

FREE



FAIR

**REPORT TO THE ELECTORAL COMMISSION OF SOUTH AFRICA IN
TERMS OF SECTION 14(4) READ WITH SECTION 5(2)(A) OF THE
ELECTORAL COMMISSION ACT**

MEDIA RELEASE

Findings and conclusion

Introduction

- [1] It will be remembered that this Report has been commissioned by the Commission in terms of section 14(4) read together with section 5(2) of the Electoral Commission Act. These provisions authorise the Commission to publish a report on the likelihood or otherwise that a pending election will be free and fair. The need for the Report was triggered by the onset of the Covid-19 pandemic.
- [2] The outcome of the Report is not binding on the Commission which retains its constitutional and legislative mandate and, indeed, duty to decide on the conduct of elections in our country. It is appropriate to acknowledge that this Report was prepared with the diligent and professional support of Ms Molebogeng Kekana, Ms Catherine Kruyer, Ms Faathima Mahomed and Mr Thabang Mabina.
- [3] The Report was prepared in haste in part because of the tight electoral timetable of the Commission. Even so, the current Report runs through 120 pages and traverses considerable material on the contextual background, applicable law on local government elections, the Covid-19 pandemic, and its likely impact on free and fair elections, and the rights to life, bodily and psychological integrity and access to health care, which are self-evidently threatened by the ominous rate of infections, hospitalisation and deaths associated with the different and recurrent waves of the Covid-19 pandemic.
- [4] The Report carefully records and examines the submissions of the Commission and stakeholders, including political parties; the public; civil society organisations and organised media; organised business, labour, and civil societies under the purview of

the National Economic Development Labour Council; and a public opinion survey. The Inquiry went on to receive and hear submissions from independent electoral monitoring bodies whose submissions, amongst others, prompted the Inquiry to study and compare electoral practice in our country, the rest of our African continent and elsewhere in the world in the wake of the Covid-19 pandemic.

[5] The Inquiry went on to receive written and oral submissions from organisations focused on health care, independent medical experts, and from government functionaries that included the Director-General of the Health Department, medical experts and scientists related to or serving within a Ministerial Advisory Committee on Covid-19 established by the Minister of Health, and from the Minister of Cooperative Governance and Traditional Affairs.

[6] The central issue that this Inquiry was tasked to report on is whether the local government elections that are scheduled for October 2021 are likely to be held in a free and fair manner. The political parties and civil society organisations that made submissions to the Inquiry are fiercely divided on whether the elections, if held, are likely to be free and fair. In this Report we represent these divergent views and have preserved the submissions in their original form on our website.

[7] Whilst submissions by political parties, civil society and members of the public are instructive and important, this Report does not make any factual findings on or assess cogency of the positions advanced by these stakeholders. This is so because the respective political views are not susceptible to a fact-finding process. They are often driven and animated by their partisan and subjective world views, or even by self-interest. To that extent, the Inquiry heeded and respected all views and deemed each to carry equal force whatever the size or pedigree of the political party concerned.

- [8] The Inquiry sought to find an objective and dependable standard that is suited to measure whether the pending elections are likely to be free and fair in the face of the threat to life and limb and access to health care posed by infections, hospitalisation and deaths spawned by the pandemic on our country and its population.
- [9] The outcome the Inquiry has reached is not, and must not be, driven by positions and preferences of political actors or entities of civil society, important as all these views are and must be. Public opinion too is divided. We have rather turned to our Constitution and other electoral law. First, we have looked at the electoral response to the pandemic in our own country, and thereafter in the rest of the African continent, and in other significant electoral destinations abroad.
- [10] Thereafter we have sought to be guided by the science related to the Covid-19 pandemic. That explains why we have heard submissions and presentations from no less than 9 medical experts and scientists, including State functionaries tasked with curbing the impact of the pandemic. This Report carefully records the core presentations of these experts and delineates their convergences and divergences on the research data, projections and expert opinions they have tendered.

May local government elections be postponed?

