



COUNCIL
FOR THE ADVANCEMENT OF THE
SOUTH AFRICAN
CONSTITUTION

SUBMISSION TO JUSTICE MOSENEKE

HOLDING FREE AND FAIR ELECTIONS UNDER THE STATE OF NATIONAL DISASTER

18 JUNE 2021

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Yours sincerely,



Lawson Naidoo
Executive Secretary
Council for the Advancement of the South African Constitution