



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 245/21

In the matter between:

ELECTORAL COMMISSION OF SOUTH AFRICA

Applicant

and

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

First Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF
THE EASTERN CAPE**

Second Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF
THE FREE STATE**

Third Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF
GAUTENG**

Fourth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF
KWAZULU-NATAL**

Fifth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF
LIMPOPO**

Sixth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF
MPUMALANGA**

Seventh Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF**

THE NORTHERN CAPE Eighth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF
THE NORTH WEST** Ninth Respondent

**MEC RESPONSIBLE FOR LOCAL GOVERNMENT
IN THE PROVINCIAL GOVERNMENT OF
THE WESTERN CAPE** Tenth Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
ASSOCIATION** Eleventh Respondent

and

AFRICAN NATIONAL CONGRESS First Intervening Party

INKATHA FREEDOM PARTY Second Intervening Party

DEMOCRATIC ALLIANCE Third Intervening Party

MAKANA INDEPENDENT NEW DEAL Fourth Intervening Party

AFRICAN TRANSFORMATION MOVEMENT Fifth Intervening Party

FORUM 4 SERVICE DELIVERY Sixth Intervening Party

ONE SOUTH AFRICA MOVEMENT Seventh Intervening Party

ECONOMIC FREEDOM FIGHTERS Eighth Intervening Party

and

**COUNCIL FOR THE ADVANCEMENT OF THE
SOUTH AFRICAN CONSTITUTION** First Amicus Curiae

FREEDOM UNDER LAW (RF) NPC Second Amicus Curiae

**SOUTH AFRICAN INSTITUTE OF RACE
RELATIONS** Third Amicus Curiae

AFRIFORUM NPC Fourth Amicus Curiae

Neutral citation: *Electoral Commission v Minister of Cooperative Governance and
Traditional Affairs and Others* [2021] ZACC 29

Coram: Zondo ACJ, Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J

Judgments: Zondo ACJ (dissenting): [1] to [151]
Rogers AJ (majority): [152] to [265]

Heard on: 20 August 2021

Order issued on: 3 September 2021

Reasons issued on: 18 September 2021

Summary: [Urgent application] — [direct access] — [postponement of local government election]

[Local Government: Municipal Structures Act 117 of 1998 — section 24] — [Local Government: Municipal Electoral Act 27 of 2000 — section 11] — [Electoral Commission Act 1 of 1996] — [Electoral Act 73 of 1998] — [Constitution of the Republic of South Africa — section 159]

[Free and fair elections] — [application dismissed]

ORDER

On application for direct access to the Constitutional Court on an urgent basis:

1. The Electoral Commission's application for direct access on an urgent basis is granted.
2. Save for what is set out in paragraph 1, the Commission's application is dismissed.
3. The Democratic Alliance's application for direct access is granted.
4. It is declared that the proclamation issued by the Minister of Cooperative Governance and Traditional Affairs (Minister) on 3 August 2021 in terms

of section 24(2) of the Local Government: Municipal Structures Act 117 of 1998 (Municipal Structures Act), by which she proclaimed 27 October 2021 as the date for the local government elections (proclamation), is unconstitutional, invalid and is set aside.

5. Pursuant to paragraph 4, it is further ordered, in terms of section 172(1)(b) of the Constitution:

- (a) The Commission must, within three calendar days after the date of this order, determine whether it is practically possible to hold a voter registration weekend with a view to registering new voters and changing registered voters' particulars on the national voters' roll in time for local government elections to be held on any day in the period from Wednesday, 27 October 2021 to Monday, 1 November 2021 (both dates inclusive).
- (b) The Commission must notify the Minister of, and publicly announce, its determination as soon as it has been made.
- (c) If the Commission determines that it is practically possible to hold a voter registration weekend:
 - (i) The Commission is directed to conduct a voter registration weekend.
 - (ii) On the day following the voter registration weekend the Minister must issue a proclamation in terms of section 24(2) of the Municipal Structures Act determining a date for the local government elections in the period from Wednesday, 27 October 2021 to Monday, 1 November 2021 (both dates inclusive).
 - (iii) The timetable published by the Commission on 4 August 2021 (current timetable) shall, notwithstanding the provisions of section 11(1) of the Local Government: Municipal Electoral Act 27 of 2000 (Municipal Electoral Act), remain applicable, save that as soon as possible after the issuing of the proclamation envisaged in paragraph

- 5(c)(ii), the Commission must, in terms of section 11(2) of the Municipal Electoral Act, publish such amendments to the current timetable as may be reasonably necessary;
- (d) If the Commission determines that it is not practically possible to hold a voter registration weekend:
- (i) The Minister must, not earlier than 10 September 2021, issue a proclamation in terms of section 24(2) of the Municipal Structures Act, determining a date for the local government elections in the period from Wednesday, 27 October 2021 to Monday, 1 November 2021 (both dates inclusive).
 - (ii) Between the date of this order and 10 September 2021, eligible voters who wish to register may apply to do so at the relevant municipal office.
 - (iii) Subject to amendments reasonably necessitated by paragraph 5(d)(ii), the current timetable shall, notwithstanding the provisions of section 11(1) of the Municipal Electoral Act, remain applicable.
6. The Economic Freedom Fighters' conditional application for the relief set out in paragraphs 4 and 5 of its notice of motion is dismissed.
7. Each party shall pay their own costs.

JUDGMENT

ZONDO ACJ (Madondo AJ and Tshiqi J concurring):

Introduction

[1] The Electoral Commission (applicant) brought an application for direct access on an urgent basis and sought a primary remedy or a certain alternative remedy if this Court was not prepared to grant the primary remedy. The purpose of the application was for the applicant to get an order to the effect that it could hold the local government election, then scheduled for 27 October 2021, in February 2022. Its alternative remedy was an order declaring that its failure to hold the local government election on 27 October 2021 was unconstitutional and a suspension of that declaration of invalidity to allow it (i.e. applicant) to have time up to 28 February 2022 to correct the constitutional defect. Whether this Court granted the primary or alternative remedy, the applicant also wanted this Court to grant a supervisory order so that it would submit regular reports to this Court on progress in its preparations for the holding of the election in February 2022.

[2] Despite submissions to the contrary by Counsel for the applicant that the applicant was not seeking an order for the postponement of the election then scheduled for 27 October 2021, the true position is that the effect of both the primary and the alternative remedy sought by the applicant was to postpone the election from 27 October 2021 to 23 February 2022. One only has to quote the first part of the primary remedy and the first part of the alternative remedy to show this. Respectively, they read:

Main relief:

- “3. It is declared that the Electoral Commission may hold the forthcoming local government elections outside the 90-day period required by section 159(2) of the Constitution and section 24(2) of the Local Government: Municipal Structures Act 117 of 1998.
4. The Electoral Commission is directed to hold the forthcoming local government elections before 28 February 2022.”

Alternative relief:

“8 Alternatively to prayers 3 to 7 above:

- 8.1. It is declared that the failure to hold the forthcoming local government elections within the 90-day period required by section 159(2) of the Constitution and section 24(2) of the Local Government: Municipal Structures Act 117 of 1998 is unconstitutional and invalid;
- 8.2. The declaration of invalidity is suspended and:
 - 8.2.1. The duty of the Electoral Commission to hold the forthcoming local government elections within the 90-day period required by section 159(2) of the Constitution and section 24(2) of the of the Local Government: Municipal Structures Act 117 of 1998 is suspended until 28 February 2022;
 - 8.2.2. The Electoral Commission is directed to hold the forthcoming local government elections before 28 February 2022”

The parties and amici curiae

[3] The applicant cited the Minister of Cooperative Governance and Traditional Affairs (Minister of COGTA) as the first respondent and all members of the Executive Councils responsible for local government in the nine provinces. The Minister of COGTA delivered a notice to abide the decision of the Court but filed an explanatory affidavit to explain her position. Among the members of the Executive Councils responsible for local government, the MEC for Local Government in the Western Cape was the only MEC who participated in these proceedings. He opposed the application. The other members of the Executive Councils responsible for local government in the other eight provinces either delivered notices to abide the decision of this Court or simply did not deliver any notice or affidavits. They did not oppose the application. The South African Local Government Association was cited as the 11th respondent but did not participate in the proceedings.

[4] The following political parties and entities applied for admission as intervening parties and were admitted as such:

- (1) African National Congress (ANC);

- (2) Inkatha Freedom Party (IFP);
- (3) Democratic Alliance (DA);
- (4) Makana Independent New Deal (MIND);
- (5) African Transformation Movement (ATM);
- (6) Forum 4 Service Delivery (F4SD);
- (7) One South Africa Movement (OSAM); and
- (8) Economic Freedom Fighters (EFF).

[5] The following entities applied for leave to be admitted as amici curiae (friends of the court) in these proceedings and were admitted as such:

- (1) Council for the Advancement of the South African Constitution (CASAC);
- (2) Freedom Under Law (RF) NPC (FUL);
- (3) South African Institute of Race Relations (IRR); and
- (4) AfriForum NPC (AfriForum).

[6] The ANC supported the application and delivered an affidavit in which it set out various matters in support of the application. The EFF also supported the application and delivered an affidavit in which it asked this Court to grant certain relief if the applicant's application was dismissed. The IFP also supported the application and delivered an affidavit in which it dealt with various matters in support of the IEC's application.

[7] The DA opposed the application and delivered an answering affidavit. In that affidavit it sought the following relief:

- (a) declaring the Commission's failure to hold a voter registration weekend unconstitutional and invalid;
- (b) directing the Commission to hold such a weekend on either 27 to 29 August 2021 or 3 to 5 September 2021; and

- (c) that notwithstanding the provisions of section 6(1A) of the Local Government: Municipal Electoral Act¹ (MEA), the names of people registering on the registration weekend may be added to the voters' roll for purposes of the elections on 27 October 2021.

[8] In the alternative, the DA sought orders:

- (a) declaring that the Minister's proclamation of 3 August 2021 was unconstitutional and invalid;
- (b) directing the Commission to hold a voter registration weekend on one or other of the weekends mentioned above;
- (c) directing the Minister, on the day after the voter registration weekend, to proclaim the election date for 27 October 2021; and
- (d) declaring that the election timetable published on 4 August 2021 will remain the governing timetable, subject to any future amendments.

[9] The intervening parties and the amici were granted leave to deliver written and oral submissions. We are indebted to all Counsel for the various parties and amici for their written and oral submissions. We do not propose to refer to all the submissions they made but their submissions were considered. All amici and parties who actively took part in the proceedings were represented by Counsel at the hearing, save for MIND which was represented by its leader, Prof Machanick.

[10] After hearing argument on 20 August 2021 we reserved judgment with a view to delivering as soon as possible but not later than 10 September 2021. The applicant had requested the Court to hand down its judgment, if at all possible, on or before 30 August 2021, or not later than 10 September 2021. This request by the applicant was based on the urgency of the matter and the need to have certainty on whether the election would continue in October 2021 or would be postponed to February 2022.

¹ 27 of 2000.

[11] On Friday, 3 September 2021, this Court issued the following order:

“For reasons to follow, the Court, by majority decision, makes the following order:

1. The Electoral Commission’s application for direct access on an urgent basis is granted.
2. Save for what is set out in paragraph 1, the Commission’s application is dismissed.
3. The Democratic Alliance’s application for direct access is granted.
4. It is declared that the proclamation issued by the Minister of Cooperative Governance and Traditional Affairs (Minister) on 3 August 2021 in terms of section 24(2) of the Local Government: Municipal Structures Act 117 of 1998 (Structures Act), by which she proclaimed 27 October 2021 as the date for the local government elections (proclamation), is unconstitutional, invalid and is set aside.
5. Pursuant to paragraph 4, it is further ordered, in terms of section 172(1)(b) of the Constitution:
 - (a) The Commission must, within three calendar days after the date of this order, determine whether it is practically possible to hold a voter registration weekend with a view to registering new voters and changing registered voters’ particulars on the national voters’ roll in time for local government elections to be held on any day in the period from Wednesday, 27 October 2021 to Monday, 1 November 2021 (both dates inclusive).
 - (b) The Commission must notify the Minister of, and publicly announce, its determination as soon as it has been made.
 - (c) If the Commission determines that it is practically possible to hold a voter registration weekend:
 - (i) The Commission is directed to conduct a voter registration weekend.
 - (ii) On the day following the voter registration weekend the Minister must issue a proclamation in terms of section 24(2) of the Structures Act determining a date for the local government elections in the period from Wednesday, 27

October 2021 to Monday, 1 November 2021 (both dates inclusive).

- (iii) The timetable published by the Commission on 4 August 2021 (current timetable) shall, notwithstanding the provisions of section 11(1) of the Local Government: Municipal Electoral Act 27 of 2000 (Municipal Electoral Act), remain applicable, save that as soon as possible after the issuing of the proclamation envisaged in paragraph 5(c)(ii), the Commission must, in terms of section 11(2) of the Municipal Electoral Act, publish such amendments to the current timetable as may be reasonably necessary.
- (d) If the Commission determines that it is not practically possible to hold a voter registration weekend:
 - (i) The Minister must, not earlier than 10 September 2021, issue a proclamation in terms of section 24(2) of the Structures Act, determining a date for the local government elections in the period from Wednesday, 27 October 2021 to Monday, 1 November 2021 (both dates inclusive).
 - (ii) Between the date of this order and 10 September 2021, eligible voters who wish to register may apply to do so at the relevant municipal office.
 - (iii) Subject to amendments reasonably necessitated by paragraph 5(d)(ii), the current timetable shall, notwithstanding the provisions of section 11(1) of the Municipal Electoral Act, remain applicable.
- 6. The Economic Freedom Fighters' conditional application for the relief set out in paragraphs 4 and 5 of its notice of motion is dismissed.
- 7. Each party shall pay their own costs."

[12] I did not agree with this order and would have granted the order that appears at the end of this judgment. In a separate judgment by Rogers AJ (second judgment), the majority gives reasons for that order. I set out below my reasons for the position I took.

Background

[13] The applicant is a body established under Chapter 9 of our Constitution. Its main responsibility is to manage free and fair elections for legislative bodies at all three spheres of government in accordance with national legislation. Those are the national, provincial and local spheres of government. Section 190(1)(b) of the Constitution obliges the IEC to “ensure that [the elections it manages] are free and fair”. In terms of section 190(1)(c) it is required 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”.

[14] The Electoral Commission Act² (EC Act) is one of the pieces of national legislation contemplated in section 190 of the Constitution. Section 3(1) of the EC Act provides that the applicant is “independent and subject only to the Constitution and the law”. Section 3(2) provides that the Electoral Commission “shall be impartial and shall exercise its powers and perform its functions without fear, favour or prejudice”. The applicant is one of the entities created by the Constitution to strengthen our democracy.

[15] In terms of section 181(5) of the Constitution the applicant is accountable to the National Assembly and must report on its activities and the performance of its functions to the National Assembly at least once a year. In relation to the applicant and other organisations established to strengthen democracy, section 181(2), (3) and (4) of the Constitution reads:

- “(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
- (3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

²51 of 1996.

- (4) No person or organ of state may interfere with the functioning of these institutions.”

[16] Section 5 of the EC Act also identifies the management of any election as one of the functions of the applicant. It also requires the applicant to ensure that any election it manages is free and fair. Section 5(1)(n) of the EC Act requires that the applicant must “declare the results of elections for national, provincial and municipal legislative bodies within seven days after such elections”. Section 14(4) of the EC Act confers power on the applicant, if it deems it necessary, 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”.

[17] With regard to a local government election, section 159(1), (2) and (3) of the Constitution reads:

- “(1) The term of a Municipal Council may be no more than five years, as determined by national legislation.
- (2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.
- (3) A Municipal Council, other than a Council that has been dissolved following an intervention in terms of section 139, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected.”

These provisions are repeated in section 24 of the Local Government: Municipal Structures Act³ (Municipal Structures Act).

[18] The current municipal councils were elected on 3 August 2016 and their five- year term of office expired on 3 August 2021. In terms of section 159 of the

³ 117 of 1998.

Constitution the next election of municipal councils must take place within 90 days from 3 August 2021. That period expires on 1 November 2021.

[19] Since March 2020 South Africa has been plagued by the Covid-19 pandemic and has been under a State of Disaster in terms of the Disaster Management Act.⁴ From 26 March 2020 up to now the country has been under different Alert Levels. Initially, it was placed under Alert Level 5 which basically shut the country down except for what were considered to be essential services in terms of the Regulations promulgated under the Disaster Management Act (Lockdown Regulations). Later, the country was placed on Alert Level 4 and, ultimately on Alert Level 1. Alert Level 1 is the Alert Level at which the country is subjected to the least restrictions. On 28 June 2021 we moved back up to adjusted Alert Level 4. On 26 July 2021 the country was placed on adjusted Alert Level 3 which was the applicable level at the time of the hearing of this application, with effect from 13 September 2021 the country was placed on adjusted Alert Level 2.

[20] On 21 April 2021 the President of the Republic announced that the general local government election would be held on 27 October 2021. It would appear that on 22 April 2021 the applicant had a meeting with leaders of political parties represented in the National Political Party Liaison Committee (NPLC). This is a body created in terms of the EC Act. In that meeting some of the leaders indicated that they believed that the local government election then scheduled for October this year might not be free and fair as a result of Lockdown Regulations which prohibited certain political activities. Other leaders present at that meeting expressed the view that, with certain precautions, the election was likely to be free and fair.

[21] On 20 May 2021 the applicant appointed Justice Dikgang Moseneke, former Deputy Chief Justice of the Republic, to conduct an inquiry (Moseneke Inquiry or

⁴ 57 of 2002.

Inquiry) in terms of section 14(4) of the EC Act on the likelihood or otherwise that the local government election in October 2021 would be free and fair.

[22] Justice Moseneke conducted the inquiry over two months and submitted his report to the applicant on 20 July 2021. Justice Moseneke prepared his report (Moseneke Inquiry Report or Report) against the background of certain facts which were common cause before him. It is appropriate to set them out here. I list them as they appear in the Moseneke Inquiry Report and I have changed the numbering of paragraphs to align them with the paragraphs in this judgment:

Moseneke Inquiry: common cause facts

[22.1] Most of the uncontested facts have been garnered from the material furnished by the Commission in its terms of reference or written and oral submissions, or from other research or other official documents.

[22.2] Since the last general local government elections were conducted 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. To this high-level legal proposition, we return later.

[22.3] The position of the Commission is that it must prepare for the local government elections in accordance with its constitutional mandate and the requirements that elections occur regularly and within the prescribed time limits. However, the Commission accepts that elections must be free and fair, and has undertaken to approach the Constitutional Court to seek a short postponement of the elections if it is not possible to hold free and fair elections in October of this year, considering the trajectory of the pandemic.

[22.4] The forthcoming local government elections will, in effect, involve 4 725 separate elections; electing proportional representation members of

8 metropolitan councils, 205 local councils and 44 district councils as well as 4 468 ward councillors.

[22.5] The Commission has assured the Inquiry that it has made proper arrangements to conduct free and fair local government elections in October this year. In preparation for the conduct of the local government elections, the Commission asserts that it:

- (a) is ensuring a conducive legislative environment for the holding of the elections;
- (b) has completed the ward and voting district delimitation process in preparation for the election;
- (c) is 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) is procuring 23 151 voting stations across the country for the voter registration weekend and election day;
- (e) is procuring and preparing for the distribution of electoral materials for the voter registration weekend and voting day;
- (f) is recruiting and training electoral staff to administer voter registration, voting, vote counting and the collation of the election results;
- (g) is procuring 40 000 new voter management devices to be deployed on voter registration weekend and election day;
- (h) is registering political parties as part of an on-going process; and
- (i) is 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.

[22.6] The Commission had assured the Inquiry that all preparatory steps are on track to be completed on schedule and will be in place for the voter registration weekend and for the conduct of the local government elections in October this year.

[22.7] However, the procurement cost of personal protective equipment for the voter registration weekend, and for election day, is currently unfunded. The Commission is in engagements with National Treasury regarding additional funding.

[22.8] On 7 July 2021, the Commission announced that the voter registration weekend planned for 17 and 18 July 2021 would be postponed to 31 July and 1 August 2021 because of the third wave spreading across the country. The two-week postponement necessitated changes to the Commission's timetable for the holding of the local government elections, including delaying the proclamation of the elections by the Minister from 2 August 2021 to 6 August 2021, and reducing the election timetable from 86 days to 82 days. The Commission remains confident that "successful elections can be held within [the] reduced election timetable".

[22.9] The Commission launched online voter registration in mid-July 2021. While it is hoped that online voter registration will boost registration, this can hardly be the only way in which eligible voters may place themselves on the voters roll. In-person registration is vital to avoid disenfranchising eligible voters who do not have access to online platforms.

[22.10] The importance of the voter registration cannot be overstated. There are 40 263 709 citizens eligible to vote according to the national population register. Of those eligible to vote, only 25 789 566 are currently registered to vote. In other words, 36 per cent of eligible voters are not yet registered to vote. Young people are disproportionately underrepresented among registered voters.

[22.11] It is important to grasp that only a voter who applied for registration prior to the proclamation of an election date may vote in the election concerned. This means the elections will only be formally called after the registration weekend which, for now, is set for 31 July and 1 August 2021. Given the steps that must be taken prior to voting day, the elections must be proclaimed by not later than 6 August 2021.

[22.12]The Commission's submissions also covered the measures put in place to reduce the risk of transmission of the virus on election day. The Covid-19 protocols adopted by the Commission are as follows:

- (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.

[22.13]The Commission has affirmed that political party agents, electoral observers and the media will be able to observe the voting and counting process, with adherence to all Covid-19 protocols, including physical distancing. Each party or candidate may have two agents per voting station and one agent per home visit. If the venue cannot accommodate these numbers, an alternative arrangement will be reached in consultation with the political parties and independent candidates.

[22.14]The Commission has submitted that the Covid-19 protocols adopted by it are reasonable measures to ensure that the elections are held in a manner that safeguards the health of voters, electoral staff and others who will attend voting stations during the voter registration weekend and on voting day. The Commission has indicated that it does not currently have the budget to implement any additional risk reduction measures that have cost implications.

[22.15]From the time the President announced the declaration of a national state of disaster on 15 March 2020, the Commission has approached the Electoral Court (Court) on eight occasions, to seek an order postponing the by-elections. We return to the postponement of by-elections later.

[22.16]Nonetheless, the Commission repeatedly reassured the Inquiry that it was ready to discharge its constitutional and legislative obligations to conduct the general local government elections by 1 November 2021, and that it was at an advanced stage of preparation. To this end, from a technical point of the view, the Commission is confident that the arrangements to conduct the national local government elections will be fully in place.

[22.17]On 11 March 2020, the World Health Organisation (WHO) publicly characterised Covid-19 as a pandemic, which means a global outbreak of disease. The Covid-19 outbreak has since been declared a national emergency by many countries. Since then, the pandemic has grown exponentially and, as of 18 July 2021, internationally there have been 189 743 723 confirmed cases of Covid-19, including 4 084 990 deaths, reported to WHO. In South Africa, as at 18 July 2021, 2 295 095 persons have tested positive for the virus and 1 510 385 persons have recovered from the disease, representing a recovery rate of 89 per cent, and 66 859 persons have succumbed to the disease.

[22.18]On 15 March 2020, the President announced that Cabinet had resolved to declare a national state of disaster, 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 on the same day.

[22.19] The Minister also promulgated the Disaster Management Regulations to contain the spread of Covid-19. The Regulations make provision for an alert level system to manage the response to Covid-19. The applicable alert level is determined by the Minister in consultation with the Minister responsible for health and Cabinet. The determination of the alert level considers the prevalence and incidence of the virus, the availability of resources to treat those with severe illness and other factors relevant to the containment of the virus.