- [11] The first question to probe is whether local government elections may ever be postponed. The starting point must be our Constitution. It tells us that ours is a democratic state founded on universal adult suffrage and regular elections. What is telling is that regularity of elections, like our democratic form of governance, is a founding value so highly cherished that it may not be amended except by a super

majority of 75 per cent of members of the National Assembly and the supporting vote of at least six provinces.¹

[12] In plain language, our Constitution commands that a term of a municipal council may be no more than five years and, when its term expires, an election must be held within 90 days of the date of expiry. As we have earlier recorded in this Report, electoral legislation accords with this constitutional stricture on the term of a municipal council. Local government elections may be postponed if they are likely not to be free and fair but to a date within the mandatory term of five years and 90 days.

[13] However, in sharp contrast, the Constitution and other law do not provide for an extension of the term of a municipal council. This is consistent with the tenor of our Constitution which tends to hold public office bearers to fixed terms of office.

[14] The first order answer to the initial question is that local government elections must be held within 90 days of the expiry of the fixed term of five years and the Constitution does not contemplate a deferment.

[15] Well, we also know that in our democratic order, elections must not only be regular, but they must also be free and fair.² The Constitution does not create an optional binary that says elections must be regular but need not be free and fair or that they must be free and fair even if they are not regular. Elections that are not free and fair, even if held regularly, are not democratic elections at all. They are a nullity. The two requirements must co-exist and be co-present at every election held under our jurisdiction.

¹ Section 74(1)(a) and (b) of the Constitution.

² Section 19(2) of the Constitution.

[16] It seems to me there two ways to approach the fixed term set by the Constitution and other law for a municipal council. The first option that suggests itself, is to seek to amend the Constitution and the applicable legislation. The provisions concerned are section 1(d), which is especially entrenched as a founding value, and section 159(2) of the Constitution. It seems plain that an amendment of 159(2), which seeks to remove the regularity of elections, in effect, undermines section 1(d) and may not be done without a super majority of 75 per cent. It may also be said that it is an undesirable democratic practice to amend the Constitution on an ad hoc basis or to solve a short-term challenge.

[17] Then the question must follow: May a court of competent jurisdiction grant or permit the extension or relaxation of a fixed term deliberately set by the Constitution? Happily, our current assignment does not require us to answer that difficult question which we respectfully leave for the courts to decide. It may be argued that a court of competent jurisdiction may want to assume jurisdiction to extend the limited term of office of a municipal council to a finite date if it is shown that exceptional and compelling circumstances warrant the extension. Such circumstances could include elections that are likely to be a nullity because they were not free and fair, or dire circumstances like a pandemic that massively threaten life or limb, or other considerations of necessity that render compliance with the constitutional dictate impossible or exceptionally hazardous.

Would local government elections in October 2021 be free and fair?

[18] What our current assignment requires us to answer is whether the local government elections set for October 2021 are likely to be free and fair.

[19] Having considered all the submissions of stakeholders, applicable law, research on electoral practices during the Covid-19 pandemic, and the related science, we conclude that it is not reasonably possible or likely that the local government elections scheduled for the month of October 2021 will be held in a free and fair manner, as required by the peremptory provisions of the Constitution and related legislation. And we go further to find that the scheduled elections are likely to be free and fair if they were to be held not later than the end of the month of February 2022.

Grounds for the decision

[20] The decision and recommendations we have arrived at are supported by grounds which are all foreshadowed in the Report. The decisive and dominant reasons are drawn from agreed scientific data and prognosis tendered by medical experts and scientists.

The election timetable of the Commission

[21] When an election has been called, the Commission must prepare a timetable for the election.³ Any act required to be performed in terms of the Municipal Electoral Act must then be performed by no later than the time stated in the election timetable.⁴ The Commission is entitled to amend the timetable, if it considers it necessary for a free and fair election.⁵ On the current draft timetable the voter registration is now scheduled for 31 July and 1 August 2021 and only thereafter may “elections be called”. It is planned

³ In terms of section 11 of the Municipal Electoral Act and Schedule 3 thereto.

