

Report on Ensuring Free and Fair Elections during COVID-19
Justice Dikgang Moseneke
Tugela House
1303 Heuwel Avenue
Centurion
0157

Dear Justice Moseneke

Re: Report On Ensuring Free And Fair Local Government Elections During Covid

Pursuant to the invitation to make submissions received on 1 June 2021, and the subsequent email communication requesting inputs on the Independent Electoral Commission, we have prepared submissions on certain constitutional and public health law issues relevant to the issue of whether it is possible to conduct free and fair elections in October 2021 in South Africa.

These submissions are made in our personal capacities and based on our respective areas of expertise.

Our submissions canvass the following issues:

1. The right to vote
2. Balancing the right to vote, other rights and public health objectives
3. Measures to ameliorate the spread of COVID-19
4. Additional Considerations
5. Recommendations

We hope these submissions assist the Commission in its task of determining whether the local government elections scheduled for October 2021 can proceed and under what conditions.

Please do not hesitate to contact us should you require further information, our details are included in the attached written submissions.

Yours sincerely

Prof Elmien Du Plessis, Petronell Kruger and Safura Abdool Karim

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1. The right to vote

1.1.Importance of the right to vote under the South African Constitution

Though the right to vote is given recognition within the Constitution of South Africa, the concept of universal franchise is one that underpins our young democracy. Its importance is evident in that it forms part of the founding provisions of the Constitution. Section 1(d) lists “[u]niversal adult suffrage” as a foundational value. The importance of the right to vote has been underscored by the Constitutional Court many times over and, in particular, the following paragraph of *August* succinctly articulates the key reasons why the right is of such critical importance:

“Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. 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. Rights may not be limited without justification

and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.”¹

This importance of the right to vote flows as a direct result of the history of South Africa where people of colour were denied the right to vote and denied basic freedoms and rights.² Against this history, the right to vote is integrally linked to our democracy and, in a practical sense, has been deeply linked to the realisation and protection of many other rights including the right to dignity.³ The right to vote is also vital to our working democracy.⁴ If voters do not want to register to vote, and to vote, then “democracy itself will be imperilled”.⁵ For this reason, the right to vote encompasses far more than simply casting a ballot and the protection of this right, protects far more than the instance or event of an election.

1.2. Content of the right to vote under section 19 of the Constitution

Section 19 of the Constitution specifically focusses on political rights – including the right to vote. Where section 19(1) provides that every citizen is free to make political choices, it is section 19(2) specifically that states that “[e]very citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution” (right to free, fair and regular elections). Section 19(3) confirms this, and states that “[e]very citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret” (right to vote).

The rights encompassed within section 19 are important as they aim to prevent a recurrence of the denial of political rights as during apartheid. In *Ramakatsa v Magashule*⁶ it was stated that this was more than mere disenfranchisement – it was exclusion from all decision-making processes. It is exclusion that section 19 tries to prevent. These rights are furthermore important because they give effect to the system of a “representative democracy”. For this reason, section 19 must be interpreted in the context of the whole Constitution.⁷

It is clear that the right to vote is combined with the right to free and fair elections.⁸ In *New National Party*⁹, the Constitutional Court clarified that the right to free and free elections is closely related to the right to vote, as “the right to vote is indispensable to, and empty without, the right to free and fair elections; the latter gives content and meaning to the former”.¹⁰ Where the right to vote is only available to citizens above the age of 18, the right to have free, fair and regular elections is a right enjoyed by all citizens, regardless of age.¹¹

1.3. State obligations under section 19 of the Constitution

The right to free, fair and regular elections is a positive right and thus requires the state to ensure that it fulfils this right.¹² This requires the state to promulgate a date for elections, to ensure that the ballot is secret, and to manage the process of elections. It also requires that the

¹ *August v Electoral Commission* [1999] ZACC 3 at para 17.

² *New National Party v Government of the Republic of South Africa* [1999] ZACC 5 at para 120.

³ *August* supra note 1 at para 17.

⁴ *Richter v The Minister for Home Affairs* [2009] ZACC 3.

⁵ *Ibid* at para 53.

⁶ *Ramakatsa v Magashule* [2012] ZACC 31 par 64.

⁷ *Ibid* at para 65.

⁸ FR Dau *From disenfranchisement to enfranchisement: the right to vote in South Africa* 144.

⁹ *NNP* supra note 2.

¹⁰ *NNP* supra note 2 at para 12.

¹¹ *NNP* supra note 2 at para 12.

¹² *NNP* supra note 2 at para 118.

election results be declared.¹³ Responsibility to discharge this positive obligation of the state is borne by Independent Electoral Commission (IEC).¹⁴ The IEC organise and manage elections.¹⁵ As an independent body they are subject only to the Constitution and the law, and must be impartial, excising their powers and perform their functions without fear, favour or prejudice.¹⁶

However, the duty goes beyond the running of impartial elections. Under section 19, there is a broader duty on the state to ensure that an individual's right to vote is realised. The *August* case,¹⁷ for instance, dealt with the rights of prisoners to vote. There, the Constitutional Court held that the IEC was required to allow prisoners vote as well as to provide them with the means and facilities to register as voters and participate in the elections..¹⁸ However, these obligations are not unlimited. In the *NICRO* case,¹⁹ the Constitutional Court had to consider whether the Legislature could justifiably limit the right to vote of a particular group of prisoners who required special arrangements to be made. The majority found that it was not necessary to engage on whether the limitation was justifiable as the state had failed to provide there were resource constraints that warranted limiting the right. However, Ngcobo J's dissent highlighted that limitations on the section 19 rights could ensure the integrity of the voting process was protected and in this manner, could "engender public confidence in the democratic process..."²⁰.

