

## **ORAL SUBMISSIONS TO THE MOSENEKE INQUIRY INTO FREE AND FAIR ELECTIONS DURING THE COVID-19 PANDEMIC**

Good morning Justice and thank you for the invitation.

We will in these oral submissions attempt to not repeat all of the arguments we made in our written submissions, but rather aim to assist with some arguments that will deal with mountain of information that has been placed before you and to make arguments on the issues that you have identified in your engagement with others this week and which then seems to be pertinent to your inquiry.

With this in mind, we at the outset want to acknowledge the manner in which you have expressed and showcased an appreciation of the competing rights and interests that are in play during the course of this inquiry.

We did not deal in detail, in our written submissions, with the likely future trajectory of the infection rate that is at the heart of the pandemic and we still do not profess to hold any scientific knowledge and expertise which could assist you to make a definitive finding on what the state of play would be come 27 October this year.

And it has become very clear in listening to the oral submissions and reading through the written submissions on the website that scientists are not unanimous in the conclusions they have

reached, based on the available data, as to what this virus is likely to do in the months to come, and the risks it will pose from now until 27 October.

Our reading is that scientists tend to generally hold the view that if the cyclical nature of the pandemic, as has been seen up to now, continues from now until October, that the rate of infections could in all likelihood be towards the lower end of the scale in the two months immediately prior to and on Election Day.

This much was said by most of those who presented this week, although it must immediately be acknowledged that this is based on forecasts and was not said with absolute certainty. Some have pointed to the possibility of further mutations of the virus which might cause an earlier fourth wave and the only expert which used the term likely in sharing talking about this forecast was Professor Karrim, yesterday.

Justice, you have used the term the “sweet spot” in reference to what I think we can describe as the ideal time to hold the elections in the context of what the virus will, in all likelihood do.

We formed the distinct impression from your interactions with other parties that up to yesterday you leaned, on the basis of the evidence of some of the scientists, that in order to save lives we should consider waiting with the elections until we have reached herd or community immunity through vaccination.

We however submit that the difficulty is that there seems to be firstly some uncertainty as to whether we can say there is a likelihood that this will be reached on a more or less discernable date. Some have said that on the basis of the current vaccine roll out plans of government we will reach this by February next year, but then we heard Professor Karim say he deem this as an unlikely event on which we should not place reliance for a decision to advocate for a postponement of the elections.

On this score we argue Justice, and it is not for political reasons, that surely in order to place reliance on the future roll out of the vaccination programme one must consider the track record of government. And this poses a great difficulty: Very little of what government has promised us up to now regarding the roll out of the vaccine programme in as far as the numbers of people that would have been vaccinated daily and weekly has materialised; so therefore we must ask ourselves whether it is reasonable to accept the forecast of 40 million of us being vaccinated by February.

If one adds to this the possibility, and Professor Karrim even said he deems it a probability, of further mutations of the virus which will become present before the target date for community immunity by vaccination and which could render the protection given by the vaccines we receive in this country useless, then

the possibility of this community immunity on the back of vaccinations becomes even more remote.

We submit that if all of the submissions by the scientists are taken into account the only three things that can be concluded are:

**One:** that the pandemic is not going away anytime soon. **Two:** that it is very difficult to predict the further trajectory of the pandemic but that the most likely path from now until October shows a likelihood of us finding ourselves in the break between the third and fourth wave which would be the optimal time for the campaign period and voting and **three,** that the one element of our traditional way of life as human beings that should be avoided in order to best manage the pandemic is the mass gathering of people in close proximity to one another.

Now, we accept that all of us who participate in this process are committed to the protection of the right to life and health which South Africans enjoy. And we accept that this issue will weigh heavily on your mind, specifically given the forceful testimony given by Dr Fareed Abdullah, which effectively said that if this election continue in the absence of community immunity the lives of thousands of South Africans will be put at risk.

We are of course very hesitant to disagree with such a forceful statement, but we feel it is important to place reliance on it only in as far as it is properly contextualised and in as far as it is not

contested by other experts, who appeared here and gave their insights, as well as a further consideration we will argue.

Firstly, it is important to remember that this advice is to be contextualised by the fact that the reference to the election potentially exposing us to increased loss of life was primarily based, if one listened carefully to the submission of Dr Abdullah, on the assumption that mass gatherings will form part of the campaign period.

We will later on deal with this issue in some more detail but for now it should suffice to say that we believe that a prohibition on mass gatherings from now until the election is non-negotiable.

Secondly, we have the strong evidence of Professor Karim, who testified that what should happen in all instances is to manage the pandemic with what he called **the toolkit** that is available to do so and his conviction that it should be possible to have elections in a safe way in October.