⁴ Section 11(3) of the Municipal Electoral Act. Clause 1 of Schedule 3 specifies that an act required in terms of the Municipal Electoral Act and the Municipal Electoral Regulations, 2000, must be performed by no later than 17:00 on the date stated in the election timetable.

⁵ Section 11(2) of the Municipal Electoral Act.

that the Minister will call the elections not later than 6 August 2021. The scheduled voter registration weekend is 6 days from the end of the current Adjusted Alert Level 4 restrictions, whose currency may be extended beyond that date (being 25 July 2021). This Report describes in some detail the nature and extent of the restrictions on movement, gatherings and activities of political parties and other hopeful independent candidates.

- [22] We conclude that, if the elections were to proceed as scheduled, most of the acts required to be performed in accordance with the draft timetable will not be reasonably possible, starting with the face-to-face registration of voters who do not have access to electronic registration, the provisional and final certification of the voters' roll, and the finalisation of the nomination processes for registered parties and independent candidates. This is so because the subsisting lockdown restrictions will stand in the way of parties and independent candidates of accomplishing acts prescribed by the timetable and electoral laws.

Electoral conduct of the Commission during the pandemic and lockdown restrictions

- [23] This ground for concluding that scheduled elections cannot possibly be conducted in a free and fair manner relates to the previous one. Our study of the electoral conduct of the Commission, since the onset of the pandemic, is that it has conducted by-elections but only when the country was placed under Alert Level 1.

- [24] From March 2020 until June 2021, the Commission approached the Electoral Court on eight occasions, to seek orders postponing the holding of by-elections. The Court granted the orders on each occasion. The Commission's first application was brought two days after the President announced that a national state of disaster was being

proclaimed to deal with the Covid-19 pandemic. The remaining seven applications were brought when the country was placed under Alert Levels 2 to 5.

[25] The Commission advanced four broad bases for seeking postponements of by-elections under Alert Levels 2 to 5. First, the Commission was hindered from preparing for, and conducting, the by-elections in a free and fair manner. Second, the risk of infections spreading through the holding of election activities did not make it possible for the by-elections to be held safely. If the Commission proceeded to hold the by-elections, this would undermine Government's efforts to curb the spread of the infections. Third, Alert Levels 2 to 5 impose restrictions on gatherings and political activities. In addition, people are confined to their places of residence from specified hours in the night to the early hours of the morning. These limitations, the Commission stated, adversely impact on the ability of political parties and independent candidates to campaign for votes. This would render the by-elections not free and fair. Fourth, as the population was more aware about the risk of infections, coupled with the existence of highly transmissible new variants of the virus, there was a real possibility that voters would have stayed away from the polls. This may have resulted in low levels of voter turnout and participation, which would have undermined the credibility of the outcomes and the legitimacy of those who were elected to lead.

[26] The Commission proceeded with by-elections when the country was placed under Alert Level 1. When the Alert Level was subsequently changed to Alert Level 3, the Commission sought postponements of the by-elections that were scheduled to take place during January, February, and March 2021, and again later when the country moved to Adjusted Alert Level 4.

[27] This Report finds no fault in the attitude of the Commission. Much as the Commission has often proclaimed that it is technically ready to conduct elections, historically it has also made the correct call that the measures promulgated by the

Government to curb the continued spread of the pandemic had an adverse impact on the likelihood of the by-elections being free and fair.

[28] The concern of the Commission is justified that under a state of national disaster, and with restrictions in place on the movement of persons and gatherings, political parties and independent candidates will not be able to freely participate in the forthcoming local government elections and voters will not have the opportunity to exercise rights that are essential to the conduct of free and fair elections. The concern is heightened if South Africa is placed under an alert level that imposes more severe restrictions during the run up to, and at the time earmarked for, the local government elections.