This illustrates that while it is possible to limit the section 19 rights – something that may be necessary during COVID-19, the state has a high bar to clear in order to justify this limitation and must provide sufficient evidence to prove that they were unable to make accommodations or arrangements where they assert this failure is the result of resource or other constraints.²¹

Section 19 also encompasses an entitlement for South Africans to make 'political choices'.

In addition, the principles of freeness and fairness do not only pertain to the workings of the IEC. For example, the rights to free and fair elections may be undermined where political parties are being treated unfairly – whether by the IEC or the media – or if they cannot campaign due to restrictions by the state.²² This will be discussed in greater detail below.

2. Balancing the right to vote, other rights and public health objectives

¹³ Danie Brand, Warren Freedman and Pierre De Vos, *South African Constitutional Law in Context* (Oxford University Press 2015) at 568; *NNP* supra note 2 at paras 13 – 14; *August* supra note 1 at para 16; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* [2004] ZACC 10 at para 28; Richter supra note 4 at para 54.

¹⁴ This commission gets its authority from sections 181 and 190 of the Constitution, read with the Electoral Commission Act.

¹⁵ *NNP* para 16.

¹⁶ S 181(2) of the Electoral Commission Act.

¹⁷ *August* supra note 1..

¹⁸ *August* supra note 1 at para 33. The IEC must compile and maintain a voters role, and a person can only vote if their name is on the voters role. Compiling and maintaining the role is therefore an integral part of voting.

¹⁹ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* [2004] ZACC 10.

²⁰ *Ibid* at para 126.

²¹ *NICRO* para 49.

²² P. De Vos, W. Freedman and D. Brand *South African constitutional law in context* Publisher: Oxford University Press 2014 p 569.

Following the first reports of the SARS-CoV-2 virus in December 2019, the COVID-19 pandemic has had a drastic impact on how societies function globally.²³ Many countries introduced stringent public health interventions such as quarantines, travel restrictions and even national lockdowns.²⁴ However, government actions and their efficacy in responding to the pandemic have varied considerably, particularly in light of the lack of information about the virus and the drastically changing landscape.²⁵ In this context, evaluating the impact of public health responses, and particularly whether the human rights limitations that accompanied them were justified, has been particularly challenging. There has been a temptation to frame public health measures as diametrically opposed to civil and political liberties and see the public health response to COVID-19 as inherently requiring the limitation of human rights.

There are tensions between individual human rights and public health objectives. Sometimes measures adopted in response to outbreaks can infringe on human rights when trying to achieve their public health objective.²⁶ This was particularly prevalent in traditional public health responses to communicable diseases such as quarantine and isolation.²⁷ However, modern approaches to disease control recognize that human rights and public health efforts can complement each other, especially where efforts work towards realization of the right to health.²⁸ This can manifest through improved access to health care and infrastructure, improved disease surveillance and reporting and implementation of gold standard methods to control the spread of disease.²⁹ States have obligations under human rights principles, including the right to health, to respond and control epidemics and outbreaks within their borders and some argue, beyond their borders.³⁰ Consequently, efforts to realize human rights to health often meld with public health responses to communicable diseases. In other respects, human rights and public health necessarily function independently and while public health responses to communicable diseases may impact particular human rights, the assessment of whether the public health measures in question promote or violates human rights more broadly depends on the circumstances and measures adopted.

South Africa's response to the COVID-19 epidemic was swift. In March 2020, the government declared a national state of disaster and began to implement public health interventions such as closing restaurants and introducing testing.³¹ Just over two weeks after the first case was diagnosed in the country, the government announced its plan to implement a national lockdown.³² The public health measures adopted during the course of the lockdown were

²³ Talha Burki, 'China's Successful Control of COVID-19' (2020) 20 *The Lancet Infectious Diseases* 1240.

²⁴ *ibid.*

²⁵ 'Coronavirus Government Response Tracker | Blavatnik School of Government'

<<https://www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker>> accessed 9 November 2020; 'Policy Responses to COVID19' (*IMF*) <<https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19>> accessed 9 November 2020.

²⁶ Benjamin Mason Meier, Dabney P Evans and Alexandra Phelan, 'Rights-Based Approaches to Preventing, Detecting, and Responding to Infectious Disease' (2020) 82 *Infectious Diseases in the New Millennium* 217.

²⁷ Lawrence O Gostin, Lindsay F Wiley and Thomas R Friedan, *Public Health Law: Power, Duty, Restraint* (3rd edn, University of California Press 2016).

²⁸ Jonathan M Mann and others, 'Health and Human Rights' [1994] *Health and human rights* 6; Andrew Clapham, *Realizing the Right to Health* (Rüffer & Rub 2009); Gostin, Wiley and Friedan (n 27); Lawrence O Gostin, *Global Health Law* (Harvard University Press 2014).

²⁹ Meier, Evans and Phelan (n 26).

³⁰ *ibid.*

³¹ Declaration of a National State of Disaster: Disaster Management Act 57 of 2002 GN 313 GG 43096 of 15 March 2020.

³² Salim S Abdool Karim, 'The South African Response to the Pandemic' (2020) 382 *New England Journal of Medicine* e95.

expansive from prohibiting public gatherings, introducing mandatory testing, isolation and quarantine, criminalising transmission of SARS-CoV-2 and suspending most economic activity outside of essential services.³³ The government response to the pandemic was couched almost entirely within the Disaster Management Act.³⁴

The government's decision to utilise the Disaster Management Act rather than declaring a state of emergency³⁵ meant, importantly, that the constitutional rights were not suspended during the state of disaster. Consequently, limitation of these rights resulting from the COVID-19 needed to be justified in terms of section 36 of the Constitution.³⁶ The first case challenging the validity of the national lockdown brought by the Hola Bon Renaissance Foundation was filed in the Constitutional Court within a few days of the lockdown being implemented.³⁷ This case was quickly dismissed by the Constitutional Court but was the beginning of a slew of cases related to the lockdown and its implications on constitutional rights.