[22.20] The Regulations impose non-pharmaceutical interventions that apply generally, regardless of the alert level in application, such as the mandatory wearing of masks while in public, physical distancing, and sanitisation. In addition, the Regulations require persons who are infected with the virus, or who have been in contact with someone who is infected with the virus, to isolate or quarantine.

[22.21] The Regulations also place restrictions on the movement of persons and gatherings of varying levels of severity, depending on the applicable alert level. There are a number of offences created in terms of the Regulations that criminalise political gatherings and other political activity. The penalty, on conviction, is a fine, a period of imprisonment not exceeding 6 months, or both a fine and a period of imprisonment.

[22.22] Alert Level 5 would involve the most severe restrictions on movement of persons and gatherings, much like the restrictions in place when South Africa was in a hard lockdown from 26 March to 30 April 2020. The Regulations do not at present prescribe the restrictions that will be in place under Alert Level 5.

[22.23] Adjusted Alert Level 4, which was determined to apply nationally on 27 June 2021, places significant restrictions on the movement of persons and gatherings. Although work outside the home is permitted, every person who can work from home must do so. There are restrictions placed on interprovincial travel. A curfew is imposed from 21h00 until 04h00, during

which time every person is confined to their place of residence, with narrow exceptions. In addition, it is a criminal offence to break curfew.

[22.24] Under Adjusted Alert Level 4, all gatherings are prohibited, with very few listed exceptions. The ban on gatherings expressly includes gatherings at political events. Moreover, it is a criminal offence to convene or attend a gathering, including a political gathering, under Adjusted Alert Level 4. On 11 July 2021, Adjusted Alert Level 4, with some amendments, was extended for two weeks, until 25 July 2021, and may be extended again.

[22.25] Alert Levels 3, 2 and 1 impose less severe restrictions on the movement of persons and gatherings. Curfews are imposed under Alert Levels 3, 2 and 1, beginning at 22h00, 23h00 and 00h00, respectively, and ending at 04h00. In addition, breaking curfew is a criminal offence under all these alert levels. There are no restrictions on interprovincial travel under Alert Levels 3, 2 and 1.

[22.26] Gatherings, including political gatherings, are permitted under Alert Levels 3, 2 and 1 subject to restrictions, such as the wearing of masks, physical distancing and adherence to Covid-19 health protocols. There are also limits imposed on the number of people who may attend a gathering, depending upon whether the gathering is to take place at an indoor or outdoor venue and the capacity of the venue to accommodate physical distancing.

[22.27] Under Alert Level 3, the maximum number of people who may attend a gathering is 50 at an indoor venue and 100 at an outdoor venue. Under Alert Level 2, the maximum number of people who may attend a gathering is 100 at an indoor venue and 250 at an outdoor venue. Under Alert Level 1, the maximum number of people who may attend a gathering is 250 at an indoor venue and 500 at an outdoor venue. If a venue cannot accommodate the numbers permitted with the requisite physical distancing, then more than 50 per cent of the capacity of the venue may not be used.

[22.28] Under Alert Levels 4, 3, 2 and 1, any gathering that contravenes the Regulations must be dispersed by an enforcement officer. If any person refuses

to disperse, the enforcement officer must take appropriate action, which may include the arrest and detention of any person at the gathering. It is also a criminal offence, for the duration of the national state of disaster, to hinder, interfere with or obstruct enforcement officers in the exercise of their powers or performance of their duties.

[22.29] In addition, the Regulations have recently been amended to make it an offence for any person to incite, instigate, command, or procure any other person to commit any offence in terms of the Regulations. This may include convening a gathering that contravenes the Regulations under Alert Levels 3, 2 and 1.

[22.30] The Commission documented with considerable detail the potential impact of the pandemic as well as measures introduced to combat the spread of Covid-19 on the conduct of free and fair elections. The Commission's posture is that elections cannot be free and fair whilst restrictions imposed under Alert Levels 2, 3, 4 and 5 are in force. We did not understand any of the stakeholders to challenge this stance of the Commission. It notes 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 or who is talking or singing. Respiratory droplets containing the virus can reach the mouth, nose or eyes of a susceptible person and can result in infection.

[22.31] The holding of a general election 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 Alert Level 1. However, it is not able to predict with any certainty the trajectory of the virus and recognises that this uncertainty also poses challenges to the potential climate within which elections will take place.

[22.32] Prior to the calling of a general local government election, the Commission interacts with a generous number of people during its targeted communication and registration activities.

[22.33] 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.

[22.34] The second feature involves the Commission employing fieldworkers to undertake a door-to-door registration campaign in identified areas to ensure that affected voters can 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.

[22.35] The Commission records that, as of 6 May 2021, there were 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 because of additional registrations between now and the proclamation of the elections.

[20.36] The impact of the pandemic and the regulatory measures which have been adopted to curb its spread are a vital consideration in assessing whether the pending local government elections are likely to be free and fair. To this matter we return later in the analysis and findings.

[23] The Moseneké Inquiry concluded that, if held in October 2021, the local government election would not be free and fair and would put at risk the people's constitutional right to have access to health care services and the right to freedom and security of the person, which includes the right to bodily and psychological integrity. The Moseneké Inquiry concluded that the local government election would be or would be likely to be, free and fair if they were to be held not later than the end of

February 2022. The Inquiry suggested that the applicant should consider approaching with speed a court of competent jurisdiction to apply for an order postponing the election if it (i.e. the applicant) accepted the Inquiry's findings and recommendations. The applicant subsequently accepted the conclusions and recommendations of the Moseneke Inquiry. It then instituted this application.

[24] It is common cause that the voter registration weekend scheduled for 31 July 2021 and 1 August 2021 did not take place because various parts of the country were experiencing the peak of the third wave, and the country was in Adjusted Alert Level 4 (from 28 June 2021 to 25 July 2021) and Adjusted Alert Level 3 (since 26 July 2021). The applicant has submitted to this Court that, since the Minister of COGTA proclaimed the forthcoming election on 3 August 2021, it is now impossible for the Commission to hold a voter registration weekend. Thus, the applicant contends that the forthcoming election will not be free and fair.

[25] In its replying affidavit, the applicant dealt with, among others, the relief sought by the DA, namely, that its failure to hold a voter registration weekend is unconstitutional and the applicant had to be ordered to hold a voter registration weekend before 27 October 2021. The applicant's response was that the DA's proposed solutions would be "unworkable". To support this contention, the applicant's Chairperson made the following points in the replying affidavit:

1. Once the election has been proclaimed, the period for inspection of the voters' roll opens (see *Kham*⁵ and *Mhlope*⁶). Adding persons to the voters' roll beyond the objection period will imperil the freeness and fairness of the election in certain localities.
2. The date for the voter registration weekend proposed by the DA is too close to the date of certification of the voters' roll (which enables the

⁵ *Kham v Electoral Commission* [2015] ZACC 37; 2016 (2) SA 338 (CC); 2016 (2) BCLR 157 (CC).

⁶ *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) (*Mhlope*).

applicant to validate and quality assure the registration applications for compliance with section 6 of the Electoral Act⁷).

3. Certification of the voters' roll cannot be delayed. Following the certification unique segments of the roll must be printed for the 23 151 voting districts and these printed segments must be delivered to the voting districts. Printing must be procured in accordance with the Public Finance Management Act⁸ (PFMA).
4. The proposed voter registration weekend is scheduled after the candidate nomination process closed. Therefore, those who intended to stand for office but failed to register will still not be able to stand.

In response to the contention that the applicant should be ordered to hold a voter registration weekend before 27 October 2021, the applicant's Chairperson made this statement in the replying affidavit:

"When the abovementioned factors are considered, it is clear that the DA's proposed solutions are unworkable."

[26] The proclamation triggered the requirement for the applicant to publish an election timetable. The applicant said that it would undertake the activities which must be performed in terms of the timetable until a competent court ordered differently. The election timetable spans 85 days and lays down the key dates and deadlines for various electoral milestones until voting day on 27 October 2021.

[27] It has to be highlighted that the cut-off date for the certification of the voters' roll was looming. According to the election timetable, by 1 September 2021 the Chief Electoral officer had to certify the voters' roll or the municipality's segments of the voters' roll to be used in the October election in terms of section 6(2) of the MEA and

⁷ 73 of 1998.

⁸ 1 of 1999.

make those segments available for inspection by 1 September 2021. It is common cause that the voters' roll would only include citizens that were already registered to vote.

Jurisdiction

[28] This matter implicates the rights entrenched in section 19(2) and (3) of the Constitution. The right provided for in section 19(2) is the right of every citizen “to free, fair and regular elections for any legislative body in terms of the Constitution”. The right provided for in section 19(3) is the right—

- “(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
- (b) to stand for public office and, if elected, to hold office.”

[29] This matter also implicates the constitutional obligations of the applicant in section 190(1)(a) and (b) of the Constitution, respectively “to manage elections of national, provincial and local legislative bodies in accordance with national legislation” and “to ensure that those elections are free and fair”. It also implicates the interpretation and application of section 159(2) of the Constitution. Accordingly, this Court has jurisdiction in this matter.

[30] If this Court were to grant the order sought by the applicant, every citizen's right to vote for a municipal council within 90 days of the expiry of the term of office of the current Municipal Councils would be adversely affected in that, whereas he or she is entitled to vote for a new municipal council by 1 November 2021, he or she would not be able to vote for a few more months. This Court has jurisdiction on this basis too.

[31] Some of the parties and amici contended that this Court does not have jurisdiction in this matter but, in my view, they mischaracterised their objection. I understood them to mean that this Court did not have the power to make the order sought by the applicant, particularly the order that they argued would effectively postpone the election to a date outside of the 90 days contemplated in section 159 of the Constitution.

Urgency and Direct Access

[32] I deal with the topics of urgency and direct access jointly because they are related in this matter. The applicant seeks to have the local government election scheduled for 27 October 2021 postponed to no later than 28 February 2022.

[33] The local government election was scheduled for 27 October 2021. The applicant received the Moseneke Inquiry Report on 20 July 2021. As already stated, that Report found that, if held in October 2021, the forthcoming local government election was likely not to be free and fair. It was that Report, too, which suggested that the applicant should consider approaching a court of competent jurisdiction for an order postponing the election if it accepted the conclusions and recommendations in the Report.

[34] Once the applicant had accepted the conclusions and recommendations of the Moseneke Inquiry Report, it acted with diligence in instituting this application. It was argued on behalf of some of the parties and amici that the applicant delayed unduly in appointing the Moseneke Inquiry and that it should have made that appointment much earlier. It was also argued that whatever urgency there may have been in this case was created by the applicant itself. While I accept that the Electoral Commission may have acted less diligently than it should have prior to its appointment of the Moseneke Inquiry, I am of the view that this is not a case in which it would be appropriate to dismiss the application or strike it off the roll for that reason. If this Court dismissed the application on the grounds that the applicant acted less diligently than it should have, the people who would suffer the consequences of such a decision would be the citizens of this country who are entitled to a free and fair election by no later than 1 November 2021 which is the expiry of the 90 day period referred to in section 159 of the Constitution.

[35] It was of the utmost importance that the applicant, various political parties and the citizens of this country have certainty whether or not the local government election

would go ahead on 27 October 2021 or would be postponed. Within the time available, there was no room for the Electoral Commission to first go to another court before approaching this Court.

[36] In these circumstances I hold that the matter was urgent and that it was in the interests of justice that leave be granted to the applicant to approach this Court directly.

The merits

[37] The applicant approached this Court for the relief that it sought on the basis that, although it had a constitutional and statutory obligation to hold the forthcoming local government election in October this year, it had formed the view that it would not be able to hold a constitutionally compliant election in October, but would be able to do so in February next year. It, therefore, sought an order that declared that it could hold the forthcoming local government election outside the 90 day period referred to in section 159 of the Constitution and section 24(2) of the Municipal Structures Act and an order that it hold that election before 28 February 2022.

[38] The applicant asked that, if we were not prepared to grant it the primary relief that it sought, we should grant it alternative relief. The alternative relief it sought was an order:

- (a) declaring that its failure to hold the forthcoming local government election within the 90 day period referred to in section 159 of the Constitution and section 24(2) of the Municipal Structures Act is unconstitutional and invalid;
- (b) the declaration of invalidity referred to in (a) is suspended and the applicant's duty to hold the forthcoming local government election within the 90 day period is suspended until 28 February 2022.

[39] Both under its primary remedy and its alternative remedy the applicant also asked this Court to grant three further orders. The one was an order declaring that the

current municipal councils were competent to continue to function until the new municipal councils were declared elected. The applicant contended that this would be in terms of section 159(3) of the Constitution and section 26(1) of the Municipal Structures Act. Another prayer was for an order authorising the Minister of COGTA to withdraw the proclamation she issued on 3 August 2021 fixing the date of 27 October 2021 as the date for the forthcoming local government election. The third was a supervisory order to enable this Court to supervise the applicant's preparations for the election in February 2022. To that end the applicant also sought an order that would compel it to lodge regular reports with this Court on the progress of its preparations.

[40] Before I proceed, it is necessary to refer to the constitutional and statutory context within which this matter had to be determined. As already indicated, this matter concerned this country's citizens' right to vote in a free and fair election for municipal councils. It is a right which the majority of the people of this country holds dear because for a long time it was denied to them. It is a right that the citizens get to exercise twice every five years in this country – once in respect of the national and provincial elections and once in respect of the local government election. That is, of course, unless there are by-elections or one or other election is challenged in court and it has to be re-run. The right to vote is a right that gives every citizen the opportunity to choose a government of his or her choice, be it a national, provincial or local government.

[41] Section 1 of the Constitution provides that:

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

...

- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”

[42] Section 2 then reads:

“Supremacy of the Constitution

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

[43] Section 7(1) of our Constitution makes it clear that the Bill of Rights in Chapter 2 of the Constitution is a “cornerstone of democracy in South Africa”. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom”. Section 7(2) reads:

“The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

[44] Section 12(2) of the Constitution provides that “everyone has the right to bodily and psychological integrity”.

[45] Section 27(1)(a) of the Constitution provides that—

“[e]very one has the right to have access to—

(a) health care services, including reproductive health care.”

[46] As already indicated earlier, one of the values on which our state is founded is the holding of regular elections. Furthermore, our Constitution does not just confer upon every citizen the right to vote which it does in section 19(3)(a) but it also confers upon every citizen in section 19(2) “the right to free, fair and regular elections for any legislative body established in terms of the Constitution”.

[47] Section 24 of the Municipal Structures Act also deals with the terms of Municipal Councils. It reads:

- “(1) The term of municipal councils is five years, calculated from the day following the date set for the previous election of all municipal councils in terms of subsection (2).
- (2) Whenever necessary, the Minister, after consulting the Electoral 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. The notice may be published either before or after the term of municipal councils expires in terms of subsection (1).”

[48] Section 26 of the same Act reads:

- “(1) A person—
 - (a) is elected as a member of a municipal council for a period ending when the next council is declared elected; or
 - (b) is appointed as a representative of a local council to a district council for a period ending when the next local council is declared elected.
- (2) A person assumes office as a councillor when declared elected or when appointed, as the case may be.”

[49] In *August* this Court had this to say about the importance of the right to vote:

“[17] The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.”⁹

[50] Indeed, in *August* this Court went on to say:

“[17] In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity.”¹⁰

⁹ *August v Electoral Commission* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) at para 17.

¹⁰ *Id.*

[51] In *New National Party*, this Court, through Yacoob J, had this to say about the right to vote:

“[12] The right to vote is of course indispensable to, and empty without, the right to free and fair elections; the latter gives content and meaning to the former.”¹¹

[52] The applicant pointed out that as an organ of state it also had the constitutional obligation under section 7 of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. Those rights include the right to bodily and psychological integrity contained in section 12 of the Constitution as well as the right in section 27 to have access to healthcare services.

[53] The applicant contends that not only has it got an obligation to conduct regular and free and fair elections but that it also has an obligation to ensure that the elections are safe. In this regard it suggested that it could or should not conduct an election that would expose voters to a serious risk of transmission of the Covid-19 virus which could lead to hospitalisation and possible death. It said that the right to life also had to be protected. The applicant also contended that it had a negative obligation not to impair or infringe the right to life, the right to physical and psychological integrity and the right of access to health care services. What the applicant said was that if it conducted the election in October 2021, it would be unduly exposing voters to the risks associated with Covid-19 including possible death after contracting Covid-19. It also sought assistance from this Court so that it could conduct the forthcoming local government election in February 2022 when it believed it would be safer to run the election.

[54] Counsel for the applicant submitted that it would be impossible for the applicant to hold a constitutionally compliant election in October 2021. He invoked the common law principle of *lex non cogit ad impossibilia* (the law does not compel the performance

¹¹ *New National Party of South Africa v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at para 12.

of what is impossible). He referred to the case of *Barkhuizen*¹² where this Court said through Ngcobo J:

“[75] For instance, common law does not require people to do that which is impossible. This principle is expressed in the maxim *lex non cogit ad impossibilia* – no one should be compelled to perform or comply with that which is impossible. This maxim derives from the principles of justice and equity which underlie the common law. Over the years the maxim has become entrenched in our law and has been applied to avoid time bar provisions in statutes.”¹³

Counsel submitted that the principle permeates many branches of our law including the law of contract. He also referred to *Rex v Hargovan*¹⁴ where Greenberg JA said:

“I think that the maxim, *lex non cogit ad impossibilia* would apply. . . . The cases on the point, in the main at any rate, deal with civil and not criminal obligations but I see no difference in principle between the two classes, and in *Halsbury* (Vol. 31, 2nd ed., sec. 753) it is stated generally that the performance of a statutory obligation is excused if it is rendered impossible by the operation of a subsequently enacted statute.”¹⁵

He also drew our attention to the case of *Montsisi*¹⁶ where the Appellate Division said about this principle:

“Under certain circumstances compliance with the provisions of statutes which prescribe how something is to be done will be excused. Thus, in accordance with the maxim of law *lex non cogit ad impossibilia*, if it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like an act of God or the King’s enemies, these circumstances will be taken as a valid excuse.”¹⁷

¹² *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

¹³ *Id* at para 75.

¹⁴ *Rex v Hargovan* 1948 (1) SA 764 (A).

¹⁵ *Id* at 770.

¹⁶ *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A).

¹⁷ *Id* at 635-6.

[55] I do not think that the principle of *lex non cogit ad impossibilia* finds application in this case. There are no practical steps or measures that the applicant is required to take in regard to the election, that the applicant cannot practically and objectively take. The principle *lex non cogit ad impossibilia* applies to a situation where someone is obliged to take a practical step and it is objectively impossible to take such step. As I see it, the applicant is simply saying that the election that it can conduct in October 2021 will not in its view be one that will be free and fair because of the threat posed by the Covid-19 pandemic. Whether an election is free and fair is a value judgment one makes in the light of certain circumstances.¹⁸ Accordingly, the applicant's reliance on this principle is misplaced. The applicant made it clear that it would not be entitled to its primary remedy if this Court rejected its reliance on the *lex non cogit ad impossibilia* principle. This submission was correct. I, therefore, turn to consider the applicant's alternative relief.

[56] The applicant's alternative relief contemplated that the applicant would not hold the local government election by the expiry of the 90 day period referred to in section 159(2) of the Constitution which, of course, would be a breach of its constitutional and statutory obligations. Given that the applicant's failure to hold the election within the 90 day period would be unconstitutional, the applicant asked under its alternative relief that this Court should declare its failure to be inconsistent with the Constitution in terms of section 172 of the Constitution, suspend that declaration to the extent of such inconsistency until 28 February 2022 to allow the applicant to correct the constitutional defect and hold the election by 28 February 2022. This relief would enable the applicant to hold the election in February 2022 instead of 27 October 2021.

[57] The applicant's basis for its failure to hold election in October 2021 would have been that it wanted to avoid holding the election at that time in order not to infringe the voters' constitutional rights to life, bodily and psychological integrity and to access to

¹⁸ *Kham* above n 5 at para 34.

health care services which it feared it would infringe if it held the election in October 2021 as a result of the Covid-19 pandemic. The applicant wholly relied upon the conclusions reached in the Moseneke Inquiry Report and the reasoning in that Report. The Moseneke Inquiry concluded that, if held in October 2021, the forthcoming local government election would not be held in a free and fair manner because of the Covid-19 pandemic. The Report concluded that the election was likely to be free and fair if held in February 2022. This was based on the belief that by then South Africa would have achieved herd immunity or that at least more South Africans would have been vaccinated by then. It is, therefore, necessary to turn to that Report to see whether it provided a proper justification for this conclusion and the conclusion that the election should be postponed from October 2021 to February 2022.

[58] In conducting its investigations the Moseneke Inquiry had regard to the evidence of various stakeholders including submissions by various political parties and nine medical experts or scientists. It also took into account international experience in the holding of elections during the era of Covid-19. It considered the Constitution, the relevant legislation and various other sources of information.

[59] Under the heading: “Global overview of elections held or postponed during Covid-19”, the Report reflects, among others, the following:

- (a) In the period from 21 February 2020 to 21 June 2021 at least 78 countries postponed elections due to Covid-19 and at least 41 of those countries postponed national elections and referendums. At least 55 of the countries that had initially postponed elections subsequently held their elections. In the same period, 125 countries held elections notwithstanding Covid-19 concerns. At least 104 of these countries held national elections and referendums.
- (b) While many countries which held elections during Covid-19 experienced a decline in voter turnout, in many cases the decline was small and in some countries there was even an increase in voter turnout.

- (c) Since 21 February 2020 to 21 June 2021 at least 14 African countries and territories on the African continent decided to postpone national and sub-national elections due to the Covid-19 pandemic and at least 28 countries decided to proceed with elections despite the Covid-19 pandemic, some of which had originally postponed elections due to the Covid-19 pandemic.
- (d) At least 28 countries on the African continent decided to hold national elections or sub-national elections. These include Cameroon, Guinea, Mali, Benin, Burundi, Nigeria, Malawi, Tunisia, Egypt, Uganda, Namibia, Ghana, Kenya, Algeria, Ethiopia and others. 21 of these 28 countries held national elections. Information was not available on whether these elections had led to an increase in Covid-19 infections.
- (e) It appears that in countries where there was an observance of Covid-19 protocols during elections under Covid-19 conditions, there were no spikes in Covid-19 infections whereas in countries where there was no observance of Covid-19 protocols there were spikes in Covid-19 infections.
- (f) In France, although the voter turnout was low in the election that was held under Covid-19 in June 2021, confirmed new Covid-19 cases were low.
- (g) In England the number of new Covid-19 cases arising out of an election that was held under special conditions with altered voting procedures to mitigate the transmission of the virus was low.
- (h) In Brazil, there was a serious increase in infections after an election that was held in November 2020 but it reported that the election campaigns had been conducted in disregard of Covid-19 protocols.
- (i) In the United States there was a serious increase in the virus transmission arising during the Presidential election in November 2020 mainly because the Republicans held large election rallies in disregard of Covid-19 protocols.
- (j) In India there was also a huge increase in Covid-19 infections during their April 2021 State Assembly elections where large election rallies were

held in breach of Covid-19 protocols. There was also a huge increase in hospitalisations and deaths.

[60] Based on the above it would seem to me that, generally speaking, where Covid-19 protocols were observed during elections there were no spikes in Covid-19 infections.

[61] The Moseneke Inquiry also had regard to submissions made to it by two election monitoring bodies. The one was the Electoral Institute for Sustainable Democracy in Africa (EISA). The other was the Institute of Election Management Services in Africa (EIMSA). They both made written and oral submissions to the Moseneke Inquiry. The Moseneke Inquiry Report acknowledges “[t]heir expertise and experience in the electoral field”. The Report records in paragraph 114 that EISA said that, while experiences of holding elections during the pandemic had varied from one country to another, “available data broadly indicates that with sufficient precautions and mitigation measures in place, elections can take place without unduly and negatively impacting on either health or democratic rights of citizens.” The Report reflects that EISA said that from all available results in various countries, no “post-campaign or post-election ‘surges’ or spikes in infection rates were reported”.¹⁹

[62] EIMSA expressed the view that the local government election should be postponed to between March and May 2022 as that would be the most appropriate time for holding the local government election. From the Report it is not clear why EIMSA thought that March to May would be the most appropriate time for the holding of the local government election as opposed to October 2021.

