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JUSTICE MOSENEKE INQUIRY ON FREE AND FAIR LOCAL GOVERNMENT ELECTIONS DURING COVID-19

MS FAATHIMA MOHAMED

Tugela House

Floor 1

1303 Heuwel Road

CENTURION

0157

By email: freeandfair@elections.org.za

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Ms Faathima Mohamed,

ECONOMIC FREEDOM FIGHTERS SUBMISSION ON THE POSTPONEMENT OF THE 2021 LOCAL GOVERNMENT ELECTIONS

1. INTRODUCTION

South Africa is due for Local Government Elections in 2021, as per the requirements of the Constitution of the Republic of South Africa. The President of the Republic of South Africa Mr. Cyril Ramaphosa has since announced that Local Government Elections will be held on Wednesday the 27th of October 2021, and the Independent Electoral Commission (IEC) has reiterated that they are ready to conduct elections.

The announcement for and the subsequent planning for the 2021 Local Government Elections are happening in the context of the spread of the Coronavirus (henceforth referred to as 'COVID-19'), a devastating global pandemic that thrives on human contact. In South Africa, over 1.8 million people have been infected with the virus at the time of writing this submission, and over 58 000 have lost their lives due to COVID-19. If excess deaths recorded between March 2020 and now are taken to account, then it might very well mean that over 100 000 lives have been lost due to COVID-19.

This submission is intended to demonstrate that under the conditions of a rapidly spreading virus and its attendant socio-economic devastation and loss of lives, the 2021 Local Government Election must be postponed in order to save lives and to create conditions necessary for society-political party engagements, which is a prerequisite for free and fair elections.

2. CONSTITUTIONAL BASIS FOR ELECTIONS

Elections are a crucial mechanism in which citizens can exercise their choice on who should lead the government. It is a right that was denied to black people in this country for generations, and as a result, it is one of the most treasured rights in the Constitution.

Mobile: +27 83 514 8074

Tel: +27 11 403 2307

Email: effsg2npa@gmail.com

78 De Korte Street, Braamfontein, 2001

Economic Freedom Fighters

@EFFSouthAfrica

@EFFSouthAfrica

receptionist@effonline.org

www.effonline.org



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Section 1 of the Constitution of 1996 states that;

“The Republic of South Africa is one, sovereign, democratic State founded on the following values:

- a. Human dignity, the achievement of equality and the advancement of human rights and freedoms*
- b. Non-racialism and non-sexism.*
- c. Supremacy of the Constitution and the Rule of Law.*
- d. Universal adult suffrage, a national common voter’s roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness.***

In terms of political rights, Section 19 (2) of the Constitution under the Bill of Rights gives every citizen a right to free, fair and regular elections for any legislative body established in terms of the Constitution. Section 46 (1) and 105 (1) provide for the election of national and provincial legislatures respectively, elected in terms of an electoral system that is prescribed by national legislation.

In terms of section 157 (1), Municipal Councils are made up of members elected in accordance with section 157 (2) and (3) of the Constitution. Section 157 (2) states that:

‘The election of members to a Municipal Council as anticipated in subsection (1) (a) must be in accordance with national legislation, which must prescribe a system:

- a. Of proportional representation based on that municipality’s segment of the national common voters roll, and which provides for the election of members from lists of party candidates.
- b. Of proportional representation as described in paragraph (a), combined with a system of Ward representation based on that municipality’s segment of the national common voters roll.’

In terms of Sections 49, 108 and 159, the terms of National Assembly, Provincial Legislatures and Municipal Councils are elected for a term of five years and must all hold elections within 90 days after their term has expired. The Constitution does not prescribe that these elections must take place separately, and the current election system was an outcome of unintended consequences due to delayed restructuring of local government.

3. COVID 19 AND ITS IMPACT

According to the World Health Organisation, COVID-19 can spread from an infected person’s mouth or nose in small liquid particles when they cough, sneeze, speak, sing or breathe. These particles range from larger respiratory droplets to smaller aerosols. Current evidence suggests that the virus spreads mainly between people in close contact, typically within 1 metre (short-range). A person can be infected when aerosols or droplets containing the virus are inhaled or come directly into contact with the eyes, nose, or mouth.

