



**An Enquiry on Whether the Conditions Under the COVID-19
Pandemic Are Conducive To The Holding of Free and Fair Local
Government Elections in October 2021**

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Role of the Commission

The Constitution of the Republic of South Africa implores the Electoral Commission to ensure that the elections happen within an atmosphere conducive to free and fair elections. According to section 190(1)(b) of the Constitution: “The Electoral Commission must ensure that those elections are free and fair.” This obligation is further emphasised by the Electoral Commission Act, 1996. Under Powers, Duties and Functions of the Commission section 5(1)(b) of the Act puts it thus: “The functions of the Commission include - ensure that any election is free and fair.”

Obligation to ensure free and fair elections

An obligation to ensure free and fair elections is therefore fundamental to the role of the Electoral Commission, and not incidental to its core functions and mandate. The Constitution expects the Commission to perform the following responsibilities:

1. Manage elections of national, provincial, and municipal legislative bodies in accordance with national legislation.
2. Ensure that those elections are free and fair; and
3. Declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.

These functions are equally important, and none should be elevated above the other. Simply put, these functions and responsibilities do not have a hierarchy of importance and the Commission when expected to carry out its obligations try to prioritise one above the other and try to find an exit clause in the Constitution or any legislation in order to avoid these obligations. The Commission therefore cannot claim to be between the rock and the hard place when it is expected to carry out these obligations. There are no expectations for the Commission to do anything outside the law or its obligations as



captured in the Constitution. The fundamental question is whether the Commission has satisfied an obligation of ensuring free and fair elections in its preparation of the 2021 Municipal elections. The short answer is that the Commission has admitted that the conditions currently do not exist for free and fair elections. The only difficulty that the Commission seems to be raising is that there is no provision in law that empowers it to hold an election outside a Constitutionally stipulated period of 90 days. Of course, this is a false argument, and we will explain why it is a false argument later.

What Constitutes as Free and Fair Elections?

The Constitutional court considered the issue of what constitutes free and fair election during the deliberations in the Kham matter.¹ It was emphasised that the notion of free and fair elections, must always be assessed in the context of the by-elections in Tlokwe. The court indicated that the concept of free and fair elections must include amongst others:

1. that every person that is entitled to vote should be registered to vote;
2. that no one that not entitled to a vote should be allowed to participate in the electoral process;
and
3. that only people who are residents in an area where the elections are taking place should have the right to participate in the elections, and that the political parties should be able to canvas support in the correct constituency.

The context that the Constitutional Court is referring to also entails the protection of political rights. As section 19(1)(b) says “to participate in the activities of or recruit members for, a political party and section 19(1)(c) to campaign for a political party or a course”. The exercise of this rights is dependent on the existence of conditions conducive to free and fair elections, and the constraints imposed by the COVID-19 pandemic have seriously limited the capacity of citizens and political parties to exercise this right.

¹ Kham and Others v Electoral Commission and Another [2015] ZACC 37



Postponement of Elections

The electoral legislation anticipates moments in history when it may be necessary to postpone an election. Section 21 of the Electoral Act deals with General postponement of elections. According to this section:

“The Commission may request the person who called an election to postpone the voting day for that election, provided the Commission is satisfied that - (a) the postponement is necessary for ensuring a free and fair election.”

The issue of possible postponement of elections is further outlined in the Local Government Municipal Electoral Act, 2000. On postponement of elections section 8(1) puts it as this:

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

Therefore, the postponement of an election as anticipated by the legislation and the legislation does indicate the circumstances under which postponement can be sought. The postponement of an election is therefore not an arbitrary act outside the confines of the law. It is a provision in law that is there to enable citizens to exercise their rights in an environment where the exercise of such rights is not compromised by the process.

The Electoral Commission itself has over the past few months approached the Constitutional Court to ask for a postponement of by-elections. All by-elections that took place recently took place outside a Constitutionally stipulated period of 90 days. The IEC understood the process to be followed and the reasons of holding elections outside a Constitutionally stipulated period. The reasons were explained to the country and the electorate accepted the explanation. There was a clear understanding that it was



not reasonably possible for the Commission to conduct free and fair elections under those circumstances. Holding elections or by-elections outside a Constitutionally stipulated period did not compromise the quality of our democracy in South Africa, nor did the sky fall as a result. So, a dichotomy of having to choose between spreading the disease and acting unconstitutionally is a false one.

The following statement by the Chairperson of the IEC Mr. Glen Mashinini is therefore problematic and without substance: “The commission is walking a tightrope. On one side is the tyranny of the elections becoming a super-spreader event, leading to further loss of human life. On the other side is the tyranny of the failure to adhere to the dictates of our constitution, leading to democratic backsliding and setting an undesirable precedent for the future,” said Mashinini.

As we have attempted to demonstrate, the IEC has an obligation to ensure that elections are free and fair and if the current circumstances do not allow for that, as indicated by the Chairperson, then the right thing is for the IEC to postpone the elections like they have done in the recent past. The so-called “tyranny of the failure to adhere to the dictates of our Constitution” by postponing an election by few months is a scarecrow and has no substance. The IEC has done it recently and can surely still do it.

