



**HELENSUZMAN**  
FOUNDATION

Mr Justice Dikgang Moseneke  
Inquiry into Ensuring Free and Fair Local Government Elections during COVID-19  
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17 June 2021

Dear Judge Moseneke

**Submission to the Inquiry into Ensuring Free and Fair Local Government Elections during COVID-19 (“the Inquiry”)**

I attach the Helen Suzman Foundation’s written submission in response to your letter of 1 June 2021, on the freeness and fairness of the forthcoming local government elections.

Should you have any queries, it would be appreciated if you could contact me on the following email address: [francis@hsf.org.za](mailto:francis@hsf.org.za).

Yours sincerely

Francis Antonie

Director



# HELENSUZMAN FOUNDATION

## Submission in response to the Inquiry into Ensuring Free and Fair Local Government Elections during COVID-19

17 June 2021

### Introduction

The Helen Suzman Foundation (“**HSF**”) welcomes the invitation to make submissions to the Inquiry into Ensuring Free and Fair Local Government Elections during COVID-19 (“**the Inquiry**”), which has been appointed by the Independent Electoral Commission (“**the IEC**”), to assist it in making an informed determination as to whether the upcoming local government elections will be free and fair, given the challenges posed by the COVID-19 pandemic and the measures promulgated by government to curb its spread.

The HSF is a non-governmental organisation whose main objective is to promote and defend the values of South Africa’s constitutional democracy, with a focus on the rule of law, transparency and accountability. The HSF views this submission as part of its ongoing efforts within this context.

The HSF has reviewed the Submission by the Chief Electoral Officer (“**the IEC Submission**”) to the Inquiry and has considered the questions listed in the invitation. The questions raised by the Inquiry and the HSF’s responses are set out below.

### **Are the current conditions under the COVID-19 pandemic conducive or not to the holding of free and fair local government elections during October 2021?**

The Constitutional Court has provided a helpful starting point for this submission in *Kham and Others v Electoral Commission and Another*.<sup>1</sup> In that decision, the Court emphasised that “*there is no internationally accepted definition of the term ‘free and fair election’ [and] whether any election can be so characterised must always be assessed in context.*”<sup>2</sup>

The HSF submits that the context within which the current situation should be assessed, needs to take into consideration the impact of the real and perceived risk of infection and of government’s measures to curb the spread of COVID-19. The question is whether the overall impact would affect political activity and campaigning, voter participation and the administrative aspects of the elections to the degree that the elections could not be viewed as being free and fair.

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<sup>1</sup> *Kham and Others v Electoral Commission and Another* (CCT64/15) [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC) (30 November 2015)

<sup>2</sup> *Ibid* at para 34.

As part of the overall assessment, it has to be kept in mind that it can be expected that the COVID-19 pandemic will be with us for some time to come. Even with a steadily progressing vaccine rollout, South Africa is still a long way from herd immunity. In addition, the timing of subsequent waves of infection and their severity are impossible to predict. This means that any postponement of the forthcoming elections will not solve the problem: it is simply impossible to predict whether the situation will be more (or less) serious, for example in six, twelve or eighteen months.

Against this overall background, a course of action that avoids delay is most desirable. This approach obviously assumes that the currently envisaged risk mitigation measures for the elections are of such a nature not only to contain a further spreading of the pandemic, but also that these measures are commonly perceived as being appropriate and sufficient. In other words, if the holding of elections is not seen as carrying greater risk to voters than the risks that confront them in their daily activities (eg. shopping, drawing money from ATMs, transport, queuing for social grant payments), then it would be logical to assume that participating in elections as a voter, does not carry a greater risk of infection. In these circumstances, the freeness and fairness of elections would not be in doubt.

### **What risks are posed to the lives and health of people in South Africa if the local government elections were to proceed in October 2021?**

Given the nature of COVID-19, it is impossible to exclude the risk of infection, in an absolute manner, where people are in relatively close contact. However, strictly applying the accepted safety measures, reduces the risks to a minimal level.