Though many of these cases were ultimately not brought to finalisation, there is a need to recognise that the South African judiciary has – for the most part – recognised that public health measures act in service of key constitutional rights including the rights to healthcare, life and dignity. As a consequence, where measures related to COVID-19, including those related to elections, infringe rights, these infringements must be balanced against the potential realisation of these competing public health-related rights.

For example, in *One South Africa Movement and Another v President of the Republic of South Africa and Others*,³⁸ the High Court endorsed the view that “it was possible to protect both lives and livelihoods, without choosing one over the other.” in justification of adopting a less restrictive public health measure. The Court's view of the relationship between public health and human rights generally saw the pandemic, and consequently public health measures of less urgent importance than the competing economic interests and other civil and political rights such as:

“the right to reasonable access to health care services for all the population, and not only for Covid-19 patients; the right to freedom of movement; the right to dignity which attaches to the ability to earn a living and feed one's family; the right to free choice of one's trade, profession and occupation; and the right to property. Moreover, the measures that the state adopts must also not hinder its ability to meet its constitutional obligations progressively to

³³ Regulations issued in terms of section 27(2)(c) of the Disaster Management Act, 2002 GN 318 of GG 43107 (18 March 2020)

³⁴ Declaration of a National State of Disaster: Disaster Management Act 57 of 2002 GN 313 GG 43096 of 15 March 2020.

³⁵ The Constitution of the Republic of South Africa, 1996, section 37(1)(a) & (b) (the Constitution).

³⁶ Section 36 of the Constitution provides that:

‘(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.’

³⁷ News24 Wire, ‘NGO Challenges Constitutionality of Lockdown, Files Constitutional Court Papers’ (*The Citizen*) <<https://citizen.co.za/news/south-africa/courts/2261928/ngo-challenges-constitutionality-of-lockdown-files-constitutional-court-papers/>> accessed 9 November 2020.

³⁸ [2020] ZAGPPHC 249.

provide access to housing, social-welfare, health care and education. The health of the economy and fiscus are central to its ability to do so.”

In addition, there is an acknowledgement that one may need to defer to government policy positions where an evidence based is unsettled and still evolving. For example, in *FITA v President of the Republic and another*,³⁹ the Applicant challenged the banning of the sale of tobacco products in response to the Covid-19 pandemic on the basis that the ban was irrational, breached the principle of legality. Though there was a lack of conclusive evidence to support the ban, and other countries had not adopted a similar approach, the court deferred to the “still developing and not conclusive” evidence presented by the Minister of Cooperative Governance and Traditional Affairs.⁴⁰

We will, in the remainder of the submission, outline the measures that have been adopted in countries that sought to proceed with elections and highlight instances of elections being postponed. However, we wish to underscore the importance of acknowledging the ever-changing evidence based related to COVID-19 and the rights that are fulfilled and protected by decisions which prioritise public health, even where infringements of civil and political rights result.

3. Measures to ameliorate the spread of COVID-19 during elections

Given the duration and extent of the COVID-19, several countries have had to conduct elections under pandemic conditions and have adopted a wide range of interventions to ameliorate the risk of spreading the virus during elections.

3.1. Special Voting Arrangements

While the norm for voting remains in-person voting on specified election days, a range of alternative voting arrangements has developed in several jurisdictions and arguments to increase the use of these measures (called special voting arrangements) have been canvassed.⁴¹

Special voting arrangements include:

- early voting,
- postal voting,
- proxy voting,
- home and institution-based voting; and
- voting abroad.

Early voting has been used to decongest voting on election day (eg. South Korea and New Zealand).

³⁹ [2020] ZAGPPHC (26 June 2020)

⁴⁰ *ibid* at para X where the court stated:

“In our view, the medical material and other reports, inclusive from the WHO, considered by the Minister, though still developing and not conclusive regarding a higher COVID-19 virus progression amongst smokers compared to non- smokers, provided the Minister with a firm rational basis to promulgate regulations 27 and 45, outlawing the sale of tobacco products and cigarettes. This in our view is a properly considered rational decision intended to assist the State in complying with its responsibilities of protecting lives and thus curbing the spread of the COVID-19 virus and preventing a strain on the country’s healthcare facilities.”

⁴¹Robert Krimmer, David Duenas-Cid & Iuliia Krivonosova (2021) Debate: safeguarding democracy during pandemics. Social distancing, postal, or internet voting—thegood,thebadorthegugly?, *Public Money & Management*, 41:1, 8-10

In Lithuania and the Czech Republic, persons with Covid-19 or self-isolating could use “drive-by” voting stations.⁴² This mechanism was limited to persons pre-screened to qualify for the voting (eg. when requesting a ballot, proof of quarantine was required).⁴³ Persons were to drive in alone in a vehicle and drop their ballot into a box.⁴⁴ This mechanism obviously raised equity issues as the person has to have access to a private vehicle to participate in this arrangement.

A combination of early and home voting can be used to enable COVID-19 positive patients to participate in the elections. In Bermuda, patients isolating or in quarantine qualify for early voting on condition of providing a letter from a registered medical practitioner.⁴⁵ Patients then qualify for “voting from home” whereby an election official (and party agents) will visit the person’s place of residence and strict health protocols are to be observed.⁴⁶ North Macedonia also used a similar early voting mechanisms to accommodate quarantined and isolating individuals.⁴⁷

Postal voting was employed in, amongst others, the United States and Poland. Postal voting requires a prior application by a citizen, and a ballot is delivered to the voter via mail and then returned via mail before a specified date.⁴⁸

Proxy voting was employed in Croatia after the Croatian Constitutional Court rules that the government had a duty to ensure the right to vote extended to persons impacted by Covid-19.⁴⁹ This decision was made despite an argument by the Electoral Commission that it was citing the right to health of other citizens by restricting the right to vote of isolating or quarantining individuals.⁵⁰

3.2. Arrangements to be adopted at polling stations

The World Health Organisation has issued guidance on how to conduct elections in the context of the Covid-19 pandemic.⁵¹ It provides guidance on three aspects: risk evaluation, risk mitigation and risk communication. In terms of risk mitigation, the WHO provides the following four categories of advice: 1) basic advice, 2) advice on precautionary measures related to venues, 3) advice on personal protective equipment for all stakeholders and 4) advice on precautionary measures for special population groups.