[29] Freedom to participate in elections is an element fundamental to the conduct of free and fair elections. This includes the “freedom to canvass; to advertise; and to engage in the activities normal for a person seeking election”.⁶ While the Constitution and the law are not prescriptive as to the manner in which parties should campaign and advertise, the activities “normal for a person seeking election” in South Africa include the holding of large political rallies, the holding of smaller political gatherings, and door-to-door campaigns. However, the freeness and fairness of the local government elections must be evaluated in context, which includes the “new normal” imposed upon all of us by the Covid-19 pandemic.

[30] What is important is that political parties and independent candidates must be able to participate in elections “fully and effectively”.⁷ This means that they must be able to get their political message to their chosen electorate. If political parties and independent candidates are restricted in the ability to convey their messages to voters,

⁶ *Kham* at para 86.

⁷ *Kham* at para 85.

this limits their rights to contest elections,⁸ to campaign⁹ and to freedom of expression,¹⁰ and diminishes the freeness and fairness of the election.

[31] Although the restrictions on movement of persons and gatherings under the Disaster Management Regulations apply to all political parties and candidates, there is likely to be a disproportionate impact of the Covid-19 restrictions on smaller less-resourced political parties and independent candidates. Larger well-resourced political parties will more easily be able to advertise widely and shift to digital platforms to engage with voters. In addition, incumbents are advantaged in terms of broadcasting opportunities to share their political messaging under the principle of proportionality applied by the Independent Communications Authority of South Africa.

[32] The restrictions on the ability of political parties and independent candidates to campaign, in turn, diminishes the rights of the electorate, including the right to vote. It has long been established that the effective exercise of the right to vote requires access to information.¹¹ If voters are unable to receive political messaging from political parties and independent candidates, they will be hindered in their ability to make political choices and to vote. In addition, the rights of the electorate to participate in political activities,¹² and to freedom of assembly,¹³ are limited by Covid-19 restrictions. This diminishes the freeness and fairness of the election, since free and fair elections require that every person can exercise their fundamental rights.

⁸ Section 19(3) of the Constitution.

⁹ Section 19(1)(c) of the Constitution enshrines a right to campaign for a political party or cause.

¹⁰ Section 16 of the Constitution. *Kham* at para 103. See also *Democratic Alliance v African National Congress and Another* [2015] ZACC 1; 2015 (2) SA 232 (CC) at para 135.

¹¹ *My Vote Counts II* at para 35, quoting with approval Ngcobo CJ in *President of the Republic of South Africa v M & G Media Limited* [2011] ZACC 32; 2012 (2) SA 50 (CC) at para 10.

¹² Section 19(1)(b) enshrines a right to participate in the activities of a political party.

¹³ Section 17 of the Constitution.

[33] A legitimate question may be asked: What if the lockdown restrictions higher than Alert Level 1 were removed? The ready answer is that, on all medical expert predictions, during October 2021 infections, hospitalisation and mortality will remain a significant threat to physical wellbeing and life until a substantial number of our population has been vaccinated.

Medical expert data and predictions

[34] We now turn to deal with the submissions on expert data and predictions.

[35] As we have seen, the question whether the scheduled local government elections of October 2021 should be held or deferred is fiercely contested within and amongst election stakeholders of varied kinds. Some stakeholders have urged us to find and follow medical science and others have scoffed at reliance on science. We chose to heed the science, and, to that end, solicited the assistance of no less than 9 leading medical and public health experts in South Africa.

[36] They are 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, from the National Institute for Communicable Diseases, and Prof. Susan Goldstein.¹⁴

[37] The material presented by the scientists displayed substantial convergence. The differences amongst them are limited, in the main, to the likely trajectory of the virus and the resultant infections, hospitalisation and deaths in October 2021 compared to

¹⁴ The Inquiry also received a joint written submission from Prof Elmien du Plessis, Ms Petronell Kruger and Ms Safura Abdool Karim.

February-March 2022. We set out briefly the convergence, and later individualise the divergences, on the predictions.

[38] The experts are at one that available data shows that the country is amid a third wave of Covid-19 infections. By the time the oral hearings were held,¹⁵ the delta variant was the dominant strain of the virus in South Africa and in the world. Hospital admissions and deaths follow the rise in infections. It 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 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 infections, and the changing nature of the virus.

