

Testing the Right to Vote in Free, Fair, and Regular Local Government Elections in South Africa: Challenges from the COVID-19 Pandemic

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Abstract

This article uses the doctrinal legal research method to examine the challenges that faced South Africa in preparing for the 2021 local government elections. The health risks posed by the COVID-19 pandemic led the national executive to promulgate emergency health regulations and impose lockdowns to combat the spread of the coronavirus. Inadvertently, these measures threatened the freeness and fairness of the local government elections by restricting political mobilisation and freedom of movement and association. They also led the Electoral Commission to attempt, through an inquiry and a court application, to postpone the 2021 local government elections. The discussion shows that contrary to its contentions on the impossibility of holding the elections in 2021, the Electoral Commission had unwittingly demonstrated that it was well-prepared to mitigate the risk of COVID-19 infections. This article concludes that a postponement of the elections was not warranted and would have led to legitimacy and constitutional crises. It would have undermined the democratic foundation of the South African Constitution and would have unlawfully infringed on the right to participate in free, fair, and regular elections.

Keywords: Local government; right to vote; free, fair, and regular elections; COVID-19; lockdown; South Africa

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Introduction*

The COVID-19 pandemic threatens liberal democracy, the rule of law and other basic tenets of constitutionalism worldwide.¹ The pandemic also presents unprecedented challenges in conducting free and fair elections.² Some leaders have used it to stifle democracy and human rights by postponing elections to ‘save lives’. At the time of writing, more than 73 states worldwide had extended the terms of their leaders and legislatures in various spheres of government by postponing elections in the name of COVID-19.³ Where elections have been held, populist leaders have denounced such elections as not free and fair due to the challenges posed by COVID-19.⁴ The postponement of elections due to COVID-19 shows that the pandemic is not merely a health emergency but also a challenge to democracy. Hence, there is a need to carefully balance the right to health with democratic considerations and the right to vote.⁵ The experience of Ethiopia shows that postponing elections in the name of COVID-19 has ramifications beyond the threats of constitutional crises: it could lead to civil unrest and even civil war.⁶

At the time of writing, South Africa was scheduled to hold local government elections for the election of municipal councils on 1 November 2021. However, there were attempts to postpone the elections to February 2022. This article uses the doctrinal legal research method to analyse the legal challenges that faced the holding of the 2021 local government elections.⁷ The analysis shows that the COVID-19 pandemic and the health risks it posed were not justifiable excuses to postpone the elections. It also shows that contrary to its contentions on the impossibility of holding the elections in 2021, the

* This article is based on research conducted with the financial support of the National Research Foundation (grant no 115581). All views and errors are the author’s own.

1 Kevin Arceneaux and others, ‘Is COVID-19 a Threat to Liberal Democracy?’ 1 <<https://psyarxiv.com/8e4pa/download?format=pdf>> accessed 16 September 2021.

2 See Toby S James, ‘New Development: Running Elections During a Pandemic’ (2021) 41 *Public Money & Management* 65; Todd Landman and Luca Di Gennaro Splendore, ‘Pandemic Democracy: Elections and COVID-19’ (2020) 23 *Journal of Risk Research* 1060.

3 Olivier De Schutter, ‘Foreword’ in Morten Kjaerum, Martha F Davis and Amanda Lyons (eds), *COVID-19 and Human Rights* (Routledge 2021) xvii.

4 See Martin Scheinin and Helga Molbaek-Steensig, ‘Human Rights-Based Versus Populist Responses to the Pandemic’ in Morten Kjaerum, Martha F Davis and Amanda Lyons (eds), *COVID-19 and Human Rights* (Routledge 2021) 29–30.

5 Khabele Matlosa, ‘Elections in Africa During Covid-19: The Tenuous Balance Between Democracy and Human Security’ (2021) 48 *Politikon: South African Journal of Political Studies* 159.

6 See Declan Walsh and Abdi Latif Dahir, ‘Why is Ethiopia at War with Itself?’ (*The New York Times*, 2020) <<https://www.nytimes.com/2020/11/05/world/africa/ethiopia-tigray-conflict-explained.html>> accessed 16 September 2021 for a discussion of Ethiopia’s descent to civil war after the federal government postponed elections on the pretext of COVID-19.

7 The doctrinal legal research method entails the analysis of primary and secondary sources of law such as statutes, case law, and scholarly works such as books, journals, and other periodicals. See Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 *Deakin LR* 83 for a discussion.

Electoral Commission was well-prepared to mitigate the risk of COVID-19 infections during the elections. While there were genuine fears that the actions of political parties and other stakeholders had the potential to contribute to the risk of more COVID-19 infections, it would appear that any unjustified postponement of elections would have undermined the democratic foundation of the Constitution of the Republic of South Africa, 1996. The case law discussed in this article shows that the right to vote in free, fair, and regular elections is one of the pillars of South Africa's democracy. It also shows that this right is infringed when elections are not held regularly and when they are not free and fair. Reflectively, the attempts to extend the terms of municipal councils beyond their five-year periods threatened a constitutional crisis in that the members of such councils would have been in office unconstitutionally. This would have cast shadows of illegitimacy.