⁴²<https://apnews.com/article/virus-outbreak-national-elections-lithuania-elections-europe-75bef74b7e8985e81908345ead6bb8d8>

⁴³ <https://www.laprensalatina.com/czech-republic-sets-up-drive-in-polling-stations-for-voters-with-covid/>

⁴⁴<https://www.laprensalatina.com/czech-republic-sets-up-drive-in-polling-stations-for-voters-with-covid/>;
<https://apnews.com/article/virus-outbreak-national-elections-lithuania-elections-europe-75bef74b7e8985e81908345ead6bb8d8>

⁴⁵ <https://www.bermudareal.com/general-election-2020-advanced-polling-takes-place-on-thursday-friday/>

⁴⁶ <https://www.bermudareal.com/general-election-2020-advanced-polling-takes-place-on-thursday-friday/>

⁴⁷ <https://abcnews.go.com/International/wireStory/north-macedonia-holds-election-amid-virus-surge-71746871>;
<https://www.idea.int/news-media/news/elections-and-covid-19-how-special-voting-arrangements-were-expanded-2020>

⁴⁸<https://www.idea.int/news-media/news/elections-and-covid-19-how-special-voting-arrangements-were-expanded-2020>.

⁴⁹ <https://www.croatiaweek.com/croatias-constitutional-court-says-electoral-commission-must-ensure-right-to-vote-to-covid-patients/>

⁵⁰ <https://www.croatiaweek.com/croatias-constitutional-court-says-electoral-commission-must-ensure-right-to-vote-to-covid-patients/>.

⁵¹ <https://apps.who.int/iris/rest/bitstreams/1321361/retrieve>

The basic advice relates to practices that should be observed by all people within and outside of the electoral context:

- maintain a physical distance of more than a metre,
- cover your mouth and nose when coughing or sneezing and do not touch your eyes, nose or mouth, and
- regularly wash hands.⁵²

The use of physical distancing measures in polling sites was quite common in a number of the elections conducted in African countries.

In African elections from February 2020 to May 2021, some examples of mandatory physical distancing at polling sites include: Benin (1m), Cabo Verde (1m), Cote d'Ivoire, (1m), Mali (1m), Namibia (1m), Niger (1m) and Uganda (2m). It should also be noted that some countries relaxed general Covid-19 restrictions during elections: In Benin, restrictions on the maximum number of persons at public gatherings were suspended to accommodate campaign rallies. In Burkina Faso, mandatory mask wearing was suspended to ensure access to polls. Similarly, in Liberia, mandatory mask wearing was relaxed to ensure “the democratic process of voting” was not stalled.

4. Additional Considerations

4.1. Pre-election arrangements: campaigning during COVID-19

Campaigning is an important component of free and fair elections as pre-election activities such as campaigning enable voters to become informed about candidates and thus enables voters to effectively exercise their right to vote. Indeed, under section 19, South Africans are entitled to make political choices and as a part of exercising this right, voters are entitled to information about the candidates they must choose between. The Constitutional Court underscored this key relationship between voters having information about candidates and exercising their right to vote in *My Vote Counts*, stating:

“For every citizen to be truly free to make a political choice, including which party to join and which not to vote for or which political cause to campaign for or support, access to relevant or empowering information must be facilitated. Not only must the information be “held” in one form or another, it must also be reasonably accessible to potential voters. They need it to be able to make a quality decision to vote for a particular political party or independent candidate.

For, there is a vital connection between a proper exercise of the right to vote and the right of access to information. The former is not to be exercised blindly or without proper reflection. In this regard, Ngcobo CJ made the following observations:

‘In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.’⁵³ (references omitted)

⁵² WHO, pg 2

⁵³ *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17 at paras 34-35.

As a result, the ability to campaign and for voters to learn about the candidates is an integral component of fulfilling the rights under section 19. Typically campaigning has involved close contact activities such as rallies, canvassing voters, campaign events and meet and greets.⁵⁴ These are difficult to implement safely during the COVID-19 pandemic and carry a high-risk of spreading infection if protocols are not observed. Simultaneously, in-person traditional campaigning techniques may be the primary and in some instances, on pathway to access certain marginalised groups of voters. Consequently, limiting campaigning activities to digital or telephonic options may disenfranchise and miss significant proportions of the South African population who do not have access to these technologies easily – typically those in lower socio-economic groups.

There is a need to carefully consider how to balance these competing issues when regulating pre-election campaigning and in particular, mitigate the impact of COVID-19 measures on the right to vote.

At a minimum, evidence-based measures which could be implemented at campaign events to mitigate the risk of spreading the virus could include:

- Only permitting outdoor campaign events
- Implementing screening procedures which will also enable effective contact tracing in the event of an infection
- Ensuring there is sufficient space to implement social distancing as well as delineating separate exits and entrances
- Requiring and enforcing the implementation of NPIs including mask wearing, hand sanitizer
- Recommending the vulnerable populations avoid campaign events.