On this score justice we submit that the protocol that the IEC has used successfully during the by-elections that have taken place during the State of Disaster is that toolkit.

We submit that this protocol not only enabled the IEC to test whether its own risk measures could be successful, in the sense that the participation rate of voters show trust and confidence in the IEC's ability to hold the elections while not unduly exposing voters to infection, but also to test whether, on an objective basis,

these elections did expose voters in an undue manner to the risk of infection.

So: What have these by-elections showed us? The turnout on average, as we have showed in our written submissions, compared very favourably to the by-elections that were held in the same period before the previous general local government elections – it was less than four percent lower in the set of by-elections held in the current cycle.

We submit that this showed that voter confidence in the possibility of safe elections amidst the pandemic.

In addition, the interesting further unique aspect of the sample that is provided by these by-elections is of course that they were held in very clearly demarcated geographical areas.

Therefore, any scientists that had an interest in analysing the impact on the likely trajectory caused by elections, in the best possible local context, should have looked into whether we had higher rates of infection in these wards after these by-elections.

From where we are looking at it we want to submit that if we had so-called bushfires, which is the term government used at the beginning of the pandemic to describe smaller localised spikes in infection, in these wards, then we would surely have been alerted to this by health officials and of course it would have been a relevant local context to any argument that elections and voting

exposes South Africans in an undue manner to a higher risk of infection.

We submit, Justice, that while we hold no scientific expertise this is the type of local context that should be factored into the equation, in our view, before reliance can be placed on those who say this election cannot be held safely.

We say this specifically in light of the guidance the Constitutional Court has given in the Kham judgement, which says that the investigation into the freeness and fairness of elections should be done **in context** and we submit that it goes without saying that the pandemic and the success of the measures introduced to minimise risk of infection is an essential part of our current context.

While we are on the point of measures to ensure that voters are not exposed in an undue manner to the risk of infection we confirm, as we did in our written submissions, that we are of the opinion that the one further measure that could be considered is to allow for those with co-morbidities and over fifty years of age to cast special votes on the day before the main voting day.

This Tuesday, will in any event, in terms of the ordinary arrangements of the Commission be used for special votes at voting stations. Therefore, to use this special voting day to accommodate bigger numbers than in the past can enable some spreading out of voters and minimise the risk of infection.

This will also address some of the other problems that could be caused by extending voting days and having four days of voting, which you have already taken note of: Issues around the safe storage of ballots and even the financial burden which will be placed on the public purse and the Commission if we add more than the ordinary three days of voting to this election.

This brings me Justice to the other elements of free and fair elections that are in play:

Firstly, the arguments around the role of mass gathering in elections.

We submit that if we are to cut to the bone on this issue it is quite clear that the danger mass gatherings hold for a significant increase in the rate of infections is quite possibly the one issue all scientists agree on. Therefore, it must be accepted that this will have to be a non-negotiable element of the campaign period if we are to have safe elections.

If we circle back the contextual investigation that the Constitutional Court said we are to use in South Africa to assess the freeness and fairness of elections we submit that given that there is scientific agreement that mass gatherings is a no-no if we are to successfully manage the pandemic and given that this applies to everyone it cannot be argued on a conceptual level that this prohibition can render elections not free and not fair in the context of a health pandemic.



If we then turn to the potential impact of the prohibition on mass gatherings on the ability of voters to make informed decisions on voting day, we stand by our written submission that it cannot be reasonably argued that mass gatherings are essential to achieving a properly informed electorate.

It is only one of an ever growing number of platforms and tools, the remainder of which will remain available to all parties and candidates. We have noted with interest the debate, during these oral submissions, around the effective ability of poorer South Africans to access online information for the purpose of familiarising themselves with the offer of different parties and candidates.

On this score I believe two things are important: The first is the proposal by Media Monitoring SA that to address this issue, it should be facilitated that, what they called “public interest sites”, should be zero rated for the campaign period and their confirmation that the zero rating of some sites carrying information on the pandemic was achieved in a fairly efficient and effective manner at the start of the pandemic which show that this can still be done in time for it to add value towards the elections. We believe that if this is facilitated it will definitely broaden access.

The second thing that is important is that it in our view it should be remembered that those who do not have effective access to online sources make use in a greater way of radio and television for information. And as we have pointed out, the levels of penetration and the typical amount of time which radio listeners spend listening to radio programming and the amount of South Africans regularly watching television, clearly indicate that the overwhelming majority of potential voters will not be precluded from accessing information on the policy proposals of political parties and candidates if they do not have unfettered access to online information.