[63] Within the country the applicant postponed by-elections under the Covid-19 pandemic except when the country was on Alert Level 1. The Report also reflects that the Moseneke Inquiry considered submissions from three health organisations. These

¹⁹ Moseneke Inquiry Report at para 114.

were Right to Care, Health Justice Initiative and People’s Health Movement of South Africa. The Report reflects that Right to Care said that by week 4 of October 2021 there was a “potential for cases to be low in the October period, assuming the onset of the third wave in each province within the next month”.²⁰ The Report reflects that Right to Care expressed the view that it was only in week 4 of October 2021 that no high cases were predicted in all provinces. Health Justice Initiative and People’s Health Movement South Africa stated that their joint written submission should not be construed as being for or against holding the local government election in October 2021. They did not express any view on this issue.

[64] Under a heading relating to whether the risk to life would be less in March 2022 than in October 2021, the Report reflects that “if the third wave is likely to be over by the end of August or September 2021, there may be a period of about two to three months where there will be a low number of infections”.²¹ Prof Abdool Karim had also expressed the view that the third wave would be over by the end of August 2021 and that in October the infections would be likely to be very low. He said, that when he said that the rate of infections would be low in October, he was talking about between 1000 and 2000 infections per day.

[65] It would appear that Prof Silal’s predictions were along the same lines as well. The Report reflects that Prof Silal said that the fourth wave may well be over by the beginning of March 2022 and that “[i]n that sense, she states that the country may be in the same position in March 2022 as it would be in October 2021. However, she went on to say that we may be in a better position in March 2022, because more people would have been vaccinated and ‘even one more vaccine is . . . a wonderful bit of extra protection’”.²²

[66] Later the Report reflects this paragraph on Prof Silal and Dr Moultrie:

²⁰ Id at para 159.

²¹ Id at para 176.

²² Id at para 177.

“Prof Silal and Dr Moultrie were unable to say whether we are likely to be in a fourth wave in October 2021. Prof Silal is of the view that, on any scenario, the country will be better off, and there will be less infections, hospitalisations and lower mortality around March 2022 than in October 2021, because more people of voting age would have been vaccinated. Put otherwise, more lives are likely to be saved in March 2022 than in October 2021.”²³

[67] Dr Miot is recorded as having said in her concluding remarks that the country would be better protected in March 2022 because more people would have been vaccinated.²⁴

[68] The Report reflects that the Ministerial Advisory Committee, which is a non-statutory advisory body on the Covid-19 pandemic that consists of 21 medical experts with different skills and expertise, said that it was “not possible to predict what the pandemic will look like in October in South Africa let alone the provinces and districts”.²⁵ Prof Silal said that, if the third wave is likely to be over by the end of August or September 2021 there could be a period of about two to three months where there would be a low number of infections. However, the Report also reflects that the Health Department said that if the election was held in October 2021, there would be a high likelihood of a high number of delta infections, hospitalisation and deaths.

[69] The Report reflects that Dr Buthelezi, the Director-General of the Department of Health, said that it was difficult to predict the likely state of the pandemic in October 2021 for certain reasons. However, he was of the view that the election should not be held in October. He expressed the view that, if the election was held in October there was a high likelihood of a high number of delta infections, hospitalisations and death. However, he did not say that this would be the case even if there was observance of Covid-19 protocols.

²³ Id at para 186.

²⁴ Id at para 179.

²⁵ Id at para 169.

[70] The Report also reflects that Dr Miot expressed the view that, considering the current pace of vaccinations, we would not achieve community immunity by the end of February 2022.²⁶ This means that Dr Miot’s view was that by the end of February 2022 the population would not have reached community immunity. This greatly undermines the view that community immunity is what would make a difference in February 2022. Prof Silal was unable to predict when the country would achieve 67% vaccination of the population which, is a reference to community immunity. That means that she, too, could not say that community immunity would have been achieved by February 2022. Her view on this is also inconsistent with the reliance by the Report on community immunity to justify why the election should be held in February 2022 and not in October 2021. Prof Silal said that when community immunity would be achieved would depend on the supply of vaccines.

[71] The Moseneke Inquiry Report said that in determining whether the local government election should be held or deferred it “chose to heed the science, and, to that end, solicited the assistance of no less than nine leading medical and public health experts in South Africa”. It said that those were Dr Aslam Dasoo, Dr Fareed Abdullah, Prof Shabir Madhi, Dr Sandile Buthelezi (the Director-General of the Health Department), Prof Salim Abdool Karim, Dr Jacqui Miot, Prof Sheetal Silal from the Advisory Committee (Health Department), Dr Harry Moultrie for Communicable Diseases and Prof Susan Goldstein.²⁷

[72] There are five paragraphs in the Moseneke Inquiry Report in which the Inquiry said it had fairly summarised the science that was to guide it. They read as follows:

“[287] There is difference of opinion among the experts on when it would be less risky, and safer, to hold elections between October 2021, and later around February-March 2022. Prof Abdool Karim presented that if the elections were

²⁶ Id at para 175.

²⁷ Moseneke Inquiry Report at para 200.

delayed by three months, South Africa will be in low transmission, but will be in the ‘very early stages’ of a fourth wave. Relying on a useful graph, he displayed projections of likely virus infections during October 2021, then during a three-month delay and a six-month delay. Based on the projections, Prof Abdool Karim maintained that the best time to hold local government elections ‘is now’, meaning October 2021, rather than three months later.

[288] Prof Abdool Karim is of the view that ‘we are likely to see several new variants’ by March 2022. He believes that at some stage there is going to be a variant that escapes immunity and, once that variant arrives, everyone who has been vaccinated will be back to ‘square one’. Prof Abdool Karim said he had no firm view about whether elections should be held in October 2021 or at another time. He only presents the data and says that support can be found in the data for either of the options.

[289] Prof Madhi pointed out that it is difficult to predict the trajectory of the virus, particularly for October 2021. He said the major risk lies in the period leading to voting day. Electioneering, especially large outdoor gatherings, and any indoor gatherings of more than 20 people will have a major impact on the resurgence of infections. Based on past patterns with waves 1 and 2, it may be that October 2021 is a period of relative calm, with a resurgence in December 2021 onwards.

[290] Dr Abdullah is of the view that continuing with current plans to hold elections in October 2021 puts thousands of lives at risk. The country or parts of it will remain at different stages of a wave for the foreseeable future. He recommends that the elections be postponed until the mortality rate declines. The country must reach a stage where there is a flattening of the hospitalisation and mortality curve. Conducting elections in February-March 2022 will certainly save more lives than in October 2021, because of the higher levels of vaccination and related immunity.

[291] It will be remembered that in their submissions, Prof Silal, Dr Miot and Dr Moultrie expressed their personal opinions – not representing the Advisory Committee or the Modelling Consortium – that the more people that are vaccinated at the time of holding elections the more lives will be saved.

They took the view that there will be many more people vaccinated in February-March 2022, and expected less hospitalisation and mortality. This expert view, it will be remembered, accords with that of Dr Buthelezi of the Health Department who warned against election gatherings and campaigning during October 2021, and that community immunity through vaccination will have been reached by February 2022 when approximately 40 million of the population would have been vaccinated.

[292] The foregoing paragraphs are a fair summation of the science that ought to guide us. Whilst the delta variant may have subsided somewhat during October 2021, the risk to our population of infection, serious illness and the consequential hospitalisation and death will remain remarkably high. Our public health care system is inadequate for the health demands spawned by the pandemic. Our death or mortality rate appears to be nearly three times more than the official statistics of death. That means the threat to life posed by the pandemic is much higher than meets the eye. All experts tell us that by holding elections in October 2021 or in February-March 2022 there is a potential risk of infection or of even a fourth wave. The real difference will be made by community immunity through vaccination. Even if community immunity, at 67 per cent of our population, is not reached in February-March 2022, there will be far less risk of hospitalisation and death than there will be in October 2021.”²⁸

[73] Having regard to all of the above I am unable to share the conclusion reached by the Moseneke Inquiry that election should not be held in October 2021 because of the Covid-19 pandemic. There is no evidence that, if the Lockdown Regulations prohibit large gatherings and there is strict observance of the Covid-19 protocols between now and voting day, we would have a spike in infections, particularly when, according to Prof Abdool Karim, the infections would be low in October. I am of the opinion that, if the election that was scheduled for October 2021 was postponed, that should be based on a strong and clear case. No strong and clear case has been shown in this matter. In my view, if the number of infections will be as low as 1000 to 2000 in October, as

²⁸ Id at paras 287-92.

Prof Abdool Karim predicts, the country will be at Alert Level 1 which is the same Alert Level at which the applicant, on its own version, conducted by-elections in 2020 and early in 2021.

[74] Even if the daily infections are not as low as 1000 to 2000 but about there are about 5000, I believe that that would still place us at either Alert Level 1 or Alert Level 2. On either scenario I think we should go ahead with the election. Indeed, even if we were to be at Alert Level 3 in October, I believe that we should go ahead with the election in October 2021 unless there is another reason other than the Covid-19 pandemic justifying a postponement of the election. Scientists tell us that Covid-19, with different variants that keep emerging, is here to stay and we should devise ways of living with it. If that is true, the position is that we cannot postpone elections indefinitely or for long periods but we must find ways in which we can hold our elections – which are so important for our democracy – under Covid-19 conditions. In my view, Alert Levels 1 to 3 do not present problems that the applicant cannot manage.

[75] 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.

[76] Accordingly, I would have dismissed the applicant's application insofar as it sought a postponement of the election from October 2021 to February 2022 on the ground of its fear that to hold the election in October would infringe the voters' rights

to life, bodily and psychological integrity and to have access to health care services. However, I do need to consider the effect of the applicant's failure to hold a voter registration weekend on the freeness and fairness of the election planned for October to determine whether it would provide a justification for the effective postponement of the election.

Voter registration weekend

[77] It was clear that the applicant's plan was that, if the election took place in October, they would take place without it having held a single voter registration weekend. The question that arises is: what would be the effect of this omission on the freeness and fairness of the election?

[78] A registration weekend is a weekend during which citizens who are eligible to vote but are not registered are encouraged to go and register to vote and those who are registered to vote are encouraged to go and check whether they are correctly registered so that, if they are not correctly registered, necessary changes can be effected to their registration. The applicant has explained that, in the case of a local government election, a voter registration weekend provides a registered voter with an important opportunity to check the voters' roll to see whether he or she is registered in the correct district and ward. This is important in the case of a local government election because in such an election a voter is only allowed to vote in the ward and district where he or she is ordinarily resident. If at a certain stage a voter was registered in Ward A in District 1 and later moved to Ward B in District 2, he or she needs to get himself or herself registered in Ward B in District 2 before he or she can be allowed to vote in Ward B in District 2. A voter registration weekend gives such a voter an opportunity to update his or her registration.

[79] The applicant had stated that it would have been for the first time in its 27 year history hosting, that a national election would be held without the applicant having held even a single registration weekend. The applicant says over the past 27 years it has always held one or two voter registration weekends before any national election.

[80] The Chairperson of the applicant states in the applicant's founding affidavit that, based on previous experience the applicant anticipates that, if it held a single voter registration weekend ahead of the election – I assume whether the election is in October or February or any other time – between 400 000 and 600 000 new voters would be registered. He says that those figures did not include registered voters who would update their registration details. This category of people would include registered voters who would have moved from the one district or ward to another since the local government election of August 2016 or even the national and provincial government elections of 2019. The Chairperson pointed out that, according to the national population register, there were 40 263 709 citizens who were eligible to vote but, of those citizens, only 25 741 615 are currently registered to vote. That meant that there were about 15 million or so citizens who should have registered but were currently not registered. Obviously, some of these would be people who were not interested in getting registered. However, there would have been many who did wish to register but had, for one reason or another, not registered. Some might not have needed any encouragement to vote but there would have been some who would have got themselves registered to vote if they were encouraged to do so or if they got an opportunity by way of a registration weekend to do so.

[81] The applicant had initially intended to have a registration weekend on the weekend of 17 and 18 July 2021 but, for one reason or another, this did not happen. The applicant then scheduled the weekend of 31 July and 1 August 2021 as the voter registration weekend. However, that plan was cancelled. The applicant says that the plan to have that weekend as a registration weekend was cancelled because various parts of the country were experiencing the peak of the third wave of Covid-19. He points out that the country was on adjusted Alert Level 4 from 28 June 2021 to 25 July 2021, but was placed on adjusted Alert Level 3 on the night of 26 July 2021.

[82] The applicant's Chairperson then makes the point that the upshot of the fact that no registration weekend was held and the election would take place without the holding

of a registration weekend if it takes place in October, is that the election will take place without a significant portion of the eligible voting population registered to vote.

[83] The applicant's Chairperson also points out that, once the Minister of COGTA had published her notice calling for and setting the date for the election as 27 October 2021, legally no further registration of voters could take place. The Minister published her notice on 3 August 2021. The applicant states that, because there has been no voter registration weekend, "political parties agree that the local government elections in October 2021 will not be free and fair".

[84] The applicant's Chairperson makes the point that, if the election were to have gone ahead in October without a registration weekend, this would disenfranchise about 15 million eligible but not registered voters (which is 36% of the eligible voters). In addition to that point, there is also the fact that, as a result of a ward delimitation process, 1 123 voting district boundaries were bisected by the 2021 ward boundaries and needed to be geographically aligned to the 2021 wards before the applicant could undertake voter registration ahead of the forthcoming local government election. Two features of the delimitation process were that there were 76 more wards now than there were in the 2016 local government election and the number of voting districts has increased from 22 925 to 23 151. It seems fair to infer that these changes meant that there were many people who had a need for a voter registration weekend so that they could go and register or update their registration details. The absence of a voter registration weekend meant that they were disenfranchised and would not be able to vote if the election took place in October 2021.

[85] The applicant's Chairperson also referred to a voter registration weekend that was held in 2016 during which he says the applicant interacted with 3 581 500 potential voters. He says that 691 524 of those potential voters registered as voters for the first time during that voter registration weekend. He said 1 166 000 were re-registrations in different voting districts (that is people whose addresses had changed) and 1 723 000 were re-registrations in the same voting district (that is people who, after inspecting the

voters' roll, confirmed their details to be correct). From this, one can tell that a voter registration weekend attracts large numbers of people who either register for the first time as voters or who re-register because their addresses have changed or who confirm the correctness of their registration details on the voters' roll.

[86] The ANC supports the application for a postponement of the forthcoming local government election. Its Deputy Secretary General, Ms Yasmin Duarte said that election should only be postponed if they would not be free and fair. Two of the matters she raised that she said would render the election not free and fair if held in October 2021 were the absence of a voter registration weekend and the fact that the applicant's election timetable had, in her view, given political parties inadequate time to submit their lists of candidates. She said that, contrary to a practice that had been established by the applicant over many years of ensuring that there were two or so voter registration weekends before the proclamation of an election date (which effectively closes the door to further registrations), this time around the applicant would hold the forthcoming election in October 2021 without even one voter registration weekend. She accepted that initially the applicant had planned to hold at least one voter registration weekend but that that voter registration weekend was ultimately cancelled.

[87] Ms Duarte says that:

“Voter registration is crucial to an election. It is an indispensable step in the compilation of a voters roll, and, it is only after being registered on the roll that a voter can assert their right to vote. This is made clear by the laws that regulate elections, particularly at local government level, where a voter has to be registered in the ward where they live.”

[88] She correctly referred to section 7(1) of the MEA which states that “a person may vote in an election only if registered as a voter on the certified segment of the voters' roll for a voting district which falls within the municipality.” She went on to say that “[a] ‘voter’ is defined by the Municipal Electoral Act as ‘a person whose name

appears on the voters' roll'. So quite clearly, registration is a necessary conduit for the exercise of the right to vote.”

[89] She pointed out later in her affidavit that the ANC's experience was that “voter registration weekends have been the most successful method used by the IEC to enable the vast majority of citizens to register to vote”. She said that the fact that there were about 40 million eligible voters and only 25 million of them were registered meant that, if the forthcoming local government elections were proceeded with in October without a voter registration weekend having been held, 14 million potential voters would have been disenfranchised. She stated that this was 36% of the eligible voters.

[90] With regard to the time that political parties were given to submit the list of their candidates, Ms Duarte complained that the applicant's election timetable – which was rejected by all political parties on 3 August 2021 – gave them too short a timeframe. She said the ANC normally took, at a minimum, two months to do all they considered necessary to produce such a list and this time the applicant had given the political parties only three weeks.

[91] Ms Duarte also referred to the judgment of this court in *Kham* and said that in that case this Court held that the accuracy of voter registration information in respect of local government elections was essential for a free and fair election. She said that, without a voter registration weekend, a voter has to directly approach the municipal electoral office at one venue per municipality and during office hours before the proclamation of the election. She expressed the view that this was not “an adequate opportunity afforded to employed or working class voters who often live many kilometres away from municipal head offices”.

[92] Ms Duarte referred specifically to two paragraphs in the judgment of this Court in *Kham* with regard to the importance of voter information and ensuring that the registration information of every voter on the voters' roll is correct. In those passages this Court said:

“[61] Ensuring that voters are correctly registered in the voting district where they are ordinarily resident is of particular importance in the context of municipal elections because they are conducted in the first instance on a ward basis.

[62] All metropolitan municipalities and local authorities are required to be delimited in wards. The reason for ward representation in municipalities is to bring the politicians dealing with issues that most directly impact upon ordinary citizens closer to home. Instead of having to deal with an amorphous political party, citizens in a municipality have a local representative, who should be available to them, irrespective of political affiliation, to address their local problems.”²⁹

[93] Ms Duarte stated that the applicant reported to the NPLC on 27 May 2021 that 290 new voting districts had been created by a change in the municipal boundaries effected by the Municipal Demarcation Board and a further 1 274 voting districts had been impacted by this change in ward boundaries. Ms Duarte says that this means that there are thousands of eligible voters who would have had the opportunity, through a voter registration weekend, to register in the current wards and voting districts in order for their votes to count but “those voters now stand the risk of being disenfranchised, as was the case in *Kham*, because they would seek to cast their vote in the incorrect voting district”.

[94] Ms Duarte added:

“52.2. Voter registration weekends have proven to be immensely successful in drawing new voters in. No registration weekends have taken place for the upcoming elections.

52.3. Any person desiring to vote is unable to because the Minister has already proclaimed the election date. This means over 14 million South Africans have been disenfranchised.

²⁹ *Kham* above n 5 at paras 61-2.

- 52.4. Any voter whose place of ordinary residence has changed over the years may be denied the vote as they have been deprived of the opportunity to change their voting district.
53. In view of all of the above, the position of the ANC is that, should the Commission fail in its application, the upcoming elections would not be free and fair.”

[95] There may be eligible voters who may have intended to register during a voter registration weekend which they legitimately expected the applicant would hold in due course before the proclamation of the election date as it has done since 1994 but who were prevented from registering when the applicant cancelled the voter registration weekend that had been planned for 31 July and 1 August 2021. Three days thereafter, on 3 August 2021, the Minister closed the door for registration by proclaiming the election date. In this regard it must be remembered that by law no voters may be registered once the Minister has proclaimed the election date. This applies also to registered voters who may have intended to update their registration details during a voter registration weekend but this opportunity was taken away when the applicant cancelled the voter registration weekend at the end of July/beginning of August and then a few days thereafter the Minister proclaimed the election date and they could no longer correct their registration details.

[96] What makes this situation worse is that there is no evidence put up by the applicant to the effect that a warning or notice was given to the public or eligible voters that there was to be no voter registration weekend before the proclamation of the election date by the Minister. If eligible voters and registered voters had been warned in advance and given a reasonable opportunity to register or correct their registration details before the Minister proclaimed the election date, many eligible voters and registered voters may have used that opportunity to register or to correct their registration details so that they would be able to exercise their right to vote during the forthcoming election. It could well be that millions of eligible voters have been disenfranchised because their opportunity to register during a voter registration weekend was abruptly taken away from them without any warning and they were not

allowed any real opportunity to go and register in municipal electrical offices or to correct their registration details at such offices before the Minister proclaimed the election date.

[97] The DA was also concerned about the fact that the applicant was proceeding on the basis that, if the election was to be in October, it would take place without a voter registration weekend having been held. The deponent to the DA's affidavit, Mr Horn, says:

“The DA accepts that – unless this Court intervenes – the effect of s6(1A) is that names cannot be added to the voters roll for an October election. The DA also accepts that *failing to allow voters a reasonable opportunity to register would constitute a limitation of the right to vote*. While voters were able to register online, the DA accepts that many South Africans traditionally register in person, and that many are unable to register online.”

[98] The DA suggested that the proclamation of the election date by the Minister without giving the voters a reasonable opportunity to register for the election in October was unconstitutional and invalid and asks this Court to declare it and then to suspend the operation of section 6(1A) in the way that this Court suspended section 16 in *Mhlophe*. The DA submitted that this Court should then order the applicant to hold a registration weekend either at the end of August or during the weekend of 17 September 2021 which the applicant had planned for anyway if this Court granted its application to hold an election in February 2022. The DA submitted that, if this Court did that, the applicant would still have enough time to do all that it needed to do to ensure that the election was held in October. The DA pointed out that its attorneys wrote to the applicant before this application was launched and made this proposal but that the applicant rejected the proposal by way of a letter dated 6 August 2021.

[99] In its replying affidavit the applicant's response to the DA's proposal is in effect that, while holding a registration weekend on its own may be possible, adding to the voters' roll the names of the voters who would have registered during the voter

registration weekend would throw the election timetable in disarray and would simply not work when one has regard to the time left before the election date and all the work that the applicant must still do if it is to hold the election on 27 October 2021. The applicant suggests that the DA's complaint about the absence of the registration weekend shows that the election, if held in October 2021, will not be constitutionally compliant and that supports the proposition that the election should be postponed.

[100] I took the view that, when one has regard to the applicant's election timetable for October 2021, it was clear that it could not accommodate a voter registration weekend and thereafter allow the applicant to do all that it needed to do in order to be able to run the election in October.

[101] If the applicant were to hold the forthcoming local government election without having held a voter registration weekend, it would have disenfranchised a significant portion of the citizens who are eligible to register to vote but did not register before the election date was proclaimed because they legitimately and reasonably believed that the applicant would hold a registration weekend before the Minister could proclaim the election date. I accept that eligible voters and registered voters were at all times, prior to the Minister proclaiming the election date, free to visit the municipal electoral offices and register to vote or update their registration details in which case they would have been entitled to vote in the forthcoming local government election. However, I take the view that there would be many who would have relied on the well-established practice of the applicant of ensuring that there was at least one voter registration weekend before a date for a national election was proclaimed which would give thousands of eligible voters a chance to register to vote and registered voters a chance to update their registration details. By not holding a voter registration weekend or allowing the proclamation of the election date by the Minister without a voter registration weekend having been held, the applicant has denied them the opportunity to register to vote in the forthcoming election.

[102] I can find no valid reason why, if the applicant could not hold a voter registration weekend, it did not at least warn the potential voters and registered voters in advance that it would not hold a voter registration weekend and give those who wanted to register or update their details a reasonable opportunity to do so before the Minister could proclaim the election date. I, accordingly, concluded that, if the local government election went ahead in October without a voter registration weekend or at least without the applicant affording eligible and registered voters a reasonable opportunity to register or to update their registration details, the election either would not be free and fair or there would be a likelihood that it would not be free and fair.

