

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: 245/21

In the application of:

ELECTORAL COMMISSION OF SOUTH AFRICA

Applicant

and

**MINISTER OF COOPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS**

First Respondent

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

Second Respondent

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

Third Respondent

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

Fourth Respondent

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

Fifth Respondent

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

Sixth Respondent

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

Seventh Respondent

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

Eighth Respondent

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

Ninth Respondent

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

Tenth Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
ASSOCIATION**

Eleventh Respondent

with

FREEDOM UNDER LAW

Second Amicus Curiae

FREEDOM UNDER LAW'S HEADS OF ARGUMENT

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INTRODUCTION

1. In this urgent application, the Electoral Commission asks the Court to exempt it from the plain requirements of the Constitution. It presents this, oleagiously, as “*seek[ing] guidance from this Court*”,¹ when that is clearly not true. The exemption it seeks involves a declarator that it may hold the local government elections outside the 90-day period required by section 159(2) of the Constitution. This imputes a dispensing power, where none exists, placing the Court above the supreme law. The effect of the relief would be to permit the Electoral Commission to breach unequivocal constitutional obligations and to absolve it from the consequences of this breach.
2. The Electoral Commission really argues two things. The first is that it would be lawful for this Court to disregard the Constitution on the basis of an ancient common law maxim of impossibility.² The second is that necessity drives this, because of the COVID-19 pandemic.
3. FUL’s position is simply stated. Nobody, not even this Court, has the power to allow departures from the clear limits set by section 159(2) of the Constitution. Either the Constitution must be amended to grant this Court the power to grant the extraordinary relief which is sought – which can only be effected through the Parliamentary process set out in section 74 of the Constitution – or the Constitution must be complied with.³ The Court may not, in the memorable phrase of Van den Heever JA, in the

¹ Electoral Commission’s Replying Affidavit, para 15, p. 662.

² Electoral Commission’s Replying Affidavit, para 21, p. 665.

³ FUL’s Affidavit, para 23.

constitutional crisis triggered by the removal of the Coloured vote, simply lift itself by its own bootstraps.⁴

4. Moreover, even if this Court *could* bend the Constitution, as a matter of constitutional principle, this Court dare not permit departures, when convenient or even pressing, from time limits ensuring regular elections in compliance with the fundamental constitutional value enshrined in section 1(d). Hundreds of elections have been held around the world during the pandemic. Just this past weekend, on 14 August 2021, dealing with unrest as well as the pandemic, Presidential elections were successfully held in Zambia, a far less resourced fellow SADC member.⁵
5. The affidavit filed by the MEC Responsible for Local Government in the Provincial Government of the Western Cape, revealing the Electoral Commission's presentation of May 2021, documents that the Electoral Commission has been aware of the impact of the COVID-19 pandemic on the local government elections since at least this date. It reveals further that the Commission had even at that stage put in place measures to hold local government elections, and briefed the Western Cape Provincial Legislature on its readiness to hold elections on 27 October 2021.⁶ It said that it could do so. The Electoral Commission did not disclose these facts to the Court.

Freedom Under Law

6. Freedom Under Law (“FUL”) is a public interest organisation whose objectives are *“the promotion of democracy and the advancement of the rule of law and the principle*

⁴ *Minister of the Interior and Another v Harris and Others* 1952 (4) SA 769 (A) at 790D.

⁵ See article: **Zambia's opposition leader wins landslide election as young people turnout in huge numbers**, available at <https://edition.cnn.com/2021/08/16/africa/zambia-election-president-hichilema/index.html>.

⁶ Tenth Respondent's Affidavit, para 68.

of legality, understanding these to be the foundation for constitutional democracy in Southern Africa". This case falls squarely in the terrain of the values that underpin South Africa's democracy, with the right to vote giving that democracy meaning.

7. FUL has been admitted as *amicus curiae* in terms of the Directions of this Court of 16 August 2021. These written submissions are filed in accordance with this Court's directives.

8. In what follows, we deal with the following topics.

8.1. We first describe the Electoral Commission's obligation to hold regular elections under the constitutional dispensation.

8.2. Thereafter, we explain that this Court has no jurisdiction to grant the relief which the Electoral Commission seeks.

8.3. Finally, we demonstrate that it is not impossible for the Electoral Commission to hold elections in October, but even if that had been established, it gives no warrant to depart from the bedrock principle recognised in the first clause of the Constitution.⁷

8.4. Finally, we make submissions on the question of remedy.

⁷ FUL's Affidavit, para 24.