Before proceeding with the discussion, it is imperative to briefly clarify the standard of what could be viewed as free, fair, and regular elections. The case law emanating from the challenges to the 2021 local government elections does not clarify these terms. Also, a search on the legal databases does not, as far as could be ascertained after a diligent search, reveal cases specifically focussing on what constitutes free, fair, and regular elections. In light of this difficulty, it is necessary to design working definitions of these terms. The Declaration on Criteria for Free and Fair Elections provides insight.⁸ It stipulates that governments can only derive authority from the will of the people when 'expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage.'⁹ In this article, testing the freeness of elections entails determining whether the elections are held in a manner that makes the political processes leading to the elections and actual voting accessible to potential voters without hindrance. The fairness of elections is closely related to their freeness and denotes both opportunity and access ie the electoral environment must be neutral so as to allow parties and independent candidates to canvass for votes and for the voters to choose whom to elect. Testing whether elections are regular entails ascertaining whether the elections are held within prescribed constitutional and legislative periods. These working definitions are adapted from the Declaration on Criteria for Free and Fair Elections.¹⁰

The Legal Framework for Holding Local Government Elections

The duty to hold free, fair, and regular elections is entrenched in the constitutions of democratic states. It originates from the Universal Declaration of Human Rights¹¹ and the International Covenant on Civil and Political Rights.¹² Like other State Parties to

8 Inter-Parliamentary Council, Declaration on Criteria for Free and Fair Elections, 1994.

9 *ibid* art 1.

10 Universal Declaration of Human Rights (adopted 10 December 1948) 217 A (III) Art 21(3).

11 *ibid* Art 21.

12 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Art 25.

this instrument, South Africa is bound to hold free, fair, and regular elections. The obligation is stipulated in section 19(2) of the Constitution. In fact, South Africa's phrasing of the founding political values in the Constitution¹³ mirrors the wording of Article 25(b) of the International Covenant on Civil and Political Rights. Since the duty to hold free, fair, and regular elections emanates from both international law and the Constitution, it follows that any postponement of elections or their deferral to a date outside the prescribed periods would be unconstitutional if done under conditions in which it is possible to hold the elections within the stipulated time frames.

Section 1(d) of the Constitution lists a set of political rights that form part of the Constitution's founding values. These include 'universal adult suffrage, a national common voter's roll, regular elections and a multiparty system of democratic government.'¹⁴ These founding values have symbolic importance and serve as interpretative aids for civil, political, and other rights enshrined in the Bill of Rights.¹⁵ However, these founding values are not justiciable.¹⁶ Thus, any person approaching a court about a violation of political rights that are mentioned in the founding values must rely on the Bill of Rights, which enshrines justiciable rights. In the context of the right to vote in free, fair, and regular elections, the applicable provision in the Bill of Rights is section 19, which entrenches the right to vote. The constitutional and legislative framework for holding local government elections is further governed by section 159 of the Constitution, which has two principal provisions that are relevant to this discussion. The first is that the terms of municipal councils 'may be no more than five years, as determined by national legislation.'¹⁷ The second is that when the term of a municipal council expires, elections must be held within 90 days from the date of the expiry of the term.¹⁸ Since South Africa held the previous local government elections on 3 August 2016,¹⁹ it follows that the next elections were due, at the latest, on 1 November 2021.²⁰ These constitutional provisions are echoed in legislation.²¹

The Constitution mandates the Electoral Commission to manage the elections of local, provincial, and national legislative bodies.²² Due to contestations among political parties about various aspects of the electoral process, the Electoral Commission consults political parties when making decisions about electoral activities. This helps to minimise legal challenges to elections and to give assurance to all that the elections will

13 The founding political values are entrenched in s 1(d) of the Constitution.

14 Section 1(d) of the Constitution.

15 Edwin Cameron, *Justice: A Personal Account* (Media24 Boeke 2014) 177.

16 *Rail Commuters Action v Transnet Ltd t/a Metrorail* 2005 4 BCLR 301 (CC) para 21.

17 Section 159(1) of the Constitution.

18 Section 159(2) of Constitution.

19 *Electoral Commission of South Africa v Minister of Cooperative Governance and Traditional Affairs* [2021] ZACC 29, para 18.

20 *ibid* para 18.

21 Local Government: Municipal Structures Act 117 of 1998, s 24.

22 Section 190(1)(b) of the Constitution.

be free and fair. The Electoral Commission has succeeded in doing this since the dawn of democracy in 1994. However, in 2021, it faced new challenges due to the COVID-19 pandemic, which led political parties to disagree on whether to hold the local government elections. While the African National Congress, Economic Freedom Fighters, and Inkatha Freedom Party, among others, were in favour of postponing the elections to February 2022, the Democratic Alliance was opposed to the idea.²³ The Electoral Commission was also opposed to holding local government elections in 2021, citing the risks posed by the COVID-19 pandemic.

The COVID-19 Threat to Free, Fair, and Regular Elections

The COVID-19 pandemic threatened the freeness and fairness of the 2021 local government elections in two principal ways. Firstly, it threatened people with risks of infections and possible death. Secondly, it led the government to respond in a manner that negatively affected political processes. In response to the onslaught of COVID-19, the government invoked emergency powers under the Disaster Management Act.²⁴ The COVID-19 regulations issued under this Act gave the national executive extensive powers to regulate public life by, inter alia, limiting freedom of movement and gatherings, including political gatherings. The government response to the pandemic was structured under different Alert Levels in which Level 5 was the strictest while Level 1 was the least restrictive.²⁵ When the Minister of Cooperative Governance and Traditional Affairs proclaimed 27 October as the date for holding local government elections, South Africa was at Adjusted Alert Level 3 of the COVID-19 lockdown. It moved to Alert Level 2 after 13 September 2021.²⁶

23 *Electoral Commission v Minister of COGTA* (n 19) para 6.

24 The events that led to the imposition of a national state of disaster were as follows: On 15 March 2021, the Head of the National Disaster Management Centre classified the COVID-19 outbreak as a national disaster in terms of section 23 of the Disaster Management Act 57 of 2002. This Classification of a National Disaster was published in GG 43096 (15 March 2020) GN 312. On the same day, the Minister of Cooperative Governance and Traditional Affairs published a Declaration of a National State of Disaster GG 43096 (15 March 2020) GN 313. This declaration triggered emergency powers under section 27(2) of the Disaster Management Act, after which the national executive began legislating the response to the pandemic through regulations.