The virus can also spread in poorly ventilated and/or crowded indoor settings, where people tend to spend longer periods of time. This is because aerosols remain suspended in the air or travel farther than 1 metre (long-range). People may also become infected by touching surfaces that have been contaminated by the virus when touching their eyes, nose or mouth without cleaning their hands.

As indicated above, the COVID-19 pandemic has already wreaked havoc on the lives of millions of South Africans. Starting in Wuhan, China in late 2019, COVID-19 has become a global epidemic within a very short time. Many countries across the world have been hit severely by the virus. Countries such as Italy, Spain, the UK, France, U.S., and most recently India have been hardest hit in terms of infections and fatalities despite their more



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sophisticated health service delivery systems. This has raised great concern for the African continent due to the continent's relatively weak health systems compared to Europe and the Global North, and the wide expanse of areas on the continent with no health services or systems in place.

Here in South Africa, the quality and capacity of our public health to deal with the pandemic in an appropriate manner have been found to be gravely lacking from our experience of handling the first and the second wave of the virus.

By all intents and purposes, South Africa is now well into its third wave of the pandemic. Infections are rising across the country, and particularly in Gauteng.

During the first wave, the peak of daily infections was 13 944 on 24 July last year, whereas the highest number of cases during the second wave was 21 980 on 8 January 2021. By all indications, it looks like the third wave of the pandemic will be far more devastating. The government has not done anything out of the ordinary to prevent the rise of infections or improve our health system's quality to deal with the rising infections.

The strict adherence to COVID-19 prevention protocols has not been enforced, nor are these enforceable without community buy-in and support.

Taking all these into account, and with our current experience of adherence to COVID-19 protocols, and our previous experience on elections, it is highly likely that both voter registration activities and the actual Election Day, will be massive spreaders of the virus.

4. THE ELECTION PROCESS ACCORDING TO THE IEC

National and Provincial Government Elections are held in terms of the Electoral Act of 1998 and the Electoral Laws Amendment Act of 2019, and these deal with administrative processes and related matters. The Electoral Act applies to an election of a Municipal Council or a by-election for such Council only to the extent stated in the Local Government: Municipal Electoral Act of 2000. Local Government Elections are held in terms of the Local Government Municipal Electoral Act of 2000 amended in 2010 and 2016. The Act provide for voter's roll, election date, preparation for elections, observers and voter education, and other related matters.

All these elections are presided over by the Independent Electoral Commission. At the moment, over 26 million voters are registered to vote in South Africa. Over 10 million people eligible to vote are not registered to vote.

The election process starts with voter registration, because no one can vote without having registered to vote. The IEC engages in various forms of voter education, in an attempt to get people to register to vote. Each election is preceded by voter registration campaigns, culminating in voter registration dates. In between each of these voter registration dates; South Africans are welcome to visit IEC offices for registration.

The country has over 22 000 voting stations across the country, which must accommodate election officials, observers, volunteers and the actual voters on both voter registration days, and on actual voting days.



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5. HOW THE EFF PREPARES FOR ELECTIONS

Local Government Elections are about local issues that affect people on a daily basis and not high-level policy issues. To achieve a localised election campaign, EFF election campaign principles and pillars aim to prioritise voter home visit to canvass voters. The EFF undergoes a very intensive process in our preparations for elections, particularly for local government elections. The EFF has branches across the country, and each legitimate branch of the EFF must have a minimum of 100 members in each Ward.

In preparation for the Local Government Elections, each and every Ward is required to launch their branch, and to reach a quorum, there must be 50+ members of each branch present. If a branch has over 200 members, then 100 members of that branch must be present. These launched branches are then required to intensively engage with the communities in which they operate, in order to select candidates for the Local Government Elections that are sanctioned by the community.

To do this, each branch must hold a community meeting attended by no less than 500 members of the community in order to select a Ward Councilor Candidate for the EFF.