Since the inception of the coronavirus outbreak, there have been periods where the virus showed high rates of infection and resulting fatalities. However, as already mentioned above, the HSF wishes to emphasise the impossibility of trying to anticipate at which time of the year a reprieve from infections will be in the offing. In this regard, the NICD has noted that:

*“Across provinces, the time from initial increase in transmission to the peak is on average 2-3 months. It should be noted however, that these results are subject to substantial uncertainty due to the incompleteness of the seroprevalence and other underlying data, and unknown future population behaviour,”<sup>3</sup>*

Indeed, current figures suggest that South Africa as a whole will enter and exit waves of infection at different rates and at different times.<sup>4</sup> This makes it very difficult to schedule a delay of the local government elections, in anticipation that a later date falls in a period of low infections.

It is nevertheless worth pointing out that that the scheduled date for the elections in October will be springtime in South Africa. The weather conditions will therefore most likely be suited to having as much as possible of the election activities out of doors, which is commonly accepted to minimise any infection risk. This applies especially to queuing.

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<sup>3</sup> [Covid-19 third wave warning for South Africa – what to expect \(bussetech.co.za\)](https://www.busetech.co.za/news/2021/03/covid-19-third-wave-warning-for-south-africa-what-to-expect/)

<sup>4</sup> [How do we know if South Africa is in a third wave - and could there be a fourth? | Health24 \(news24.com\)](https://www.news24.com/Health24/How-do-we-know-if-South-Africa-is-in-a-third-wave-and-could-there-be-a-fourth-20210303)

**What additional measures can be put in place to reduce the risk posed if the local government elections were to proceed in October 2021?**

The HSF is encouraged by the IEC's comprehensive risk assessment and its proposal for mitigation measures as set out in the IEC document "PSM19."<sup>5</sup> These measures would be adequate to deal with the risks of contagion. In addition, attention is drawn to the following:

- It is recommended that persons (voters, campaigners and onlookers) should be prohibited from remaining in close proximity to the voting station in larger groups. Voters and any other persons should leave the voting station as soon as they have cast their vote. This may, however, be difficult to control.
- It should be emphasized that the role of staff queue marshals is crucial in ensuring strict adherence with these protocols. The observation can be made that South Africans can be quite nonchalant in adhering to the basic safety measures. Political party personnel should be mindful of adhering to COVID-19 protocol and IEC measures, also when playing their role of monitoring the voting process.

**The constraints, if any, that the measures in place to prevent and combat the spread of COVID-19 have imposed or will likely impose on political activity and campaigning in the lead-up to the local government elections earmarked to be held in October 2021**

Elections are a key aspect to any democratic society.<sup>6</sup> Essential to a free and fair election is that in the lead-up to elections political parties and candidates are able to campaign in order to garner the citizenry's vote on election day.<sup>7</sup> The ability and right to campaign and partake in political activities are therefore fundamental elements to any democracy. Section 19 of the Constitution encapsulates this vital right. Section 19(1)(c) provides that "Every citizen is free to make political choices, which includes the right to campaign for a political party or cause."

In *Kham* the Constitutional Court recognised the importance of the right of canvassing voters by finding that it was part and parcel of the term "free and fair election". The Court held that "it demands the freedom to canvass; to advertise; and to engage in the activities normal for a person seeking election."<sup>8</sup>

Campaigning is the way in which political parties and candidates can inform the citizenry of what they stand for.<sup>9</sup> This enables citizens to make an informed choice when at the voting station. Campaigning

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<sup>5</sup> [PSM19. COVID19 MEASURES AT VOTING STATIONS.pdf \(elections.org.za\)](https://www.idea.int/publications/catalogue/how-do-distanced-and-online-election-campaigning-affect-political-freedoms)

<sup>6</sup> T G Daly, 'How Do Distanced and Online Election Campaigning Affect Political Freedoms', *Institute for Democracy and Electoral Assistance* available at <https://www.idea.int/publications/catalogue/how-do-distanced-and-online-election-campaigning-affect-political-freedoms>, 1. See also T S James and S Alihodzic, 'When is it Democratic to Postpone an Election? Elections During Natural Disasters, COVID-19, and Emergency Situations', *Election Law Journal* [2020] 19(3) 344.

