfir &Fardel 2020:5-7)

5. Measures to ensure human safety and credibility of elections

Zamfir and Fardel (2020: 5) outline some of the safety measures that should be in place when elections are conducted during the current situation namely;

- providing vulnerable voters with the possibility to register and vote remotely, or use proxy voting (delegate the vote to another person),
- ensuring enhanced hygiene measures at polling stations,
- rearranging polling stations to guarantee social distancing, and;
- communicating with the public about safety measures.

This calls for the Electoral Commission, the government and various stakeholders including political parties to be proactive and ensure that safety and health protocols are in place on election day. Further that in the event of rallies and campaigns such gatherings are safely conducted with observation of social distancing and mask wearing. Moreover, the current situation should be closely monitored to ensure that the decisions taken will promote voter turnout. The reason being if eligible voters do not participate in the electoral process the credibility of the electoral process may be questioned by various political parties and observing bodies. Slim (2020:216) argues that

"holding elections as planned presents risks in terms of turnout and true representativeness, postponing elections also constitutes perils in terms of political reputation and repression".

6. Conclusions and recommendations

In conclusion, central to holding of elections is the fact that the right to vote (especially municipal elections) is an entrenched basic human right that not only enables the public to elect suitable political representatives to govern but has a direct impact on the enjoyment of other democratic rights such socio-economic development. Therefore, it is recommended that the Electoral Commission hold deliberative conferences with political parties to determine their readiness for the 2021 municipal elections. This is critical to safeguarding the notion of free and fair elections and to enable not only equal participation in the upcoming elections but to determine whether all stakeholders have confidence in the administration of the whole electoral process in order to prevent foreseeable electoral disputes post elections.

Finally, factors such as voter turnout, accessibility to polling stations, safety and health protocols should be at the core of the decision whether or not to hold the 2021 municipal elections. Needless to say respect for human rights and the founding values of the Constitution remains the sterling guide to any decision to be taken in this regard.

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