Many of these measures are already in place under the existing State of Disaster Regulations but enforcement is complex. We would recommend that responsibility for compliance lie with candidates and that the IEC play a role in ensuring enforcement and compliance with these measures at campaign events as well as sanctioning non-compliance. We further recommend that candidates utilise alternative techniques to reach voters who are part of vulnerable populations.

4.2. Voter turnout and the impact on democracy

There is a concern that conducting elections during COVID-19 and particularly in times where infection rates are high will result in lower voter turnout and negative impact perceptions of South Africa's democracy.

Research conducted in Serbia, the Dominican Republic and Nigeria during June 2020 indicated that the fear of getting infected at the polling stations is a significant concern for voters.⁵⁵ Serbians (where the number of COVID-19 infections were declining) had an average concern, while the Dominicans and Nigerians (where the number of COVID-19 infections were increasing) expressed high levels of concern. The greatest concerns were related to gathering and queuing at polling stations. Interestingly, respondents were not as concerned about a lack of masks, disinfectant, PPE for poll workers or uncleanliness at the polling station. There was

⁵⁴ <https://elections.bc.ca/docs/GuidelinesForCampaigningDuringCOVID-19.pdf>

⁵⁵ {Burl, 2020 #1132}. <https://www.abc.net.au/news/2020-03-29/queensland-local-government-council-by-elections/12097852>

a gendered component to these results with women being more concerned than men. However, these results may be of limited transferability to South Africa.

Several countries have conducted elections and seen lower voter turnout during COVID-19. France recorded a historically low turnout (45%) during its first round of municipal elections in March 2020, despite taking precautions.⁵⁶ In June 2020, during the second-round of elections, there was an even lower voter turnout (40%), even if lower daily new infections. The same was true for Mali⁵⁷ and Iran's⁵⁸ parliamentary elections, elections in several US states and (compulsory) local elections in Australia.⁵⁹ Evidence suggests that voter turnout in national elections globally increased in 42% of countries by a mean of 7%.⁶⁰ Correspondingly, voter turnout decreased in 58% of countries by about 10%.⁶¹

We also considered voter turnout across Africa in various elections (using previous comparable elections as a base-line) and found that a reduction in voter turnout was common during a "Covid" election, but that in certain countries voter turnout rates remained stable or even improved. In a sample of 21 elections (ranging in types of elections) 13 elections (61.9%) faced a reduction in voter turnout.

- The most significant drop in voter turnout was in Liberia, where turnout was 37%⁶² as opposed to a consistent voter turnout of over 70% in the last three elections.⁶³ Reports link this with concerns over inefficient health protocols.⁶⁴
- Algeria faced a historically low election turn-out (23.7%), although a previous presidential election in 2019 also faced a historic low turn-out.⁶⁵
- Similarly, In Mali, a record low turnout was observed with 35.6 %⁶⁶ as compared to 42.7% in 2018 and 38.5% in 2015.⁶⁷ However, the country was facing consistent in-country violence,⁶⁸ and larger trends of voter dissatisfaction should also be considered.⁶⁹
- Guinea had a down turn to 58% in the Parliamentary elections (as opposed to 68.4% in 2015) voter turn-out, however, other factors such as election violence and opposition

⁵⁶ S. Birch, F. Buriel, N. Cheeseman, A. Clark, S. Darnolf, S. Dodsworth, et al. *How to hold elections safely and democratically during the COVID-19 pandemic* 2020 British Academy.

⁵⁷ <https://www.dw.com/en/mali-legislative-elections-hampered-by-low-voter-turnout/a-52958735>

⁵⁸ <https://www.voanews.com/middle-east/voa-news-iran/iran-voter-turnout-below-50-first-1979-islamic-revolution>

⁵⁹ S. Birch, F. Buriel, N. Cheeseman, A. Clark, S. Darnolf, S. Dodsworth, et al. *How to hold elections safely and democratically during the COVID-19 pandemic* 2020 British Academy.

⁶⁰ <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>

⁶¹ <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>

⁶² <https://necliberia.org/results/>

⁶³ <https://www.electionguide.org/countries/id/122/>; Note a poor turn-out in 2014 at 26.68% is also noteworthy.

⁶⁴ <https://www.newrepublicliberia.com/elections-covid-19-superspreading-event/>

⁶⁵ <https://www.voanews.com/africa/algeria-says-voters-backed-constitutional-changes-referendum>;

<https://www.aljazeera.com/news/2020/11/2/low-voter-turnout-hits-algeria-referendum-amid-boycott-calls>

⁶⁶ http://www.courconstitutionnelle.ml/wp-content/uploads/2020/04/divers_2020-arret-03-annexe.pdf

⁶⁷ <https://www.idea.int/data-tools/country-view/208/40>.

⁶⁸ <https://www.google.com/url?q=https://www.aljazeera.com/news/2020/03/polls-open-mali-coronavirus-threat-security-fears-200329081850465.html&sa=D&source=editors&ust=1623141357953000&usg=AOvVaw279X118trXgFqMDxdCJ0Du>

⁶⁹ R Gerenge ' Managing elections under COVID-19 pandemic conditions: the case of Mali Case Study' 23 September 2020 available at https://www.idea.int/sites/default/files/managing-elections-under-covid-19-pandemic-conditions-the-case-of-mali_en.pdf.

boycotts could have influenced this number markedly.⁷⁰ However, the Presidential elections showed an increase in voter turn-out of 10% and was conducted only a few months thereafter.⁷¹