Apart from this formal process, members of the branch are required to do door-to-door visits to each house in their Wards and voting stations, in order to persuade people to go register first, and then to vote for the EFF. To this end, the EFF has established Elections Task Forces, from the Voting District level up to the national level. The Voting District Elections Task Force is made up of community activists who are required to:

- Know each and every family in their street, Voting District and Ward.
- Partake in community struggles and activities. This means that these activists will always be the first whenever there is a funeral or party or wedding in their community
- Participate in the street, Voting District and Ward forums, civil society, committees and burial societies.
- Always willing to listen to the concerns of the people and find solutions to help the people and should be available 24 hours.
- Always available for genuine protests and mass actions in their street, Voting District and Ward as leaders and not hijack community struggles.
- Always know the exact details of their community, including the number of people in their Wards and the challenges the majority of the people are confronted with, starting with their street, Voting District and Ward.

These activists are further required to engage in consistent person to person liaison with all voters in their Voting Districts, host community meetings, and conduct voter education campaigns for the communities in which they live. They must help communities to register to vote, and that those without ID documents are assisted to go to Home Affairs and get those ID documents.

These community activists are required to regularly report to their regional leaders, who must regularly report to their provincial leaders, and these provincial leaders must also report to national leadership.

This process requires constant and consistent meetings of people. Further, the EFF hosts mass rallies, in order to communicate its election message to a wider group of people. These take place in the form of mass rallies. All these require close human contact, and without these activities, the EFF will not be able to reach out to potential voters.



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6. IMPOSSIBILITY OF AN ELECTION CAMPAIGN IN THE MIDDLE OF A PANDEMIC

We have outlined above what goes into preparing for elections in the EFF, and the level of human interaction needed to fulfil our election strategy. All this is impossible to do in the context of rising numbers of COVID-19 infections, and in the context of the restrictions introduced by the cabinet.

According to the new level 3 regulations, it is stated that:

“Social, political and cultural gatherings, are permitted but limited to 50 persons or less for indoor venues and 100 persons or less for outdoor venues and if the venue is too small to hold the prescribed number of persons observing a distance of at least one and a half metres from each other, then not more than 50 percent of the capacity of the venue may be used, subject to strict adherence to all health protocols and social distancing measures”

This regulation is necessary in order to prevent the spread of the virus. That notwithstanding, it is impossible to perform the kind of political and mobilization activities we outlined above if these regulations are implemented to the letter. This would mean that no single branch would meet and launch, and no community meetings will take place in order to select Ward Councilor Candidates.

It would also mean that our election campaign is dead in the water, because our community activists would be barred from going house to house, engaging in a person-to-person engagement with prospective voters. This would also mean that our mass mobilization campaigns must be cancelled, and so must our rallies.

Without these, the EFF would be in no position to influence voters, and in no position to convince those who are not registered to vote to go register.

Apart from this, continuing with the elections will pose significant dangers to the democratic project itself. Of the 26.7 million registered voters in the country, only 17.7 million voted in the 2019 general elections. There is growing voter apathy in the country, as a result of the many failures of the democratic state. There is no hope of ever getting the 9 million registered voters who did not vote in 2019, to go vote in 2021 in light of the dangers posed by COVID-19.

More unlikely will be any attempt to convince those who are not registered to go register. Continuing with the elections as things stand pose an existential threat to the very idea of democratic and free elections.

South Africa has 4 468 Wards and 22 924 Voting Districts (VD). Any political party that aims to have a national impact should have a minimum of 20 Volunteers per VD who for the three months to Wards Election Day constantly interact with voters to persuade them to vote for a political party. The EFF's internal assessment of elections is that this form of persuasion is the most potent and powerful weapon and mechanism to win electoral support.

Whilst billboards, television adverts and broadcasts, posters raise some degree of interest in elections, it is primarily the human interaction and contact that wins votes for a political party. At the core of COVID-19 preventative measures is avoidance of human contact, and therefore a sound, free and fair election process cannot avoid human interaction on a constant and intense basis.

Rallies and community meetings constitute the core of our election programmes. In the 2019 General Elections for instance, EFF President would address a minimum of 5 community meetings per day attended by hundreds of people in spaces that will not be easy to achieve social distances. Leaders inevitably have to speak to potential voters in larger crowds because talking to them one by one will not have the same impact. Rallies and Community



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meetings are therefore essential and important and cannot be regulated in terms of the number of people who must attend because the larger the people in attendance, the better the chances of winning support from a larger number of potential voters.