[103] The next question that arises is: what should a court do if it is approached before an election is held (and, therefore, within the 90 day period) and asked to conclude that the election will not be free and fair³⁰ or that a postponement of the election is necessary to ensure a free and fair election or that it will not be reasonably possible to conduct a free and fair election on the voting day and it so concludes? I would have preferred to make an order that would have enabled the applicant to either hold a voter registration weekend or that would have required the applicant to publicly announce that it did not intend to hold a voter registration weekend and to afford the voters a reasonable opportunity to go to municipal electoral offices to register to vote or to update their registration details. I would have preferred to make such an order and allow the election to still proceed in October. However, I concluded that that route was not available because the applicant's Chairperson said in the applicant's replying affidavit that holding a voter registration weekend within the already tight election timetable that the applicant had put up and still hold the election in October would be "unworkable". The applicant's Chairperson did not say that it would be difficult. He said it would be "unworkable". The applicant has been running elections for 27 years in this country and one should defer to it when it says introducing a certain measure in the election timetable would be unworkable.

³⁰ Whenever in this judgment reference is made to an election that will not be free and fair or would not be free and fair that must be taken to include a situation where it may not or would not be reasonably possible to conduct a free and fair election on voting day or a situation where a postponement is necessary to ensure a free and fair election.

[104] In this case we do not need to reach the conclusion that the election would not be free and fair. It is sufficient that we be satisfied that a postponement is necessary to ensure a free and fair election or that it will not or would not be reasonably possible to conduct a free and fair election on the voting day. Why? Because that is the standard used in the Electoral Act to decide or to determine whether an election should be postponed or not. I deal with this issue in greater detail later in this judgment.

[105] What then? It seems to me that this question raises the issue of whether this Court has power to grant the alternative relief sought by the applicant. The effect of such an order would be to allow the local government election to be held outside of the 90 day period.

The power of the Court to postpone the forthcoming local government election

[106] The MEC for Local Government, Western Cape, the DA, CASAC, FUL and a number of other amici and intervening parties contended that this Court has no power to grant the order sought by the applicant – whether as the primary remedy or alternative remedy – because such an order would postpone the election beyond the prescribed 90 day period. They submitted that such an order would amount to this Court amending the Constitution. The question that was put to a number of Counsel who presented this argument was whether they accepted that the Court has the power to order the applicant to re-run an election outside of the 90 day period where the Court concludes that an election that was held within the 90 day period was not free and fair. That is if the Court was approached after the expiry of the 90 day period but in respect of an election that had been held within the 90 day period. It was suggested to Counsel that in such a case the Court would have such power in order to grant an effective remedy where a litigant's fundamental rights had been infringed. Counsel were asked why, if the Court had such power when it is approached after the election has been held and the 90 day period has expired, it would not have such power if it was approached before the election was held and within the 90 day period. Counsel for the MEC, Mr Jamie SC, conceded, after reflecting on the issue, that there was no reason why the Court would not have such

power if it was satisfied that the election would not be free and fair. Counsel for FUL, Mr Gauntlett SC, also conceded that, if the Court was approached before an election happened and within the 90 day period and it was satisfied that the election that would be taking place would be a sham and, therefore, not be free and fair, the Court would have the power to order that an election be held outside the 90 day period. That, of course, would be on the basis that it would not be practicable for the election to be held within the 90 day period.

[107] In conceding that a court that is approached before the expiry of the 90 day period has the power to order that an election be held outside the 90 day period, Mr Gauntlett SC referred to the decision of this Court in *President of the Republic of South Africa v United Democratic Movement* where this Court said:

“[31] Having regard to the importance of the legislature in a democracy and the deference to which it is entitled from the other branches of government, it would not be in the interests of justice for a court to interfere with its will unless it is absolutely necessary to avoid likely irreparable harm and then only in the least intrusive manner possible with due regard to the interests of others who might be affected by the impugned legislation. Where the legislation amends the Constitution and has thus achieved the special support required by the Constitution, courts should be all the more astute not to thwart the will of the legislature save in extreme cases.”³¹

[108] What this Court made clear in this passage, as Mr Gauntlett SC correctly emphasised, is that, although a court should generally not interfere with the will of the legislature, it may interfere with the will of the legislature where “it is absolutely necessary to avoid irreparable harm and then only in the least intrusive manner possible”. In this passage this Court said “in extreme cases” courts may even thwart the will of the legislature. Obviously, those must be really extreme cases. Other Counsel who contended that the Court did not have that power did not make the concession. However, they could not provide a satisfactory explanation why a court

³¹ *President of the Republic of South Africa v United Democratic Movement (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* [2002] ZACC 34; 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC) at para 31.

that has power to order an election to be re-run after the expiry of the 90 day period if it is approached after the expiry of that period does not have the power to order an election to be held after the 90 day period if holding it within the 90 day period would result in an election that is not free and fair. Later in this judgment I set out various scenarios which show that this view is untenable.

[109] In my view, the concessions made by Mr Jamie SC and Mr Gauntlett SC were correctly made. There may be cases where it would not be practically possible for the court-ordered election to be held within the 90 day period even if the court was approached before the expiry of the 90 day period. A good example of such a scenario would be where the election was scheduled to be held a few days before the expiry of the 90 day period and the court concludes that, if held, that election will not be free and fair or that it will not be reasonably possible to conduct a free and fair election on the voting day or that a postponement is necessary to ensure a free and fair election and is asked to order that the election be held after the expiry of the 90 day period. In such a case it might not be practically possible for the election to be held within the 90 day period and the only date on which the election could be held and the election be free and fair may be a date outside of the 90 day period. In such a case the court has the power to order that the election be held after the expiry of the 90 day period.

[110] I am of the view that a court that is approached before an election is held and asked to declare that the election to be held within the 90 day period will not be free and fair or it will not be reasonably possible to conduct a free and fair election on the voting day or that a postponement is necessary to ensure a free and fair election has the power to order that the election be held on a date that falls outside the 90 day period if it is satisfied that the election that is to be held within the 90 day period will not be free and fair or that a postponement is necessary to ensure a free and fair election or that it will not be reasonably possible to conduct a free and fair election on voting day and that it would not be practical to hold a free and fair election within the 90 day period. If a court were to make such an order, it would not be amending the Constitution but would be discharging its adjudicative function and providing effective relief in circumstances

where citizens' fundamental rights to a free and fair election or to vote in a free and fair election would have been infringed or where there was a threat of the infringement of their fundamental rights.

[111] Section 38 of the Constitution confers on a court of competent jurisdiction the power to grant “appropriate relief” where it is approached by any person or entity falling within the categories listed in that section alleging that a right in the Bill of Rights has been infringed or threatened. In other words, a court may be approached for relief even before fundamental rights of citizens are infringed as long as they are threatened. One of the appropriate reliefs such a person or entity can ask the court to grant when there is a threat to their fundamental rights is an interdict. Therefore, if such a person or group of persons believe that their right to a free and fair election or their right to vote is threatened or that their rights will be infringed because of the manner in which an election will be run on a particular day, they have a right in terms of section 38 of the Constitution to approach a court of competent jurisdiction for relief. They have a right to insist on an election that complies with the Constitution. Section 172 of the Constitution allows a court dealing with a constitutional matter that falls within its power to declare as invalid any conduct that is inconsistent with the Constitution and, if it wants that constitutional breach or defect to be remedied, to suspend that declaration of invalidity “*for any period and on any conditions, to allow the competent authority to correct the defect*”. This is how section 172(1) reads:

“When deciding a constitutional matter within its power, a court—

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including—
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity *for any period and on any conditions, to allow the competent authority to correct the defect.*”
(Emphasis added.)

[112] It is quite clear from the language of section 172 that the drafters of our Constitution took the view that, where a court has found any law or conduct to be inconsistent with the Constitution and thus to constitute a breach of the Constitution, the court must provide a remedy that is just and equitable. The drafters left it to the court to decide what would be just and equitable in any particular set of circumstances.

[113] Three decisions of this Court show that the just and equitable power of the courts, including this Court, under section 172(2) is very wide. They are *Mhlope*, *Black Sash Trust*³² and *Corruption Watch*.³³ In *Mhlope* this Court used its just and equitable power under section 172(2) to suspend a statutory provision which was not under any constitutional challenge in order to avert a possible constitutional crisis. There, Mogoeng CJ, writing for the majority, had this to say:

“[132] Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy even for exceptional, complex or apparently irresolvable situations. And the operative words in this section are ‘any order that is just and equitable’. *This means that whatever considerations of justice and equity point to as the appropriate solution for a particular problem, it may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in section 172(1)(b). In this case a just and equitable order is one that would pave the way for the August elections to be held although our voters’ roll is the product of unlawful conduct. Failure to do so could indeed lead to a constitutional crisis with far-reaching implications.*”³⁴ (Emphasis added.)

[114] In *Black Sash Trust* this Court used its just and equitable power under section 172 to effectively impose on the parties a contract that had expired. This was

³² *Black Sash Trust v Minister of Social Development (Freedom Under Law Intervening)* [2018] ZACC 36; 2017 (3) SA 335 (CC); 2018 (12) BCLR 1472 (CC).

³³ *Corruption Watch NPC v President of the Republic of South Africa* [2018] ZACC 23; 2018 (2) SACR 442 (CC); 2018 (10) BCLR 1179 (CC) (*Corruption Watch*).

³⁴ *Mhlope* above n 6 at para 132.

to avert a “threatened breach of the right of millions of people to social assistance in terms of section 27(1)(c) of the Constitution”. In that case this Court said:

“[43] The primary concern here is the very real threatened breach of the right of millions of people to social assistance in terms of section 27(1)(c) of the Constitution. It is that threatened breach that triggers the just-and-equitable remedial powers the court has under section 172(1)(b)(ii) of the Constitution, not only the potential invalidity of the proposed new contract that Sassa and CPS seeks to conclude.”³⁵

I emphasise that in this passage this Court said that it was resorting to its just and equitable remedial powers to protect the rights of millions of people which were threatened with infringement. This is in line with the provisions of section 38 of the Constitution which deals with the enforcement of the rights entrenched in the Bill of Rights. It says that anyone listed in that section “has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened and the court may grant appropriate relief including a declaration of rights”.

[115] What section 38 makes clear is that in the context of a case such as the present any voter who alleges or group of voters who allege that an election that is scheduled to take place two or three or five days before the expiry of the 90day period poses a threat to their fundamental rights have a right to approach a court of competent jurisdiction before the election happens and allege – if they can show this – that the manner in which the election will be run or has been planned is such that their right to a free and fair election or their right to vote will be infringed or is likely to be infringed. They can then ask the court to declare that the election will not be free and fair or that a postponement of the election is necessary in order to ensure a free and fair election or that it will not be reasonably possible to conduct a free and fair election and that it should not take place until the constitutional defect or breach or threatened breach has been remedied so that they will be able to vote in a free and fair election. If the court is satisfied that, indeed, the election will not be free and fair or that it will not be

³⁵ *Black Sash Trust* above n 32 at para 43.

reasonably possible to conduct a free and fair election or that a postponement is necessary to ensure a free and fair election, it may grant appropriate relief. Appropriate relief includes a just and equitable order under section 172 which would entail that the election not be held as scheduled but be held on a day outside the 90 day period, if it cannot practically be held within the 90 day period and still be free and fair.

[116] In *Corruption Watch*, this Court used its just and equitable remedial power to prevent a natural consequence of a declaration of invalidity of an appointment into office or the invalidity of a contract of employment. There Madlanga J, writing for the majority, said:

“[68] There is no preordained consequence that must flow from our declarations of constitutional invalidity. In terms of section 172(1)(b) of the Constitution we may make any order that is just and equitable. The operative word ‘any’ is as wide as it sounds. Wide though this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity.”³⁶

[117] In *Glenister*, this Court said the following with regard to a court’s power to prevent constitutional violations:

“[33] In our constitutional democracy, the courts are the ultimate guardians of the Constitution. *They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so.* It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers.”³⁷ (Emphasis added)

³⁶ *Corruption Watch* above n 33 at para 68.

³⁷ *Glenister v President of the Republic of South Africa* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) at para 33.

[118] I accept that this does not mean that the power of the court under section 172 is limitless. Obviously, that cannot be. However, I do think that it does mean that it can make an order the effect of which would be that an election that should have been held within the 90 day period be held after the expiry of the 90 day period where it would be just and equitable to make such an order. Obviously, where a free and fair election can be held within the 90 day period the court would order that the election be held within the 90 day period. In this regard it must be remembered that section 159(2) of the Constitution enjoins that the election “be held within 90 days of the date that the Council was dissolved or its term expired”. This means that such an election may not be lawfully held prior to the expiry of the term of current municipal councils but it can only be held after the expiry of such term but before the expiry of 90 days. This means that there is a very short time during the 90 day period within which anybody aggrieved by the election would have to institute legal proceedings to challenge the freeness and fairness of the election. It seems that any litigation relating to such an election is likely to spill over to a period outside of the 90 days.

[119] The drafters of the Constitution would have known that the constitutionality or the freeness and fairness of elections gets challenged in courts all the time and that, therefore, such challenges would occur from time to time. What would they have had in mind would happen at a practical level if a court that found two days before the expiry of the 90 day period that an election that was held two days before had not been free and fair? Obviously, in that scenario, they could not have thought that it would be practical for the court to order the election to be held the following day or in the next two days. After all, the competent authority that would be required to remedy the constitutional breach or defect that caused the court to hold that the election was not free and fair could need more than two days to correct the constitutional defect contemplated in section 172. What could the court do in such a case if it could not order the election to be held after the expiry of the 90 day period.

[120] There would be no point in the court setting aside the results of one election on the basis that it was not free and fair only to order that the election be re-run before the

constitutional defect is corrected or remedied. Actually, if the court did that, it would be acting in breach of section 172 because the “period . . . to allow the competent authority to correct the constitutional defect” that section 172 empowers the court to afford the competent authority must be interpreted to be a reasonable period. It cannot be that the drafters of our Constitution intended that the voters should not be afforded another opportunity to vote in an election that complies with the Constitution.

[121] The second judgment suggests that, where a court were to set aside an election such as the one involved in this matter after the expiry of the 90 day period, the power that the court would use is not the just and equitable remedial power under section 172(1) but it would be the power in section 25(1)(b) and section 25(3)(b) of the Municipal Structures Act. This is not correct. Section 25 of the Municipal Structures Act deals with by-elections. So, how does the second judgment invoke a section that deals with by-elections to answer a problem that relates to a national election such as the one involved in the present case? It invokes that by obliterating the distinction between a by-election and a national election. It says that, once a court has set aside a national election after the expiry of the 90 days, that will spark by-elections in all municipal councils throughout the country. That is not correct. What will have been set aside is not a by-election nor will it have been a number of by-elections. It will have been a national election that must be held throughout the country. Section 1 of the Municipal Structures Act defines a by-election as “an election that is held between the regular elections called in terms of section 24”. A by-election is called in terms of section 25 whereas a national election is called in terms of section 24. Although the second judgment says the Court would be using section 25 of the Municipal Structures Act to order a fresh election after the expiry of the 90 day period, it says that it does not exclude the possibility as an alternative legal foundation for the re-running of such election, an order in terms of section 172(1)(b) of the Constitution. The answer to this is simple. Section 25 of the Municipal Structures Act has no application here at all.

[122] Section 25 of the Municipal Structures Act has no application to a national election. Section 25 deals with by-elections and not national elections. Section 25(6) makes it clear that there is a difference between by-elections and a national election. It precludes a municipal manager of a municipality from calling a by-election in terms of section 25(3) if the next election of all municipal councils must be held:

- “(6) The municipal manager of a municipality may not call a by-election in terms of subsection (3) if—
 - (a) the next election of all municipal councils must be held—
 - (i) within nine calendar months of the applicable date mentioned in paragraph (a), (b) or (c) of subsection (3); or
 - (ii) if it is a by-election in a ward, within six calendar months of the applicable date mentioned in paragraph (a), (b) or (d) of subsection (3); and
 - (b) the MEC for local government in the province decides that the by-election must stand over until the next election of all municipal councils.
- (7) A by-election in a ward does not affect the representation of parties by councillors elected from party lists.”

The election that we are talking about in this matter is an election that section 25(6)(a) refers to as an “election of all municipal councils” and not a by-election.

[123] In any event, the provisions of the Municipal Structures Act cannot take away from the Court powers that the Court derives from the Constitution. So, a court dealing with a constitutional matter within its power as contemplated in section 172 of the Constitution will always have the power to grant a just and equitable order in terms of section 172(1) where the requirements of section 172(1) are met.

[124] Furthermore, in terms of section 25(6)(a)(i) and (ii) no by-election may take place within the periods mentioned in that provision read with section 25(3) and that means that no by-election may be held during the 90 day period referred to in

section 159 of the Constitution. Only a national election may take place during the 90 day period. Therefore, in our present case an election that is contemplated in section 159 is a national election and not a by-election and, if something goes wrong with that election, it cannot be remedied by invoking provisions that govern by-elections. By-elections do not fit into the 90 day period.

[125] In *August*, the decision by the court a quo was set aside which in effect held that the present applicant had no obligation to ensure that awaiting trial and sentenced prisoners may register and vote in the 1999 general elections. This Court held that the court a quo had unlawfully decided that the group of prisoners were not entitled to register to vote nor to vote. Mr August and others brought an application to have that decision set aside ahead of the election and the Court ordered the present applicant to take all the necessary steps to have the prisoners registered so that they could vote. If the present applicant had taken a decision excluding prisoners from registration and they brought their application a few days before the expiry of the 90 day period in circumstances in which they were not at fault for bringing their application so close to the election day and the court was satisfied that all those prisoners or all those people should have been allowed to register but it would be practically impossible to allow them to be registered and still hold the election within the 90 day period, what effective relief would the court be able to grant if it had no power to have the election held after the expiry of the 90 day period?

[126] If an election was scheduled for the 60th day of the 90 days and a litigant, who complained that the election would not be free and fair or that it was unlikely to be free and fair, obtained an interdict on the 59th day with the result that no election was held on the 60th day and the unsuccessful party appealed against the interdict but the Appeal Court could only hear the appeal on the 89th or 90th day and it found that the court of first instance had erred in interdicting the election, what effective relief could the Appeal Court grant the successful appellant if it could not order that the election be held after the expiry of the 90 day period?

[127] When the Appeal Court delivers its judgment on the 89th or 90th day, it cannot order that the election be held within the 90 day period because that would simply be logistically and practically impossible. If effective relief is to be granted to the successful appellant, that relief would have to be that the election must be held after the expiry of the 90 day period. On the approach that a court has no power before the expiry of the 90 days, to order that an election be run after the expiry of the 90 day period, that successful appellant would have no effective relief. The result would be that no election could be held before the expiry of the 90 day period because, firstly, it was interdicted and, secondly, because when the interdict was set aside by the Appeal Court, that court could not order that the election be held within the 90 day period since there was only a day or a few hours left before the expiry of the 90 day period and it would have been practically impossible to hold the election before the expiry of the 90 day period and the court had no power to order that the election be held after the 90 days.

[128] Surely, an interpretation of the Constitution that produces this type of result is untenable. A litigant who should have succeeded in the court of first instance in which case there would have been no interdict and the election would have been held on the 60th day and, maybe this litigant was a candidate in the election and would have been elected to office finds himself or herself in a situation where his or her appeal succeeds but the election cannot be held because the Appeal Court handed down its judgment in his or her favour before the expiry of the 90 day period. If that is not the type of injustice that the drafters of the Constitution intended the courts to use their just and equitable remedial power under section 172(1) of the Constitution to prevent, then it is difficult to understand why courts dealing with constitutional matters falling within their powers, were given the power to grant a just and equitable order.

[129] If the unsuccessful respondent in the appeal decides to appeal to a second Appeal Court and that court hears the appeal after the expiry of the 90 days and dismisses the appeal and upholds the decision of the first Appeal Court, can the second Appeal Court then order that the election be held after the expiry of the 90 day period? If one says that the second Appeal Court may order that the election be held after the expiry of the

90 day period because it heard the appeal outside the 90 day period, what happens to the well-established principle of our law that an appeal court cannot make an order that the court whose judgment it is considering had no power to make? The second Appeal Court would be precluded by that principle from ordering that the election be held outside the 90 day period. If, however, it would have such power, it would mean that the fate of the successful applicant in the first Appeal Court would depend on whether the respondent in the first Appeal Court appealed to the second Appeal Court.

[130] What this means is that on the approach taken by the second judgment, the appellant in the first Appeal Court would have obtained an empty victory because no election could be held and yet he would have successfully appealed against the order of the court of first instance. If the matter ended there, that would be a grave injustice. That appellant in the first appeal cannot appeal to a further Court that could hear his appeal outside the 90 day period because you cannot appeal against a judgment in your favour. That is the result that is produced by the approach that says, when approached before an election but within the 90 day period courts have no power to order an election to be held after the expiry of the 90 day period even if they are satisfied that the election will not be free and fair or a postponement of the election is necessary in order to ensure a free and fair election or that it is not reasonably possible to conduct a free and fair election on voting day within the 90 day period. If, however, he or she is lucky and the respondent appeals to a second Appeal Court which then hears that appeal outside the 90 day period and it dismisses the appeal, the appellant in the first Appeal Court may be lucky if that Court has power to make an order that the first Appeal Court could not have made. That is because in that case, maybe, the second Appeal Court could then make an order that the election be held after the expiry of the of the 90 day period. If, however, it says it has no power because it cannot make an order that the first Appeal Court could not have made, then the injustice would continue. That would be the result if the view advanced by the second judgment is correct.

[131] It is not clear whether, on the view that, if approached before the expiry of the 90 day period, a court has no power to order that an election be held after the expiry of

the 90 day period, that means that a court has no such power at all, irrespective of whether it delivers its judgment before or after the expiry of the 90 day period. Perhaps it could mean that, if the Court hears an application before the expiry of the 90 day period, and it reserves its judgment and delivers it after the expiry of the 90 day period, it would have power to order that the election be held after the expiry of the 90 day period. Of course it would mean that, what matters is when the Court is approached and not when it delivers its judgment. If that is the case, it would mean that, if a court is approached before the expiry of the 90 day period, it has no power but, if it is approached after the expiry of the 90 day period, it has the power to adjudicate the matter. So, it would depend on which side of the expiry of the 90 days a litigant approaches the Court. If it is before, then the Court has no power but, if the litigant waits until after the expiry of the 90 day period, the Court will have power. In my view either approach is untenable.

[132] If the correct interpretation is that the Court does not have the power to order that the election be re-run after the expiry of the 90 day period, that would mean that the councillors whose term of five years had expired continue in office and get another term of five years without winning any election for that extra term of five years. I am sure that this is not what the drafters of the Constitution intended. In my view, the better proposition is that, where the Court has found an election not to have been free and fair, which is a breach of the Constitution or a constitutional defect and it would not be practical to afford the competent authority a reasonable opportunity to correct the defect if the election was held within the 90 day period, it has the power to afford that authority the opportunity to correct the defect even if that would mean that the election must be held or be re-run after the expiry of the 90 day period. After all, if such a case was heard by a High Court or the Electoral Court within the 90 day period but there was an appeal and the next Court could only hear that appeal after the expiry of the 90 day period, it cannot be that the next Court could not order that the election be re-run because the 90 days would have expired. The Court would be able to do so. It, therefore, seems to me that section 159 should not be read in isolation nor should section 172. The two sections should, as far as possible, be read harmoniously. In my

view, that means that this Court has the power to make an order the effect of which would be that an election be held or be re-run after the expiry of the 90 day period where it is necessary to do so in order to allow the competent authority to correct a constitutional defect that has been found by the Court.

