



AL JAMA-AH SUBMISSION ON FREE AND FAIR ELECTIONS

This is the first time that section 14(4) of the Electoral Commission Act (51 of 1996) has been invoked providing for a report to be published on the likelihood or otherwise that it will be able to ensure elections will be free and fair.

Respected (former) Deputy Chief Justice Judge Dikgang Moseneke, I – as the president of Al Jama-ah Party – and others acknowledge the sterling role that you have played as the Deputy Chairperson of the Independent Electoral Commission (IEC). As far as I know, the IEC under your abled leadership had set high standards; and because of your significant contributions in the IEC's transformation, it stands out as a noteworthy institution today.

I am, however, rather disturbed by the fact that the IEC has asked you to determine a matter that seems to have already been decided upon. This week in the Electoral Court in Bloemfontein, the IEC officials handed in an affidavit which the court accepted; herein it stated that 'free and fair (local government) elections in South Africa' under the present Covid pandemic environment can only be held under Level One regulations and conditions. In the affidavit, the IEC officials spelt out that as an electoral institution it cannot agree to hold free and fair local government elections under Levels Two, Three, Four, and Five.

As far as I am informed, none of the 14 political parties, cited as respondents, had a quarrel with this; and the same applies to each of the provinces' MECs. In fact, none of the 54 respondents - most of them who made submissions before you - disagreed.

While these positions are understood and respected, I wish to point out that the basis for justifying section 14(4) of this report is flawed. From my perspective, it should have been narrowed down; and you should have been asked for a report whether Level One will be in place by 27 October 2021 or whether your office would know whether the 'state of disaster' will come to an end by the mentioned date. Upon reflection and with the deepest respect unless one has Prophet Solomon's wisdom, I cannot see how your office would be able to produce such a report.

Honourable Judge Moseneke, I have a sense that you may perhaps be facing one of your greatest challenges; a challenge that might be weightier than your period of incarceration on Robben Island as its youngest political prisoner and resistance fighter. My mom, for your





information, regularly enquired from Robben Island visitors - to whom she gave a warm bed and a warm plate of food at her two District Six safe houses - about your welfare. You indeed captured our imagination at that time and thereafter.

Now at this critical juncture in our nation's electioneering campaign and not forgetting that you are one of the nation's most honoured retired civil servants, you have been approached – because of your rich experience and wisdom - to deal with a significant issue; one that may keep our democracy afloat.

I wish to bring it to your attention that (a) 'free and fair elections' and (b) observing COVID-19 protocols do not necessarily cancel each other out. If one looks at the C-19 precautions, then it is observed that the IEC clearly set out the rules and regulations that must be in place on Election Day. Factoring in this and considering the safeguards for counting votes, then one may ask the question: Why am I being asked for a section 14(4) report when one already has the answer whether 'a free and fair election' can take place on 27 October 2021?

Respected Judge, I intend to share a quote from the IEC's affidavit to the Electoral Court this week. This affidavit the judge of the said court duly accepted, and it went unchallenged by the 54 respondents that were referred to earlier. I am amazed at the attention to detail; an aspect that has never been so aptly set out by the IEC. Later, I will spell out the "attention to detail" in my submission; and it will come as a surprise that you, as the judge, were asked to prepare this section 14(4) report.

It will also become clear whether the IEC is to be believed; as a nation, we cannot have 'free and fair elections in South Africa' for the next decade - or even longer - as we do not know when the next couple of waves will hit us, or when there will be herd immunity as variant after variant is rearing its head.

So, the question is: how can you assist and intervene to rescue us from the current situation? I, as AL JAMA-AH leader along with its members, firmly believe that the scheduled date should remain and that no delays should be considered. In line with this position, my sincere advice is that the report should stress that no changes would occur and that the IEC gear itself preparing for the scheduled elections. If, however, one accepts the IEC affidavit that was submitted to the Electoral Court, then Al Jama-ah doubts IEC's readiness for Election Day.