25 For a comprehensive list of the original COVID-19 regulations in all Alert Levels, see South African Government, 'Regulations and Guidelines - Coronavirus COVID-19' (*Government of the Republic of South Africa*, 2021) <<https://www.gov.za/covid-19/resources/regulations-and-guidelines-coronavirus-covid-19>> accessed 14 December 2021.

26 *Electoral Commission v Minister of COGTA* (n 19) para 19. The reduction of COVID-19 restrictions towards the elections mirrors developments in other jurisdictions in which states relaxed COVID-19 restrictions to accommodate the electoral process—see Massimo Pulejo and Pablo Querubín, 'Electoral Concerns Reduce Restrictive Measures During the COVID-19 Pandemic' (2021) 198 *Journal of Public Economics* 104386.

The Adjusted Alert Level 3 and 2 Regulations, like their predecessors, did not prohibit elections. However, they placed restrictions on freedom of movement and association to the extent that it was not feasible for the Electoral Commission to conduct Civic and Voter Education as required by sections 5(1)(d) and (k) of the Electoral Commission Act. Civic and Voter Education imparts citizens with communication and general skills to meaningfully participate in the electoral process. This amplifies the preparedness and willingness of the voters to participate in the elections. Given that Civic and Voter Education events are generally large public gatherings, the restrictions under Alert Level 3 and 2 affected the Electoral Commission's work. This, evidently, threatened a fully-fledged democratic electoral process. Understandably, it raised questions about whether elections held under such restrictions would be free and fair.

The Adjusted Alert Level 3 and 2 Regulations also restricted freedoms of movement and association, thus impacting political parties from campaigning freely. For instance, the regulations introduced curfews from 22:00 and 23:00, respectively, both ending at 04:00.²⁷ The regulations required the public wearing of masks, physical distancing, and strict adherence to all COVID-19 health protocols, including sanitising hands and limits to the number of people in attendance for both indoor and outdoor activities.²⁸ The restrictions on the number of people were the most negative for political campaigns. Under Adjusted Alert Level 3, only 50 people could attend indoor gatherings, while only 100 people could attend outdoor gatherings. Under Adjusted Alert Level 2, 100 people indoors and 250 people outdoor could attend gatherings.²⁹ These regulations did not grant exemptions for political activities. Instead, the regulations required that where venues could not accommodate the mentioned maximum numbers of people, they could not be used.³⁰ While these regulations supposedly protected public health, they had blind spots. Realistically, political mobilisations during election campaigns are not events where one can choose who to invite and who not to invite. People who attend political rallies do not have to RSVP. They are not required to do so. They just attend. Hence, a political party cannot predict, with any degree of accuracy, how many people would attend a particular rally.

Hence, the lockdown restrictions under the different Adjusted Alert Levels were not conducive to holding free and fair elections. The lockdown regulations put two competing constitutional rights in conflict. On the one hand, the regulations sought to protect public health and preserve life in the middle of a global health emergency, thereby also preserving the rights to bodily and psychological integrity. On the other hand, the regulations severely encroached on the right to vote in free, fair, and regular elections. Since elections entail mass mobilisation, any law or regulation which

27 See Reg 17 of the Consolidated Regulations Issued in Terms of Section 27(2) of the Disaster Management Act 57 of 2002 GG 43258 (29 April 2021) GN 480, updated to 12 September 2021.

28 *ibid* Reg 15B.

29 *ibid* Reg 21.

30 *ibid* Reg 21.

constrains freedom of movement and association in the name of preserving life negatively affects the right to participate in free, fair, and regular elections. This is because, by its nature, the right to vote in free, fair, and regular elections is dependent on the exercise of the rights to freedom of movement and association. If political parties and independent candidates are prohibited by law from moving around and canvassing for votes, the reach of their electoral message is limited, meaning that some potential voters will not receive the message. It also means that independent candidates will not be able to put their message directly to potential voters. This makes the right to vote in free, fair, and regular elections directly dependent on the freedoms of movement and association.

Before proceeding to the discussion on how the COVID-19 threat led to the failure of the Electoral Commission to conduct a physical voter registration weekend, there is something to be said about the wisdom of retaining the Alert Level 2 and 3 lockdown regulations towards the 2021 local government elections. There are two issues to note in this regard. Firstly, many people were already disregarding the lockdown regulations, particularly in the townships, informal settlements, and rural areas in which they walked in public without masks and did not adhere to social distancing and other COVID-19 regulations.³¹ Secondly, South Africa experienced three ‘waves’ of COVID-19 infections between week 24 of 2020 and week 19 of 2021.³² Thus, despite the lockdowns, infections continued to increase, surging to wave propositions at different times between 2020 and 2021. This makes it possible to accept the reality that the lockdowns did not work to combat the spread of COVID-19. Reality shows that the prolonged lockdowns, whose regulations were ignored by many in society, did not really curb the spread of COVID-19.³³ If the lockdowns really worked to combat the spread of COVID-19, then the first lockdown in South Africa would have completely solved South Africa’s COVID-19 problem. If this proposition is correct, the question that arises is whether it was necessary to maintain the lockdown regulations, particularly in the light of their stringent limitations on political rights and freedoms of movement and association.

Since the lockdown regulations severely restricted political mobilisation in an election year, one doubts their proportionality, rationality, and reasonableness. To determine these constitutional standards for the promulgation, administration, and enforcement of

31 For a discussion of the possible reasons for this lack of adherence, see Sanele Brian Mbambo and Samuel Babatunde Agbola, ‘The Impact of the COVID-19 Pandemic in Townships and Lessons for Urban Spatial Restructuring in South Africa’ (2020) 9 *African Journal of Governance and Development* 329, 340.

32 National Institute for Communicable Diseases, ‘Proposed Definition of COVID-19 Wave in South Africa’ (2021) 20 *Communicable Diseases Communiqué* 3.