[133] This Court has more than once held that different provisions of the Constitution must as far as possible be read harmoniously. In *King* this Court said:

“[141] It is a well-established principle of our law that the Constitution must be read harmoniously.”³⁸

In *Doctors for Life International* it said:

“[48] [W]here there are provisions in the Constitution that appear to be in conflict with each other, the proper approach is to examine them to ascertain whether they can reasonably be reconciled. And they must be construed in a manner that gives full effect to each. Provisions in the Constitution should not be construed in a manner that results in them being in conflict with each other. Rather, they should be construed in a manner that harmonises them. In *S v Rens*, this Court held that ‘[i]t was not to be assumed that provisions in the same constitution are contradictory’ and that ‘[t]he two provisions ought, if possible, to be construed in such a way as to harmonise with one another’.”³⁹

In *United Democratic Movement* this Court held:

“[83] A court must endeavour to give effect to all the provisions of the Constitution. It would be extraordinary to conclude that a provision of the Constitution cannot be enforced because of an irreconcilable tension with another provision. When there is tension, the courts must do their best to harmonise the relevant provisions, and give

³⁸ *King N.O. v De Jager* [2021] ZACC 4; 2021 (4) SA 1 (CC); 2021 (5) BCLR 449 (CC) (*King*) at para 141.

³⁹ *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 48.

effect to all of them. Sections 157(1) and (3) must thus be read together in the context of the Constitution and the section as a whole.”⁴⁰

[134] One of the difficulties I have with the view that, if approached before an election is held within the 90 day period, the court has no power to order that an election be held outside of that 90 day period if it is satisfied that the election that will be held within the 90 day period will not be free and fair but that the same court will have the power to make such an order if it is approached after the election or after the expiry of the 90 day period, is that this. That view seems to give different meanings to the same provision depending on whether the court is approached before or after the election. Everyone accepts that the power that the court would be exercising in ordering a re-run of the election if approached after the election or after the expiry of the 90 day period is contained in section 172. It is the same provision that the court would use to grant the same order if approached before the election. It is difficult to understand why the same words should be read to give the court power if the court is approached after the election or after the expiry of the 90 day period but the same words should be read not to give the court the same power if the Court is approached before the election or before the expiry of the 90 day period.

[135] Another difficulty I have with the view that the Court does not have power to order an election to be held after the expiry of the 90 day period if approached before the election or before the expiry of the 90 day period and it is satisfied that the election scheduled to be held before the 90 day period expires will not be free and fair is this. It implies that, if, for example, a litigant or one of the political parties were to discover a few days before an election that there was a corrupt plan involving some officials of the applicant to rig the election in favour of a certain political party and approached the court for an order interdicting the holding of such election until all the steps needed to be taken to ensure a free and fair election are taken (which would take the election

⁴⁰ *United Democratic Movement v President of the Republic of South Africa (African Christian Democratic Party; Institute for Democracy in South Africa as Amici Curiae) (No 2)* [2002] ZACC 21; 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) at para 83.

outside of the 90 day period), that election may be interdicted but the court would not have power to order that election be held after the 90 day period.

[136] If that is correct, the question arises: what then would happen to the citizens' rights to a free and fair election and to their rights to vote and the right to stand for public office? Would the aggrieved litigant have to approach Parliament to make a constitutional amendment each time there is such litigation? What if the political party that had entered into a corrupt arrangement with certain officials of the applicant had sufficient numbers in Parliament to defeat any attempt to pass the constitutional amendment? It seems to me that this view could create a serious constitutional crisis.

[137] Yet another difficulty is this. The second judgment seems to take the view that the applicant is obliged to hold an election within the 90 day period even if the applicant is convinced that the election will not be free and fair and will, thus, not comply with the Constitution and would subsequently be held to be unconstitutional and invalid and could or would likely be set aside afterwards. That cannot be correct. The Chief Executive Officer of the applicant is obliged by section 38 of the PFMA, to prevent fruitless and wasteful expenditure. If he went ahead and got the applicant to spend millions of rands on an election that he realises quite well will not be free and fair and will thus not comply with the Constitution and would probably be set aside later and the applicant would have to hold another election and spend more millions, he would probably be committing an act of financial misconduct in terms of section 81 of the PFMA.⁴¹ The correct approach is that, if the applicant believes on reasonable grounds that an election will likely not be free and fair, it should approach a court to obtain a

⁴¹ Section 81 of the PFMA reads:

- “(1) An accounting officer for a department or a constitutional institution commits an act of financial misconduct if that accounting officer wilfully or negligently—
 - (a) fails to comply with a requirement of section 38, 39, 40, 41 or 42; or
 - (b) makes or permits an unauthorised expenditure, an irregular expenditure or a fruitless and wasteful expenditure.
- (2) An official of a department, a trading entity or a constitutional institution to whom a power or duty is assigned in terms of section 44 commits an act of financial misconduct if that official wilfully or negligently fails to exercise that power or perform that duty.”

declarator and the court may then order that the election be held later even if that may have to be outside the 90 day period if it would not be practically possible to hold the election within the 90 day period.

[138] It is to be noted that in terms of section 21(1) of the Electoral Act⁴² the applicant may request the person who called an election to postpone the voting day of that election if it is satisfied that a “postponement is necessary for ensuring a free and fair election” and the voting day will happen within the period required by the constitution or national or provincial legislation thereunder. It is also to be noted that in terms of section 22(1) of the same Act the applicant may itself postpone voting at a particular voting station “[i]f it is not reasonably possible to conduct a free and fair election on a voting station on the proclaimed voting day” if the three requirements set out in section 22(2) are met and one of them is that the postponed voting day must still fall within the period referred to in section 21(1)(b).

[139] Must a court be satisfied that the election will not be free and fair before it may effectively postpone it or is it enough if the court is satisfied that the election is unlikely to be free and fair. I do not think that the court needs to be satisfied that the election will certainly or definitely not be free and fair before it may postpone it. In my view it is sufficient if the court concludes that a postponement is necessary to ensure a free and fair election or if the court is satisfied that it is not reasonably possible to conduct a free and fair election at a voting station on the proclaimed day.

⁴² Section 21 of the Electoral Act reads:

- “(1) The Commission may request the person who called an election to postpone the voting day for that election, provided the Commission is satisfied that—
 - (a) the postponement is necessary for ensuring a free and fair election; and
 - (b) the voting day for the election will still fall within the period as required by the Constitution or national or provincial legislation thereunder.
- (2) If the person to whom the request is made accedes to the request, that person, by proclamation or notice in the Government Gazette, must postpone the voting day for the election to a day determined by that person, but that day must fall within the period referred to in subsection (1)(b).”

[140] Section 21 of the Electoral Act allows the postponement of an election by the person who called the election “provided the Commission is satisfied that – the postponement is necessary for ensuring a free and fair election; and the date to which the election is postponed falls within the period as required by the Constitution or national or provincial legislation thereunder.”

[141] Section 22 of the Electoral Act deals with the postponement of voting at voting stations. Section 22(1) provides that “[i]f it is not reasonably possible to conduct a free and fair election at a voting station on the proclaimed voting day, the Commission may postpone voting at that voting station” and the date to which the election is postponed must fall within the period referred to in section 21(1)(b).”

[142] In the light of the fact that under the Electoral Act it is not a requirement for the postponement of elections that the applicant be satisfied that the election will definitely not be free and fair but it suffices if the Commission is satisfied that the postponement is necessary for ensuring a free and fair election or that it is not reasonably possible to conduct a free and fair election at a voting station on the proclaimed day, there is no reason why, if the court is approached for the postponement of an election, it should not use those tests. Accordingly, it is enough that we take the view that a postponement is necessary to ensure a free and fair election or if we were satisfied that it would not reasonably be possible to conduct a free and fair election. If we are so satisfied, we would be justified to effectively postpone the election.

[143] The power of the Court to order a re-run of a national election or, as section 25(6)(a) of the Municipal Structures Act calls it, “an election of all municipal councils”, is to be found in section 172 read with section 38 of the Constitution. Section 38 refers to “appropriate relief” and section 172 refers to a “just and equitable” order. It is difficult to be certain as to what the position taken by the second judgment is on whether it agrees with this judgment that, if a court is approached before the expiry of the 90 day period, it has power to order that an election be held after the expiry of the 90 day period if it is satisfied that an election that has already been held within the 90

day period was not free and fair or if it is satisfied that an election that is yet to be held within the 90 day period will not be free and fair. Paragraph 3(h) of the second judgment says that “the possibility that section 172(1)(b) could arguably be invoked pursuant to a successful challenge after the holding of timeous elections does not lead to the conclusion that it is permissible for a court, in advance, to employ that section to postpone the elections in contravention of the constitutional time-limit.” However, in paragraph 3(i) the second judgment says that “... this judgment does not hold that there could never be circumstances in which a pre-emptive order in terms of section 172(1)(b), having the effect of authorising elections to be held later than the constitutional deadline, would be permissible. However, if such an order would ever be permissible it would be in rare and exceptional circumstances, and those circumstances do not exist here.”

Conclusion

[144] In the circumstances I would have granted an order under section 172 of the Constitution effectively postponing the election and allowing that it be held not later than 10 December 2021- not on the basis of the applicants’ fear of infringing the voters’ constitutional rights arising from the Covid-19 pandemic but to allow the applicant to hold a voter registration weekend or to give eligible and registered voters a reasonable opportunity to go to their municipal electoral offices to register to vote or to update their registration details. I would have set aside the Minister's proclamation. She has effectively consented to it being set aside if the election is postponed.

[145] I would not have fixed any weekend by when the applicant should hold a voter registration weekend or when voters should be allowed an opportunity to visit municipal electoral offices to register or update their registration details. I would have left that to the applicant to decide having due regard to its election timetable. The reason why I would have held that the election should not be held beyond 10 December 2021 is that Prof Abdool Karim and one or two other scientists said before the Moseneke Inquiry that there was a possibility that the three months from end of September could be a period of low infections before the fourth wave of the Covid-19 pandemic starts.

[146] I would have granted the applicant a limited postponement of the election so that the election could have been held at any time between 27 October 2021 and 10 December 2021 provided that the applicant held a voter registration weekend or if it did not hold a voter registration weekend, a reasonable opportunity was given to eligible voters and registered voters to, respectively, register to vote or to update their registration details before the Minister issued her proclamation to fix the date of the election. This means that in effect I would not have dismissed the applicant's application as such but would have granted the applicant a much shorter postponement than the one it wanted. I would also not have done so on the main ground on which the applicant sought a postponement but would have done so on the basis of the applicant's failure to hold a voter registration weekend before the Minister issued the proclamation on 3 August 2021 or without the applicant having publicly announced that it would not hold a voter registration weekend this time and allow eligible and registered voters to visit municipal electoral offices to register to vote or to update voter registration details before the Minister made her proclamation.

[147] The applicant's failure to either hold a voter registration weekend prior to the Minister issuing her proclamation or its failure, if it was not to hold a voter registration weekend, to publicly announce that it would not hold a voter registration weekend and afford voters a reasonable opportunity to register or update their voter registration details before the Minister could issue the proclamation, was a breach of its constitutional obligations in terms of section 190(1) of the Constitution to "manage elections" and to "ensure that those elections are free and fair". The applicant's failure was also a breach of the applicant's obligation under section 7 of the Constitution to respect, protect, promote and fulfill voters' rights to a free and fair election or rights to vote as provided for in the Bill of Rights. Section 7 obliged the applicant as an organ of state to "respect, protect, promote and fulfill the rights in the Bill of Rights".

[148] That failure constitutes a constitutional defect as contemplated in section 172(1) of the Constitution and the applicant is the competent authority as contemplated in that

section that must be allowed a (reasonable) period within which to correct that defect. This Court can do this in the exercise of its just and equitable remedial power under section 172(1) even if the election may have to take place after the expiry of the 90 days where it would not be practically possible for the constitutional defect to be corrected within the 90 days and the election be held within that period. This failure by the applicant is conduct that is inconsistent with the Constitution and is invalid to the extent of its inconsistency. A declaratory order to this effect is, therefore, called for in terms of section 172(1)(a) of the Constitution. The rest of the order that appears at the end of this judgment is an order that this Court may grant in the exercise of its just and equitable power contained in section 172(1)(b) of the Constitution.

[149] The EFF applied for a certain order if this Court dismissed the applicant's application. That order was to compel the President to amend the Lockdown Regulations so as to allow gatherings of more than 100 people to enable the EFF to have such meetings of its members as it needed to have for purposes of nominating its candidates. But in any event, the EFF said its application should be considered if the applicant's application was dismissed. On my approach the applicant's application on the basis of its alternative relief would succeed but only to the extent that I would have given it a little over a month more time to hold the election whereas it wanted a postponement of four months.

[150] I would have granted the DA direct access but would have used section 172 of the Constitution to effectively postpone the election for just over a month. The DA opposed the application for a postponement. I would have taken the view that suspending the operation of section 6(1A) of the Municipal Structures Act to allow a voter registration weekend for an election in October 2021 would not be workable as stated by the applicant's Chairperson.

[151] In the circumstances I would have granted the following order:

1. The applicant's application that this matter be dealt with on an urgent basis is granted.

2. The applicant's application for direct access is granted.
3. The Democratic Alliance's application for direct access, insofar as it may be necessary, is granted.
4. The Democratic Alliance's application is dismissed insofar as it is inconsistent with this order.
5. The applicant's application for its primary relief is dismissed.
6. The applicant's application for alternative relief is granted only to the extent reflected in this order.
7. It is declared that the applicant's failure to hold a voter registration weekend before the Minister of Cooperative Governance and Traditional Affairs could issue the proclamation that she issued on 3 August 2021 fixing the date of 27 October 2021 as the date for the local government elections or, if it was not to hold such a voter registration weekend before the Minister could issue the proclamation to publicly announce that it would not hold a voter registration weekend and afford eligible and registered voters a reasonable opportunity to register to vote or to visit their municipal electoral offices to register to vote, or to update their registration details before the Minister issued the proclamation is inconsistent with the Constitution and invalid.
8. The order in paragraph 7 above is suspended up to and including 10 December 2021 to allow the applicant to correct the constitutional defect.
9. The proclamation issued by the Minister of Cooperative Governance and Traditional Affairs referred to in paragraph 7 is set aside.
10. The Minister of Cooperative Governance and Traditional Affairs may issue a proclamation fixing the date of the local government elections on any day during the period from 27 October 2021 to 10 December 2021 (both dates inclusive) provided that such proclamation shall be issued either after the applicant has held a voter registration weekend or after the applicant has publicly announced that it will not hold a voter registration weekend and thereafter has allowed eligible voters and registered voters

a reasonable opportunity to visit their municipal electoral offices to register to vote or to update their registration details.

11. Each party shall pay its own costs.

ROGERS AJ (Madlanga J, Majiedt J, Mhlantla J, Theron J and Tlaletsi AJ concurring):

Introduction

[152] This judgment contains the reasons for the order which this Court issued on 3 September 2021. That order is quoted in paragraph 11 of the first judgment. As is by now widely known, the Electoral Commission (Commission) determined that it was practically possible to hold a voter registration weekend on 18-19 September 2021, and it made various amendments to the current timetable mentioned in the order. However, this judgment addresses the case as it presented itself to the Court on 3 September 2021, and on the basis that it was unknown what determination the Commission would make.

[153] I have read and gratefully adopt the background contained in the first judgment. I agree that the case engages our jurisdiction and that direct access on an urgent basis was justified. In addition to the bases for jurisdiction mentioned in the first judgment, the Commission’s application concerns the founding value of “regular” elections in section 1(d) of the Constitution and the interpretation and operation of section 159 of the Constitution which gives effect to the requirement of regularity insofar as municipal elections are concerned.

[154] It may be useful to state, at the outset, what this judgment does and does not decide, and to summarise the main conclusions:

- (a) This judgment does not decide whether the constitutional standard for “free and fair” elections is altered by the Covid-19 pandemic and the related restrictions on gatherings and other activities imposed by the Lockdown Regulations. That is an important legal question, but it is unnecessary to decide it in this case.

- (b) If the “free and fair” standard requires only that the elections should be as free and fair as reasonably possible in the circumstances brought about by the pandemic and related regulation, the Commission failed to establish, and did not even allege, that elections held on or before 1 November 2021 would fail that standard.
- (c) If, conversely, the “free and fair” standard requires the attainment of a standard which the pandemic and related regulation make it impossible to achieve on or before 1 November 2021, the Commission failed to establish that elections that are materially better in terms of freeness and fairness would be possible on or before 28 February 2022. There is thus no principled factual basis to postpone the elections to a date in February 2022.
- (d) Quite apart from the conclusion in (c), adhering to the constitutional standard of regularity of elections, as expressed (with reference to local government elections) in section 159(2) of the Constitution, is a matter of the utmost importance.
- (e) This leads to the conclusion that the Commission’s constitutional duty, when it fears that timeous elections will not be free and fair, is to conduct those elections within the constitutional time-limit and to make them as free and fair as reasonably possible.
- (f) The maxim that the law does not compel the impossible does not excuse the Commission from complying with this constitutional duty, and section 159(2) is not subject to any implied term permitting an extension of the date for elections on the grounds that timeous elections will not, or may not, be free and fair.
- (f) Although Parliament may, subject to the Constitution’s procedural requirements, amend the time-limit imposed by the Constitution, the courts cannot.
- (g) Depending on all the facts, including events yet to unfold, and depending also on the answer given to the legal question in (a), a court, after the holding of timeous elections, would be entitled to set some or all of them

aside on the grounds that they were not free and fair. To the extent that one or more elections were set aside, fresh elections could then be held as by-elections in terms of section 25 of the Municipal Structures Act. This judgment does not however exclude the possibility, as an alternative legal foundation for the re-running of such elections, of an order in terms of section 172(1)(b) of the Constitution.

- (g) However, the possibility that section 172(1)(b) could arguably be invoked pursuant to a successful challenge after the holding of timeous elections, does not lead to the conclusion that it is permissible for a court, in advance, to employ that section to postpone the elections in contravention of the constitutional time-limit.
- (h) Because it is unnecessary to do so, this judgment does not hold that there could never be circumstances in which a pre-emptive order in terms of section 172(1)(b), having the effect of authorising elections to be held later than the constitutional deadline, would be permissible. However, if such an order would ever be permissible, it would be in rare and exceptional circumstances, and those circumstances do not exist here.

The constitutional and legislative framework

[155] Section 1(d) of the Constitution specifies, as one of the founding values on which the Republic of South Africa is founded, “[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness”. Section 19 confers certain fundamental political rights on citizens. In terms of section 19(2), every citizen has the right “to free, fair and regular elections for any legislative body established in terms of the Constitution”. Section 19(3)(a) guarantees to every adult citizen the right to vote in such elections.

[156] Section 2 declares that the Constitution is “the supreme law” of our country, that “law or conduct inconsistent with it is invalid” and that “the obligations imposed by it must be fulfilled”.

[157] The Commission’s constitutional mandate, imposed by section 190(1) of the Constitution, is to manage our elections in accordance with national legislation, to ensure that they are free and fair, and to declare the results within a period prescribed by national legislation. This mandate is included among the functions of the Commission specified in section 5(1) of the EC Act. In terms of section 5(1)(n), the Commission must declare the results of elections for national, provincial and municipal legislative bodies within seven days after such elections.

[158] In terms of section 40(1) of the Constitution, government in this country is constituted “as national, provincial and local spheres of government which are distinctive, interdependent and interrelated”. Chapter 7 of the Constitution (sections 151-164) deals with local government. Section 152(1)(a) provides that one of the objects of local government is “to provide democratic and accountable government for local communities”.

[159] Section 159(1) of the Constitution stipulates that the term of municipal councils “may be no more than five years, as determined by national legislation”. The national legislation in question is the Municipal Structures Act, section 24(1) of which provides that the term of municipal councils is five years, calculated from the day following the date set for the previous election of all municipal councils in terms of subsection (2). Subsection (2) reads:

“Whenever necessary, the Minister, after consulting the Electoral 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. The notice may be published either before or after the term of municipal councils expires in terms of subsection (1).”

[160] Section 24(2) gives effect to section 159(2) of the Constitution, which states:

“If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.”

[161] In relation to local government, section 159(2) of the Constitution gives effect to the founding value of “regular” elections. Regular elections are in turn crucial if local government is to remain democratic, accountable, responsive and open.⁴³ The Commission’s constitutional duty to manage municipal elections in accordance with national legislation thus encompasses the duty to conduct the elections within the time period prescribed in the Constitution and the Municipal Structures Act.

[162] The date set for our previous local government elections was 3 August 2016. This means that the five-year period contemplated in the provisions I have cited ran from the inception of 4 August 2016 and expired at the end of 3 August 2021. The 90-day period began the following day, 4 August 2021, with the last day being 1 November 2021. Subject, therefore, to any valid dispensation, our local government elections had to be held on or before 1 November 2021. On 3 August 2021 the Minister proclaimed 27 October 2021 as the date for the local government elections. This was within the 90-day period.

[163] Section 7(1) of the MEA provides that a person may vote in an election for a particular municipal council only if registered as a voter on the certified segment of the voters’ roll for a voting district which falls within that municipality. The voters’ roll is the national voters’ roll established in terms of section 5 of the Electoral Act.⁴⁴ In terms of section 6(2) of the MEA the chief electoral officer for an election must certify, for

⁴³ In *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17; 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC), the Court said at para 31:

“Regular elections, accountability, responsiveness, openness and public office bearers who are committed to the core values and principles for good governance laid down in section 195 of the Constitution, are what would facilitate the attainment of the South Africa we all deserve.”

⁴⁴73 of 1998.

the relevant voting district, the segments of the voters' roll to be used in the election, and in terms of section 6(1), the segment so certified must be used in that election. Importantly, section 6(1A) stipulates:

“Except where this Act otherwise permits, only a voter who applied for registration prior to the proclamation of an election date may vote in the election concerned.”

[164] The effect of section 6(1A) in the present case was that persons who had not applied for registration as voters before 3 August 2021 were not, save where the MEA otherwise provided, entitled to vote at the elections proclaimed for 27 October 2021. A voter registration weekend after 3 August 2021, for purposes of enabling people to vote on 27 October 2021, was thus impossible. People could continue to apply for registration as voters so as to qualify for future elections, but they would not be entitled to vote on 27 October 2021.

[165] If a person applies for registration as a voter on or before the proclamation date calling the election, but his or her name does not appear on the certified segment of the roll, such person may in terms of section 7(2) of the MEA submit a statement to the Commission's local representative or to the presiding officer of the relevant voting station, setting out the details specified in the subsection. In terms of section 7(3), the Commission or presiding officer may endorse the statement if there is no reason to doubt its correctness, and the person must then be regarded as having been registered on the relevant segment.

The Commission's case

[166] On 4 August 2021 the Commission approached this Court as a matter of urgency for relief, the practical effect of which was to allow the Commission not to conduct the elections on 27 October 2021, and instead to do so not later than 28 February 2022. The ANC, IFP and EFF supported a deferral of the elections, with the ANC proposing that they be held not later than 1 April 2022 and the IFP proposing that they be held on

26 May 2022. All the other parties and organisations which were permitted to join as intervenors or make submissions as amici opposed a deferral.

[167] There were two main strands to the Commission's case for a deferral of the elections:

- (a) that because of the Covid-19 pandemic, and the restrictions imposed by the Lockdown Regulations, it was not possible to hold free, fair and safe elections on 27 October 2021;
- (b) that because no voter registration weekend was held before the Minister's proclamation of 3 August 2021, many thousands of people who would have applied for registration over such a weekend would be disenfranchised, as a result of which elections on 27 October 2021 would not be free and fair.

[168] The Commission put its case on the basis that no law, not even the Constitution, requires the impossible and that, for the two reasons I have summarised, it was impossible for the Commission simultaneously to comply with its obligation to hold timeous elections and its obligation to hold elections which are free, fair and safe.

