



SOUTH AFRICA

TERMS OF REFERENCE: ENQUIRY AND REPORT ON THE FEASIBILITY OF FREE AND FAIR LOCAL GOVERNMENT ELECTIONS IN TERMS OF SECTION 14(6) OF THE ELECTORAL COMMISSION ACT, 1996

1 Background

- 1.1 The Commission is a constitutional institution established in terms of sections 181 and 190 of the Constitution of the Republic of South Africa (the Constitution). Section 190(1) requires the Commission to manage elections of national, provincial and municipal legislative bodies in accordance with national legislation, to ensure that those elections are free and fair, and to declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.
- 1.2 Section 1(d) of the Constitution identifies regular elections as a foundational value of our democratic system and, in terms of section 159(1) of the Constitution, the term of a municipal council may be no more than five years, as determined by national legislation. Section 24 of the Local Government: Municipal Structures Act, 117 of 1998 (the Structures Act), sets the term of municipal councils as five years calculated from the day following the date set for the previous election of all municipal councils.
- 1.3 According to section 159(2) of the Constitution, when the term of a municipal council expires, an election must be held within 90 days of the date that council's term expired. In terms of section 24(2) of the Structures Act, whenever necessary, the Minister responsible for local government, after consulting the Commission, must, by notice in the Government Gazette, call and set a date for an election of all municipal councils, which must be held within 90 days of the date of the expiry of the term of municipal councils.

1.4 Since the last general local government elections took place on 3 August 2016, the current term of all municipal councils in the Republic will terminate by effluxion of time on 3 August 2021, and general local government elections will have to be held by 1 November 2021 to elect new municipal councils.

2 **The Commission's preparations for the general local government elections**

2.1 In the discharge of its constitutional and legislative obligations to conduct the general local government elections by 1 November 2021, the Commission is at an advanced stage of preparation.

2.2 The Commission has carefully considered the challenges of the current context and has come to the conclusion that it has put in place appropriate measures to enable the elections to proceed within the current context. To this end, the Commission is confident from a technical or mechanical point of view that the arrangements to conduct the national municipal elections will be fully in place.

2.3 The Commission has consulted extensively with the Minister of Co-operative Governance and Traditional Affairs ("Minister"), in her capacity as the member of the national executive responsible for the proclamation of the general local government elections in terms of the Structures Act, since 2019. These consultations have proceeded well, the uncertainties of the pandemic notwithstanding, and the Commission's submissions in this process have been well received and taken into consideration.

2.4 The Commission has also held ongoing consultations with political parties represented in the NPLC, including obtaining the parties' respective submissions concerning the practicality and advisability of conducting the elections in the COVID-19 era.

2.5 On 21 April 2021, the President announced that the 2021 general local government elections will be held on 27 October 2021. Due to budgetary constraints, the Commission is planning to hold one (instead of the usual two) registration weekend prior to the elections, which is currently scheduled to take place on 17 and 18 July 2021.

2.6 According to section 6(1A) of the Local Government: Municipal Electoral Act, 27 of 2000 (the Municipal Electoral Act), only a voter who applied for registration prior to the proclamation of an election date may vote in the election concerned. Accordingly, the elections will only be formally called after the registration weekend. Given the steps that have to be taken prior to voting day, the elections must be proclaimed by not later than 2 August 2021.

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2.7 As part of its ongoing consultations with political parties, the Commission held a pre-arranged meeting with the leaders of political parties represented in the NPLC on 22 April 2021. At this meeting some leaders of the represented political parties expressed concern that the elections may not be free and fair emphasising the reasons set out in paragraph **Error! Reference source not found.** above.

3 The Corona-19 virus outbreak

3.1 There is currently a global outbreak of a severe disease caused by a novel coronavirus that was first detected in Wuhan, Hubei Province, People's Republic of China, and which has now been detected in 219 countries and territories internationally, including in South Africa. The virus has been named "SARS-CoV-2" and the disease it causes has been named "coronavirus disease 2019", abbreviated as "COVID-19".

3.2 On 30 January 2020, the International Health Regulations Emergency Committee of the World Health Organization ("WHO") declared the outbreak a "public health emergency of international concern". On 11 March 2020, the WHO publicly characterized COVID-19 as a pandemic, which means a global outbreak of disease.