<sup>7</sup> Institute for Democracy and Electoral Assistance (IDEA), 'International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections', 55; James and Alihodzic (n 1 above) 351; E Asplund et al, 'Elections and COVID-19: How Election Campaigns Took Place in 2020', *Institute for Democracy and Electoral Assistance* available at <https://www.idea.int/news-media/news/elections-and-covid-19-how-election-campaigns-took-place-2020>

<sup>8</sup> *Kham and Others v Electoral Commission and Another* [2015] ZACC 37 (CC); 2016 (2) SA 338 (CC) (*Khan*) at para 86.

<sup>9</sup> IDEA (n 2 above) 56; Asplund (n 2 above);

opens up conversations and allows ideas and discussions to flow freely on what is important to the citizens.<sup>10</sup> When a citizen is informed, able to discuss and deliberate, and votes using such information, they are given real power to hold those elected accountable.<sup>11</sup>

Traditionally political parties and candidates campaign in person.<sup>12</sup> These methods can include holding rallies, canvassing and holding other political events. However, COVID-19 restrictions may impact upon the use of these traditional methods and will require a different approach.

In addition, it should be remembered that political rallies are not a normal or essential feature of local government elections, although they may occur from time to time in constituencies where there is major local issue of some controversy.

South Africa is under Alert Level 3 as of 15 June 2021.<sup>13</sup> The gazetted limits on the size of gatherings may have a bearing on election campaigning and political activity. In essence, these regulations restrict the number of people that may gather for the purposes of political activity as well as the timing that these gatherings may take place. Whilst it is clear from the regulations that gathering for political activities is not banned outright, the regulations may significantly reduce the capability of campaigning to a wider citizenry. However, the HSF is not of the opinion that any such reductions would have a material effect on the freeness and fairness of the elections.

Any elections held during COVID-19 must ensure that there are still mechanisms available for political parties and candidates to campaign and canvass the citizenry.<sup>14</sup> Although the regulations may impose restrictions on in-person campaigning, there are other methods which may be utilised by political parties and candidates to effectively engage with the citizenry. Traditionally, the use of television and radio have been utilised in addition to other in-person campaigns.<sup>15</sup> However, there is the possibility of utilising other platforms to run, for example, a digital campaign as well.<sup>16</sup>

The following methods have been utilised or suggested in other elections:

1. Virtual webinars: using a platform like Zoom, will enable the political party and candidates to reach a large number of citizens and can also include interaction where questions can be posed either verbally or through the comments section.<sup>17</sup>
2. Live streaming: Political parties or candidates can livestream an event on YouTube or other social media platforms allowing them to present a speech or dialogue that can be easily accessed.<sup>18</sup>
3. Emails: can be used to convey important information.

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<sup>10</sup> James and Alihodzic (n 1 above) 350-1.

<sup>11</sup> IDEA (n 2 above) 55; Daly (n 1 above) 2;

<sup>12</sup> IDEA, 'Adapting to the New Normal: Political Parties During Lockdown and Social Distancing'

<sup>13</sup> [https://sacoronavirus.co.za/wp-content/uploads/2021/06/44715\\_15-6\\_Cogta.pdf](https://sacoronavirus.co.za/wp-content/uploads/2021/06/44715_15-6_Cogta.pdf)

<sup>14</sup> Asplund (n 2 above)

<sup>15</sup> Adapting (n 7 above) 11

<sup>16</sup> J Tham, 'How Might Digital Campaigning Affect the Problems of Political Finance', *IDEA* available at <https://www.idea.int/publications/catalogue/how-might-digital-campaigning-affect-problems-political-finance>.