The impossibility maxim

[169] The maxim that the law does not require the impossible is often expressed in one or other Latin phrase, most commonly *lex non cogit ad impossibilia* (the law does compel one to do the impossible).⁴⁵ I shall refer to it as the impossibility maxim. The appeal to the impossibility maxim in this case has legal and factual aspects. The legal aspects are whether the impossibility maxim applies to the Constitution at all; and, if so, whether it applies to section 159(2) of the Constitution, what level of impossibility must be established, and what the consequences are of proven impossibility. The factual

⁴⁵ Other versions are *impotentia excusat legem* (inability excuses compliance with the law), *nemo tenetur ad impossibilia* (nobody is bound to do the impossible) and *impossibilia nulla obligatio est* (an impossibility is not a legal obligation). The last of these applies particularly in a contractual setting.

aspect is whether the evidence adduced in this case proves impossibility to the requisite standard.

[170] It is unnecessary in this case to decide what role, if any, the impossibility maxim plays in the interpretation and operation of the Constitution in general. It is enough to say that the maxim cannot apply in the way the Commission has sought to deploy it in order to avoid the time-limit imposed by section 159(2). And in that regard it is important to emphasise that the Commission's case, if it were right, would have profound implications for elections at all levels of government, because sections 49(2) and 108(2) of the Constitution, which deal with national and provincial elections, contain the same language as section 159(2).

[171] It is not the Commission's case that it is practically impossible to conduct elections on 27 October 2021. It began its preparations for the October elections well before launching its application to this Court. The Commission assured the Moseneke Inquiry and this Court that if a deferral of elections were refused, elections would take place on 27 October 2021. All the steps required by its election timetable would be performed, and on 27 October 2021 voting stations around the country would open and registered voters would be able to cast their votes. The Commission's case was that such elections would take place but would not be free, fair and safe.

[172] The cases in which the impossibility maxim have been applied show that, when operative, it relieves the person from a disadvantage which would otherwise flow from non-compliance with an obligation or requirement. For example, a non-compliance which would ordinarily attract liability in the criminal, delictual or contractual sphere may be found not to have been unlawful, or compliance with a statutory requirement may be excused. In the context of contracts and statutes, whether the maxim has this excusing or relieving effect will depend on the interpretation of the particular contract

or statute, since there might be something inherent in the contract or statute, or something expressed or implied, which excludes the maxim's operation.⁴⁶

[173] In the case of statutes, the impossibility maxim may work in tandem with the principles governing implied statutory terms, since the question naturally arises as to what, if anything, the lawmaker intended should happen in the case of impossibility. The impossibility maxim, when operative, does not without more replace the requirement with which it was impossible to comply with a new or changed requirement. When operative, the maxim excuses or relieves. As stated by this Court in *Mtokonya*:⁴⁷

“According to the maxim *lex non cogit ad impossibilia*, the law does not require a person to do the impossible. If performance in terms of a particular law has been rendered impossible by circumstances over which the person with interest had no control, those circumstances are taken as a valid excuse for not complying with what such law prescribes.”

[174] In the statutory context, *Ex parte Mackenzie N.O.*⁴⁸ affords an example of the maxim's excusing effect, and there are apt examples from other jurisdictions as well.⁴⁹ For there to be a new or changed regime in the statutory sphere, one needs to go the further step of ascertaining whether there is an implied term giving rise to the new or changed regime.

⁴⁶ In Bailey and Norbury *Bennion on Statutory Interpretation* 7 ed (LexisNexis, 2017) (*Bennion*) at 694 the rule is stated as being that the impossibility maxim applies to statutes "[u]nless the contrary intention appears". This formulation was approved by Dyson LJ in *Winchester College & Anor, R (on the application of) v Secretary of State for Environment, Food and Rural Affairs* [2008] EWCA Civ 431; [2008] 3 All ER 717 (CA) (*Winchester College*) at para 50. In Australia in *Dowell Australia Ltd v Archdeacon* [1975] HCA 29; (1975) 132 CLR 417, McTiernan J found at para 42, with reference to a particular statutory provision, that the impossibility maxim was not rendered inapplicable "by anything inherent in the sub-section or express or implied in the Act".

⁴⁷ *Mtokonya v Minister of Police* [2017] ZACC 33; 2018 (5) SA 22 (CC); 2017 (11) BCLR 1443 (CC) at para 137.

⁴⁸ *Ex parte Mackenzie N.O.* 1960 (1) SA 793 (W).

⁴⁹ *Melville Dundas Ltd & Ors v George Wimpey UK Ltd & Ors (Scotland)* [2007] UKHL 18; [2007] 3 All ER 889 at paras 20-2; *Winchester College* above n 50 at paras 50-2; *Re Trim Perfect Australia Pty Ltd; National Australia Bank Ltd* [2005] NSWSC 972; (2005) 55 ACSR 237 at para 22; and *Lockrey v Historic Houses Trust of New South Wales* [2012] NSWCA 249 at paras 76-83.

[175] The Commission in the present case does not deploy the impossibility maxim purely to excuse or relieve. If it were truly impossible to conduct elections on 27 October 2021, the impossibility maxim might – if operative – justify a conclusion that the Commission’s failure to conduct the elections on that date was not unlawful. However, what the Commission has asked this Court to do is to decree that it would be lawful to hold the elections in February 2022. That goes beyond excusing the Commission’s failure to hold the elections on 27 October 2021. The Court would be instituting a changed regime in which elections in February 2022 become permissible, and this in violation of the express language of section 159(2) of the Constitution.

The interpretation of section 159(2)

[176] In truth, therefore, the Commission’s case is not a conventional case of the impossibility maxim, where there is a single requirement or obligation with which it is impossible to comply. Instead, the Commission’s case is that there are two requirements and that it is impossible to comply with the one without violating the other. It is impossible, so the Commission asserts, to hold free and fair elections on 27 October 2021; but conversely, it is impossible to hold regular elections which comply with sections 1(d) and 159(2) of the Constitution after 1 November 2021.

[177] The impossibility maxim, in my view, does not without more supply an answer to this dilemma because it does not resolve the question as to which of the two requirements must yield to the other. The proper interpretation of the Constitution or a statute, including the implication of a necessary term, might supply the answer. The question is whether section 159(2) does so. The language is unyielding and unambiguous. Section 179(1) of the interim Constitution⁵⁰ required local government elections to take place in terms of applicable law and at intervals of not less than three and not more than five years. Section 159 of the present Constitution in its original form simply provided that the term of a municipal council “may not be more than four years, as determined by national legislation”. Section 159 was brought into its present

⁵⁰ The Constitution of the Republic of South Africa Act 200 of 1993.

form by a constitutional amendment which took effect on 7 October 1998.⁵¹ The amendment lengthened the permissible term of office of municipal councils to five years and introduced a 90-day period after the termination of municipal councils' terms of office during which elections could be conducted.

[178] Although national legislation does not influence the interpretation of the Constitution, the national legislation mandated by Chapter 7 of the Constitution in sections 157 and 159 of the Constitution is also unyielding in its time-limits. Shortly after section 159 of the Constitution was brought into its present form, the Municipal Structures Act was promulgated. Section 24(2) of the Municipal Structures Act replicated the 90-day window specified in the constitutional amendment. About two years later came the MEA. Section 8 of the MEA empowers the Minister to postpone a proclaimed voting day if the Commission is satisfied that it is not reasonably possible to conduct a free and fair election on that date, but the new date determined by the Minister must still fall within the 90-day period. Section 9 empowers the Commission itself to postpone the date of voting at a particular voting station if it is of the view that it is not reasonably possible to conduct a free and fair election at that voting station, but again the new date must fall within the 90-day period. The same applies in the case of section 10, which regulates re-voting at a particular voting station where the ballot papers have been lost, destroyed or unlawfully removed.

[179] This indicates the importance which Parliament attached to the regularity of elections. Section 8 of the MEA envisages that an election on a proclaimed voting day may not be free and fair, and allows for a postponement, provided that the new date falls within the 90-day window. The same is true of section 9 in relation to a particular voting station. Conspicuously absent is any provision allowing for a postponement beyond the 90-day period on account of the Commission's belief that elections within the 90-day period will not be free and fair.

⁵¹ Constitution of the Republic of South Africa Amendment Act 65 of 1998, which was passed with the requisite special majority.

[180] The requirement of regularity of elections as a cornerstone of democracy is an international norm. Article 25(b) of the United Nations International Covenant on Civil and Political Rights⁵² confers on every citizen the right and opportunity to “vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”. In terms of Article 3 of the Protocol⁵³ to the European Convention on Human Rights⁵⁴ the High Contracting Parties “undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”.

[181] Article 6 of the Venice Commission’s⁵⁵ Code of Good Practice in Electoral Matters⁵⁶ states: “Elections must be held at regular intervals; a legislative assembly’s term of office must not exceed five years.” The heading of Part I of the Explanatory Report accompanying the Code is “The underlying principles of Europe’s electoral heritage”. In Article 3 of the introduction to Part I the following is stated concerning these principles and their legal basis:

“If elections are to comply with the common principles of the European constitutional heritage, which form the basis of any genuinely democratic society, they must observe five fundamental rules: *suffrage must be universal, equal, free, secret and direct*. Furthermore, elections must be held *periodically*. All these principles together constitute the European electoral heritage.” (emphasis in the original)

⁵² United Nations International Covenant on Civil and Political Rights (ICCPR). The ICCPR was adopted by the General Assembly of the United Nations on 19 December 1966 and signed by South Africa on 3 October 1994 and ratified on 10 December 1998.

⁵³ The Protocol to the European Convention on Human Rights was adopted by the signatory members of the Council of Europe in Paris on 20 March 1952.

⁵⁴ The European Convention on Human Rights was adopted by the signatory members of the Council of Europe in Rome on 4 November 1950.

⁵⁵ The Venice Commission is the common name of the European Commission for Democracy through Law, the Council of Europe’s advisory body on constitutional matters.

⁵⁶ The Venice Commission Code of Good Practice in Electoral Matters was adopted by the Venice Commission in Venice at its 51st and 52nd sessions held on 5-6 July and 18-19 October 2002.

Under the heading “Frequency of elections”, Article I.6.57 elaborates upon the requirement of periodicity:

“Both the International Covenant on Civil and Political Rights and the Additional Protocol to the European Convention on Human Rights provide that elections must be held periodically. General elections are usually held at four- or five-yearly intervals, while longer periods are possible for presidential elections, although the maximum should be seven years.”

[182] In an Opinion adopted by the Venice Commission in October 2019 concerning the President of Albania’s attempt to postpone the holding of that country’s local government elections by slightly more than three months,⁵⁷ the Venice Commission, in finding that the President had not been empowered to postpone the elections, reviewed the statutory procedures in various countries for the postponement of elections,⁵⁸ and concluded that in the European constitutional law tradition it was possible to postpone the elections “in limited circumstances”, subject to this caveat:

“Such a decision has to be taken by a competent body. This competent body has to be identified in the law or the postponement process should be directly provided for in the law.”⁵⁹

[183] The Venice Commission said that annulling or postponing elections “directly affects the right to vote, which is a human right”.⁶⁰ Such a restriction had to be proportionate and required a specific legal basis.⁶¹ The Venice Commission acknowledged that emergency situations could justify the postponing of elections,⁶² but

⁵⁷ *Albania: Opinion on the scope of the power of the President to set the dates of elections* Opinion No 959 / 2019 CDL-AD(2019)019, adopted by the Venice Commission at its 120th Plenary Session (Venice 11-12 October 2019).

⁵⁸ *Id* at paras 10-8.

⁵⁹ *Id* at para 18.

⁶⁰ *Id* at para 46.

⁶¹ *Id* at paras 46 and 50.

⁶² *Id* at para 51.

emphasised that “even in emergency situations, extraordinary measures have to be based on the law”,⁶³ cautioning:

“The principle of the rule of law requires that emergency measures be provided for in abstract terms by the law, because only this guarantees that, whenever institutional and/or political tensions arise in a country, the task of evaluating whether these tensions correspond to a situation of emergency is anchored to a legal standard. Otherwise, that task would be left to the rulers who might define ‘emergency’ as whichever tension they believe dangerous for the functioning of the country and adopt whichever measure they might think fit for dealing with an emergency as defined by themselves. Respect for the rule of law bars such a possibility, which might pave the way for unchecked enlargement of power by rulers.”⁶⁴

Finally, the Venice Commission reiterated that the principle of democracy required that elections be held periodically, and this included local (municipal) elections:⁶⁵

“Periodic elections are thus a requirement of the principle of democracy and a fundamental right. Any restriction of the right to take part in periodic elections has to be provided for in the law, have a legitimate aim and be proportionate. The same criteria apply to local elections.”⁶⁶

[184] Although this Court in *Mhlope*⁶⁷ was not called upon to decide the issue which the Commission’s contention in the present case raises, the judgments reflect the importance which this Court attached to complying with the constitutional time-limit for municipal elections. In that case the Commission had failed to comply with the duty imposed by section 16(3) of the Electoral Act to record on the voters’ roll the available addresses of registered voters, though there was some difference of opinion between the members of the Court as to the date from which this duty became operative. It was

⁶³ Id at para 58.

⁶⁴ Id at para 61.

⁶⁵ Id at para 74.

⁶⁶ Id at para 75.

⁶⁷ *Mhlope* above n 6.

recognised that failing to record the addresses would adversely affect the freeness and fairness of the elections, though the Court did not decide that elections conducted on that basis would fail the standard of freeness and fairness. In crafting a just and equitable remedy, the members of the Court appear to have thought it essential that the municipal elections should not be delayed.

[185] Madlanga J, in a dissenting judgment, referred to the requirements of section 159(2) as obligatory, and emphasised the need for regularity of elections as a founding constitutional value and as a component of section 19(2) of the Bill of Rights, stating that “[a] threat of a possibility of the elections not taking place is a threat to our democracy itself”.⁶⁸ In regard to a possible legislative amendment of section 16(3), it was too late, he said, to expect Parliament to enact remedial legislation “in time for the conduct of the elections within the constitutionally set deadline”.⁶⁹ It was thus the duty imposed by section 16(3) of the Electoral Act, rather than the constitutional time-limit, that had to yield.

[186] Mogoeng CJ, writing for the majority, was of a similar view. The Constitution, he said, did not provide for the extension of the five-year term of office of municipal councils: “Every constitutionally permissible solution must thus be explored to avert a looming constitutional crisis that could result from the unconstitutional elongation of terms of office.”⁷⁰ A just and equitable order was thus one that would pave the way for the elections to be held timeously, even though the voters’ roll was the product of unlawful conduct: “Failure to do so could indeed lead to constitutional crisis with far-reaching implications.”⁷¹ Like Madlanga J, Mogoeng CJ adopted the solution of temporarily suspending the obligation imposed on the Commission by section 16(3) of the Electoral Act.

⁶⁸ Id at para 85.

⁶⁹ Id at para 86.

⁷⁰ Id at para 127.

⁷¹ Id at para 132.

[187] None of the parties in the present case argued that section 159(2) was subject to an implied term permitting elections beyond the 90-day period. This Court has held that “words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands and to the ostensible legislative intent”.⁷² In *Rennie*, which has been cited by this Court with approval in connection with this test, Corbett JA endorsed the further proposition that a strong factor militating against the implication of a term in a statute is the difficulty in formulating it.⁷³ This is, in my opinion, a sound limitation which guards against the danger of courts straying beyond the judicial domain into matters of legislative policy or pure speculation.

[188] The problem of an implied term covering the circumstances of the present case lies precisely in its formulation. To start with, which statutory functionary has the power to defer the elections: the Minister, the Commission, a court or some other person? How significant must the derogation from freeness and fairness be before the power of deferral can be exercised? What standard must the functionary apply in making predictions about the future? And importantly, for how long can elections be deferred?

[189] The present case illustrates these difficulties. There is keenly contested evidence, including expert evidence, on the questions whether elections in October 2021 will be free and fair and whether the position will be better in February 2022. The Commission itself envisaged that the progression of the pandemic might be such that elections could not safely be held in February 2022, hence the provisions in its notice of motion for monthly reporting and a supervisory role for the Court. There was also recognition in argument that elections could not be indefinitely postponed, so that a time would come when they would have to be held, even if the circumstances were no

⁷² *Rennie v Gordon* 1988 (1) SA 1 (A) at 22E-F; *Bernstein v Bester and Others N.N.O.* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 105; *National Director of Public Prosecutions v Mohamed N.O.* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at para 48; and *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) 566 (CC); 2008 (1) BCLR 1 (CC) at para 192.

⁷³ *Rennie* above n 76 at 22G-H.

better, or were perhaps even worse, than they would be for elections in October this year.

[190] Difficulties of this kind are partly a result of the inherently imprecise standard of “free and fair” elections. The standard is relative, and must at least to an extent be conditioned by the circumstances prevailing in a country, even if there is an irreducible core. Eric Bjornlund, an American lawyer and expert in the field of election monitoring, writes that despite consensus in theory about the requirements of “free and fair” elections and the formulation of proposed criteria by international organisations and commentators, the standards by which international observers assess elections remain vague:

“Although typically articulated as minimum standards for free and fair elections, such criteria are usually broad aspirations. Assessing whether a given election has met such standards can be extremely difficult, and external considerations often influence such assessments. Judgments about political context often seem subjective or tend to make minimum requirements for democratic elections appear more relative than universal. The phrase ‘free and fair’ has tended to obscure rather than clarify.”⁷⁴

And a few pages later:

“Measuring elections against a free and fair standard suggests a dichotomy – that elections either pass or fail the test of legitimacy – when elections are actually political processes more realistically judged along a continuum and placed in context. This focus on the free and fair determination has encouraged international election assessments to make categorical, ‘bottom-line’ judgments that fail to take nuances and context into account.

. . .

Despite the long-standing use of the phrase and the great significance attached to it, there has been surprisingly little progress in the development of a practical set of

⁷⁴ Bjornlund *Beyond Free and Fair: Monitoring elections and building democracy* (Woodrow Wilson Center Press, Washington DC 2004) at paras 94-5. The passages referred to in the text above come from chapter 6 of this work, titled “Towards ‘Free and Fair Elections’?”. Bjornlund is an American lawyer and co-founder of Democracy International.

criteria by which to judge whether an election has been free and fair. Efforts to make the standard more precise have been largely unsatisfactory.”⁷⁵

[191] In *Kham*,⁷⁶ Wallis AJ writing for a unanimous Court echoed these sentiments, pointing out that there was no internationally accepted definition of the term “free and fair” elections. Whether any election could be so characterised “must always be assessed in context”, and ultimately involves a value judgment.⁷⁷ Later he said:

“The nature of the irregularities and their impact on the conduct, as well as the result of the election, so far as that can be assessed, must be measured against the constitutional standard... Because the facts will be different in every instance where the question arises, it is appropriate to say that the existence of a particular deficiency in one case, does not necessarily mean that the presence of the same deficiency in another election held in differing circumstances, will result in the same conclusion.”⁷⁸

[192] When democracy dawned in South Africa, our interim Constitution envisaged the holding of “free and fair” elections despite the inequalities which characterised, and still characterise, our society. These inequalities affect the ease with which voters can access information bearing on their political choices, navigate digital platforms, register to vote and travel to voting stations. They also affect the scale on which and the ways in which political parties operate.

[193] Another factor influencing the freeness and fairness of elections is the budget available to those tasked with organising elections. There may be a point at which an election budget becomes so parsimonious that an election cannot be said to be free and fair, but above that level the extent of the budget can significantly affect the quality of elections. By way of example, in the present case the Commission stated that it has previously held two voter registration weekends before elections, but due to budget cuts

⁷⁵ Id at 97.

⁷⁶ *Kham* above n 5 at para 34.

⁷⁷ Id.

⁷⁸ Id at para 90.

it was only able to schedule one voter registration weekend in 2021. Based on the outcome of previous registration weekends, it might be reasonable to expect that about half a million new voters or more would be added to the roll during such a weekend and that more than a million registered voters would change their voting districts. The Commission has not said that the elimination of a second registration weekend, with its impact on one and half million or more citizens, would lead to the elections not being free and fair. The same is true of other activities which the Commission has had to curtail, including the appointment of democracy education fieldworkers.

[194] The desirability of adhering to our constitutional (and the international) requirement of regularity in elections is given added point by the current malaise which besets local government in this country, even though these factual circumstances do not affect the question of constitutional and statutory interpretation. Very real prejudice could be suffered by voters if local government elections are delayed, bearing in mind the high level of municipal dysfunction as reflected in reports of the Auditor-General and interventions which provincial governments have had to make in terms of section 139(1) of the Constitution. Regular elections are the most important means by which citizens can hold their municipal representatives to account by removing indolent, incompetent or corrupt councillors.

[195] This feature of the dilemma confronting the Moseneke Inquiry was reflected in the submissions made to the Inquiry, which were summarised as follows in the Report:

“Many stakeholders in their submissions drew attention to the governance devastation to be found within the ranks of most municipalities in our country. They rightly pressed 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.”⁷⁹

⁷⁹ Moseneke Inquiry Report at para 297.

The Report also alluded to the Auditor General's latest annual report released on 30 June 2021, in which she recorded that the decline in the affairs of local government had been consistently reported by her office over the past four years. There was little evidence that the messages of the Auditor-General had been taken to heart.⁸⁰ The Mosenke Inquiry Report concluded on this:

“It is saddening that the Auditor-General finds that most municipalities are in a worse condition than at the beginning of this administration's term in 2016-2017. The Auditor-General's report concludes with a clarion call for ethical and accountable leadership to drive the desired changes to bring about an improved local government.”⁸¹

[196] I am impelled to the conclusion that the Constitution does not supply an answer to the question as to what is to be done when there is serious doubt as to whether elections held within the 90-day period will be free and fair. The constitutional duty imposed on the Commission, in my view, is to hold the elections within the 90-day limit and make them as free and fair as circumstances reasonably permit.

Pre-emptive and ex post facto challenges

[197] It does not follow, from the fact that this is the Commission's duty, that the resultant elections would, in an *ex post facto* (after the fact) assessment, be found to be free and fair. There might, despite imperfections in the elections, be no challenge, or the challenge might be confined to certain municipalities. Even if there were a nationwide challenge, an *ex post facto* inquiry allows the matter to be assessed with reference to circumstances which have actually unfolded, rather than requiring functionaries and perhaps courts to engage on short notice in a predictive exercise on contested evidence. An *ex post facto* challenge would be the occasion to decide what exactly the standard of freeness and fairness entailed in the circumstances. The

⁸⁰ Id at para 298.

⁸¹ Id.

passages I quoted earlier from *Kham*, which was an ex post facto challenge, bear this out.⁸²

[198] Moreover, if a court were to conclude, after the event, that the derogation from freeness and fairness was sufficiently great to justify a conclusion that the elections did not meet the constitutional standard, the court would be able to fashion a remedy with reference to the circumstances then prevailing, which might be quite different from those which existed some months earlier at the time of a pre-emptive challenge. It is not the case that the setting aside of an election flows inevitably from a finding that it was not free and fair.⁸³

[199] If, in the present case, there were to be an ex post facto challenge to elections held on or before 1 November 2021, the matter would be assessed four months or more later than the date when the present application served before us. The state of the pandemic in the country at that time would inform the decision whether materially better elections could be re-run in the foreseeable future or whether one should rather live with the results of imperfect elections. The court could also take into account the actual results in the various municipalities with a view to assessing whether a delay in the elections, or the holding of a voter registration weekend, could plausibly have made a difference.⁸⁴ A court might set aside some elections while allowing others to stand.

[200] This case, I must emphasise, does not present a situation of objective practical impossibility. It is difficult to postulate plausible circumstances in which it would be practically impossible for the Commission to hold elections on a nationwide basis. Examples at a local level can more readily be envisaged, for example localised flooding on election day or the destruction of voting materials at a voting station by a disgruntled

⁸² *Kham* above n 5.