33 This argument should not be understood to imply that popular ignorance, exhibited through wanton disregard of the lockdown regulations, was a ground for the lifting of the COVID-19 restrictions. The author accepts that in a pandemic, public health measures should only be lifted as a matter of policy directives which should be informed by available data and other scientific considerations.

the COVID-19 regulations, one must look into section 27(3) of the Disaster Management Act. This section provides that the executive may declare a national state of disaster for specified reasons, ie, to mitigate the disaster, assist and protect the public, provide relief, protect property, and prevent and combat corruption. The rule of law demanded the imposition of the least restrictive measures.³⁴ As such, regulations that did not serve the purpose of section 27(3) of the Disaster Management Act did not pass the rule of law test, as they unduly infringed on human rights and freedom. They also did not pass the test if they were no longer achieving their purpose.³⁵ Such regulations could be best described as arbitrary.³⁶ By imposing arbitrary regulations, the executive was acting against public welfare—a power with which it is not endowed.³⁷

The Failure of the Electoral Commission to Conduct a Physical Voter Registration Weekend

The impact of the COVID-19 regulations on political mobilisation in preparation for the local government elections was compounded by the fact that the Electoral Commission did not conduct a physical voter registration weekend as scheduled for 31 July to 1 August 2021. It cancelled the voter registration weekend because of rising COVID-19 infections during the third wave.³⁸ Although voters could have been encouraged to visit the local Electoral Commission’s offices for registration, such an action would have mitigated but not entirely solved the problem. When the Minister proclaimed 27 October 2021 as the date for the local government elections on 3 August 2021, the registration of new voters and amendments of voter particulars closed, meaning that at no point again would the Electoral Commission conduct the voter registration weekend for the 2021 local government elections.³⁹ Although the Electoral Commission had not given any indication that there would be no other voter registration weekend, there is no requirement in law for the Electoral Commission to hold a voter registration weekend.⁴⁰ As such, elections could not be postponed on the basis of the failure to hold a voter

34 *Khosa v Minister of Defence and Military Veterans* 2020 7 BCLR 816 (GP) para 7.

35 See the discussion in *De Beer v Minister of Cooperative Governance and Traditional Affairs* 2020 11 BCLR 1349 (GP) para 6.1.

36 In *De Beer*, para 7, the court pointed to some of the arbitrary regulations which it also described as irrational. These included restrictions on the purchase of jerseys and undergarments. These prohibitions were no more than an abuse of power.

37 See Mortimer Sellers, ‘What is the Rule of Law and Why is it Important?’ in James R Silkenat, James Jr Hickey and Peter D Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, vol 28 (Springer 2014) 4 for a discussion.

38 *Electoral Commission v Minister of COGTA* (n 19) para 24.

39 *ibid* para 95.

40 *ibid* para 233.

registration weekend. Notwithstanding, the failure to hold a voter registration weekend potentially disenfranchised voters who planned to register to vote during that weekend.⁴¹

This failure caused one of the political parties, the Democratic Alliance, to ask the Constitutional Court to declare that the failure to hold the voter registration weekend before the first date proclaimed for elections, ie 27 October 2021, was unconstitutional for disenfranchising large portions of the population.⁴² The Electoral Commission countered this by relying on previous judgments in which the court held that once the Minister proclaims the date for elections, registration of new voters ceases and the voters' roll is opened for inspection.⁴³ Opening the voters' roll for new registrations after the ministerial proclamation of the election date is deemed to make the election not free and fair. The Electoral Commission also raised other objections to the Democratic Alliance's argument. These will be discussed in the section dealing with the Electoral Commission's case at the Constitutional Court.

As the Electoral Commission prepared for the local government elections, it became increasingly clear that the COVID-19 pandemic posed threats to the fulfilment of its constitutional mandate to hold free, fair, and regular elections. These were some of the threats:

- a) Health risks for the elderly and other persons suffering from comorbidities. These groups were said to be more vulnerable to COVID-19 infection and severe illness.⁴⁴
- b) Health risks to the staff of the Electoral Commission, politicians and the staff of their parties, service providers, supporters, and potential voters partaking in political campaigns. This is because of perceptions that these gatherings were super-spreaders of COVID-19.⁴⁵
- c) Voter hesitancy to participate in political processes such as physical registration to vote, mobilisation and voting due to fear of contracting COVID-19.⁴⁶

41 *ibid* para 96.

42 *ibid* para 8.

43 *Kham v Electoral Commission* 2016 2 BCLR 157 (CC); *Electoral Commission v Mhlophe* 2016 8 BCLR 987 (CC).

44 See Peter Lloyd-Sherlock and others, 'Older People in South Africa and Excess Mortality During the COVID-19 pandemic' (*Global Platform*, 2021) <<https://corona-older.com/2021/03/01/older-people-in-south-africa-and-excess-mortality-during-the-covid-19-pandemic/>> accessed 20 September 2021.

45 See, for instance, *Electoral Commission v Minister of COGTA* (n 19) para 75.

46 For a discussion on voter hesitancy as a result of fear of COVID-19, see Tania Fernandez-Navia, Eduardo Polo-Muro and David Tercero-Lucas, 'Too Afraid to Vote? The Effects of COVID-19 on Voting Behaviour' (2021) *European Journal of Political Economy* 102012; Abdul Noury and others, 'How Does COVID-19 Affect Electoral Participation? Evidence from the French Municipal Elections' (2021) 16 *PLOS ONE* e0247026; Gowokani Chijere Chirwa and others, 'Malawi at the

- d) The lockdown regulations imposed by the national executive under the Disaster Management Act infringed on free political mobilisation by restricting the number of people in attendance at political gatherings.