<sup>17</sup> James and Alihodzic (n 1 above) 351; 'Campaigning During COVID-19' Strategies 360 available at [https://www.strategies360.com/wp-content/uploads/2020/04/S360-OnePager-Covid\\_Campaigns\\_R106.pdf](https://www.strategies360.com/wp-content/uploads/2020/04/S360-OnePager-Covid_Campaigns_R106.pdf)

<sup>18</sup> Strategies 360 (n 10 above); Asplund (n 2 above)

4. Social media: Facebook, Twitter and Instagram.<sup>19</sup>
5. Text: Useful to send short and informative details or highlights in a cost effective manner to a large number of people and is easily accessible to anyone who owns or uses a cellphone.<sup>20</sup>
6. For those without access to online messages or viewing, the existing television or community radio services could be employed in a useful manner.<sup>21</sup> It is precisely for purposes of local government elections that local radio stations may play an important role, because of the local interest element. It is essential that all such airtime is distributed according to a fair and equal formula.
7. In addition, the regulations do not prohibit in-person campaigning in its entirety. Walk-throughs, the use of vehicles, and door-to-door canvassing, whilst adhering to all health and safety protocols, is still possible.<sup>22</sup>

An advantage of the restrictions imposed is that they may even have the potential to balance the playing field. Digital campaigning increases accessibility, ease of distribution of content at a lower cost than many other methods.<sup>23</sup> By utilising some or all of the above methods, the smaller political parties and individual candidates may have a better opportunity to have their voices heard by a larger number of citizens. As recognised by the Constitutional Court in *Kham*:

*“organisationally and financially the larger political parties will have advantages that their smaller cousins and individual candidates will lack. But the latter may have advantages in greater local knowledge and understanding of the area, and be able to make a fuller commitment to the interests of the voters in a ward than someone who must hew to a party line.”<sup>24</sup>*

An example of a political party managing to campaign within the restrictions is ActionSA. Leaders and members of ActionSA are canvassing areas, informing the citizens of what the party stands for, and makes use of social media to enforce those actions.<sup>25</sup> Other recognised political parties have all set up and are utilising social media and live streaming to interact with the citizenry.<sup>26</sup>

It is therefore submitted that the consequences on campaigning, as a result of the COVID-19 restrictions imposed, will not materially negate the freeness and fairness of the local government elections in October 2021.

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<sup>19</sup> Asplund (n 2 above); ‘Regulating Online Campaign Finance: Chasing the Ghost’, *IDEA* available at <https://www.idea.int/publications/catalogue/regulating-online-campaign-finance>; Adapting (n 7 above) 17-8.

<sup>20</sup> Adapting (n 7 above) 9; Strategies 360 (n 13 above); Asplund (n 2 above)

<sup>21</sup> Adapting (n 7 above) 12.

<sup>22</sup> Asplund (n 2 above).

<sup>23</sup> Tham (n 11 above). Regulating Online (n 14 above) 6. Adapting (n 7 above) 16.

<sup>24</sup> *Kham* (n 3 above) at para 87.

<sup>25</sup> See ActionSA social media pages <https://www.facebook.com/Action4SA>; <https://twitter.com/Action4SA>; <https://www.instagram.com/action4sa/>; <https://www.youtube.com/channel/UCGg5acaY91RzO-weJgMIMsQ>

<sup>26</sup> For example, the African National Congress <https://www.facebook.com/MyANCza>; <https://twitter.com/MYANC>; <https://www.instagram.com/myanc/>; <https://www.youtube.com/channel/UCnQj1cxMLtrWRcDk4Ck4FQ>; Democratic Alliance [https://twitter.com/Our\\_DA](https://twitter.com/Our_DA); [https://www.instagram.com/our\\_da/](https://www.instagram.com/our_da/); <https://www.youtube.com/user/DAParliament>; and the Economic Freedom Fighters <https://www.facebook.com/economicfreedomstruggle>; <https://twitter.com/EFFSouthAfrica>; <https://www.instagram.com/effsouthafrica/>; [https://www.youtube.com/channel/UCF-A\\_4x9-bLrxXrmgBOWuJA](https://www.youtube.com/channel/UCF-A_4x9-bLrxXrmgBOWuJA)

***The constraints, if any, that the measures in place to prevent and combat the spread of COVID-19 are likely to impose on the proper and effective monitoring, by political party agents and independent electoral monitoring bodies, of the freeness and fairness of the local government elections earmarked to be held in October 2021***

The IEC report annexure entitled 'Voting in the Time Of Covid-19: Voting Procedures to Minimise Contagion at Voting Stations' sets out the key considerations regarding containment measures which highlight the communal nature of the voting process and which inevitably 'brings people together'.<sup>27</sup> The IEC has acknowledged the need to 'facilitate the right of citizens to elect their public representative in a manner that does not increase the spread of COVID-19'.