- In Edo State, in Nigeria, voter turnout was 25% as opposed to 32.74% during the previous governor elections, but again, threats of violence in the region might have reduced voter turnout.⁷² In Ondo State, Nigeria, voter turnout reduced from 35% in 2016 to 31.6%.
- Benin had a voter turnout of 49.14% in the local elections as opposed to a 56.95% turn out in 2015, and 50.17% for the presidential election as opposed a turnout of more than 64% in 2016 voting rounds.⁷³
- Burkina Faso had a voter turn-out of 50%, as compared to a turn-out of 60% in 2015.⁷⁴ Cabo Verde saw a reduction from 65.93% in 2016 to 57.5
- In Malawi voter turnout reduced from 74.4% (2019) to 64.81%.⁷⁵ This election was a rerun.
- In the Syrian parliamentary elections, voter turnout was 33% as compared to 57% in 2016.⁷⁶
- Voter turnout in Tanzania also dropped, despite widespread Covid-19 denialism at the time of the election (from 67.34% in 2015 to 50.72%).⁷⁷

It is worthwhile to note that other factors such as violence or concerns over the legitimacy of the elections were also observed as 4 elections (19%) showed very similar turnout rates:

- In Côte d'Ivoire, the final turnout was 53.9%, as opposed to 2015 where the rate was 55%.⁷⁸ However, there is a general trend of lower turnout, where in 2010, voter turnout was as high as 80%.⁷⁹
- In Chad, 63.37% voter turnout was achieved as opposed to the marginally higher 65.95% in the 2016 presidential elections.⁸⁰
- In Egypt's senate election a trend of incredibly low voter turnout continued with 14.23% in comparison to a voter turnout of less than 14% in 2012.⁸¹
- In The Republic of Congo, voter turnout was 67.55% as compared to 68.92% in a previous election.⁸²

Five elections (19%) show increased voter turnout:

⁷⁰<https://www.aljazeera.com/news/2020/03/23/guinea-holds-controversial-referendum-marred-by-violence-boycott/>; <https://www.idea.int/data-tools/country-view/115/40>.

⁷¹ <https://www.idea.int/data-tools/country-view/115/40>.

⁷²<https://www.premiumtimesng.com/news/more-news/416340-low-voters-turnout-mars-2020-edo-governorship-election.html>; <https://www.facebook.com/CDDWestafrica/posts/our-analysis-of-the-edo-governorship-election-shows-a-worrying-decline-in-voter-/3646045208753515/>

⁷³<https://issafrica.org/iss-today/benins-local-elections-further-reduce-the-political-space>;

<https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>

⁷⁴ <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>

⁷⁵ <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>

⁷⁶ <https://www.dw.com/en/syria-assads-party-wins-expected-majority-in-parliamentary-polls/a-54259180>

⁷⁷ <https://www.idea.int/data-tools/country-view/291/40>

⁷⁸<https://www.aljazeera.com/news/2020/11/3/ivory-coast-election-president-ouattara-wins-third-term>;

<https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>

⁷⁹ <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>

⁸⁰ <https://www.idea.int/data-tools/country-view/277/40>

⁸¹ <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>

⁸²<http://www.afriquevision.info/denis-sassou-nguessou-au-pouvoir-depuis-36-ans-reelu-avec-886-de-la-presidentielle-au-congo-brazzaville/>; <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>

- Burundi has an increased voter turn-out (87.71%) as compared to 2015 (73.4%).⁸³
- The Central African Republic of increased to 76.31% as opposed to 59% (2016).⁸⁴
- In the Côte d’Ivoire, legislative elections, voter turn-out increased from 34% in 2016 to 37.88% (as opposed to the reduction in turnout for the Presidential election, despite the increased incidence of Covid-19).⁸⁵
- In Djibouti, voter turnout spiked from 69% in 2016, to 82.24% in 2021.⁸⁶
- Ghana’s turnout increased with almost 10% from 69.25% in 2016 to 79%.⁸⁷

4.3. Enforcement of non-pharmaceutical interventions to enable safe elections

The introduction of /or maintenance of Covid-19 non-pharmaceutical interventions such as eg. mask-wearing and social distancing requires a measure of enforcement at polling stations. In Cabo Verde, increased policing was used to ensure adherence to Covid-19 protocols during voting. In Djibouti, security forces were deployed to enforce the mandatory wearing of face masks during voting. In Namibia, police enforced the 1.5m social distance rule. Security forces were observed in a majority of voting stations in Niger during the second round of the Presidential election.

The concern relating to enforcement of Covid-19 restrictions comes from a real concern of excessive use of force: In the Ugandan elections, police violence under the guise of enforcing covid-19 restrictions led to at least 54 deaths. Police used teargas to disperse crowds. These concerns have relevance in the South African context as the enforcement of Covid-19 restrictions outside the context of elections has resulted in serious concerns amongst the public.

4.4. Postponement of the Elections

Though, overwhelmingly, countries have chosen to proceed with elections albeit with COVID-19 compliant measures, a handful of countries have opted to postpone elections (Table 1) and of these four countries, half have not yet set dates for the elections to be held.

Table 1: Election snapshot in Africa (Current postponements)⁸⁸

Country	Type of election (National/Sub-national/Both)	Original activity date	Postponed date
Botswana	Sub-national; Local by-elections	May 2020	-
Chad	Legislative elections	13 December 2020	24 October 2021
Ethiopia	Parliamentary elections	29 August 2020	21 June 2021

⁸³<https://www.google.com/url?q=https://www.idea.int/data-tools/country-view/64/40&sa=D&source=editors&ust=1623141357714000&usg=AOvVaw2bHHQTdlcSHrFo8Iyj1wbZ>

⁸⁴<https://www.google.com/url?q=https://www.idea.int/data-tools/country-view/75/40&sa=D&source=editors&ust=1623141357726000&usg=AOvVaw3cncr3jYwqoiJ8LPgT-UV90>

⁸⁵<https://www.voanews.com/africa/opposition-claims-victory-ivory-coast-counts-votes;>

<https://www.rfi.fr/en/africa/20210309-cote-d-ivoire-ruling-rhdv-wins-majority-in-parliamentary-polls.>