[39] The experts drew attention to rising infections and the impact on hospitalisation and mortality. The delta variant can spread much faster, and large numbers of people need hospitalisation and medical care. Similarly, during the second wave of the pandemic, the hospitalisations rose rapidly. Prof Abdool Karim stated that "anything that exacerbates the spread of these variants just makes matters so much worse".

¹⁵ From 28 June 2021 to 2 July 2021.

[40] Prof Madhi made identical observations of a rising third wave. Around 7 June 2021, 5 of the 9 provinces were experiencing the third wave. In provinces where the third wave was yet to start, namely the Eastern Cape, Western Cape and KwaZulu-Natal, it may happen that the infection rates may be lower because over the course of the first two waves, the population in these provinces could possibly have developed natural immunity. However, natural immunity may not be relevant if there are further variations of the virus that makes it resistant to immunity from past infections.

Capacity of the health system and excess mortality

[41] In dealing with the rising third wave, Dr Abdullah reflected on the ability of the health services to respond to Covid-19. He measured the responses of the health services during the first, second and third waves and, using this information, considered the capacity of health services to deal with the fourth and future waves. Gauteng, the Western Cape and KwaZulu-Natal may be able to meet the minimum capacity required for a “substantial health system response” (especially having regard to the private sector health care facilities), but the other provinces do not have the benefit of a similar response. This mainly accounts for the high mortality rate in the Eastern Cape during the second wave.

[42] Dr Abdullah agrees with Dr Dasoo that there is significant undercounting of Covid-19 deaths. Under-reporting is extensive. Deaths are underreported because hospitals are often remarkably busy, or they are not very well organised. The excess death reports produced by the Medical Research Council provide a good lens through which one can observe the trends of the pandemic through the mortality rates. The effect of the under-reporting of excess deaths, is that the threat to life and limb is much higher than the official number of Covid-19 deaths suggest. The official mortality rate from Covid-19 is reported as 58 000. The excess mortality rate from the Medical

Research Council, however, records the figure as 180 000. On this account of excess mortality, it seems that the actual figures of Covid-19 mortality are about three times higher than the official reports of deaths. Dr Dasoo added that it was “common cause” amongst the scientific community. Comparable excess mortality figures were presented to the Inquiry by Prof Silal and Dr Moultrie of the Modelling Consortium.

- [43] Dr Dasoo added that the country’s health care system has not been able to create special capacity to manage the third wave and it is unlikely that it will be able to do so in a fourth wave. The national response reveals “deep dysfunction in governance”, and “poor state capacity” in “what should be regarded as a public health emergency”.

Similar trajectory of waves of infection

- [44] Another common position of the experts is that patterns or subsequent waves of infection will be similar, and follow a similar trajectory, to that of infections in the first and second waves in South Africa. In the effort to project the trajectory of the virus, the modelling data presented by the experts is based on certain assumptions. The primary assumption is that there will be no new variant that would arise in the projected period. On the assumption that no new variant will emerge from now until then, October 2021 will be a period of low infections. This means the present delta-driven third wave is predicted to peak and thereafter decline during August and September 2021, depending on varied trajectories of the different provinces. If this pattern holds, October 2021 will be a period of low transmission.

Community immunity and vaccines

- [45] Vaccines are better at protecting against severe disease and death than at protecting against mild symptomatic illness. If one makes one important assumption, that the

virus does not change, then it will be worthwhile to try to get some level of community immunity, which will substantially reduce the risk of hospitalisation and death. Currently South Africa has one of the lowest vaccination rates in the world and the highest rates of Covid-19 fatalities. With varying emphasis, the experts agree that it is necessary to strive for community immunity and that, given the vaccination rate, it will not be possible for South Africa to achieve community immunity by October 2021.