THE ELECTORAL COMMISSION'S OBLIGATION TO HOLD REGULAR ELECTIONS

The democratic order

9. The constitutional institution of regular elections allocates power on a temporary basis to a particular group of elected representatives. It lies at the heart of constitutional democracy. The time factor is crucial because it guarantees accountability of elected representatives and ensures that representatives do not lose touch with the electorate over time and pursue only their own interests.⁸ In short, it means that elected officials govern “on borrowed time”.⁹ Regular elections prevent the accumulation of political power and a lack of responsiveness between the elected and the electorate. *Regular* means set, and known. Not a six year term here and a four year term there.

The Constitutional context

10. Section 1 of South Africa’s Constitution establishes the nation as a sovereign and democratic state founded on, among other, the values of “*universal adult suffrage, a common voter’s roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.*” Further, the preamble to the Constitution states that government is based on the will of the people.
11. Section 2 of the Constitution, the supremacy clause, lays the foundation for the control of public power,¹⁰ and requires that the obligations imposed by it must be fulfilled.

⁸ John Locke *Two Treatises of Government* 2nd Treaties (1688), Chapter XI para 138.

⁹ Seedorf and Sibanda: *Constitutional Law of South Africa: Separation of Powers*, 2 Ed: 12-14.

¹⁰ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000) at paras 19-20.

12. At the heart of this case is the guarantee in section 19(2) of the Bill of Rights:
- “Every citizen has the right to free, fair and **regular elections** for any legislative body established in terms of the Constitution.”*
13. The right to vote in regular elections is the crux of our democratic order, particularly in the light of South Africa’s history. This Court has on many occasions highlighted the importance of the right to vote. In *August*,¹¹ this Court held:
- “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. . . . Legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.”¹²*
14. More recently, this Court has confirmed that although *August* dealt with interpretation of legislation, there is no reason why the views expressed in that judgment ought not apply to the interpretation of the Constitution.¹³ Section 19 has been singled out by this Court as a right which must be accorded a “generous and purposive meaning to give every citizen the fullest protection afforded by the section.”¹⁴ Moreover, this Court has said that rights conferred without restriction should not be cut down by reading implicit limitations into them.¹⁵

¹¹ *August v Electoral Commission* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC).

¹² *Id* at para 17.

¹³ *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) at para 108.

¹⁴ *Id* at para 144.

¹⁵ *SATAWU v Moloto* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC) at para 44.

The Electoral Commission

15. The Electoral Commission is a Chapter 9 institution which is tasked with one function, being to conduct regular, free and fair elections in terms of the Constitution at all three levels of government.¹⁶
16. In relation to municipal elections, section 159 of the Constitution is clear and unequivocal:
- (1) The term of a Municipal Council may be no more than five years, as determined by national legislation.*
 - (2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.*
 - (3) A Municipal Council, other than a Council that has been dissolved following an intervention in terms of section 119, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected.*
17. In its original form, section 159 of the Constitution provided that the term of a municipal council was 4 years. This section was amended by Parliament in 1998 in the Second Amendment to the Constitution, and came into force on 7 October 1998.
18. The Electoral Commission is the guardian of citizens' right to vote. It has been entrusted to ensure that this right is realised and that this is done regularly. Its statutory mandate is to "strengthen constitutional democracy and promote democratic electoral processes."¹⁷

¹⁶ Section 190 of the Constitution provides that the Electoral Commission must (a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation; (b) ensure that those elections are free and fair; and (c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.

¹⁷ Section 2 of the Electoral Commission Act 51 of 1996.

19. The Electoral Commission is accountable to Parliament.¹⁸ As for its relationship with the judiciary, it is clear that decisions by the Electoral Commission can be reviewed or appealed in a court.¹⁹ However, no law contemplates circumstances where the Electoral Commission may approach a court, even less the apex court for euphemistic “guidance” in truth, seeking to postpone an election which is constitutionally required to be held.