⁸⁶<https://www.google.com/url?q=https://www.idea.int/data-tools/country-view/93/40&sa=D&source=editors&ust=1623141357776000&usg=AOvVaw1922mLZxAAG13itf9ZW2yl.>

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⁸⁸ <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>

Zimbabwe	Legislative and council elections by-	5 December 2020	-
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The primary concern in electing to postpone the elections is what criteria ought to be fulfilled in order for elections to be held. South Africa, like many other low- and middle-income countries, has low rates of vaccination which have been heavily influenced by our lack of access to vaccines and global vaccine inequity. In addition, the emergence of several variants of concern including B.1.501v2 has resulted in reduced efficacy of certain vaccine candidates.⁸⁹ As such, the achievement of herd immunity may not be a realisable goal for South Africa in the near future. Notably, many African countries with similarly low or even lower vaccination rates have elected to move ahead with holding elections – adopting non-pharmaceutical interventions (NPIs) to ameliorate the risk of the elections becoming super-spreading events.

5. Recommendations and Comments on the IEC Submissions

In this section we have benchmarked the IEC’s intended interventions (as outlined in their submissions) against the WHO’s recommendations⁹⁰ on the public health interventions which should be implemented when conducting elections. To assist in assessing the feasibility of these interventions in our context, we have added in instances where these interventions have been implemented in other contexts.

5.1. Recommended interventions for designated polling locations

WHO recommended Intervention	Instances of Implementation	Comments and Recommendation based on IEC submissions
Increase the space in designated polling locations and consider adding additional polling places.	This technique was employed in Egypt, Ghana and Nigeria. Ghana, for example, introduced 10 000 additional polling stations and reported low numbers of voters queuing. ⁹¹ Similarly, in certain Nigerian State elections, polling stations were introduced to decongest polling stations as a measure both aimed at preventing Covid-19 transmission, and encourage voter participation. ⁹²	The IEC should consider increasing the number of polling stations.

⁸⁹ Shabir A Madhi et al, ‘Efficacy of the ChAdOx1 NCoV-19 Covid-19 Vaccine against the B.1.351 Variant’ (2021) 0 New England Journal of Medicine null; Vivek Shinde et al, ‘Efficacy of NVX-CoV2373 Covid-19 Vaccine against the B.1.351 Variant’ (2021) 0 New England Journal of Medicine null.

⁹⁰ WHO, pg 2

⁹¹ <https://www.myjoyonline.com/full-text-jean-mensas-address-at-ipac-workshop-on-2020-elections/>.

⁹² <https://guardian.ng/news/inec-creates-additional-440-polling-units-in-bayelsa-state/>.

Increase the operating hours of polling stations and streamline processes to remove the time of people spent in polling places.	As an alternative, the United States Centres for Disease Control recommends extending the voting process over multiple days. ⁹³	Based on “PSM 20”, voting stations will be open only from 08:00 – 17:00. Best practice is to operate for extended hours to decongest voting stations.
Maximise ventilation. If possible, have outdoor or partially outdoor (queues are outside) polling stations.	For example, in Uganda, most polling stations were outdoor.	The IEC has presented a visual representation of the voting process and layout which creates the impression that queuing will occur outside (i.e. venues are partially outdoor).
Place physical barriers such as plexiglass in places with frequent interaction, such as where voters are identified.		The IEC is to consider introducing physical barriers at areas of frequent interaction, such as the voters’ roll officer desk, the ballot paper issuer desk.
Regulate the flow of people at venues, using a range of techniques, including, minimising observers, party agents and media persons, limiting election related activity close to the venue, using uni-directional movement flows (crowd controllers may be necessary).	For example, in Guinea, a maximum limit of 20 counting officials per venue was introduced.	The IEC has indicated several techniques for regulating the flow of persons, including: <ul style="list-style-type: none"> • Limiting the number of voters in a voting station (110.6); • Limiting the number of party agents in the voting station (110.11); • The use of a pre-planned uni-directional floor layout for voting (PSM21).
Provide hand washing facilities or hand sanitizer to be used throughout the venue and before touching shared objects.	Burundi, Ghana and Uganda introduced mandatory hand-washing, while Malawi and Niger introduced recommended hand-washing. See Annex A for summary of mandatory hand-washing or sanitizing practices.	The IEC has indicated that that an official will sanitise each voter’s hand prior to entering the voting station (110.6) and that observers and party agents will be required to sanitise their hands (110.8)
		The IEC has indicated that social distancing of 1.5+ metres apart in the form of

⁹³ <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>

		marking spaces in queues (108.1;110.5) and that voting officials should observe this social distance as well as enforce it (108.10).
Provide visual reminders in venues of health protocols.	For example, in Benin and the Central African Republic, infographics were displayed to assist voters and staff of the health protocols. In Niger, the electoral commission broadcasted an instructional video on television prior to the elections to assist in understanding health protocols.	The IEC should utilise existing materials from the NDOH on observing COVID-19 protocols.
Regular and thorough cleaning of the venue should occur at least twice daily.		The IEC has indicated that the presiding officer at each voting station must defog and sanitise the voting station before voting (para 110.1 & 2.). For best practice, a thorough sanitisation of cleaning of the venue and all equipment should ideally be introduced at some stage during the course of the day.
Consider making masks available to voters at the polling station and encouraging voters to bring their own pens.	In Malawi, voters were encouraged to bring their own pens to polling stations.	The IEC has indicated that voters will be encouraged to bring their own pens, but that pens will be available at the polling station and will be sanitised after each single use (para 110.4).The IEC should consider the implication of turning voters away from polling stations based on a failure to wear a mask. Examples in other African jurisdictions have shown that enforcement of this rule presents practical and principled difficulties. Best practice is to make masks available at the polling station.