When I last engaged with the IEC's chairperson, Hon. Mr. Glen Mashinini, regarding the Popi Act, he complimented me; and he described my contribution as having been on the higher grade and not the standard grade. I hope that Al Jama-ah's suggested way forward will gain your office's support and that it will enjoy the same praise.

In the circumstances that our communities are in, I recommend that since the IEC has the voters' addresses the ballot forms be posted or delivered to them. Alongside this, ballot votes be posted at post offices, and collected from voting stations; if all of these are observed, then so no one would be left out.



In the United States, it was proven that the availability of postal votes tended to increase voter turnouts. So, here is a plus if South Africa's IEC develops strategies enabling postal votes; this would help avoid everyone from having to line up in long queues as we did and so proud of when we participated in our first democratic election during 1994 over which you presided.

Under the present situation, it is acknowledged that Hon. President Cyril Ramaphosa is doing his best to protect the lives and livelihoods of our country's citizens and residents. The country cannot expect the leader of the governing party (that is, the ANC) to make the cut to also salvage our democracy because of a corruption pandemic and an integrity blackout that are perhaps even more serious than COVID-19.

Sadly, our current government don't make the grade because it sliced the budget to ensure free and fair election. This was further aggravated by the high cost of preventative measures to combat Covid 19; an expense that was absent from previous budgets and it is one that you, as Electoral chairman as well as others who followed, did not have. So, the democracy budget has been snipped in half and this outcome has left us all with 'half a democracy.' This should not be and now that Al Jama-ah tabled its suggestion, I look forward to your report in this regard.

And may I add that for parties to effectively campaign, regulations should allow for the parties' officials to have greater freedoms than the general public for the duration when these regulations are operational. Alongside this, the Covid 19 pandemic must not be used by the ANC to hold on to its dominance in municipalities; many of which are, unfortunately, in disarray. This has resulted in scores of communities having been neglected and not getting the basic services. For the record, yesterday, the Auditor General (AG) told the nation how deep the corruption and looting in the municipalities are. The AG also underlined how incompetent the leadership was in these municipalities.

Factoring in these unhealthy developments, there is a need for the electorate to put in place councillors that will provide service delivery, that will ensure that budgets are not looted, and that corruption does not become endemic. Present councillors have served their terms. The AG told the nation that many of them have let their communities down; so, if your office recommends that their terms be extended by even one day then this will not go off well with residence who have been and are still being harmed by poor service delivery.

Respected Judge, I am of the view that voter registration is more important than voting. Since the IEC has been given the nod by political parties that voter registration can be done from home and considering that checks and balances are in place with the purpose of preventing fraudulent voting, then this surely means that voting can be done in the same way. I, therefore, wish to reiterate that there is no reason to postpone the 27 October local elections; and this plea is to keep our democracy intact.

On a related matter, the IEC claimed in a technical meeting that was held this week that there was a penetration of 90% of voters most of whom possess smart phones; regarding this, AL



JAMA-AH feels that the claim is an over-exaggerated one. The IEC also made a preposterous claim that android phones can be bought for just over R100; my concern is why overstate these when this is not so in reality?

Leaving that aside, let me re-state and say that voting from the comfort of one's home is no longer a pipedream. Now, if the IEC takes a position that voting from home is not secure then surely that must apply to registering as a voter from home. If voter rolls are suspicious, then surely there can be no free and fair election.

Your Honour, the first task regarding your mandate is to establish whether a credible voters' role is in place, and whether there has been adequate voter education; this was, as far as I recall, one of the highlights of your tenure when you served the IEC. And your Honour, you also must determine whether the IEC has the necessary resources to run free and fair elections. In my respectful view, it certainly does not. IT services cannot be taken to the next level and AL JAMA-AH has its own reservations about whether the IEC's IT department makes the grade considering the challenges that we all face amidst the Covid 19 pandemic.

We have dealt with salvaging our democracy which AL JAMA-AH - with deepest respect - stated is as important in rescuing our communities' lives and their livelihoods; and we turn our attention to campaigning by political parties and persuading voters to vote for them. You will hear mainstream political parties clamouring for the good old days when stadiums were packed and booze flowing. Those days are gone as result of the Covid pandemic.