The Current Elections Timeframe (Election Timetable) and Justice Moseneke’s Enquiry

The current enquiry by Justice Moseneke is an important intervention in preparations for upcoming Municipal elections. The enquiry has given hope that Justice Moseneke’s independence, objectivity, integrity, and enormous experience as an imminent jurist would help to level the playing field. This hope has also created a “pause” in preparation for elections. The implementation of the draft Election Timetable and time frames should have therefore been suspended pending the outcome of this process.

The launch of the election campaign by the IEC and all other activities such as registration weekend of the 17th and 18th July has created a public perception that this enquiry is a meaningless exercise that



will only legitimise the current processes. The elections are won or lost during registration. If a political party is not able to excite its constituency to register during the registration process such a party would be at a disadvantage going into the elections. The current dilemma is whether political parties should use their limited resources and work within the current Covid constraints to push for registration, or to await the outcome of the enquiry. This anxiety is further contributing negatively to an environment of free and fair elections.

Recommendations

1. Postponing the elections to early 2022 will allow all the role players particularly the political parties some space to rearrange their campaigns to reach out to the electorate. This will also enable the Commission sufficient time to plan its logistics, including training of its electoral staff.
2. The Commission must halt the implementation of the current draft election Timetable. In terms of section 20(2) of the Electoral Act: “The Commission may amend the election timetable by notice in a Government Gazette- (a) if it considers it necessary for a free and fair election.” In any case, the Commission has not as yet gazetted the Election Timetable. Implementation of the current Election Timetable timeframes will render the recommendations of this Committee irrelevant, and null and void, particularly because the voters roll will close before the submission of the report and the proclamation of the date of the elections will also happen before the report is submitted. Below here is the draft election timetable for ease of reference



DRAFT CRITICAL PATH - LGE 2021 - PLANNING ELECTION DATE 27 OCTOBER 2021			
Activity description	Responsible	Planned Start	Planned End
Targeted Communication and Registration of voters in Voting districts whose boundaries have changed following the ward demarcation process		6/4/21	6/30/21
REGISTRATION WEEKEND	IEC	7/17/21	7/18/21
PROCLAMATION DATE (86 DAY TIMETABLE)	Minister CoGTA	8/2/21	8/2/21
Candidate Nomination Open			
Inspection Voters' roll available for objections	IEC	8/4/21	8/11/21
Commission considers objections to inspection v roll	Commission	8/12/21	8/18/21
Cut off date for submission of candidates	Parties/ Candidates	8/16/21	8/16/21
Cut-off parties/candidates to comply	Parties/ Candidates	8/27/21	8/27/21
Certify & publish voters roll	IEC	9/1/21	9/1/21
Special votes application period	IEC	9/3/21	9/17/21
Final lists of candidates compiled	IEC	9/7/21	9/7/21
Certificates issued to candidates	IEC	9/13/21	9/13/21
Special voting days	IEC	2021/10/	10/26/21
LGE 2021 - VOTING DAY	IEC	10/27/21	10/27/21
Publish Election Results	IEC	11/3/21	11/3/21
Election of LC reps to the DCs	IEC	11/3/21	11/17/21

3. The Independent Communications Authority of South Africa (ICASA) must be approached to review Regulations on party elections' broadcast, political advertisement, and the equitable treatment of political parties by broadcasting licensees. The current rules have not taken into consideration a COVID-19 environment and its constraints.
4. Introduction of support measures for community-based radio stations. Community radio stations can play an important role in information dissemination for political parties.
5. In considering the period within which a postponed election can take place, November, December, and January period should be excluded largely because of exam period and holidays. April would also have to be excluded due to the fact that there are too many holidays in that month. March and May 2022 appear to be the most convenient months. We can make a separate presentation on factors to take into consideration in determining an election date should this be necessary.



Conclusion

The current COVID-19 third wave gripping the country has created much anxiety and uncertainty in the country. The political environment has also been adversely affected by the current situation. The delayed rollout of the vaccination program has been exacerbated by the decision to destroy 2 million Johnson and Johnson vaccines earmarked for the country. Postponing elections by few months will greatly help in levelling the playing field for political parties. It will also give other institutions an opportunity to prepare themselves and contribute towards ensuring free and fair elections. The IEC has previously postponed the by-elections beyond a Constitutionally stipulated period of 90 days, and this did not harm the state of democracy in the country and postponing these elections by few months is unlikely to harm democracy. Whereas the IEC submission has investigated the administration of election and its technical readiness, it completely ignored issues that relate to levelling the playing field – which factors are crucial for ensuring free and fair elections. The IEC has admitted that there is currently a “tyranny of elections becoming a super spreader event” but appears confused about measures that can put in place to obviate this. The IEC is labouring under a misapprehension that doing what it has correctly been doing all along (postponing by-elections) will suddenly harm the state of democracy in our country. There is absolutely no evidence to support this thesis. We therefore feel very strongly that the elections should be postponed by a few months, in the interest of ensuring free and fair elections.