- [46] All experts agreed with Prof Madhi that there is an extent of natural immunity derived from previous infections with the beta and delta variants, and this will play a role in what happens going forward. The Pfizer and Johnson and Johnson vaccines are both good vaccines and have protection against severe disease and death. The United Kingdom is having another surge of infections, but the death rate is flat. South Africa must get to that stage. South Africa is behind the global rate of vaccination. South Africa must reach a stage where there is a decline in deaths and this can be achieved by vaccinating the most “at risk” population, namely those who have comorbidities and are above a certain age. South Africa should aim to administer 300 000 doses of vaccines daily. The target of vaccinating 40 million people by March 2021 set by the Health Department already shows slippages.

Risks associated with elections

- [47] All experts expressed themselves on the risks associated with elections and are agreed. Large gatherings are super spreader events. This cannot be emphasised enough. Prof Madhi notes that gatherings cannot be allowed during the run up to elections and on voting day – in his words, “this is non-negotiable”. He urged strongly that no gatherings should be allowed. Elections are likely to cause a resurgence of infections, and any resurgence will be difficult to manage. As a mitigatory measure,

when elections do proceed, he suggests that voting stations should be located outdoors as the preferred option.

[48] Prof Abdool Karim speaks to five risks of transmission that arise with election activities: occupational exposure for the Commission's staff and campaign staff; door-to-door visits; small group meetings; large group rallies and marches; and voting day queues and polling booth risks. There are three principal risks associated with these activities, namely, gatherings, especially those indoors, movement of people and the level of adherence to non-pharmaceutical interventions. Large group rallies and marches are super spreader events.

[49] Dr Abdullah is aware that the limitation on gatherings translates to restrictions on electioneering. He cautions that if the scale tilts in favour of electioneering activities, when the transmission rates of the delta variant are high, the events will become seeding events, and will lead to cluster outbreaks and, in turn, trigger another wave. Ordinarily, gatherings have been shown to be super spreader events.

October 2021 vs February-March 2022

[50] 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 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.

- [51] 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.
- [52] 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.
- [53] 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.
- [54] 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.

[55] 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.

[56] Before we turn to our recommendation on when, if deferred, elections should be held, we draw attention to the section on the electoral experience in other countries on our continent and in other significant electoral destinations. We commend our research recordal in this Report to sticklers for detail. What is plain is that many countries around the world have postponed their presidential, national, and subnational elections due to the pandemic and others have held elections despite the pandemic. It is indeed difficult to make helpful comparisons from country to country because of the diversity of the context within which the decision to defer or to go ahead with the elections was made. Let it suffice to draw attention to the studies on the Presidential elections in the United States of America, State Assembly elections in India, and local government elections in Brazil during the pandemic. The recorded estimates of deaths associated

with each of these elections run into staggering numbers – something we should not wish for ourselves.

Why February 2022?

Prevent the slippery slope

[57] We have readily conceded that deferring elections might be an unwelcome dent to our nation's democratic resolve and psyche. And yet we hope we have shown that we are in exceptional circumstances that pose a real, direct and collective threat to our lives, bodily and psychological well-being and, might we add, to our livelihoods.

[58] Some have argued that deferment may encourage or initiate a slippery slope that might undermine the democratic project. We think that this argument has considerable force. Only the most compelling of reasons should justify the deferment of a term of elections set in the supreme and other law of the country. For that reason, our recommendation is that the elections be deferred only once, and to the earliest possible date, to be determined as the safest and shortest time within which local government elections may be held without excessive loss of life.

Reset municipal governance speedily

[59] Key constitutional objects of local government are to provide democratic and accountable government for local communities and the provision of services in a sustainable manner. It is so, that it will be extremely hard to find a governance injunction more compelling than the one which our Constitution imposes on local government. First, local governments wield authority only because they are so

authorised by the people who vote them into power. Second, once they assume office, their term of office is not only finite for five years, but they must ensure accountable government and the provision of services in a sustainable manner.

[60] 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.

[61] On 30 June 2021, the Auditor-General, Ms Tsakane Maluleke, released her annual report on the audit outcomes of 257 municipalities for the financial year 2019-2020. She records that the decline in the affairs of local government has been consistently reported by the Auditor-General over the past four years of the current administration. The Auditor-General bemoans the fact that there has been little evidence that the messages of the Auditor-General have been taken to heart. It is saddening that the Auditor-General finds that most municipalities are in a worse position 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.