These risks led the Electoral Commission to hold an inquiry under section 14(4) and section 5(2)(a) of the Electoral Commission Act to ‘publish a report on the likelihood or otherwise that it will be able to ensure that any pending election will be free and fair.’⁴⁷ On 20 May 2021, the Electoral Commission appointed retired Deputy Chief Justice Dikgang Moseneke to undertake this inquiry.⁴⁸

The Moseneke Inquiry into Ensuring Free and Fair Local Government Elections

The Electoral Commission appointed the Moseneke Inquiry:

to enquire into, make findings, report on, and make recommendations concerning the likelihood that the Commission will be able to ensure that the forthcoming 2021 general local government elections will be free and fair in view of the Covid-19 pandemic and the measures promulgated by the Government to curb the continued spread of the virus (Inquiry). The Commission went on to stipulate that the report of the Inquiry may indicate additional measures that the Commission may have to implement to realise free and fair elections within the Covid-19 context.⁴⁹

The Electoral Commission directed Moseneke to make the inquiry inclusive by soliciting, receiving, and considering written and oral submissions from political parties and key stakeholders, including the Electoral Commission, election monitoring bodies, and Non-Governmental Organisations.⁵⁰ It soon became clear to the Moseneke Inquiry that the central issue that stakeholders wanted to be addressed was ‘whether the local government elections scheduled for 27 October 2021 should be proceeded with or

Crossroads: Does the Fear of Contracting COVID-19 Affect the Propensity to Vote?’ (2021) European Journal of Development Research 1.

47 Electoral Commission Act 51 of 1996, s 14(4).

48 Dikgang Moseneke, ‘A Report to the Electoral Commission of South Africa in Terms of Section 14(4) Read with Section 5(2)(a) of the Electoral Commission Act’ <[https://www.elections.org.za/freeandfair/Live/20210720%20A%20REPORT%20TO%20THE%20ELECTORAL%20COMMISSION%20OF%20SOUTH%20AFRICA%20IN%20TERMS%20OF%20SECTION%2014\(4\)%20READ%20WITH%20SECTION%205\(2\)\(a\)%20OF%20THE%20ELECTORAL%20COMMISSION%20ACT%20\(Final%20edits%20-%2020210726\).pdf](https://www.elections.org.za/freeandfair/Live/20210720%20A%20REPORT%20TO%20THE%20ELECTORAL%20COMMISSION%20OF%20SOUTH%20AFRICA%20IN%20TERMS%20OF%20SECTION%2014(4)%20READ%20WITH%20SECTION%205(2)(a)%20OF%20THE%20ELECTORAL%20COMMISSION%20ACT%20(Final%20edits%20-%2020210726).pdf)> accessed 15 September 2021, 2 para 2.

49 *ibid* 2 para 2. For expedience, this article refers to the inquiry as the Moseneke Inquiry. Where reference is made to Moseneke, it should be understood to refer to the Moseneke Inquiry, except where the context indicates otherwise.

50 *ibid* 2 para 3. The invitation for stakeholders to make submissions to the inquiry was made on 1 June 2021—see *ibid* 6 para 14.

deferred to a later date within the context of the Covid-19 pandemic.⁵¹ The Electoral Commission assured the Moseneke Inquiry that it had made the following preparations to ensure that the elections were free and fair:⁵²

- (a) ensuring a conducive legislative environment for the holding of the elections;
- (b) completing the ward and voting district delimitation process in preparation for the election;
- (c) preparing for the holding of a voter registration weekend to enable eligible voters to register to vote and registered voters to check and update their registration details;
- (d) procuring voting stations across the country for the voter registration weekend and election day;
- (e) procuring and preparing for the distribution of electoral materials for the voter registration weekend and voting day;
- (f) recruiting and training electoral staff to administer voter registration, voting, vote counting, and the collation of the election results;

procuring 40 000 new voter management devices to be deployed on voter registration weekend and election day;

- (g) registering political parties as part of an on-going process; and
- (h) performing voter outreach and education, including communicating with voters about the Covid-19 health protocols that will be in place for the voter registration weekend and election day.⁵³

The Electoral Commission further informed the Moseneke Inquiry that it had put the following measures in place to mitigate the risk of COVID-19 on election day:

51 *ibid* 8 para 19.

52 For a full report of the Electoral Commission's submissions to the inquiry, see Independent Electoral Commission, 'Submission by the Chief Electoral Officer to the Moseneke Inquiry into ensuring free and fair local government elections during the COVID-19 pandemic' <<https://www.elections.org.za/freeandfair/lge2021/Submissions-Received>> accessed 20 September 2021.

53 Moseneke (n 48) read with s 5(2)(a) of the Electoral Commission Act, 11–12 para 26. These preparations align with recommendations made elsewhere on how to conduct free and fair elections during the pandemic. See, for instance, Sarah Birch and others, 'How to Hold Elections Safely and Democratically During the COVID-19 Pandemic' (*COVID-19: Shape the Future*) 1–39 <https://eprints.ncl.ac.uk/file_store/production/270392/517E0333-E4B4-4C11-B2B3-DE87CB4555D2.pdf> accessed 29 September 2021.