3.3 According to the United States Center for Disease Control ("CDC"), pandemics happen when a new virus emerges to infect people and can spread between people having severe and even fatal consequences. Because there is little to no pre-existing immunity against the new virus, it spreads worldwide. The COVID-19 outbreak has since been declared a national emergency by many countries, including South Africa.

3.4 The first positive case of COVID-19 in South Africa was confirmed by the Minister of Health on 5 March 2020. The confirmed cases quickly increased and, by 14 March 2020, the National Institute for Communicable Diseases ("NICD") reported that there were a total of 38 confirmed COVID-19 cases in the Republic.

3.5 Since then, the pandemic has grown exponentially and as of 5 May 2021, internationally there have been 153,954,491 confirmed cases of COVID-19, including 3,221,052 deaths, reported to WHO.¹ In South Africa, as at 5 May 2021, 1,588,221 persons have tested positive for the virus and 1,510,385 persons have recovered from the disease, representing a recovery rate of 95%, and 54 557 persons have succumbed to the disease.²

¹ Source <https://covid19.who.int/>

² Source <https://sacoronavirus.co.za/2021/05/05/update-on-covid-19-05th-may-2021>



State of disaster and measures taken to curb the spread of the disease

- 3.6 On 15 March 2020, the President announced that Cabinet had resolved to declare a national state of disaster in terms of section 27(1) of the Disaster Management Act, as part of government's measures to combat the global outbreak of the COVID-19 pandemic. The national state of disaster was formally declared by the Minister in her capacity as the designated authority in terms of that Act by publication in the *Gazette* on the same day, under GN 313 in GG 43096 of 15 March 2020.
- 3.7 A national disaster that has been declared in terms of section 27(1) lapses three months after it has been declared;³ if not extended, the declared national state of disaster would have lapsed on 15 June 2020. The Minister has extended the duration of the declared national state of disaster by one month at a time, being the maximum period for which a national state of disaster may be extended in terms of section 27(5)(c) of the Disaster Management Act on numerous occasions.⁴ As at the date hereof, the national state of disaster has been extended to 15 May 2021⁵ and, given recent developments, it is highly likely that the country can anticipate another extension for another month thereafter.
- 3.8 On 18 March 2020 the Minister, acting in terms of section 27(2) of the Disaster Management Act, published regulations⁶ ("the Regulations") regarding the steps necessary to prevent an escalation of the disaster and to alleviate, contain and minimise the effects of the disaster. Those Regulations have been amended several times, with the latest amendment having been published under GN R. 152 in GG 44201 of 28 February 2021.

The risk adjusted strategy and Adjusted Level 1

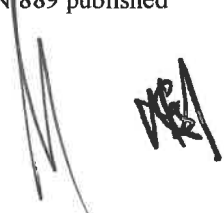
- 3.9 On 23 April 2020, the President announced that the government had decided to begin a gradual and phased recovery of economic activity beyond the hard lockdown that ended on 30 April 2020 by implementing a risk adjusted strategy through which it intended to take a deliberate and cautious approach to the easing of the hard lockdown restrictions. As part of this approach, there are five coronavirus alert levels:
- 3.9.1 Level 5 means that drastic measures are required to contain the spread of the virus to save lives;
- 3.9.2 Level 4 means that some activity can be allowed to resume subject to extreme precautions required to limit community transmission and outbreaks;

³ Section 27(3)(a) of the Disaster Management Act

⁴ By way of GN 646 in GG 43408 of 5 June 2020; GN 765 published in GG 43524 of 13 July 2020, and GN 889 published in GG 43616 of 15 August 2020.

⁵ See GN 333 in GG 44447 of 14 April 2021

⁶ In GN R. 318 published in GG of 15 March 2020



- 3.9.3 Level 3 involves the easing of some restrictions, including on work and social activities, to address a high risk of transmission;
- 3.9.4 Level 2 involves the further easing of restrictions, but the maintenance of physical distancing and restrictions on some leisure and social activities to prevent a resurgence of the virus; and
- 3.9.5 Level 1 means that most normal activity can resume, with precautions and health guidelines followed at all times.
- 3.9.6 In line with the risk adjusted strategy, the country has been placed on an adjusted coronavirus alert Level 1 since 28 February 2021.⁷ In terms of the extant Regulations:
- 3.9.7 every person is confined to his or her place of residence from 00h00 until 04h00 daily;⁸
- 3.9.8 the wearing of a cloth face mask, a homemade item or another appropriate item, that covers the nose and mouth, is mandatory for every person when in a public place.⁹
- 3.9.9 gatherings at political events are limited to 100 persons or less in case of an indoor gathering and 250 persons or less in case of an outdoor gathering and if the venue is too small to hold 100 persons observing a distance of at least one and a half metres from each other, then not more than 50 per cent of the capacity of the venue may be used subject to strict adherence to all health protocols and social distancing measures.¹⁰
- 3.9.10 It is these restrictions on political gatherings, together with the extant curfew, that give rise to some of the concerns articulated by some political parties.