These containment measures include the following:

- ***Promoting procedures that are aimed at maintaining public health:*** *This requires that practices must be institutionalized to ensure that voter registration points and voting stations do not become arenas of contagion.*
- ***Ensuring that trust in the electoral process is not eroded and the acceptability of the outcomes is safeguarded.*** *This is achieved by ensuring that adopted measures engender inclusiveness, equality and accountability.*
- ***Reviewing training guides for electoral staff to update process at voting station; communication strategy to communicate amended procedures to voters and general public.***<sup>28</sup>

The IEC document requires the following voting and counting procedures:

1. Voters will have to stand in the queue at a distance of at least one and a half meters apart.
2. Before entering the voting station door, the voter will have to sanitise both hands and must wear a face mask at all times.
3. The voting official will handle the ID document with disposable gloves and ensure that the correct distance is maintained throughout the process of identifying the voter in consideration.
4. The voter is asked to wait for at least five seconds at the inker table after applying ink to the nail in order to ensure that the use of hand sanitiser does not remove the ink.
5. The ballot box controller will wipe each pen after every vote if the voter has not brought their own with disposable wipes.
6. Before exiting the voting station, the ballot box controller again sprays hand sanitiser on both hands of the voter.
7. The counting procedures will remain the same, subject to the COVID-19 protocols in place at the time.

Although these measures present changes to the voting process, it is submitted that they will not affect the freeness and fairness of the election. This is also due to the fact that 'accredited political

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<sup>27</sup> The IEC Report, annexure PSM19 'voting in the time of covid-19: voting procedures to minimise contagion at voting stations' page 2. Available [here](#).

<sup>28</sup> Ibid.

party agents, observers and the media are able to observe the voting process. This is an important part of ensuring the transparency of the voting processes'.<sup>29</sup>

It is the HSF's submission that as long as the new processes in terms of the voting procedure are observed and transparency is encouraged, with each step being monitored and reported on, that the process as suggested above will present no material risk to the freeness and fairness of the elections.

**What lessons can be drawn from the experience of the by-elections which the Electoral Commission has conducted during the period of the COVID-19 Pandemic?**

The table below indicates the voter turnout in the past four local municipal elections. Interest in the second pair of elections was markedly greater than in the first.

Local Municipal Elections Voter Turnout 2000 – 2016

YEAR	REGISTERED VOTERS	VOTER TURNOUT (%)
2000	18,477,932.	48.1
2006	21,054,954	48.4
2011	23,654,347	57.6
2016	26 333 353	57.9

Interest in by-elections is considerably lower and more variable across wards than in general elections. In the 2019 and 2020 by-elections, turnout was just over 20% lower than in the 2016 election. In May 2021, the gap widened to nearly 30%.

By-election and Main Election Turnout (unweighted averages)