THE CONSTITUTION DEMANDS THAT THE RELIEF SOUGHT SHOULD NOT BE GRANTED

20. The requirement in section 159 of the Constitution that the term of a municipal council is “*no more than five years*” and that elections must be held within 90 days thereafter, is finite and unqualified. There is no scope for interpreting section 159 as meaning “*no more than five years unless the Constitutional Court orders otherwise*”, or “*unless exceptional circumstances exist...*”. If the drafters of the Constitution or if Parliament in considering the Constitution Second Amendment Act had intended the time period to be mutable, they would and could have said so.
21. In the light of the unambiguous language of section 159 read with section 1(d) of the Constitution, and the supremacy of the Constitution above all else, we submit that this Court does not have the power to allow departures from the clear limits set by section 159(2) of the Constitution. To do so would amount to this Court sanctioning an infringement by a Chapter 9 institution of its constitutionally entrenched obligations.

¹⁸ Section 181(5) of the Constitution provides that the Electoral Commission is “*accountable to the National Assembly and must report on [its] activities and the performance of [its] functions at least once a year*” See also section 14(1) of the Electoral Commission Act 51 of 1996.

¹⁹ See chapter 5 of the Electoral Commission Act 51 of 1996.

22. Nor does the Electoral Commission's attempt to seek refuge in section 172 of the Constitution assist it.

23. In *Eisenberg*,²⁰ this Court considered whether this Court has the power to suspend regulations under section 172(1) pending a determination of their validity by the Constitutional Court. Chaskalson P doubted that such power existed, even in relation to legislation at that level, and held:

“Section 172(1) does not, however, empower it to suspend the provisions of an Act of Parliament or a Proclamation which have not been the subject of a proper challenge before it, and it is open to doubt whether a court has the power to do so. But even if such a power exists (and I express no opinion on that issue) it would have to be exercised most sparingly and only in the most exceptional circumstances.”

24. In other words, in principle, a finding of unconstitutionality is essential to the court exercising its power to interfere with legislative or executive action. If this principle could ever be departed from was left open, but in terms suggesting considerable doubt.

25. We submit that this position is even more pertinent when it relates to one of the founding principles of our Constitution and our constitutional order: the right to vote. More so in the South African context where for so many years that right was deprived from so many. To undermine the meaning and value of the right to vote because of the current circumstances is, we submit, a slippery and dangerous slope, and one which is not competent in the constitutional order.

²⁰ *Minister of Home Affairs v Eisenberg & Associates In re: Eisenberg & Associates v Minister of Home Affairs and Others* (CCT15/03) [2003] ZACC 10; 2003 (8) BCLR 838 ; 2003 (5) SA 281 (CC) (27 June 2003) at para 68, with reference to *President of the RSA and Others v United Democratic Movement and Others* 2002 (11) BCLR (CC) at para 31.

The Electoral Commission ought to have followed the Parliamentary process

26. Section 74 of the Constitution deals with the process for amending the Constitution before Parliament and the National Council of Provinces and provides a mandatory 30-day public participation process after the intended amendment is gazetted, and that an amendment may not be passed within a further 30 days after tabling.²¹
27. There were a number of opportunities for the Electoral Commission to approach Parliament timeously to effect the required constitutional amendment prior to the launching of this application. COVID-19 was declared a national state of disaster in March 2020, and the second wave hit South Africa in around December 2020. From May 2021, when former Deputy Chief Justice Moseneke was appointed to undertake the Report, the Electoral Commission was aware that the Report might come to the conclusion that an election in October 2021 would not be free and fair. Yet the Electoral Commission did not approach Parliament at that stage.
28. Nor did it do so even upon the urging of a number of political parties which made submissions to former Deputy Chief Justice Moseneke that a postponement could not be achieved without a constitutional amendment. Even after the launch of this application the Electoral Commission could have done so. However, it chose not to do so and has allowed the clock to run down on this option.
29. The Electoral Commission, in its replying affidavit, argues first that approaching Parliament and seeking an amendment to the Constitution is just as dangerous or even more dangerous than approaching this Court for relief. The Electoral Commission

²¹ Because the proposed amendment effects the requirement of “regular” elections in section 1 of the Constitution, FUL submits that a 75% majority would be required in terms of section 74(1).

contends that approaching this Court is the lesser of two evils because it does not result in a permanent change to the law.²²