4 The potential impact of the pandemic on the conduct of free and fair elections

- 4.1 It is now well-established that people can contract COVID-19 from others who have the virus, even if the infected person is asymptomatic. According to the WHO, the virus can spread from person to person through respiratory droplet transmission, which occurs when a person is in close contact (within 1 metre) with an infected person who has respiratory symptoms (e.g. coughing or sneezing) or who is talking or singing; in these circumstances, respiratory droplets that include virus can reach the mouth, nose or eyes of a susceptible person and can result in infection.

⁷ See GN R. 151 published in GG 44201 of 28 February 2021

⁸ Regulation 68(1)

⁹ Regulation 70(1)

¹⁰ Regulation 72(3)

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- 4.2 The holding of a general elections involves probably the single largest mobilisation of citizens in the Republic on a particular day. The Commission, as indicated, has taken steps to ensure that scheduled elections can proceed within the constraints of the current circumstances. However, it is not in a position to predict with any certainty the trajectory of the virus and recognise that this uncertainty also poses challenges to the potential climate within which elections will take place.
- 4.3 Prior to the calling of the general local government elections the Commission interacts with a generous number of people during its targeted communication and registration activities.
- 4.3.1 A key feature of these activities is the voter registration weekend, during which the Commission will open all approximately 23,200 voting stations across the Republic to allow eligible citizens to register as voters, to check their registration details and to update the same, as well as to obtain the addresses of voters whose names appear on the voters' roll without addresses.
- 4.3.2 The second feature involves the Commission employing fieldworkers to undertake a door-to-door registration campaign in identified areas (especially those affected by changes to voting district boundaries due to the ward delimitation process undertaken by the Municipal Demarcation Board or whose registration figures are below the norm), to ensure that affected voters have the opportunity to register as voters or re-register in the correct voting district, as well as to obtain the addresses of voters whose names appear on the voters' roll without addresses.
- 4.4 On the Commission's current planning, and assuming that there is no change in the coronavirus alert level between now and 27 October 2021, the voter registration weekend is expected to be held on 17 and 18 July 2021.
- 4.5 As at 6 May 2021, there are about 25,7 million registered voters who would be eligible to participate in the forthcoming general local government elections. The Commission expects this number to rise on account of additional registrations between now and the proclamation of the elections.
- 4.6 The Commission is on record stating that:
- 4.6.1 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 (as originally defined) of the lock-down as it 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;



4.6.2 it is possible for it to organise and conduct the forthcoming general local government elections, albeit under stringent protocols to limit the spread of the contagion. In this regard, the Commission has learnt valuable lessons from its preparation and conduct of 133 by-elections during the declared state of disaster, while the country was on Alert Level 1. The Commission introduced significant measures to ensure the freeness and fairness of the imminent elections despite the pandemic.

5 The legal basis for the enquiry

5.1 The Commission is constitutionally obliged to ensure free and fair elections. This is so in terms of section 190(1)(b) of the Constitution. National legislation on the other hand authorises the Commission to publish a report on the likelihood or otherwise that a pending election will be free and fair. The pertinent provision being section 14(4) of the Electoral Commission Act. Section 5(2)(a) of the Electoral Commission Act provides that the Commission may for purposes of the achievement of its objects acquire capacity by way of employment, secondment, appointment on contract or otherwise.

5.2 The terms of reference and the establishment of the enquiry are pursuant to the constitutional obligation and legal mandate. The appointment is authorised in terms of section 5(2)(a) of the Electoral Commission Act.

6 Terms of Reference for the enquiry

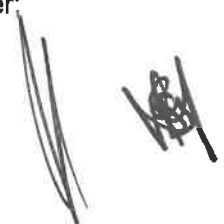
6.1 You are hereby appointed by the Commission to inquire into, make findings, report on and make recommendations concerning the likelihood the Commission will be able to ensure that the forthcoming 2021 general local government elections will be free and fair in view of the challenges posed by the COVID-19 pandemic and the measures promulgated by the government to curb the continued spread of the COVID-19 pandemic as contemplated in section 14(4) of the Act.