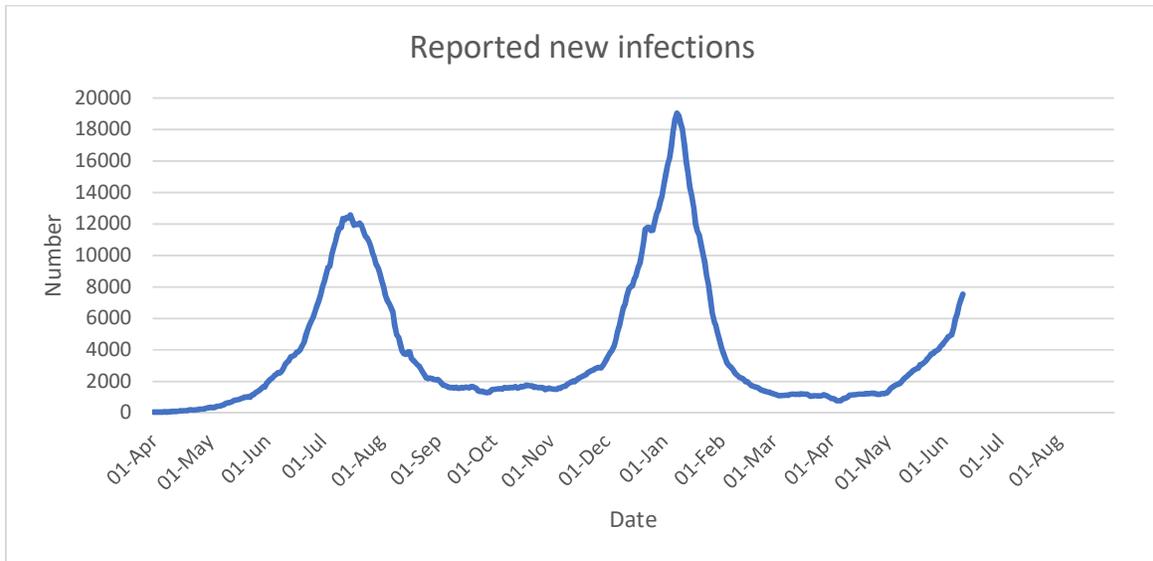
By-election dates	By-election voter turnout (%)	2016 main election turnout in same wards (%)
October-November 2019	38.8	60.0
October-November 2020	37.9	58.1
19 May 2021	27.9	56.3

The May 2021 by-elections were held across 25 municipalities in Gauteng, the Eastern Cape, Free State, KwaZulu-Natal, Limpopo, and Mpumalanga provinces. According to the IEC, the weighted average voter turnout of these by-elections was 31.9%.<sup>30</sup>

The similar turnouts in the 2019 and 2020 by-elections indicate that the presence of the epidemic did not reduce voter turnout in 2020. However, the turnout in May 2021 was lower than six months earlier. Since both the October-November 2020 and the May 2021 by-elections were both held in the lulls between waves of the epidemic, there are no grounds for believing that varying intensity of the epidemic explains the weaker May turnout. There must be other reasons, possibly including a lack of interest in electing representatives who would serve only for six months.

<sup>29</sup> The IEC report. Page 5.

<sup>30</sup> SABC 'IEC releases Wednesday's by-election results' (20 May 2021), available [here](#).



In short: the HSF is not aware of COVID-19 and the measures taken to counter it, having any material influence on the holding of recent by-elections. It also cautions against regarding the poor May 2021 by-election turnout as an indication of what might happen in elections that take place later in 2021.

However, the HSF notes with concern that due to budgetary constraints, there will only be one registration weekend taking place on 17 and 18 July 2021.

The HSF would like to commend the IEC on its ‘by-election training’ presentation which sets out all of the COVID-19 protocols for each stage of the voting process during the by-elections.<sup>31</sup> Assuming that all of these protocols are followed, it may be assumed that the by-elections would be carried out in the safest possible manner, ensuring the least amount of risk of spreading the virus through the voting process.

## Conclusion

In light of the measures put in place by the IEC, the HSF does not have any material concerns as to the freeness and fairness of the forthcoming local government elections.

We wish to emphasise that the COVID-19 pandemic will be with us for some time to come and the timing of subsequent waves of infection and their severity are impossible to predict. Trying to anticipate any future waves serves no useful purpose with reference to the timing of the holding of these elections.

However, should the COVID-19 situation prove to be of such a disastrous nature in the country in general in the months to come (and therefore much worse than what South Africa has experienced so far), with a potential material effect on the freeness and fairness of the elections that are scheduled in October 2021, the only remedy for the IEC would be to retain the right to postpone elections at short notice - this right could only be exercised as an extreme measure and would have to be done as an unavoidable decision in a last-minute emergency.

<sup>31</sup> IEC South Africa ‘introduction to electoral commission - by-election training’, available [here](#).