⁸³ Id at para 98. In *Kham*, Wallis AJ devoted many paragraphs of his judgment to a consideration of the question whether eight by-elections, which were found not to have been free and fair, should be set aside, see paras 96-125.

⁸⁴ See *Kham* at paras 100-103, although in that case the balancing of various considerations came down in favour of setting aside the results of the by-elections.

mob. Conceivably in such a case, section 25 of the Municipal Structures Act might authorise the holding of a by-election because of a failure by the Commission to declare the election results for that council or ward within the period specified in the EC Act,⁸⁵ but it is unnecessary to decide the precise legal basis on which a later election would be permissible. In the case of objective impossibility, the election would not take place on the scheduled date, and practically speaking it is difficult to imagine that anybody would object to its being held at a later time.

Constitutional amendment

[201] What I have said thus far does not mean that if there are good reasons to doubt that pending elections will be free and fair, there is no mechanism to avoid going ahead with them, but the mechanism is not judicial. It may be said with justification that a pandemic of the kind that has engulfed the world was not present to the minds of those who formulated our Constitution. Well then, let Parliament decide what to do about it. The Constitution can be amended, even though for sound reasons this must follow an exacting procedure, including a super-majority.⁸⁶ There may be competing proposals for constitutional amendment, and the choices should be made by the democratically elected representatives of the people in Parliament, not the courts.⁸⁷

⁸⁵ Section 25(1)(a) of the Municipal Structures Act requires a by-election to be held if "the Electoral Commission does not declare the result of the election of a municipal council, or in a district management area, or in a ward, within the period specified in terms of the Electoral Commission Act, 1996 (Act No. 51 of 1996)".

⁸⁶ In the submissions made to us it was assumed that a constitutional amendment allowing for the postponement of local government elections would involve an amendment of the requirement of regularity in sections 1(d) and 19(2) of the Constitution. If that is so, the amendment would, in terms of section 74(1) of the Constitution, require the support of at least 75% of the members of the National Assembly and of six provinces in the National Council of Provinces (NCOP), and the procedures in section 74(5) would have to be followed, namely timeous publication in the *Government Gazette* inviting public comment and timeous submission to the provincial legislatures for their views.

If an amendment of section 159(2) so as to allow the postponement of local government elections were regarded as not simultaneously amending sections 1(d) and 19(2), the amendment would, in terms of section 74(3), require the support of at least two-thirds of the members of the National Assembly.

In either event, section 74(7) would require that the Bill not be put to the vote within 30 days of its introduction in the National Assembly (if the National Assembly is then in session) or within 30 days of its tabling (if the National Assembly is then in recess).

⁸⁷ The non-scientific submissions made to the Moseneke Inquiry show that public opinion is divided on whether elections should be held timeously or postponed. The Inquiry received competing submissions from political parties, civil society organisations, the constituencies represented on the National Economic Development and Labour Council, individual members of the public and electoral monitoring bodies, seemingly with no clear preponderance in favour of one solution or the other.

[202] The Commission was criticised by some of the intervenors and amici for having failed to present its concerns to Parliament. The Legislature is among the organs of state which, in terms of section 181(3) of the Constitution, must through legislative and other measures assist and protect the Commission to ensure, among other things, its effectiveness. In terms of section 181(5), the Commission is accountable to Parliament.⁸⁸ A core element of the Commission's effectiveness is the holding of free and fair elections.

[203] In response to this criticism, the Commission's chairperson stated that as a Chapter 9 institution its task was to act within the confines of the Constitution, not to propose how the Constitution should be amended. He said that in the Commission's view an amendment to the Constitution was not appropriate, because (a) it would be more significant than any previous amendments of the Constitution – it would not only lengthen the term of office of municipal councillors but extend their actual terms of office; (b) any amendment by which an incumbent government entrenches and extends its own term of office is by its very nature undemocratic and should thus not be adopted to deal with what is likely to be a once-off and extraordinary set of events; and (c) pursuing a constitutional amendment would set a dangerous precedent. The deponent added that the Commission was of the view that an amendment was not likely to achieve the requisite special majority of 75%.

[204] I understand the chairperson's replying affidavit to mean that approaching Parliament was actually considered but rejected for the reasons he gives. Those reasons do not pass muster:

- (a) I have some difficulty in understanding why an approach to Parliament, to which the Commission is constitutionally accountable, should be

⁸⁸ Section 181(1) lists the state institutions which strengthen constitutional democracy. The Commission is one of them. Section 181(3) provides: "Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions." Section 181(5) provides: "These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year."

thought inappropriate. The Commission would not have been obliged to advocate for a particular solution. It was fully entitled, though, to inform Parliament of its dilemma and invite Parliament to consider whether statutory intervention was warranted.

- (b) If the Commission thought that its function was to comply with the Constitution rather than to propose its amendment, the same objection ought to have inhibited it from approaching this Court to relieve it of its constitutional duty to conduct timeous municipal elections.
- (c) It is a matter of surprise that the Commission should have thought that a constitutional amendment on a matter of political choice, which could only occur with a super-majority of a democratically elected Parliament, would set a dangerous precedent, while a decision by the Constitutional Court would set a healthy precedent.
- (d) At least in the case of local government elections, a constitutional amendment would not be a matter of an incumbent government entrenching itself. Different parties hold majorities in different municipalities, and a constitutional amendment would not be made by those councils but by a super-majority in a national Parliament.
- (e) As to lengthening the term of office of municipal councillors, there is no reason to believe that a constitutional amendment would have extended the term of office for a longer period than the order we were asked to make.
- (f) Covid-19 may or may not turn out to be the only global pandemic we face in the years ahead, but even if it is it may be with us for some – perhaps many – years, so it is not self-evident that the present application, if granted, would have been the only occasion on which judicial intervention was invoked.
- (g) Finally, it is not apparent to me why the Commission's scepticism as to whether a constitutional amendment would command the requisite support in Parliament should be thought to favour achieving the same

practical result by an ordinary majority of between eight and eleven judges.

The pandemic's effect on free and fair elections

[205] What I have said thus far applies to both strands of the Commission's impossibility case – the effect of the pandemic and associated regulation, and the effect of the absence of a voter registration weekend, on the freeness and fairness of elections on 27 October 2021. The first judgment's conclusion in favour of the Commission rejects the first strand but accepts the second.

[206] For the reasons I have explained, my conclusion is that the Commission's constitutional duty in the circumstances of the present case was to conduct the elections within the 90-day period, making them as free and fair as circumstances reasonably permitted. This conclusion does not foreclose an ex post facto challenge to the freeness and fairness of the elections. Any such ex post facto challenge will depend on the evidence adduced at that time, from which it follows that a close investigation of the evidence put up in the present case is not required.

[207] However, and insofar as the first judgment holds that a case for deferring the elections on the first strand of the Commission's case was not made out (assuming the Court's power to intervene at all), I agree. A power of intervention, if it existed, would require evidence establishing, to a high degree of confidence, that (a) elections held within the constitutionally mandated period would fail the free and fair standard and (b) that elections held in the period February-May 2022 would meet that standard. It is to be noted, in this regard, that a person who relies on impossibility to excuse performance bears the burden of proving it.⁸⁹

⁸⁹ *Liebenberg v Neville* [1988] ZASCA 121 at paras 23-4 and *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* [2008] ZASCA 27; 2008 (4) SA 111 (SCA) at para 28. Although these were contract cases, it accords with general principle that the onus rests on the person seeking to be excused by virtue of impossibility.

[208] The Commission relied almost entirely on expert evidence given to the Moseneke Inquiry in the second half of June and early July 2021. We were not furnished with transcripts of the oral presentations made by the experts. We have only the summaries in the Moseneke Inquiry Report and the experts' written submissions (in some instances, only slide presentations) to the Inquiry. The oral presentations were not subject to cross-examination. Scientific knowledge and modelling of the pandemic is evolving rapidly. The nature and urgency of the proceedings meant that we did not have up-to-date expert evidence when we heard argument on 20 August 2021.

[209] The Commission's submission to the Moseneke Inquiry was that elections cannot be free and fair while the restrictions associated with Alert Levels 2 to 5 are in force. The medical evidence adduced in the Moseneke Inquiry did not establish the likelihood that in the foreseeable future South Africa would be free of pandemic regulation or at Alert Level 1.

[210] As with much predictive modelling, the results become more and more speculative as one looks further into the future. The Ministerial Advisory Committee (MAC), which relies on data provided by the South African Covid-19 Modelling Consortium, told the Moseneke Inquiry that it was not possible to predict what the pandemic would look like in October in South Africa, let alone in the provinces and districts, where waves of infection could happen at different times. On the basis that community immunity required vaccinating 67% of the population (itself a contested figure), Dr Miot,⁹⁰ one of the scientists who presented the MAC's submissions, expressed the view that South Africa was very unlikely to achieve that level of vaccination by March 2022.

⁹⁰ Dr Miot is a pharmacist and health economics specialist. She is currently the Division Director at the Health Economics and Epidemiology Research Office, a division of the Wits Health Consortium of the University of the Witwatersrand. She is a member of the Ministerial Advisory Committee.

[211] Another scientist, Prof Silal,⁹¹ a statistician and member of the Modelling Consortium, was unable to predict accurately when this rate of vaccination would be achieved. She thought that the third wave was likely to be over by the end of August or September 2021 and that there might be a period of two to three months where there would be a low number of infections.

[212] Dr Moultrie,⁹² an epidemiologist and member of the Modelling Consortium, submitted a short report. He said that the rate of epidemic growth (this was in early June 2021) suggested that the third wave might “have a lower peak incidence but longer duration than the previous two waves”. There was substantial uncertainty about the potential of new variants to alter the trajectory of the epidemic in the coming months (at that time, this related to the Beta and Delta variants).

[213] Updated submissions from the MAC, presented by Prof Silal and Dr Moultrie, were to the effect that, except for the Free State, Northern Cape and North West provinces (where data problems led to “slightly less well-calibrated scenarios”), the third wave projection was that the rate of infection would decrease in August and September 2021. They were unable to say whether we would be in a fourth wave by October 2021, but Prof Silal was of the opinion that on any scenario South Africa would be better off in March 2022 than October 2021, just because more people of voting age would have been vaccinated. It is noteworthy that in a matter of only a few weeks the projections regarding the third wave had changed from a prediction that its peak would be smaller than the second wave to a prediction that it would be similar to the third wave in most provinces. Various factors reduced the ability to produce “robust projections in some provinces”. Model projections were described as “preliminary” and would be “updated rapidly as new data become available”.

⁹¹ Prof Silal is a statistician and Associate Prof of Statistical Sciences at the University of Cape Town, where she leads its Modelling and Simulation Hub, Africa. She is a member of the South African Covid-19 Modelling Consortium.

⁹² Dr Moultrie is a medical practitioner and epidemiologist employed in the National Institute for Communicable Diseases (a division of the National Health Laboratory Service) as Senior Medical Epidemiologist in the Centre for Tuberculosis. He is the coordinator of the Covid 19 Modelling Consortium.

[214] Dr Buthelezi, the Department of Health's Director-General, told the Moseneke Inquiry that it was difficult to predict the likely state of the pandemic in October 2021. Unsurprisingly, the Moseneke Inquiry Report does not contain a prediction by Dr Buthelezi as to what the position was likely to be four months later in February 2022.

[215] The Moseneke Inquiry solicited submissions from several other leading medical and public health experts. By the time they made their presentations to the Inquiry in late June / early July 2021, the Delta variant was the dominant strain of the virus in South Africa. One component of convergence among the experts was expressed in the Moseneke Inquiry Report as follows:

“[I]t is difficult to predict the trajectory of the pandemic with any certainty for many reasons. The virus is constantly evolving, its variants are unpredictable, and they are not going away anytime soon. There are variable geographic areas of high infections as the infections spread. The uncertainty is also worsened by the population's ‘Covid-19 fatigue’. That means that the population is not consistently adhering to the recommended non-pharmaceutical interventions. Whilst the rate of vaccination of different groups, including high-risk groups, could result in a reduction in hospitalisation and death, it may not prevent a resurgence of infections. And lastly, although all vaccines used in South Africa are shown to likely have ‘a high protection against severe disease and death, they are likely to vary significantly in protecting against infection and mild disease’. The virus is not well understood. There is insufficient knowledge, even at this stage, about the transmission trends, the ability of the virus to cause an infection, and the changing nature of the virus.”⁹³

[216] As to vaccination, Prof Abdool Karim⁹⁴ cautioned that the target of 67% for community immunity was an outdated benchmark and that there was need for a higher

⁹³ Moseneke Inquiry Report at para 203.

⁹⁴ Prof Abdool Karim is a medical practitioner, public health medicine specialist, epidemiologist and infectious disease specialist. He co-chaired the country's Ministerial Advisory Committee on Covid-19 between March 2020 and March 2021. He is currently a director of the Centre for the AIDS Programme of Research in South Africa (CAPRISA), CAPRISA Professor of Global Health at Columbia University, Adjunct Professor in Immunology and Infectious Diseases at Harvard University, Adjunct Professor of Medicine at Cornell University and Pro Vice-Chancellor responsible for Research at the University of KwaZulu-Natal, among other positions.

proportion of vaccination to achieve community immunity. His presentation suggested a figure of 75% on the basis of an assumed vaccination efficiency of 80%. Prof Abdool Karim also thought it likely that the country would see several new variants by March 2022 and that at some stage a variant would escape immunity, “and once that variant arrives, everyone who has been vaccinated will be back to ‘square one’”. Dr Abdullah⁹⁵ agreed that we could very easily see a new strain that more fully escapes vaccine-induced and natural immunity during a fourth wave. He thought that the vaccine roll-out was “likely to be of limited immediate impact”. Dr Moultrie likewise considered that there would need to be a higher percentage of immunity than 67% in order to achieve community immunity.

[217] As to projections of the timing of the third and fourth waves, Prof Abdool Karim believed that October 2021 would be a period of low infection, and he maintained that this was the best time to hold the elections, rather than three months later. He considered that most election-related risks could be mitigated.

[218] In the introduction to his written submissions, Dr Abdullah observed that any exercise to predict future trends had to be done “with both caution and spades of humility”. If the interval between waves replicated itself, the fourth wave might start in the first two weeks of October 2021 and be well established by the end of October 2021. He added, however, that there was also a strong possibility that the third wave would end a few weeks later, that the trough between the third and fourth waves would be in the period September to late October 2021, and that the fourth wave would only start at the end of October. In this event the fourth wave would peak in the second half of December 2021 and the first half of January 2022, declining to a trough in late February and March 2022. He feared that a “host of gatherings across the country” at the end of October could play a major role in triggering the fourth wave and increasing its size.

⁹⁵ Dr Abdullah is a medical practitioner and a specialist in public health medicine. He is currently Director of the Office of AIDS and TB Research at the South African Medical Research Council, and holds a part-time appointment as a public health specialist and HIV clinician at the Steve Biko Academic Hospital in Pretoria, where he is a member of the hospital outbreak response team working as a clinician in the Covid 19 wards.

[219] These predictions represented Dr Abdullah’s view of the national picture, but he warned that it masked local variations. There could be substantial inter-provincial and inter-metropolitan variations, making it likely that there would always be some parts of the country that would be experiencing an exponential fourth-wave rise in infections. He favoured postponing the elections “to a time in the future when there is demonstrable decrease of severe disease, hospital admissions and deaths as a result of high coverage of effective vaccinations”. Any hope of achieving this in 2022 would require an “unprecedented vaccination drive powered by a well-oiled machinery that ensures efficient and effective execution”. In his slide presentation he said that with a “monumental effort” vaccine coverage could be achieved in 2022. It thus appears to have been his view that an indefinite postponement of the elections was needed. He did not say that a voting day at the end of February 2022 and electioneering in the months preceding it were likely to be safe and prudent from a medical perspective.

[220] Prof Madhi⁹⁶ said that it was difficult to predict what the status of Covid-19 would be in October 2021, as it was dependent on multiple factors, among which were further mutations of the virus and the durability of protection afforded by natural or vaccine-induced immunity. Based on the pattern of past waves, October might well be a period of “relative calm”, with a resurgence more likely to occur from December onward. The aspirational goal of vaccinating 40 million people was unlikely to achieve herd immunity, and the goal should instead be maximum protection for high-risk individuals.

[221] Dr Dasoo⁹⁷ said that South Africa’s national response to the pandemic had revealed “deep dysfunction in governance, poor state capacity and an overweening

⁹⁶ Prof Madhi is a medical practitioner and specialist paediatrician. He is currently Professor of Vaccinology and Dean of the Faculty of Health Sciences at the University of the Witwatersrand, director of the university's Vaccines and Infectious Diseases Analytics Research Unit and co-director of its African Leadership in Vaccinology Expertise.

⁹⁷ Dr Dasoo is a medical practitioner and convener of the Progressive Health Forum, a voluntary association of health experts from the private and public sectors.

political interference in what should be regarded as a public health emergency”. Of great concern to him was the “lackadaisical approach to the most important intervention, viz vaccination at scale”. Although predicting the troughs was very difficult, it was hoped that the rate of infection would be much lower, and that restrictions could be eased, in the period August-October 2021 when the main electioneering activities would take place. Rallies and community mobilisation during this period were, however, virtually certain to be the direct cause of greater transmission.

[222] He also made the important point that the high level of “breakthrough infection” among vaccinated people was a function of a false popular belief that vaccinated people could dispense with personal protective measures and social distancing. In truth, while the Covid-19 vaccines afforded strong protection against serious disease, hospitalisation and death, they were much less effective in preventing mild or moderate disease. Vaccinated people remained prone to infection and could transmit the virus to others. The approved vaccines in this country were thus not expected to provide appreciable herd immunity, although there would be a “hugely positive impact” for the vaccinated people. Dr Dasoo expressed no opinion about the safety of elections in the period February-May 2022.

[223] The expert evidence given to the Mosenke Inquiry was thus, to put it no higher, equivocal. There was respectable scientific opinion to the effect that October 2021 would be better than February / March 2022. The Commission is correct that in assessing the freeness, fairness and safety of elections regard should be had not only to the circumstances prevailing on voting day but also to the circumstances which prevailed in the months preceding voting day. Nonetheless, whereas adaptations can be made to electioneering activities in the run-up to voting day, the congregating of millions of people throughout the country at designated spots on voting day is unavoidable and poses the greatest danger of so-called super-spreader events.

[224] If the assessment is broadened to the months immediately preceding the voting date, it is unknown whether the period from (say) December 2021 to an election day at

the end of February 2022 will be materially better, from the point of view of safety and pandemic regulation, than the period from August 2021 until an election day at the end of October 2021. That will depend on a combination of factors including the timing of troughs and peaks of infection, the pace of the vaccination roll-out, how long vaccines remain effective, the pace of the administration of booster shots if these are needed, and whether vaccine-resistant variants emerge. In regard to the vaccine roll-out, it is well known that our health authorities have opened up vaccination to younger age groups as hesitancy among unvaccinated people in older age groups caused demand to drop. There must, thus, be some uncertainty as to what will happen to vaccination rates once the keen members of each age group have been vaccinated.

[225] It is not a matter of the rights and wrongs of the expert evidence. The experts were being asked to make predictions where predicting was especially difficult. As one of the parties aptly put it, the scientific evidence was shrouded in uncertainty, not because the experts did not know what they were talking about but because they did. The expert opinion was divided and, more importantly, uncertain.

[226] Standing back, where does this leave us? If in law the standard of free and fair elections must be adjusted to take into account the existence of the pandemic and the restrictions brought in its wake, it cannot be said at this stage that timeous elections will not meet that standard. If, conversely, the standard of free and fair elections does not as a matter of law bend with the circumstances brought about by the pandemic, and if the assumption is made that timeous elections would fail the standard, it has not been shown that elections in February 2022 (or a month or two later) would satisfy the standard. On either approach, there would be no principled basis (assuming the power of intervention) to defer the elections until any of the dates proposed.

The absence of a voter registration weekend

[227] As to the second strand of the Commission's case – the absence of a voter registration weekend – there is, as I have observed, some uncertainty as to why the postponed voter registration weekend on 31 July-1 August 2021 was cancelled. The

Commission's main replying affidavit suggests that the principal reason was that the Commission had decided to act in accordance with the Moseneke Inquiry Report's recommendation to seek a postponement of the elections.

[228] Be that as it may, the first judgment holds that the absence of a registration weekend would result in the elections not being free and fair. It is on this basis that the first judgment would have granted limited relief to the Commission by deferring the elections beyond the 90-day period by a month or two, though not until the end of February 2022. The first step in this reasoning is that if, following an *ex post facto* challenge, a court found that elections were not free and fair, the just and equitable relief the court could grant in terms of section 172(1)(b) would be an order that the elections be re-run, even though this was outside the 90-day period. The second step of the reasoning is that if it can be determined in advance that elections, if conducted, will not be free and fair and will have to be re-run, a court must be entitled to act pre-emptively by permitting elections to be run outside the 90-day period, and that it would be futile and wasteful to require constitutionally invalid elections to be run as a precondition for judicial intervention. The third and final step in the reasoning is that this is such a case, because elections conducted without a voter registration weekend will not as a fact be free and fair.

[229] As to the first step, in an *ex post facto* challenge (which could only exceptionally be brought in this Court at first instance) the relief to be granted if elections were set aside would not, as I see it, involve an order in terms of section 172(1)(b) of the Constitution for the elections to be re-run outside of the time-limit imposed by section 159(2). The consequence of the setting aside of municipal elections by a court is regulated by section 25(1)(b) read with section 25(3)(b) of the Municipal Structures Act: by-elections must be held within 90 days of the court's order. Unusual though it would be, if the results in all or most municipal councils and wards in South Africa were set aside in a single order, by-elections throughout the country would be triggered. In such a case, the original elections will have been held in compliance with the time-limit set by the Constitution, and the by-elections would take place within a time ordained by

national legislation. The court would not be involved in determining the date of the by-elections. This is done by the various municipal managers in consultation with the Commission.

[230] However, and assuming the correctness of the first step in the reasoning, I respectfully disagree with the second and third steps. As to the second step, I have explained my reasons for concluding that the constitutional duty of the Commission is to comply with the constitutional time limit for holding the elections and to make them as free and fair as circumstances reasonably permit, and that our courts do not have the power, save perhaps in rare and exceptional circumstances not present here, to relieve the Commission of this duty. Challenges to the freeness and fairness of elections must in general take place after the elections have been held with reference to events as they actually unfolded, and any relief which the court grants must likewise be based on the circumstances prevailing at the time the court finds that the elections did not meet the required standard of freeness and fairness.

[231] While the second step in the first judgment's reasoning has a superficial attraction, it fails in my respectful view to take sufficiently into account that freeness and fairness is not an exact standard. It is relative and context-sensitive, as is any relief which may flow from a finding that the standard was breached. It is not like the examples of localised objective practical impossibility which I mentioned previously.⁹⁸ In those examples, the Commission would not go to court for an order declaring that it is relieved of the duty of opening that particular voting station. Because of the objective impossibility, voting would not happen at that voting station anyway, and nothing said by a court could change that. The consequences of the objective impossibility would be sorted out afterwards.

[232] There is nothing perverse about taking section 159(2) of the Constitution at its word, and requiring challenges to freeness and fairness to be addressed afterwards. I

⁹⁸ See [200].

do not believe that the Constitution envisages that courts should become embroiled in pre-emptive assessments of that kind. To the extent that there is room for pre-emptive flexibility in the context of local government elections, it is to be found in sections 8 and 9 of the MEA, which grant the Minister or the Commission time-bound powers to defer voting dates. Sections 21 and 22 of the Electoral Act contain similar provisions in relation to national and provincial elections. If anything would set a bad precedent, it would be to open the doors of the courts to pre-emptive election challenges with a view to disturbing constitutionally ordained time-limits for the holding of elections. It is unnecessary to hold that there can never be exceptions to this general approach, and it is undesirable to do so, since extreme situations calling for pre-emptive intervention may arise which we are not able at the present time to foresee. The present case, however, is far removed from the sort of situation which might, assuming it to be constitutionally permissible, call for pre-emptive intervention.