30. But this misunderstands FUL's position and the nature of the constitutional amendment required. As indicated in FUL's affidavit, to permit the Court to grant "once off relief", the Constitution should be amended to allow it to do so. This does not give rise to any of the dire concerns raised by the Electoral Commission about amendments to the Constitution which would allow Governments to postpone elections when it suited them to do so.²³
31. A specific, carefully crafted amendment to section 159 of the Constitution would provide appropriate limits and safeguards to the exception to be created. Indeed, that is the very purpose of the legislative process: to ensure that legislation is clear, effective and specific and that it is applied in the appropriate circumstances. In contrast, this is not the job of the courts. A precedent set by the apex court can, as Kotze CJ presciently warned, be interpreted broadly and manipulated by litigators seeking to take advantage of a judgment.²⁴
32. Secondly, the Electoral Commission submits that even if it were to seek a constitutional amendment it would not obtain the necessary votes in the National Assembly for such amendment.²⁵ This argument makes the position worse for the Commission and confirms that this application undermines not only the Constitution, but the democratic order. This Court should not be burdened with making a decision which it does not have

²² Electoral Commission's Replying Affidavit, para 84.

²³ See para 32 of FUL's Affidavit.

²⁴ *Brown v Leyds NO 1897 4 OR 17.*

²⁵ Electoral Commission's Replying Affidavit, para 85.

the authority to make simply because the proper democratic process does not favour the outcome which the Electoral Commission desires. Parliament is not to be avoided because a litigant apprehends an undesired outcome. Nor can a court be put in the position of anticipating a parliamentary outcome, and forestalling it.

33. If insufficient votes exist then the Electoral Commission must accept and respect that. Indeed, that is at the crux of giving meaning to the right to vote: if the requisite majority does not agree with the proposition then, as is required in a democratic system, that proposition must not stand and the consequences must be borne. For the Electoral Commission to seek to undermine both the Constitution and the will of the people displays a concerning misconception, or worse, by a Chapter 9 institution.
34. The Electoral Commission's argument that it knows better than Members of Parliament falls to be rejected. This Court has emphasised that courts generally "*are not concerned with the motives of the members of the legislature who vote in favour of particular legislation, nor with the consequences of legislation unless it infringes rights protected by the Constitution, or is otherwise inconsistent with the Constitution.*"²⁶ On this basis alone, this Court ought to reject the argument that Parliament will not vote in favour of an amendment to section 159 of the Constitution. In fact, were this Court to grant the relief sought by the Electoral Commission in circumstances where it is being told that the will of Parliament is that such relief ought not be granted, this would amount to an infringement of the separation of powers and an unjustifiable interference with the will of Parliament which would be at odds with what this Court held in *UDM*:²⁷

"Having regard to the importance of the legislature in a democracy and the deference to which it is entitled from the other branches of government, it would

²⁶ Id at para 56.

²⁷ *President of the RSA and Others v United Democratic Movement and Others* 2002 (11) BCLR 1164 (CC) at para 31.

not be in the interests of justice for a court to interfere with its will unless it is absolutely necessary to avoid likely irreparable harm and then only in the least intrusive manner possible with due regard to the interests of others who might be affected by the impugned legislation.”

35. If this is true, as this Court has said it is, of primary legislation or secondary legislation in the form of regulations, then of course it must apply *a fortiori* to an amendment to the Constitution. To do so would amount to what can be compared to the prevalent ‘Henry VIII’ clauses in English constitutional law preceding the Declaration of Rights in 1688, whereby the executive, by way of such a clause, is empowered through subordinate legislation to amend primary legislation.
36. In effect, the Electoral Commission is asking this Court, as the guardian of the Constitution, to amend the Constitution itself. This, of course, is extraordinary and, we submit, incompetent. It is respectfully the Constitution which is supreme, not the Constitutional Court.

NO CASE FOR IMPOSSIBILITY ON THE FACTS

37. A free and fair election does not mean a perfect election. Thus, in *August*, where the Constitutional Court found that it was unconstitutional to deprive persons who were imprisoned of the opportunity to vote. It ordered the Electoral Commission to make “*all reasonable arrangements*” to allow for registration and voting, but no more than that.²⁸
38. In *New National Party*, which dealt with the requirement of a particular kind of bar-coded identity document as a precondition for registration as a voter in national and provincial elections, as well as for the exercise of the right to vote itself, Yacoob J for the majority tested the impugned legislation by holding that to succeed in establishing

²⁸ *August* at para 42..

that the Act infringed the right to vote, a litigant would be required to show that “*as at the date of the adoption of the measure, its probable consequence would be that those who want to vote would not have been able to do so, even though they acted reasonably in pursuit of the right*”.²⁹ The Electoral Commission’s arguments on necessity fall far short of this threshold and there is no indication that persons who acted reasonably in pursuit of their right to vote would be deprived of their opportunity to do so at elections in October 2021.