You must decide if the launch of political manifestos and tv, radio and live mainstream debates and podcasts can ensure free and fair elections. We know the media is not impartial and that the SABC as the state broadcaster is struggling. There is also the debate on proportional airtime which once again is an attack on our democracy. The media embraces this and that is why my submission to you will be ignored by the media as the media gatekeepers only put forward the views of parties which they don't regard as "smaller parties"; so, it does not matter if this submission is more than a standard grade.

Chairs in our Parliament may not like this, but you and many others did not duck bullets in the trenches proportionally. So, the airwaves must not attach strong significance to proportionality for it should be freed from hampering free and fair elections. You set an example by giving all political parties the same minutes to make submissions before you.

So, AL JAMA-AH puts before you that free and fair airtime and media space are requirements for free and fair elections. Political parties must be assisted to get their own radio frequencies even if it is only in the period in the run up to an election. It cannot be that the 3 minutes a smaller party gets to speak on an item is fair to the 90 minutes a governing party gets to pass a budget. How can a small party like AL JAMA-AH influence the outcome of a vote? How can limited speaking time bring about regime change through the ballot box.

Hon. Judge, I feel that while the boxes for free and fair elections be ticked off, that a 'no' tick be inserted next to for IEC readiness. The same 'no' be ticked off regarding the issue of



campaigning and for government funding. Now, it appears that I am contradicting myself, but I am sure you understand.

The country cannot expect the governing party's leader to also rescue democracy when this party is encountering internal chaos; and this was best explained by a former President who told the nation soon after June 16 commemoration that his party is accused No 1 when it comes to flouting democracy with looting and corruption.

The IEC, which is under oath, shot itself in the foot in the Electoral Court this week by requesting a postponement of a dozen or more by elections on 30 June 2021 would be harming our democracy. It is an established fact that many Wards are still without representation for up to a year. Parties and candidates and supporters have been dealt a blow and IEC failed to ask the voters in wards whether they want a further postponement. Instead, they ran to the Electoral Court; and after election day, no order has been issued. Our Electoral Court is too slow to salvage our democracy.

We have dealt with saving our democracy which AL JAMA-AH with deepest respect stated is as important in saving lives and livelihoods we turn our attention to campaigning by political parties and persuading voters to vote for them. You will hear mainstream political parties clamouring for the good old days of full stadiums and booze flowing. Those days are gone as result of the Covid pandemic. You must decide if the launch of political manifestos and tv, radio and live mainstream debates and podcasts can ensure free and fair elections.

That attention to detail by the IEC which I promised to share earlier states that:

The holding of the by-election involves a significant congregation of people in a relatively confined space of a voting station, involves physical proximity between the voters inter se and with voting officials, and the exchange of ballot papers between voting officials and voters. It is this kind of environment that the SARS CoV-2 virus thrives on and continuing with the affected by-elections as scheduled could be fertile ground for the by-elections to become the so-called "super spreader events".

At the end of the voting process, ballot papers must be counted, in a case where an infected voter has handled a ballot paper, indications are that active (and contagious), viruses on the ballot papers are concerned will last for some time. According to the WHO, viable SARS-CoV-2 virus and/or RNA can be found on surfaces for periods ranging from hours to days, depending on the ambient environment (including temperature and humidity) and the types of surfaces. This will be yet another opportunity for cross infection of officials conducting the counting process.

In preparing the Superior Wednesday by-elections the Commission, in consultation with the NPLC, compiled COVID-19 voting protocols to ensure that not only free and fair elections are held, but that they are also held in a safe and healthy manner in order to ensure that voters and officials take the necessary precautions during the voting process to limit their risk of exposure to the virus.

The efficacy of these measures was successfully tested during the Super Wednesday by-elections of 11 November 2020 and those held on 9 December 2020, before the second wave

of the pandemic in December 2020, forced an adjustment of the alert level to Alert Level 3, leading to the postponement of by-elections scheduled for January, February, and March 2021.