- (a) All voting stations will be defogged and sanitised before voting commences;
- (b) Voting officers will be provided with personal protective equipment for use at voting stations and at-home visits;
- (c) Voters will be encouraged to bring their own pens and pens provided by the Commission will be sanitised between uses;
- (d) Queue walkers will enforce physical distancing of 1.5 metres while voters queue outside voting stations and will ensure that all voters in the queue are wearing face masks;
- (e) Door controllers will ensure that voters entering the voting station are wearing face masks, will sanitise voters' hands upon entrance and exit, and control access to the voting station to prevent congestion;
- (f) Inkers will check the identity documents of voters and mark voters' fingernails with disposable buds, which will be discarded in disposable bags;
- (g) Officials must ensure that physical distancing of 1.5 metres is maintained inside voting stations at all times; and
- (h) During counting procedures, electoral officials must use rubber gloves, sanitise hands at various stages, sanitise all surfaces before and after use, and always maintain physical distancing.⁵⁴

With these massive mitigation measures, one wonders why the Electoral Commission even appointed the Moseneke Inquiry. While the COVID-19 health hazard was real, these preparations show that the Electoral Commission was ready and had solid plans to mitigate the risk. Other factors motivating for South Africa to proceed to local government elections in 2021 despite the challenges of the COVID-19 pandemic included the fact that other states, including the USA and France, successfully held elections during the COVID-19 pandemic and did not experience any significant spikes in infections and deaths of politicians and voters alike as a result of the elections.⁵⁵ Also,

54 Moseneke (n 48) read with s 5(2)(a) of the Electoral Commission Act', 14-15 para 33.

55 Laurent Bach, Arthur Guillouzouic and Clément Malgouyres, 'Does Holding Elections During a Covid-19 Pandemic Put the Lives of Politicians at Risk?' (2021) 78 *Journal of Health Economics* 102461; Eric M Feltham and others, 'No Increase in COVID-19 Mortality after the 2020 Primary Elections in the USA' (2020) arXiv 1. However, Guilhem Cassan and Marc Sangnier, 'Liberté, Egalité, Fraternité... Contaminé? Estimating the Impact of French Municipal Elections on COVID-19 Spread in France' (2020) medRxiv 1 and Ján Palguta, René Levínský and Samuel Škoda, 'Do Elections Accelerate the Covid-19 Pandemic? Evidence from a Natural Experiment' (2021) *Journal of Population Economics* 197 found that in some jurisdictions, elections were followed by significant increases in COVID-19 infections and hospitalisations. However, the evidence they cite does not make it clear whether such peaks in infections were a result of infections during elections or whether they merely reflected the results of increased testing after the elections.

South African local government was (and continues to be) in a state of paralysis and collapse.⁵⁶ Some stakeholders submitted that:

the current municipal councillors should be given not one day more in office if citizens are to be spared more bouts of unaccountable government, inept and dishonest financial accounting, and downright failure to observe the law that governs municipalities. The consequence of this has been repeated service delivery protests in the face of dysfunctional and totally inept municipal councils.⁵⁷

As such, any unconstitutional extension of municipal council terms would have been undemocratic in that it would have denied communities the right to choose and define their leadership and to hold them accountable.⁵⁸ The municipal councils would have continued to govern without a mandate from the people. While there is no guarantee that local government elections would have led to the election of dedicated, capable, and honest municipal councillors, democracy demands that the people must not be denied the right to choose their governors.

Moseneke concluded that it was desirable for the Electoral Commission to hold elections in February 2022 instead of October 2021. He said that by that time, South Africa would presumably have herd immunity from COVID-19 and that most people would have been vaccinated.⁵⁹ He said that it was not reasonably practical to hold free and fair elections in October 2021, given the negative impact of COVID-19 regulations on health, mobilisation by political parties, and the atmosphere that would prevail on election day.⁶⁰ However, no one—not even scientists—could predict the trajectory of the COVID-19 pandemic in 2022 with any degree of certainty. As such, postponing elections on the strength of hope that threats from the pandemic would have vanished in 2022 was not the best approach. Moseneke recommended that the Electoral Commission approach a court with competent jurisdiction for an order to postpone the local government elections to February 2022.⁶¹ This prompted the Electoral Commission, after the proclamation of 27 October 2021 as the date for the local government elections, to approach the Constitutional Court for an order in that regard. The Electoral Commission was bolstered in its approach by a previous court order that allowed it to postpone by-elections on the grounds of COVID-19. It is necessary to briefly consider this case before discussing the Electoral Commission’s case at the Constitutional Court.

56 *Electoral Commission v Minister of COGTA* (n 19) para 194.

57 Moseneke (n 48) read with s 5(2)(a) of the Electoral Commission Act 297.

58 *Electoral Commission v Minister of COGTA* (n 19) para 194.

59 *ibid* para 57.

60 Moseneke (n 48) read with s 5(2)(a) of the Electoral Commission Act, 19–120 para 321.

61 *ibid* para 322.

Electoral Commission of South Africa v MEC Responsible for Cooperative Governance and Traditional Affairs in the Provincial Government of the Eastern Cape

After the Declaration of a National State of Disaster on 15 March 2021, the Electoral Commission approached the Electoral Court for an order authorising it to postpone by-elections that were due to be held after some vacancies arose in various municipalities across the country. On 19 March 2020, the Electoral Court issued its order authorising ‘the holding of the by-elections in the affected wards beyond the 90 day period ... but not beyond 120 days of the date of this order.’⁶² The Electoral Court recognised that the Electoral Commission was going to be ‘severely hampered, for the period the declared national state of disaster is in place, from preparing for and conducting free and fair elections in areas where by-elections [were] due to be held.’⁶³ It further authorised the Electoral Commission to suspend activities such as voter registration until the National State of Disaster had been lifted.⁶⁴ The Electoral Court’s judgment was erroneous in law, as would be shown in *Electoral Commission v Minister of COGTA*, in which the Constitutional Court held that the courts do not have the power to extend the dates for holding elections beyond the prescribed timelines.⁶⁵

Electoral Commission v Minister of COGTA

After receiving Moseneke’s report, the Electoral Commission brought an urgent application to the Constitutional Court seeking direct access and asking the court to order that the local government elections proclaimed for 27 October 2021 be held in February 2022. The basis of the application was that the COVID-19 pandemic made it impossible to hold free and fair elections.⁶⁶ In the alternative, the Electoral Commission asked the Court to declare that its failure to hold the elections in October 2021 was unconstitutional and that the declaration of invalidity be postponed to 28 February 2022, during which the Electoral Commission would hold the elections.⁶⁷ The Electoral Commission strenuously said that it was not seeking a postponement of the elections. However, the language, effect, and import of the relief it sought pointed to nothing else but the postponement of the elections.⁶⁸ Since the Electoral Commission accepted the Moseneke Report and approached the Constitutional Court for an order which he

62 *Electoral Commission of South Africa v MEC Responsible for Cooperative Governance and Traditional Affairs in the Provincial Government of the Eastern Cape* Case no. 001/2020 (unreported) para 4.