The IEC is in no position to enforce strict COVID-19 protocols during both the registration and the voting periods. Taking into account the number of voters who must go to the voting booths, particularly in metropolitan areas, it would be impossible to ensure that strict COVID-19 protocols are adhered to.

The country can also learn from the experience of India, which has perhaps endured the most devastation from the coronavirus. India allowed for elections to take place, while facing the same problems South Africa is facing in terms of adherence to COVID-19 safety protocols and the quality of public healthcare.

7. WHY IS IT DANGEROUS TO CONTINUE WITH THE ELECTIONS IN OCTOBER?

The third wave is only just beginning, and Gauteng may be the hardest hit province for now, but is by no means the last province to be hit. Taking the trajectory of previous waves, it can be deduced that the third wave may last up until August 2021, before infections start subsiding. With each rise of the infections, there will be public pressure for more restrictions, and the country may even go back to Level 5 COVID-19 restrictions.

This eliminates any chance of free and comprehensive campaigns by political parties, so on this alone, the elections must be postponed to allow for political parties to campaign freely.

Scarier is the potential these elections will have to unleash a health and humanitarian disaster never before seen in this country. At the moment, hospitals in Gauteng are already full to capacity, and many sick people cannot get medical assistance. When this wave sweeps through other less capacitated provinces such as Limpopo and the Eastern Cape, the impact will be more severe.

To this end, the EFF submits that the climate for free and fair elections does not exist at the moment, and that going ahead with these elections will endanger not only the health of the people, but also the very essence of democratic participation itself.

The dangers of going ahead with the election far outweighs the risks of postponing it.

In terms of current constitutional provisions, the elections cannot be postponed beyond 90 days from the date they were last held. Section 159 of the Constitution addressed the matter of Terms of Municipal Councils. It reads as follows:

"The term of a Municipal Council may be no more than five years, as determined by national legislation. 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. A Municipal Council, other than a Council that has been dissolved following and intervention in terms of section 139, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected."

This means, this year's Local Government Elections cannot be held, according to the Constitution, later than the first week of November.

The Constitution is not inflexible however, and the drafters of the Constitution never foresaw a disaster such as the one introduced by the COVID-19 pandemic. While these may require constitutional and legislative

Mobile: +27 83 514 8074
Tel: +27 11 403 2307
Email: effsg2npa@gmail.com

78 De Korte Street, Braamfontein, 2001

Economic Freedom Fighters

@EFFSouthAfrica

@EFFSouthAfrica

receptionist@effonline.org

www.effonline.org



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development, the country must take the dangers posed by the pandemic now to account, and conclude that it is impossible to hold safe, free and fair elections under these conditions.

Proceeding with elections under current circumstances will result in very low voter turnout, which will entail that the will of the people would have not been properly expressed.

South Africa has an adult population of about 58 million people, and almost 36 million of these people are eligible to vote, but only 26.7 million are registered to vote. In the 2019 national elections, almost 9 million of the registered voters did not vote.

In the previous two Local Government Elections, the turnout of voters was 57.94% in 2016, and 57.6 in 2011, this means almost a half of the people registered to vote did not vote, and when taking to account those who are eligible to vote, but are not registered, then more than half of the people eligible to participate in this democratic process did not do so over the past few elections. With the fears of COVID-19, the number of people who will turn out to vote will be drastically very low.

The turnout of voters in the by elections held in November 2020 under COVID-19 restrictions was 37.3 % and in April 2021 it was 40.63%. This points to the fact that the upcoming election process elections will be negatively impacted due to COVID-19 restrictions.

It will be impossible to enforce COVID-19 regulations if elections proceed, because we as political parties will have no other mechanisms to convene people than through measures and means that will violate the restrictions imposed by government.

8. RECOMMENDATIONS

We therefore propose that the 2021 Local Government Elections must be postponed for a period of 12 months, to give the government sufficient time to vaccinate the population, to ensure that there can be free movement of people, to allow for political parties to campaign freely, and to allow voters to go to voting booths without the risks of contracting the virus.

In the struggle for economic freedom,

SECRETARY GENERAL
CMSR. MARSHALL DLAMINI