These voting protocols have since been adjusted as new lessons are learnt, and the current protocols are:

- In the morning before voting starts, the presiding officer must defog the voting station venue;
- An hour prior to the commencement of voting the presiding officer must sanitize the voting station, including all tables, chairs and pens;
- Voting officers will be provided with personal protective equipment (“PPE”) for use at the voting station and during special vote home visits;
- Voters are encouraged to bring their own pens for marking the ballot papers as to avoid the sharing of pens. However, pens provided by the Commission will be sanitized after each single use;
- The queue walker must ensure social distancing be kept at 1.5 meters apart. Adhesive tapes or any voting specific measure to be used to enforce special distancing. The que walker must also ensure that all voters in the queue are wearing face masks and make regular checks along the queue and offer assistance where necessary;
- The door controller must ensure that every voter entering the voting station is wearing a face mask, must sanitize each voter’s hands prior to entering the station upon exit, controls the access of voters into the voting station to limit the number of persons in the voting station at any given time, and checks the voter’s identity document and directs the voter to the next step;
- The inker checks the ID of the voter is marked without touching the voter using a disposable bud, which is immediately thereafter discarded in the disposable bag to be provided;
- Protocols on social distancing and sanitizing of hands applies to all party agents and observers that enter voting stations;
- Officials must ensure that all voters inside of the voting stations maintain a distance of 1.5 meters apart at all times. Use of demarcation tape to mark the floor surface is peremptory where the voting station enables same.
- While counting procedures remain unchanged, officials and party agents need to always observe social distancing, make use of a new set rubber gloves for the count, as well as sanitize hands at the end of voting/start of counting, and at the end of counting process – together with wiping of all surfaces prior and after use.
- Each party or candidate is allowed two agents per voting station and one-party agent per home visit team. In the event where the voting station cannot accommodate two agents per party, the presiding officer, in consultation with the parties, must agree on one agent per party on a rotational basis;

However, as the Commission has previously reported to this Court, that it is constrained from preparing for and conducting by-elections in a free and fair manner for the duration of Alert Levels 5, 4, 3 and 2 of the lock-down. The Commission holds the view that the ongoing risk of infections spreading through election activities is such that it is not possible for election activities to safely take place under those levels.

Most importantly, Regulation 21 currently prohibits all social gatherings and political events, which would include such activities which are an integral part of any election as public canvassing, door to door visits and rallies. Conducting elections in these circumstances would



negatively affect the ability of parties and candidates to canvass for voters and is likely to render the by-elections not free and fair. In addition, Regulation 17 (as amended), requires every person to be confined to his or her place of residence from 21h00 until 04h00 daily.

It should also be taken into consideration that given the heightened awareness of the second wave of the COVID-19 pandemic and yet another new variant of the virus, there is a real possibility that significant numbers of voters may stay away from voting stations. This may result in low participation level which will undermine the credibility of the outcomes and the legitimacy of the elected representatives.

The Commission is therefore of the view that in the circumstances and given the measures announced as part of the national response to the pandemic, the possibility of free and fair elections is incontrovertibly vitiated and that the affected by-elections should be postponed until it is safe to proceed the same.

It must be clear to you judge that free and fair elections can only take place in terms of the present IEC readiness under Level 1 or when the disaster management declaration no longer applies. This is not only Russian roulette but a pipedream. All we can do is get the country ready for a system of postal votes. The days of voting at voting stations is over. Counting the votes after polling stations close is a no go as it is Russian roulette as counters and party agents are faced with contaminated voting ballot forms. Campaigning leading up to an election just is not going to happen as we know it. Campaigning can only happen if the State broadcaster gives more free airtime to political parties 60 days before election day.

The IEC, who has the mandate to ensure free and fair elections, must ensure elections do take place on October 27. They have the addresses of voters so they can start preparing the ballot forms, post it, or drop it off, and collect ballot forms. Let me not go into the nitty gritty of the issues but state firmly that the IEC must give leadership and securing our democracy. The present government does not make the grade to deliver democracy, so AL JAMA-AH puts the faith of the nation in the Independent Electoral Commission of South Africa.

I Thank You.

Hon. M.G.E Hendricks

AL JAMA-AH Leader in Parliament