39. Indeed, in FUL’s founding affidavit in its application for admission as *amicus curiae* it showed that the facts do not support the relief sought by the Electoral Commission.³⁰ The Electoral Commission’s main concern appears to be around voter registration, but the Commission acknowledges that voter registration is under its control.³¹
40. None of the other countries which the Electoral Commission purports to rely on in support of its position approached a court asking for the same or similar relief now being sought in these proceedings. Rather, in each and every instance, the elections were proposed by means of a parliamentary process and not by approaching the judiciary. These examples therefore do not support the Electoral Commission’s contentions.³² Rather, they undermine them.

²⁹ *New National Party v Government of the Republic of South Africa and Others* (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999) at para 23.

³⁰ See paragraphs 43 to 58 of FUL’s Affidavit.

³¹ Electoral Commission Replying Affidavit para 54.

³² FUL’s Affidavit at paras 50 to 58.

41. The Electoral Commission has approached this Court, on an urgent basis, in circumstances where the difficult and alleged urgent circumstances in which it finds itself are entirely self-created.³³
42. In its heads of argument, the Electoral Commission takes issue with the allegations levelled against it. It appears to allege that it was only after receipt of the Report of former Deputy Chief Justice Moseneke on 20 July 2021 that it became clear to it that the local elections could not go ahead. Even if that is true (which FUL denies), that was sufficient time at that stage for it to approach Parliament for the authority to postpone the elections.
43. As to the questions of necessity and impossibility, the MEC Responsible for Local Government in the Provincial Government of the Western Cape has filed an affidavit which is dispositive of this issue. The disclosure of the Electoral Commission's presentation of May 2021 made to the Western Cape Government and dealing with the Commission's preparedness for the local government elections on 27 October 2021 in the light of the COVID-19 pandemic ought, with respect, to be the end of this case. It reveals further that the Commission had even at that stage put in place measures to hold local government elections, and briefed the Western Cape Provincial Legislature on its readiness to hold elections on 27 October 2021.³⁴ The Electoral Commission did not disclose these facts to the Court – a suppression of obviously material fact unbecoming of an organ of state which is obliged not to play fast and loose with the truth.³⁵

³³ FUL's Affidavit at paras 43 to 46.

³⁴ Tenth Respondent's Affidavit, para 68.

³⁵ *Kalil NO v Mangaung Metropolitan Municipality* 2014 (5) SA 123 (SCA) at para 30.

44. In these circumstances, it is wholly inappropriate for the Electoral Commission to approach this Court to sanction yet another failure on its part. Indeed, the Electoral Commission is exhibiting a dangerous pattern of behaviour: failing to meet its obligations and then seeking pardon for its failure from this Court.³⁶
45. The Electoral Commission is a repeat-defaulter when it comes to its constitutional obligations. This is at least the third time in as many election years that this Court has had to grapple with how to deal with the Electoral Commission's failures.³⁷

REMEDY: THE CHIPS MUST LIE WHERE THEY FALL

46. What then is the proposed remedy? FUL submits that the application falls to be dismissed without any further order.
47. This Court has adopted a strongly deferential approach in regard to political rights, and has paid particular attention to separation of powers concerns when the Court steps into the political arena.
48. In *UDM*,³⁸ this Court set the tone for its consideration of the merits of the challenge to floor-crossing legislation by holding that when it is called upon to decide issues within the purview of another arm of government it can do so only to a very limited extent, and will not engage itself in the merits of the proposed political solution:

³⁶ See, for example, *Kham and Others v Electoral Commission and Another* [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC) and *Electoral Commission v Mhlope and Others* [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC).

³⁷ *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). *Electoral Commission v Mhlope and Others* (CCT55/16) [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC) (14 June 2016).

³⁸ *African Christian Democratic Party and Others Intervening ; Institute for Democracy in South Africa and Another as Amici Curiae* (No 2) (CCT23/02) [2002] ZACC 21; 2003 (1) SA 495; 2002 (11) BCLR 1179.