6.2 The report may indicate additional measures that the Commission may have to implement in order to realize free and fair elections within the COVID context.

6.3 There are two key deliverables for your assignment. The first is to call for and receive submissions from:

6.3.1 Registered political parties; (for the record we also attach hereto a summary of submissions received from political parties during consultations in the National Party Liaison Committee)

6.3.2 Key stakeholders in the electoral process, including the Chief Electoral Officer:

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- 6.3.3 The relevant health authorities in the Republic, particularly in respect of matters related to the expected future trajectory of the pandemic as well as efforts to manage, mitigate and reach community immunity through vaccination endeavours;
- 6.3.4 The relevant disaster management authorities; and/or
- 6.3.5 Other relevant stakeholders and/or experts both here and abroad whose submissions would, in your opinion, assist you in the execution of your assignment.
- 6.3.6 The second deliverable is to consider the submissions received, make findings, report in writing on and make recommendations to the Commission. The Commission will thereafter consider your report and take such steps as it considers necessary in the circumstances.
- 6.4 In the conduct of the assignment:
- 6.4.1 You may, in consultation with the Commission, appoint one or more knowledgeable or experienced persons to assist you in the performance of your functions.
- 6.4.2 You may determine such procedure as you deem appropriate for calling for and receiving submissions.
- 6.4.3 You may receive both written and oral submissions and afford the parties making such submissions an opportunity to offer such proof, including oral evidence or sworn or affirmed statements by any person which in your opinion could be of assistance for purposes of the execution of your assignment and, to that end, administer an oath or affirmation to any person appearing to testify orally before you.
- 6.4.4 Any person appearing before you may be assisted by a legal practitioner at their own cost.
- 6.4.5 The Commission will lend you the support necessary for and to ensure that adequate funds are made available to enable you to execute your assessment.
- 6.4.6 To the extent that you may receive oral submissions and/or evidence, the proceedings before you for that purpose shall be recorded in the manner determined by you.
- 6.5 Given the proximity of the announced date for the elections, there is some urgency attached to this assignment. Accordingly, the following timeline shall apply to the execution of your assignment:
- 6.5.1 Submissions from key electoral stakeholders shall be called for as soon as possible and interested stakeholders shall be granted an opportunity to make written submissions in terms of the attached Schedule 3 Timelines.

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6.5.2 You shall issue a written report to the Commission regarding the subject matter of your assignment on or before 23 July 2021.

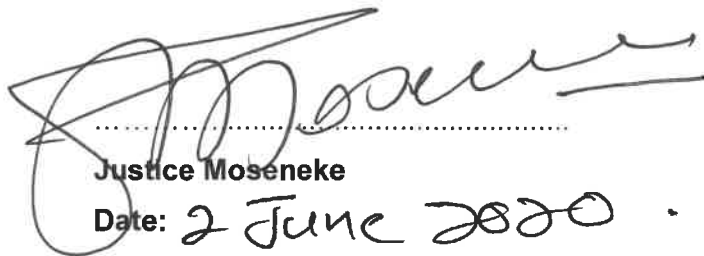
6.6 These terms of reference may be added to, varied or amended from time to time prior to the conclusion of the assignment.

7 Conclusion

7.1 This assignment is without precedent since the enactment of the Electoral Commission Act in 1996, as are the circumstances that have necessitated the conduct of the assignment. It is the Commission's hope that your report will assist it in the execution of its Constitutional mandate to ensure free and fair elections.

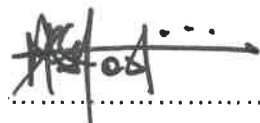
7.2 Given the urgency of the assignment, matters regarding the fees to be paid to you for undertaking the assignment and the reimbursement of any expenses that you may incur in this process will be dealt with in a separate note to be concluded between the Chief Electoral Officer and yourself.

We, the undersigned, hereby accept these Terms of Reference.



Justice Moseneke
Date: 2 June 2020

For the Electoral Commission of South Africa



Glen Mashinini

Chairperson of the Electoral Commission of South Africa

Date: 2 June 2021

Electoral Commission

Ensuring Free and Fair Elections

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