63 *ibid* para 2.

64 *ibid* para 5.

65 *Electoral Commission v Minister of COGTA* (n 19) para 154(f).

66 *ibid* para 1.

67 *ibid* para 1.

68 *ibid* para 2.

advised it to seek, it is only fair to conclude that what the Electoral Commission sought from the court was an order for the postponement or deferral of the elections.

The thrust of the Electoral Commission's contention was that although it could hold elections on 27 October 2021, as it was supposed to, such elections would not be constitutionally compliant in that they would lack the essential features of being free and fair.⁶⁹ Among its reasons, it cited the COVID-19 pandemic, the restrictions imposed by the lockdown regulations, and the potential disenfranchisement of millions of voters due to its failure to hold a voter registration weekend.⁷⁰ It contended that these difficulties made it impossible to hold free and fair elections. It justified this impossibility on the common law principle that the law does not require the doing of that which is impossible.⁷¹ The Electoral Commission said that forging ahead and attempting to do that which is impossible is not in the interests of justice and contradicts the spirit of equity that defines the South African legal order.⁷² However, the issue was not whether it was impossible to hold the elections. It was possible to hold the elections. The issue was whether such elections would be free and fair in light of the difficulties caused by the pandemic and the ensuing lockdown regulations.⁷³

The crux of the matter was whether holding the elections within the five-year period set in the Constitution and legislation, ie between 3 August 2021 and 1 November 2021, would infringe on the right to free and fair elections in that the electoral environment would be contaminated with threats to the rights to health, life, and bodily and psychological integrity as a result of COVID-19.⁷⁴ However, in as much as the court dealt with the question of whether the local government elections would be free and fair given the COVID-19 pandemic and the hazards which it posed, the court was not asked to decide whether the COVID-19 pandemic had altered the constitutionally recognised standard for free and fair elections as far as the restrictions on gatherings and related political activities imposed by the lockdown regulations were concerned.⁷⁵ Although this was an important question, the court did not deem it appropriate to answer the question. The essence of this is that the impact of the lockdown regulations on the freeness and fairness of the local government elections was unchallenged and therefore undecided by the court.

While the court accepted that the 'free and fair standard' for holding elections under COVID-19 was affected, it did not accept that there was any reasonable basis to

69 *ibid* para 37.

70 *ibid* para 167.

71 *ibid* paras 54, 168.

72 See *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) para 75, quoted with approval by Zondo ACJ in *Electoral Commission v Minister of COGTA* (n 19) para 54.

73 *ibid* para 171.

74 *ibid* para 57.

75 *ibid* para 154(a).

postpone the elections beyond 1 November 2021, particularly given that the Electoral Commission had made massive preparations to mitigate the risk of COVID-19 infections.⁷⁶ In a minority decision, Zondo ACJ agreed with the mitigation measures put by the Electoral Commission and expressed his agreement as follows:

Large gatherings must be prohibited during the period of election campaigns because everybody agrees that those are super-spreaders of the Covid-19 virus. However, apart from that, there must be strict observance of the Covid-19 protocols. Door-to-door campaigns should be permitted but I would recommend that, as far as possible, those visiting people in their homes should interact with them outside rather than inside their houses as that would minimise the chances of infections. The wearing of masks, social distancing and the washing or sanitising of hands must remain non-negotiable. I am sure that the national public broadcaster, i.e., SABC and other TV and radio stations would only be too happy to allow political parties some time to broadcast their election manifestos. Community radio stations would, I am sure, also have a role to play.⁷⁷

The majority decision did not seem to disagree with this analysis. After canvassing the above issues concerning the 2021 local government elections, the majority of the court turned to the Minister's proclamation of 27 October 2021 as the date for the elections. It held that while it could entertain a challenge to the constitutionality of elections that have been held timeously but which have not been free and fair, it could not, in advance, stop or postpone an election on the basis that the election would not be free and fair.⁷⁸ Doing so would infringe on the constitutional right to participate in free, fair, and regular elections.⁷⁹

The court declared the proclamation unconstitutional, invalid and unlawful for, inter alia, cutting off the registration of new voters. The court gave the Electoral Commission three days to decide whether it was practically possible to hold a voter registration weekend and to notify the Minister and the public of such determination. The court also ordered the Minister to proclaim a new date for elections, not later than 1 November 2021, if the Electoral Commission determined that it was practically possible to hold a voter registration weekend. Alternatively, the court said that if the Electoral Commission did not deem it practically possible to hold a voter registration weekend, the Minister had to issue a new proclamation for the elections not earlier than 10 September 2021 and that such elections had to be proclaimed for not later than 1 November 2021. Voters could continue to register to vote at municipal offices until 10 September 2021. However, disagreements arose between the Electoral Commission and

76 Moseneke (n 48) read with s 5(2)(a) of the Electoral Commission Act, 14–15 para 33 for a list of key activities and items that prove that the Electoral Commission was prepared for the elections.

77 *Electoral Commission v Minister of COGTA* (n 19) para 75.

78 *ibid* para 154(g).

79 *ibid* para 180.

some political parties on the correct interpretation of the court’s order, leading to further litigation led by the Democratic Alliance.