*“This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional.”*³⁹

49. Similarly, this matter is not about whether it would be appropriate or not to postpone the local elections. Rather, it concerns the question as to whether this Court has the power to grant the relief sought.
50. The danger of making laws during difficult times, such as a war, widespread unrest or natural disaster, such as the COVID-19 pandemic, is that these laws may become embedded in the normal legal system - essentially amounting to permanent changes to the law under the colour of the asserted emergency. This when the Constitution itself is concerned to regulate states of emergency, and no state of emergency has been declared.
51. A similar danger was addressed, as already noted, by Kotze CJ in *Brown v Leyds NO*.⁴⁰ There, it was held that connivance at or silence in the face of seemingly innocuous or minor breaches of the constitutional order may come back to haunt courts when a much more serious and hostile assault on the constitutional order arises. Proponents then argue that the earlier silence indicated consent to unconstitutional challenges to the constitutional order.
52. The Electoral Commission must bear the consequences of its decisions, or the lack thereof. Seeking exemption from the Constitution by a Court in advance, under the rubric of “guidance”, is as inappropriate as it is slippery, in every sense. What the Electoral Commission seeks is in fact far-reaching, dangerous and precedent-setting

³⁹ Id at para 11.

⁴⁰ *Brown v Leyds NO* 1897 4 OR 17.

relief which will inevitably echo into the future, to a time when the COVID pandemic is a distant memory.

CONCLUSION

53. Having failed timeously to approach Parliament, the Electoral Commission impermissibly approaches this Court. It asks it to accede to its unconstitutional request for the Court to arrogate to itself the power to amend the Constitution or provide permission, in advance, for a Chapter 9 institution to breach the Constitution. Indeed, it goes further. It asks the Court to assume the ultimate responsibility by way of supervisory jurisdiction. This is elastic: potentially to determine when the unconstitutional election will take place (given its submissions regarding the “*inherent uncertainty of the future*” and that “*there can be no guarantee that new mutations or variants will not arise before then undermining the efficacy of vaccines or that there will not be a crisis in vaccine supply to South Africa*”). This places the Court in an invidious position - not one which is contemplated by or competent under the Constitution.
54. The stance of the Electoral Commission before this Court is an entirely inappropriate approach for a Chapter 9 institution to take. It cannot make a virtue of its failure to take steps which would have meant that it would not have had to treat the Court as the holder of the proverbial “*get out of gaol free card*”. One of the fundamental principles of the constitutional order is accountability.⁴¹ If the Electoral Commission acts in a manner which is unconstitutional, it will have to account to Parliament for having acted in such a fashion. Of course the “guidance” it seeks serves to obviate even that.

⁴¹ Section 195(f) of the Constitution.

55. In the circumstances, we submit that this Court should dismiss the Electoral Commission's application.

Jeremy Gauntlett SC QC

Sarah Pudifin-Jones

Mkhululi Stubbs

Chambers, Cape Town, Durban
and Sandton

17 August 2021

TABLE OF AUTHORITIES

Legislation

1. Constitution of the Republic of South Africa, 1996
2. Electoral Commission Act 51 of 1996

Case Law

3. African Christian Democratic Party and Others Intervening ; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2) (CCT23/02) [2002] ZACC 21; 2003 (1) SA 495; 2002 (11) BCLR 1179
4. August v Electoral Commission [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC)
5. Brown v Leyds NO 1897 4 OR 17
6. Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others 2013 (2) SA 620 (CC)
7. Electoral Commission v Mlhope and Others [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC)
8. Fose v Minister Of Safety And Security 1997 (3) SA 786 (CC)

9. In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 713 (CC)
10. Kham and Others v Electoral Commission and Another [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC)
11. Minister of Home Affairs v Eisenberg & Associates In re: Eisenberg & Associates v Minister of Home Affairs and Others (CCT15/03) [2003] ZACC 10; 2003 (8) BCLR 838 ; 2003 (5) SA 281 (CC) (27 June 2003)
12. Minister of the Interior and Another v Harris and Others 1952 (4) SA 769 (A)
13. New Nation Movement NPC and Others v President of the Republic of South Africa and Others [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC)
14. New National Party v Government of the Republic of South Africa and Others (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999)
15. Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000)
16. President of the RSA and Others v United Democratic Movement and Others 2002 (11) BCLR 1164 (CC).

17. SATAWU v Moloto [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11)
BCLR 1177 (CC)

Articles

18. Ferejohn et al. "The law of the exception: A typology of emergency powers"
2 INT'L J. Const. L. 210 (2004)

19. John Locke *Two Treatises of Government* 2nd Treaties (1688), Chapter XI
para 138.

20. Seedorf and Sibanda, *Constitutional Law of South Africa: Separation of
Powers*, 2 Ed: 12-14.