This brings me as my second last point to the argument that is being raised that while it may be so that lockdown regulations will in all probability be eased in the weeks to come after the third wave has passed, the current level 4 regulations makes it very difficult to the point of impossible for parties to do the necessary to identify their candidates for the election.

We have pointed out in our written submissions that all parties were informed by the IEC that it was proceeding with the preparations of this year's election in April and in early May a draft timetable was published which, if anybody claim that they still had their doubts said in a loud voice to all political parties: This is real, and if you want to participate get your ducks in a row. That gave all of us about 6 to 7 weeks to tend to candidate selection before level 4 was announced last Sunday.

A basic analysis of the things these parties, who are now complaining that the regulations prevent them, busied themselves with since the end of April up to last weekend will however show that they rather used their time and energy in that time for other things. Some of their activities like rallies and marches and court cases involving their internal squabbles were well documented by the media.

So we must say that we could not agree more with Ms Solo of Abatsha Force for Change when she said that these parties should not complain now, they should have spent the time and money that went into those issues to rather have dealt with candidate selection.

If there is urgency now Justice and difficulty it is self-created. But also: In our view it can be argued that these candidate selection meetings are rather the business meetings of political parties and not the type of political gatherings which the regulations prohibit.

If one looks carefully at the current regulations it in our view has put a temporary stop to political gatherings in which we would engage voters. Our own internal business meetings has not been prohibited.

In conclusion we deem it important to reflect somewhat on the options available to this inquiry when it makes findings in the weeks to come.

Firstly, we submit that a purposive and contextual interpretation of section 14(4) of the Electoral Commission Act, which enabled the establishment of this inquiry, makes it clear that duty of this Inquiry is to make a finding on the likelihood of the upcoming elections being free and fair **with the purpose** of assisting the Commission in achieving free and fair elections.

We submit further that the purpose of this investigation cannot be understood in any other way as to help ensure free and fair elections within the constitutionally determined outer limit of 1 November 2021, given that this Inquiry is also bound by the Constitution.

We are not Justice of the view that some hold and which you described this week that “come hell or high water we must have this elections”.

But nonetheless we submit that the regularity of our elections was built into the foundations of our constitution by design and not by accident. It is of fundamental importance to do everything possible to adhere to the requirement that municipal councils should be replaced by way of an election before 1 November.

We agree that it is also non-negotiable that these elections must be free and fair.

We submit that the following passage from the Kham judgement by our Constitutional Court is instructive also to this Inquiry in determining the likelihood of free and fair elections.

The Court said and I quote:

*“It is insufficient for the Court to say that it has a doubt, or a feeling of disquiet, or is uncomfortable about the freedom and fairness of the election. It must be satisfied on all the evidence placed before it that there are real – not speculative or imaginary – grounds for concluding that they were not free and fair.”*

We submit that despite the fact that this inquiry is being done before these elections are to take place, the consideration remains the same, with the advantage of course, that while this Inquiry is faced with a complex task, it has the opportunity to propose additional measures to try and erase or ease the doubts, the feelings of disquiet and the issues that makes some uncomfortable about whether free and fair elections will be achieved.

In the final analysis we submit that on the balance of information before this Inquiry it is constrained to hold that it cannot find that the likelihood is that the Commission will not be able to ensure that the election is free and fair, specifically if the measures that the Commission has introduced during the by-elections that have been conducted since the State of Disaster are taken into account and if you assist, Justice as you have been requested to do, and recommend further measures that could help the

discomfort and the doubt that there is about whether free and fair elections are possible.

So, we are of the view Justice that while this inquiry is to make findings on the probabilities or likelihood of free and fair elections the constitutional demand for free and fair elections must mean that a finding now, at this stage, that free and fair elections cannot be attained in October, will have to be based on very convincing and overwhelming evidence that it will not be possible to ensure free and fair elections.

So here is the difficulty: While the Electoral Commission Act says this inquiry must make a finding on the likelihood, the probability of free and fair elections, absent conclusive evidence that it will in no way be possible at all to have free and fair elections any attempt to approach a Court already now for an order to postpone the elections will in our view, in all probability result in the applicants being send back by the Court empty handed.

So yes, we are not in disagreement with those who say that our Constitution does not require of us to perform the impossible, but similarly we must not create our own impossibility.

Our constitution demand of us all to first do whatever we can to ensure free and fair elections are held before the constitutional due date and only in the most extraordinary circumstances will allow us to come and say: We have tried our best, but it is not possible, we are now in need of an exception to the rule.

And this is at the heart of the duty of this Inquiry: To assist South Africa to prevent a situation where we will be forced to ask permission to use an exception to the rule.

This is in our view the nub of this complex tasked you are faced with. We wish you well in making your findings and thank you again for the invitation you extended to us to make oral submissions.