Democratic Alliance v Electoral Commission

After receiving the order in *Electoral Commission v Minister of COGTA*, the Electoral Commission decided that it was possible to hold a voter registration weekend on 18–19 September 2021.⁸⁰ In announcing its determination, the Electoral Commission emphasised that it would strive to hold free and fair local government elections in view of the challenges posed by the pandemic. It also announced amendments to the electoral timetable, including a revised date for the nomination of candidates after the closure of the registration weekend of 18–19 September 2021.⁸¹ This did not sit well with some opposition political parties, with the result that on 7 September 2021, the Democratic Alliance lodged an urgent application to the Constitutional Court asking it to declare the decision to reopen the nomination of candidates unconstitutional, unlawful, and invalid.⁸²

Opposition political parties that supported the Democratic Alliance’s case were motivated by the fact that the African National Congress had failed to submit ‘its party lists and ward candidate nominations in respect of 20 municipalities and 598 wards.’⁸³ In those areas, the African National Congress was leading with large majorities in municipal councils.⁸⁴ This was a windfall for the opposition parties, as they stood better chances of gaining ground in the municipalities and wards in which the African National Congress had missed the deadline to submit its list and ward candidate nominations. The prospects of success without the African National Congress were huge and appealing. Although the Democratic Alliance and the other parties who supported its application had also missed the deadline,⁸⁵ the Electoral Commission’s decision to reopen the nominations and submission of party lists disappointed them. They now faced a rival that they thought they had defeated even before the first ballot was cast.⁸⁶

In a short judgment, the court said that its order in *Electoral Commission v Minister of COGTA* did not preclude the Electoral Commission from drawing up a new timetable

80 Independent Electoral Commission, ‘The Commission is Preparing to Comply with the Constitutional Court Orders’ (2021) <<https://www.elections.org.za/pw/News-And-Media/News-List/News/News-Article/The-Commission-is-preparing-to-comply-with-the-Constitutional-Court-orders?a=AISDGvpz75ps1usOfX7oiuhNiPfPDTTAD/Bim9y11cg=>> accessed 23 September 2021.

81 *ibid.*

82 *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance and Traditional Affairs* 2022 1 BCLR 1 (CC) para 4.

83 *ibid* para 8.

84 *ibid* para 8.

85 *ibid* para 9.

86 *ibid* para 8.

for the elections and, in that timetable, setting a new deadline for the submission of party lists and ward candidate nominations. This was a relief to the African National Congress, which stood to lose from its earlier lack of due diligence. It was also a relief to potential candidates for all parties who stood to lose out on contesting the elections due to their inability and their parties' inability to submit party lists and nominations on time. As such, barring the Electoral Commission from accepting new party lists and ward candidate nominations would have infringed on the rights of affected parties to participate in free and fair elections. It would not have been reasonable and justifiable. Acceding to opposition attempts to benefit from the African National Congress' lack of due diligence would have made the elections not free and fair in that the results would have been based on technicalities rather than the free will of voters.

Conclusion

The COVID-19 pandemic affected preparations for the 2021 local government elections in South Africa in two principal ways. Firstly, the pandemic posed a serious threat to health and life. As such, it potentially disenfranchised voters who could not attend political rallies and register to vote at the Electoral Commission's centres for fear of contracting COVID-19. The risk of contracting COVID-19 made some registered voters hesitant to avail themselves to vote on election day. Secondly, the COVID-19 pandemic led the national executive to invoke emergency powers under the Disaster Management Act. The triggering of these powers led the national executive to promulgate lockdown regulations which restricted political mobilisation by, inter alia, limiting freedom of movement and association. The regulations also restricted the number of persons who could be present at any venue, including political rallies. As such, political parties could not freely canvass votes. This limitation cast doubt on whether the 2021 local government elections would be really free and fair. It appears that the only solution to this problem would have been for the national executive to lower the COVID-19 lockdown Alert Level to 1 or to scrap it altogether. The analysis in this article reveals that the prolonged lockdowns whose regulations were ignored by many did not really curb the spread of COVID-19, as seen from the different waves of infections. It also shows that if the lockdowns really worked to combat the spread of the coronavirus, then the first lockdown in South Africa would have completely solved the country's COVID-19 problem.

Due to the challenges caused by the COVID-19 pandemic and the ensuing lockdown regulations, some political parties, together with the Electoral Commission, called for the postponement of the 2021 local government elections to 2022. However, some parties fiercely opposed the postponement on the grounds that such postponement would be unconstitutional, unlawful, and invalid for allowing municipal councils to remain in power beyond their prescribed term limits. These differences of opinion resulted in litigation, in which the Constitutional Court ruled, by a majority decision, that the elections would go ahead. The court set aside the ministerial proclamation for

holding the elections on 27 October 2021, thereby allowing the Electoral Commission to open voter registration and conduct a voter registration weekend to avoid disenfranchising potential voters. The court also confirmed the constitutional validity of the Electoral Commission’s decision to reopen the process for the nomination of persons who wished to stand for election, thereby removing future challenges to the freeness and fairness of the 2021 local government elections.

Although the above challenges imposed by COVID-19 on the Electoral Commission, political parties, and potential voters made it difficult to eliminate hurdles to the freeness and fairness of the 2021 local government elections, they neither made it impossible to hold the elections nor did they make the elections not free and fair. Reading the Constitutional Court’s judgment in *Electoral Commission v Minister of COGTA*, one appreciates that difficulty in guaranteeing the freeness and fairness of an election is not an impossibility of holding such an election. Postponing elections to February 2022 when it was possible to hold such elections within the prescribed 90-day period after the expiry of municipal council terms (by 1 November 2021) would have defeated the founding constitutional value and right of every citizen to vote in free, fair, and regular elections. The only way in which the 2021 local government elections would have been postponed would have been through a constitutional amendment. This is because the Constitution gives the power to determine office terms for legislative bodies to Parliament, not the judiciary.

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