[62] These are powerful considerations that ordinarily should militate against deferment of elections. At a local government level, South Africa is due for a reset and, ordinarily, local government elections would be that reset button. We acknowledge that elections should be held soon. But it cannot be at any cost. On all expert medical evidence, many, many lives are likely to be lost unless we reach a certain level of community immunity. The nearest point of safety will be February 2022, when there is likely to be

a high level of community immunity. The postponement should be no longer than is strictly and reasonably necessary to save lives and limbs.

[63] Lastly, the additional benefit to keeping the deferment as short as four months, to February 2022, is that it will allow the newly elected municipal councils to approve the annual budget for the new financial year. Although the annual budgetary cycle will commence before elections are held in February 2022, the benefit of a short postponement is that the newly elected municipal councils will be in place to consider the annual budget to be tabled in April 2022, and to approve the annual budget before the start of the new financial year on 1 July 2022. The incumbent municipal councils will need to commence the budgetary process and should do so in accordance with the Integrated Development Plans of their municipalities.¹⁶

Recommendations for holding free, fair and safe elections during Covid-19

[64] The assignment with which we have been tasked includes indicating additional measures that the Commission may have to implement to realise free and fair elections within the Covid-19 context. The measures we suggest are in line with our recommendation that local government elections be deferred to February 2022. We have drawn upon international best practices¹⁷ and adapted them, where necessary, to

¹⁶ The position is set out in the Municipal Finance Management Act, 2003 (MFMA), the Municipal Budget and Reporting Regulations, GN 393, GG 32141, 17 April 2009, and various Treasury Municipal Budget Circulars. Municipal councils are required to approve an annual budget for each financial year for the municipality in which they serve. The integrated development plan is integral to this, since it forms the “policy framework and general basis” on which the annual budget of the municipality must be based. The municipal council must approve the annual budget before the start of the municipal financial year, which is 1 July. The mayor of a municipality must table, in the municipal council, a time schedule with key deadlines for the preparation tabling an approval of the annual budget at least 10 months before the start of the new financial year. The relevant legislation requires that the annual budget must be tabled before the municipal council by the mayor at least 90 days (that is in April 2022), and considered by the municipal council for approval at least 30 days (that is in June 2022), before the start of the municipal financial year.

¹⁷ The African Commission on Human and Peoples' Rights has published a statement on Elections in Africa during the COVID-19 Pandemic, 22 July 2020, which draws upon best practices adopted in the continent and provides valuable guidance on the measures that should be taken to ensure free, fair and safe elections. In addition, a number

the South African context in developing recommendations regarding measures to mitigate the health risks that may be posed by the local government elections. These measures are in addition to those already adopted by the Commission.

Conclusion

[65] Having considered all the submissions of stakeholders, applicable law, research on electoral practices during the Covid-19 pandemic, and the related science, we conclude that it is not reasonably possible or likely that the local government elections scheduled for the month of October 2021 will be held in a free and fair manner, as required by the peremptory provisions of the Constitution and related legislation. We find that the scheduled elections are likely to be free and fair if they were to be held not later than the end of February 2022. We have also made recommendations on how free, fair and safe elections may be held in February 2022.

[66] Should the Commission accept and seek to implement the outcome of this Inquiry it is self-evident that it must approach, with deliberate speed, a court of competent jurisdiction to seek a just and equitable order to defer the local government elections to not later than the month of February 2022 and on such terms the court may grant.

of international organisations, including the Election Management Network, the International Institute for Democracy and Electoral Assistance and the International Foundation for Electoral Systems, have published advisories on how to conduct elections safely during the Covid-19 pandemic. In particular, Buril et al 'IFES COVID-19 Briefing Series: Safeguarding Health and Elections' available at <https://www.ifes.org/publications/ifes-covid-19-briefing-series-safeguarding-health-and-elections>.