[233] As to the third step in the first judgment's reasoning, I am not at present persuaded that if elections take place on 1 November 2021 without a voter registration weekend, such elections will necessarily fail the standard of freeness and fairness. I do not decide the point, because it may be the subject of ex post facto challenges, including by parties who are not before us and with reference to evidence and arguments which have not been submitted to us. Those ex post facto challenges will be the occasion to adjudicate the matter. I wish only to mention certain matters which those defending the freeness and fairness of the elections might raise and which demonstrate that the answer is not clear-cut:

- (a) There is no statutory requirement for the Commission to hold a voter registration weekend.
- (b) In terms of section 6 of the Electoral Act, any South African citizen who has attained the age of 16 may apply for registration as a voter, and if the application is successful the person's name may be placed on the voters' roll when he or she reaches the age of 18.

- (c) Applications for registration may take place during working hours at electoral offices, and there is at least one such office in each municipal area.⁹⁹ Applications can also be submitted online.
- (d) Given that the last municipal elections took place in August 2016, citizens aware of the five-year municipal election cycle have known for several years that the next elections would take place in the second half of 2021.
- (e) Political parties (who definitely know the election cycle) have had five years in which to encourage voter registration by citizens who they think are likely to support their causes.
- (f) Our municipal elections in August 2016, and our national and provincial elections in May 2019, were both preceded by two voter registration weekends. Since there is a common voters' roll, persons who registered on those weekends would qualify to vote in this year's local government elections, provided they voted in the districts for which they registered.
- (g) The President of South Africa announced on 21 April 2021 that the local government elections would be held on 27 October 2021. Citizens who were not registered had more than three months from the President's announcement to apply for registration in the ordinary way before the election date was formally proclaimed. While citizens with unsympathetic employers may not have been able to take time off work, we know that there is, sadly, widespread unemployment among school leavers (who are likely to constitute a significant proportion of new voters), and they would have had time to approach their municipal electoral offices.
- (h) The Commission itself appears to accept that the cancellation of a second voter registration weekend, with the concomitant non-registration of many thousands of potential voters, does not render the pending elections

⁹⁹ *Richter v Minister of Home Affairs* [2009] ZACC 3; 2009 (3) SA 615 (CC); 2009 (5) BCLR 448 (CC) at para 16, where the Commission's evidence was recorded as being that it had 302 offices located in local municipalities throughout the country, that voters could register at these offices on any working day, and that these offices had been in existence since 1998.

constitutionally invalid. The question may be asked why the absence of the other registration weekend makes all the difference.

- (i) The Commission scheduled a voter registration weekend for 17-18 July 2021, but deferred it because the country was at Adjusted Alert Level 4. The registration weekend was postponed to 31 July-1 August 2021. The reasons for the cancellation of this registration weekend are not altogether satisfactory. It is unclear from the Commission's replying affidavit whether it cancelled the registration weekend primarily because it had resolved to follow the recommendation of the Moseneke Inquiry or primarily because the country, despite the alert level having been downgraded to Adjusted Alert Level 3, was still in the midst of the third wave of infection. Whatever the reasons, the Commission acted in good faith and did not simply ignore the desirability of holding a registration weekend.
- (j) There are about 40.3 million citizens eligible to register as voters, of whom about 25.8 million are currently registered.¹⁰⁰ So 14.5 million eligible voters, representing about 35.9% of the total eligible electorate, are not registered. However, statements that the absence of a registration weekend will "disenfranchise" 14.5 million voters is a gross exaggeration. We do not know the age profile of the unregistered citizens, but a fair number of them must be people who were eligible to register for the national elections held in May 2019 but chose not to do so. We do not know how many citizens have become eligible to vote since the cut-off date for the 2019 national elections, but it is reasonable to assume that a fair number of them would in any event choose not to register.
- (k) The Commission's data¹⁰¹ indicates that in the voter registration weekends held for the 2016 and 2019 elections, an average of around 650 000 citizens registered as voters for the first time on any one weekend

¹⁰⁰ In the Moseneke Inquiry Report, the number of citizens eligible to vote was said to be 40 263 709 and the registered electorate 25 789 566.

¹⁰¹ Annexure "FA12" to the founding affidavit.

while around one million registered voters changed their voting districts. If 650 000 new voters would have registered if a registration weekend had been held before this year's elections, this would represent 4.5% of the "disenfranchised" electorate of 14.5 million and about 2.5% of the registered electorate. And as I have said, a not trivial proportion of the 650 000 new voters is likely to comprise persons who had the opportunity to register in advance of the 2016 and 2019 national elections.

[234] This does not imply that the votes of persons who might have registered but for the absence of a registration weekend are unimportant. As was said in *August*, "everybody counts".¹⁰² But in deciding whether elections are free and fair one must also take into account that if elections are not held timeously, many more millions of registered voters are prevented from exercising their right to vote in regular elections.

[235] I accept the Commission's evidence that in practice voter registration weekends are a successful method of encouraging large numbers of citizens to register or change their registration details. The failure, however, of the Commission to take a step which would materially enhance the quality of elections would not inevitably lead to a finding that elections conducted in the absence of that step failed to meet the constitutional standard of free and fair elections. In *Mhlope*, Madlanga J said:

"With this twin-purpose in mind, surely then the availability of addresses on the voters' roll enhances the fairness of elections. The absence of addresses might – not will – result in elections being unfair. The IEC argued that the lack of addresses on the voters' roll does not bear relevance to the fairness of elections. The argument went so far as to say if it did, that would mean all previous elections where the voters' roll did not include addresses were unfair. This ignores one fundamental distinction. It is one thing for the IEC to take all necessary steps to exclude or minimise the possibility of unfairness in elections. It is quite another to say unfairness actually eventuated as a result of a failure by the IEC to take all necessary steps. Section 190(1)(b) of the Constitution enjoins the IEC to ensure that elections are free and fair. If the IEC were

¹⁰² *August* above n 9 at para 17.

to fail to take precautionary measures where – looked at objectively – that failure might lead to elections being unfair, it would be failing in its duty under section 190(1)(b). It does not follow, however, that just because there has been that lapse, elections will necessarily be unfair.”¹⁰³

[236] Mogoeng CJ did not agree with Madlanga J’s reasoning that the court’s jurisdiction to grant just and equitable relief flowed from a violation of section 190(1)(b), but he shared Madlanga J’s view that the absence of compliance with the important requirement of recording voters’ addresses would not necessarily lead to a finding that elections were not free and fair. This is evident from the following passage in his judgment:

“[S]ection 190(1)(b) of the Constitution imposes an overarching mandate on the IEC to ensure that our elections are free and fair. The concept of the freeness and fairness of the elections is an embodiment of much more than the availability or otherwise of voters’ addresses. That is why our elections have in the past been correctly declared to be free and fair, despite the fact that millions of voters in villages and informal settlements did not and still do not have recordable addresses available. This concept entails curbing intimidatory and unacceptable conduct and language by political parties and their supporters. It also extends to building firewalls against election-rigging occasioned or facilitated by any lapse or sloppiness on the part of the IEC or violations of the electoral code of conduct by candidates or political parties or indirectly by their proxies. It is inappropriate to base a declaration of constitutional invalidity on the link between the possible absence of freeness and fairness of the elections and the failure to record voters’ addresses. To do so would have the unintended consequence of overly magnifying the value of and the role addresses play in an electoral process. I do not think that section 190(1)(b) finds application in the determination of the invalidity of the IEC’s conduct.”¹⁰⁴

[237] The absence of a voter registration weekend is unlike the position in which prisoners found themselves in *August*, where their incarceration coupled with the Commission’s failure to make registration facilities available to them deprived them of

¹⁰³ *Mhlope* above n 6 at para 19.

¹⁰⁴ *Id* at para 106.

the opportunity to register; and is unlike the persons with whom *Richter* dealt, where statutory limitations prevented registered voters who were abroad on election day from casting their votes. Here there was opportunity to register, but unregistered voters did not benefit from the advertising and cajoling that comes with voter registration weekends. In *Richter* this Court, in assessing whether statutory provisions infringed section 19 of the Constitution, formulated the test as being whether the consequence of the challenged provisions was such that “were a voter to take reasonable steps to seek to exercise his or her right to vote, any of the provisions would prevent the voter from doing so”.¹⁰⁵ It is arguable that failing to conduct a voter registration weekend does not prevent voters who take reasonable steps to register from doing so.

[238] However, if the prejudice occasioned to unregistered but eligible citizens by the absence of a registration weekend were found, in an ex post facto challenge, to outweigh factors of the kind listed in the preceding paragraphs, it does not follow that a court would set aside the election results and order a re-run. As I have said, that would depend on prevailing circumstances, including whether free and fair elections, preceded by a voter registration weekend, could be held in the reasonably foreseeable future, having regard to the state of the pandemic, the related Covid-19 regulations and the Commission’s budgetary constraints. The court would also take into account the prejudice suffered by voters when their opportunity of replacing bad councillors with better ones is delayed, a point highlighted in the Moseneke Inquiry Report, as I previously mentioned.¹⁰⁶ Some elections might be allowed to stand while others might be set aside.

Setting aside the Minister’s proclamation

[239] The order issued on 3 September 2021 set aside the Minister’s proclamation of 3 August 2021 in order to pave the way for a possible voter registration weekend to be held. In its notice of motion, the Commission sought an order authorising the Minister

¹⁰⁵ *Richter* above n 103 at para 58.

¹⁰⁶ See [194-5].

to withdraw the proclamation, but this was as a step in the broader relief claimed by the Commission, not an independent challenge to the proclamation.

[240] The DA, however, applied in its notice of motion for direct access in order to claim certain substantive relief. The primary substantive relief comprised orders (a) declaring the Commission's failure to hold a voter registration weekend unconstitutional and invalid; (b) directing the Commission to hold such a weekend on either 27-29 August 2021 or 3-5 September 2021; and (c) that notwithstanding the provisions of section 6(1A) of the MEA, the names of people registering on the registration weekend may be added to the voters' roll for purposes of the elections on 27 October 2021.

[241] In the alternative to this relief, the DA sought orders (a) declaring that the Minister's proclamation of 3 August 2021 was unconstitutional and invalid; (b) directing the Commission to hold a voter registration weekend on one or other of the weekends mentioned above; (c) directing the Minister, on the day after the voter registration weekend, to proclaim the election date for 27 October 2021; (d) declaring that the election timetable published on 4 August 2021 will remain the governing timetable, subject to any future amendments. With some modifications to account for the passing of time, the orders contained in paragraphs 4 and 5 of our order of 3 September 2021 gave effect to the alternative relief sought by the DA.

[242] The Minister's power to call local government elections by notice in the Government Gazette is conferred by section 24(2) of the Municipal Structures Act. The Municipal Structures Act came into force on 1 February 1999, and section 24(2) has remained in the same form since then. At that time the MEA had not yet been promulgated. The Electoral Act, which came into force on 16 October 1998, applied to local government elections. Section 24(1) of the Electoral Act, which now applies only to national and provincial elections, provided in its original form that the voters' roll, or segments of the voters' roll, to be used for an election, were those as they existed on the day the election was proclaimed. Accordingly, when shortly afterwards the Minister

was given the power conferred by section 24(2) of the Municipal Structures Act, one of the consequences of the exercise of that power would be that only persons whose names appeared on the relevant segments of the roll at the date of the proclamation could vote in the election.

[243] When the MEA came into force on 11 July 2000, many of the provisions of the Electoral Act ceased to be applicable to local government elections, because section 3(2) of the MEA stipulated that the Electoral Act applied to local government elections only to the extent stated in the MEA. However, section 6(1) of the MEA in its original form adopted the language of section 24(1) of the Electoral Act, so the consequence of proclaiming a date for local government elections, namely that only persons whose names appeared on the relevant segments of the roll at the time of the proclamation could vote in the election, remained unchanged.

[244] In terms of the Electoral Laws Amendment Act 1 of 2019, section 6(1) of the MEA was amended and a new section 6(1A), the provisions of which I quoted earlier, was inserted. The result of these changes was that the cut-off date for eligibility to vote was no longer whether a person's name appeared on the relevant segment of the roll at the date of the proclamation but whether a person had applied for registration on the roll at the date of the proclamation. At the same time, identical changes were made to section 24 of the Electoral Act. The proclaiming of an election date in terms of section 24(2) of the Municipal Structures Act continued to be an act which limited the entitlement of citizens to vote at the proclaimed elections.

[245] When, in the present case, the Minister, on 3 August 2021 proclaimed the election date to be 27 October 2021, she knew that an inevitable consequence was that persons who had not by that time applied to register as voters would be unable to vote on 27 October 2021. Although the primary purpose of the power conferred on the Minister in section 24(2) is to determine the election date, a subsidiary purpose is to fix the date with reference to which eligibility to vote at the proclaimed elections is to be determined.

[246] The Minister knew that the Commission had intended to conduct a voter registration weekend in July 2021 but had cancelled it. She proclaimed the election date, knowing that the consequence would be that no voter registration weekend could thereafter be held for purposes of the proclaimed elections.

[247] Two days before proclaiming the election date the Minister wrote to the Commission. In this letter she said, among other things, that in the absence of a court order she did not have the power, under the Constitution and applicable legislation, to delay the timeous proclamation of the elections. The Minister appears to have been under the impression that she was under legal compulsion to issue the proclamation when she did on 3 August 2021. That was a misapprehension. Section 24(2) of the Municipal Structures Act provides that such a proclamation may be issued before or after the expiry of the terms of office of the municipal councils. She did not need authority from legislation or the courts to defer the timing of her proclamation, though she could not validly have proclaimed a voting date that was later than 1 November 2021.

[248] It is understandable that, in the ordinary course, the Minister would not wish to hold back the issuing of a section 24(2) proclamation, but there was nothing ordinary about the circumstances in early August of this year. Not only was South Africa in the midst of a pandemic which had brought about or influenced the Commission's decision to cancel a voter registration weekend, but the Commission was about to embark on an extraordinary application to seek this Court's approval for the elections to be conducted outside of the time period stipulated in the Constitution. The Minister could not assume that this Court either had the power to defer elections or, if it had the power, that it would decide to exercise the power favourably to the Commission.

[249] By proclaiming the election date very shortly before the Commission launched its application in this Court, the Minister made it inevitable that the case would be argued before us on the premise that no voter registration weekend had been or could

be held for purposes of elections on 27 October 2021. I do not suggest that this was her purpose, but objectively it was the inevitable effect of her decision to proclaim the election date when she did.

[250] Although this judgment does not determine that the absence of a voter registration weekend would be fatal to the freeness and fairness of elections held on or before 1 November 2021, it has been widely recognised by the litigants that the holding of such a weekend would be highly desirable and would enhance the fairness of the elections. The Minister's decision to proclaim the election date had to be rationally related to the purposes for which the power was given.¹⁰⁷ Although her proclamation was rationally related to the purpose of fixing the date for voting, it was not rationally related to the subsidiary purpose of fixing the eligibility date for voting at the proclaimed elections. On the contrary, it foreclosed the possibility of a voter registration weekend by which perhaps half a million citizens would have been added to the roll and another million would have changed their registration details.

[251] Rationality, as a minimum threshold requirement for the exercise of public power, calls for an objective enquiry.¹⁰⁸ Objectively, the Constitution required the elections to be held by not later than 1 November 2021, and this Court did not have the power to accede to the Commission's application. Objectively, matters ought to have proceeded on the basis that everything should be done to make elections on or before 1 November 2021 as free and fair as was reasonably possible. Objectively, the Minister's proclamation thwarted this objective in an important respect. Objectively, it was open to the Minister, in the extraordinary circumstances in which the country found itself, to liaise with the Commission, and if necessary with political parties, to make clear that although she intended in due course to proclaim an election date falling within

¹⁰⁷ *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at para 85 and *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 49.

¹⁰⁸ *Pharmaceutical Manufacturers* above n 111 at para 86 and *Levenstein v Estate Late Frankel* [2018] ZACC 16; 2018 (2) SACR 283 (CC); 2018 (8) BCLR 200 921 (CC) at para 48.

the 90-day period, she wished to afford maximum opportunity for citizens to register as voters. Whatever the position may have been by the time this Court issued its order on 3 September 2021, I am satisfied that in early August the Commission, acting in terms of its constitutional mandate to conduct elections by not later than 1 November 2021, could have held a registration weekend while still allowing sufficient time for the completion of the remaining steps required by an election timetable.

The consequential relief

[252] Given the grounds on which the Minister's proclamation was set aside, it necessarily followed that we should make consequential orders making the holding of a registration weekend possible. Unfortunately, there was a delay of a few days between the filing of the last affidavits and the hearing of the application on 20 August 2021, and a further delay before this Court was ready to make its order on 3 September 2021. This Court was uncertain whether it was still possible for the Commission to conduct a voter registration weekend.

[253] In reply to the DA's affidavit, the Commission said that it was too late to conduct a voter registration weekend. Since the Court only issued its order on 3 September 2021, it was plainly no longer possible to conduct a registration weekend on either of the weekends proposed in the DA's notice of motion. We were not satisfied, however, that it was impossible to do so on a later weekend, including on 18-19 September 2021, which the Commission was already targeting if the elections were postponed to February 2022.

[254] Items 4 to 6 of the timetable published by the Commission on 4 August 2021 specified the following in connection with finalising the voters' roll for purposes of the elections on 27 October 2021. Segments of the roll would be open for inspection and objection in the period 5 August-11 August. The Commission was to finalise objections by 11 August. By 1 September, the chief electoral officer was to certify the segments for use in the elections and make the certified segments available for inspection. Although this does not form part of the prescribed timetable, the Commission stated in

a replying affidavit that it was intending to print the certified segments over the period 3-6 September, after which they would be distributed to the 23 151 voting stations in readiness for elections on 27 October.

[255] The period from 7 September to 26 October is seven weeks. The Commission's papers do not explain why such a long period is needed for distribution. As to the steps which must precede the printing of the segments, various possible solutions suggest themselves. It may be possible, though we do not know for sure, that the existing certified roll (i.e. finalised with reference to the cut-off date of 3 August) can stand in accordance with the current timetable and for the Commission to prepare a supplementary roll to accommodate new voters. A supplementary roll, though, would probably not address the case of registered voters who wish to change their voting districts, since it would be unacceptable for the names of these persons to appear in one segment of the certified main roll and in another segment of the supplementary roll.

[256] Another possibility would be for there to be no amended or supplementary roll at all, and for citizens who apply for registration after 3 August 2021 and before the date of the next proclamation to take advantage of section 7(2) of the MEA, i.e. to submit sworn statements in accordance with that section. There could perhaps be a mix of these possibilities, with new voters being placed on a supplementary roll and voters with changed districts taking advantage of section 7(2).

[257] Even if it were thought necessary to reopen the dates contained in items 4-6 of the current timetable, that might be possible. If the registration weekend were held on 18-19 September, the one-week period for inspection and objection could run from 21-27 September, with objections to be finalised by 4 October. The current timetable allows two weeks from finalisation of objections to certification. A revised timetable might need to reduce this by a few days. If the segments could be certified by 13 October, printing could take place on 14-17 October, with distribution to the voting stations to start on 18 October. If the re-proclaimed voting date remains 27 October, this would allow nine calendar days up to and including 26 October. A re-proclaimed

voting date of 1 November would allow 13 calendar days up to and including 31 October.

[258] It was in the light of these possibilities that it was just and equitable for the Court's order to make provision for the Commission to conduct a registration weekend, without ordering it to do so unless the Commission determined that it was practically possible. The regime to apply if the Commission determined that it was practically possible is contained in paragraph 5(c) of the order. Although a setting aside of the proclamation of 3 August 2021 might ordinarily have had the effect of causing the current timetable to fall away, and although the issuing of a fresh proclamation might ordinarily have triggered an obligation on the Commission's part to issue a new prospective timetable in terms of section 11(1) of the MEA, these ordinary consequences would have put paid to elections on or before 1 November 2021. For this reason, paragraph 5(c)(iii) decreed that the current timetable would stand, though the Commission would be entitled to amend the timetable "as may be reasonably necessary". The amendments which we foresaw as "reasonably necessary" were those implicating items 4-6 of the timetable. Our order neither required nor precluded the Commission from amending other items of the timetable, provided of course that such changes still enabled the elections to be held on or before 1 November 2021.

[259] In the regime regulated by paragraph 5(c) of the order, citizens would naturally also have the right, up until the date of the new proclamation, to apply for registration at their municipal electoral offices in the usual way.

[260] Paragraph 5(d) of the order was the regime to apply if the Commission determined that it was not practically possible to hold a registration weekend. It was just and equitable, in those circumstances, to allow a short period for persons to register in the ordinary way at municipal electoral offices. Citizens with the right to register may have been expecting to be able to do so at the registration weekend scheduled for 17-18 July and then for 31 July-1 August. With little warning, on Tuesday 3 August the guillotine fell when the Minister issued her proclamation. It was for this reason that

paragraph 5(d)(i) provided that the Minister should not issue a fresh proclamation earlier than 10 September. This would at least give voters most of that week to go to their municipal electoral offices to register. If the Minister in consultation with the Commission decided that a few more days could be allowed, the order did not prevent the Minister from issuing her proclamation a few days after 10 September.

EFF's application for substantive relief

[261] In paragraphs 4 and 5 of its notice of motion the EFF asked for substantive relief if this Court were to refuse (as it has) the Commission's application. Paragraph 4 sought an order requiring that, within seven days of the Court's order, the Minister, President and National Coronavirus Command Council amend our current Disaster Management Regulations, or promulgate new Disaster Management Regulations, so as to allow political gatherings of more than 100 persons for the sole purpose of enabling political parties to complete their nomination lists. If this relief was granted, paragraph 5 of the notice of motion sought an order requiring the Commission to extend the date for submission of party nomination lists contained in the current timetable to a date determined by the Commission which would be consonant with and accommodate the relief sought in prayer 4.

[262] The EFF's founding affidavit sets out the party's internal procedures for compiling nomination lists. The numerous branch meetings which form part of this process typically involve meetings of more than 100 members.

[263] The relief claimed in paragraph 4 was inappropriate. It would have violated the doctrine of the separation of powers for this Court to order the Minister to promulgate amended or new Disaster Management Regulations. Section 27 of the Disaster Management Act confers the regulation-making power on the Minister. Section 27(2) requires her first to consult with the "responsible Cabinet member". In terms of section 27(3) the regulation-making power may only be exercised to the extent necessary for any of the purposes listed in that subsection. The gathering and analysis of information for purposes of determining whether to exercise the power is an executive function. The

Minister, we must assume, limited the size of gatherings because evidence, including scientific and medical evidence, led her to the conclusion that this was necessary to achieve the purposes specified in section 27(3). It is not for a court, which does not have the evidence or expertise, to compel the Minister to make an exception which could undermine achieving those purposes and be dangerous to the health of the populace.

[264] Whether local government elections will fail the free and fair standard because of the restrictions on assembly imposed by the Disaster Management Regulations is not a matter on which I need express any opinion. It is not a matter to be judged preemptively. The evidence presented to this Court would in any event not enable us to reach a firm conclusion that the Disaster Management Regulations' restrictions were so severe that parties could not compile and submit lists in a way which would allow reasonable competition at the ballot box.

[265] Since the relief prayed in paragraph 5 of the EFF's notice of motion was conditional upon this Court granting the relief claimed in paragraph 4, that prayer falls away.

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