Implement a procedure for managing persons who develop symptoms suggestive of Covid-19.	The practice in some other jurisdictions have also been to employ temperature checks (eg, Ghana, Nigeria and Syria). In the Ondo State governorship elections, any voter with a temperature of over 37.5 C was disqualified from entering the polling station.	It is unclear whether the IEC has a protocol for identifying symptomatic individuals and steps to address such individuals.
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5.2. Interventions on personal protective equipment for all stakeholders

The WHO has guidelines which apply to voters, electoral staff, election observers, party agents and media persons. It provides advice on the use of masks and gloves.⁹⁴

WHO Recommended Intervention	Instances of Implementation	Comments and Recommendation based on IEC submissions
For masks: The general population should wear fabric masks, while persons over 60 or with co-morbidities should wear medical masks.	The CDC recommends that where masks are to be removed for identification purpose (such as was documented in Niger), hand sanitizer or hand-washing facilities should be available after reapplying the mask and instructions on good mask management techniques should ideally be made available. ⁹⁵ Practice on mandatory mask wearing has differed from jurisdiction to jurisdiction. In Egypt and Niger, a policy of providing masks at polling stations were introduced. While Ghana and Ondo State, Nigeria, had a "no mask no vote" rule, however implementation of this rule was questioned. In Syria, only polling staff were mandated to wear masks.	It is unclear whether or not visual verification of identification of voters will occur (although the wording of "PSM20" suggest such verification will not occur). However, should visual verification occur, the IEC needs to introduce an additional sanitisation step in the voting process.

⁹⁴ WHO, pg 3

⁹⁵ <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

<p>Gloves are not required unless where officials are coming into contact with a suspected or confirmed case of Covid-19. Gloves should not replace hand-washing or hand-sanitizing practices.</p>	<p>Countries such as Namibia introduced additional PPE, such as disposable gowns for polling staff.</p>	<p>The IEC suggests several officers will be wearing gloves where there is contact with the public. It is important to note that the introduction of gloves does not vitiate the need to sanitise hands after contact or sanitise shared objects. For example, where the voters' roll officer handles an ID document, the use of gloves – which will presumably not be disposed after each interaction – does not fulfil the same function as sanitisation</p>
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5.3. Interventions related to precautionary measures for special population groups

The WHO recommends certain additional precautions and interventions which would be applicable to persons at a higher risk of developing Covid-19 (based on factors such as age and co-morbidities). The IEC submissions do not indicate the adoption of any measures related to these key populations. Given the high prevalence of co-morbidities in the South African population, these are of particular relevance to a significant proportion of the voting population.

WHO Recommended Intervention	Instances of Implementation
<p>Persons in isolation or quarantine should not engage in any in-person events.</p>	<p>The CDC also recommends providing education to poll workers on how to identify possible Covid-19 exposure of symptoms and to then be instructed to remain home.⁹⁶</p>
<p>Special arrangements for institution-based registration and voting (eg. At hospitals) or remote voting <i>can</i> be considered. Persons with a higher risk of developing severe illness from Covid-19 might be accommodated through dedicated voting areas, preferential treatment in queues, institution-based arrangements (retirement homes), dedicated polling places or stations.</p>	<p>Namibia attempted to make provisions for persons in quarantine or isolation, but local laws made in-person voting the only option. In Ondo, Nigeria, voters who experienced Covid symptoms were requested not to vote. The Seychelles created 5 special polling stations with staff given additional protective gear and to be tested before and after polling. These stations will service essential workers, persons travelling, the elderly and hospital patients.</p>

6. Biographies of Team

Elmien du Plessis is an associate professor in law at the faculty of law, North-West University. She specialises in statutory interpretation.

⁹⁶ <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

Email: Elmien.DuPlessis@nwu.ac.za

Petronell Kruger is a researcher at the SAMRC/Wits Centre for Health Economics and Decision Science (PRICELESS SA). She is an admitted legal practitioner in the High Court of South Africa and has previously held positions as a legal researcher at the Constitutional Court of South Africa and at the Institute for International and Comparative Law in Africa at the University of Pretoria. She completed her LLB and LLM at the University of Pretoria. She is a registered PHD student at the University of Witwatersrand.

Email: Petronell.Kruger@wits.ac.za

Safura Abdool Karim is a senior researcher at SAMRC Centre for Health Economics and Decision Science, PRICELESS SA (Priority Cost Effective Lessons for Systems Strengthening) a Research Unit based at the Wits School of Public Health. Safura is a 2020 Aspen New Voices Fellow. Safura completed an LLB at the University of Cape Town and thereafter an LLM in Global Health Law at Georgetown University. She is currently pursuing her PhD in Law at the University of KwaZulu-Natal on constitutional rights and non-communicable diseases. Prior to joining PRICELESS SA, Safura had practiced corporate law, worked on plain packaging and advertising laws for tobacco control and was a at the Constitutional Court of South Africa.

Email: Safura.Abdoolkarim@wits.ac.za

7. Additional Resources

We relied on several databases and online resources to compile this submission and these resources may be of use to the commission.

- <https://www.idea.int/news-media/news/covid-19-electoral-landscape-africa>
- <https://www.accord.org.za/analysis/covid-19-and-elections-in-africa-protecting-the-vote-or-the-voter/>
- <https://www.un.org/africarenewal/magazine/july-2020/vote-or-postpone-elections-africa-time-covid-19>

Lists of elections are available at

- <https://www.eisa.org/calendar.php>
- <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>
- <https://africanarguments.org/2020/05/how-africa-countries-dealing-elections-covid-19/>

Resources containing recommendations on conducting elections are available at:

- <https://www.ifes.org/publications/ifes-covid-19-briefing-series-legal-considerations-when-delaying-or-adapting-elections>
- <https://www.csis.org/analysis/pandemic-polls>