

CHAPTER 7

SPECIAL ELECTORAL TRIBUNALS

19. ESTABLISHMENT OF SPECIAL ELECTORAL TRIBUNALS⁵¹

- 19.1 The Commission shall appoint such Special Electoral Tribunals with jurisdiction in respect of defined geographical areas as it may be necessary, in order to adjudicate and determine all claims, issues and disputes concerning alleged electoral irregularities, including any attempt to impede access of parties to venues, voters, media, meetings or any undesirable or corrupt practices, and alleged instances of intimidation, or breaches of the Electoral Code of Conduct.
- 19.2 Each such Special Electoral Tribunal shall comprise one or more, but not more than three, persons appointed to this office by the Commission who shall be persons having appropriate knowledge and experience, of whom the Chairperson shall be a legal practitioner, being either an attorney, advocate, magistrate, or academic lawyer at a university or tertiary educational institution, with not less than ten years working experience in such capacity.
- 19.3 The function of the Special Electoral Tribunal shall be to serve as final arbiter of claims, issues and disputes (subject to a right of appeal to an Electoral Appeals Tribunal) as may be submitted for adjudication in the prescribed manner by the Adjudication Secretariat, or by any party, candidate, eligible voter or other interested person, concerning matters affecting the campaign, conduct and results of the Elections.
- 19.4 The Special Electoral Tribunals shall be entitled in respect of any claim, issue or dispute falling within their jurisdiction to impose such administrative and other penalties and sanctions as it may deem appropriate upon the relevant political parties, candidates and others guilty of having infringed the Electoral Code of Conduct or Electoral Act, as the case may be.

⁵¹ This is a new provision which sets out the Technical Committee's proposals with reference to the establishment of Special Electoral Tribunals, their composition, powers and functions.

- 19.5 Notwithstanding the foregoing, the Special Electoral Tribunals may decline to consider any claims or disputes as may not have been formally notified to the Adjudication Secretariat in the prescribed manner, within a period of 14 days reckoned from the date upon which the relevant fact became known to the complainant; and provided further that in the event of such claim, issue or dispute involving acts or decisions constituting a criminal offence in terms of this Act, the Electoral Act, or any other law, the matter shall be referred to the Attorney General for prosecution in the appropriate Court.
- 19.6 In establishing the Special Electoral Tribunals, the Commission shall determine appropriate powers and procedures, which shall be directed to the speedy investigation and determination of matters in issue.
- 19.7 The Electoral Tribunals shall have all such powers as may be necessary to subpoena and examine witnesses, administer the oath, receive evidence, hear argument, investigate matters *mero motu*, and generally to conduct its proceedings and to cause matters in issue to be investigated and determined.
- 19.8 All decisions by the Special Electoral Tribunals shall be subject to appeal and review to the Elections Appeal Tribunal, in accordance with the regulations.

CHAPTER 8

ELECTION APPEAL TRIBUNALS

20. ESTABLISHMENT OF ELECTION APPEAL TRIBUNALS⁵²

- 20.1 The Commission shall be required to establish one or more Electoral Appeal Tribunals, as it may deem necessary from time to time in order to hear and determine appeals and reviews from the Special Electoral Tribunals, duly noted in terms of the regulations.
- 20.2 The decisions of the Electoral Appeal Tribunals shall be subject to no further appeal or review.
- 20.3 The Electoral Appeal Tribunals shall comprise three persons appointed by the State President on the advice of the Commission, of whom:
 - 20.3.1 the Chairperson shall be a senior judge of the Supreme Court⁵³;
 - 20.3.2 one shall be a judge of the Supreme Court, or an attorney, advocate or magistrate of not less than ten years experience, or a lecturer in Law at a university or other tertiary educational institution of not less than ten years experience; and
 - 20.3.3 one shall be some other suitably qualified person.

⁵² The Ad Hoc Committee proposed the appointment of an Appeal Tribunal which would in effect be a "super Commission" to which decisions of the Commission might themselves be appealed and reviewed. The Technical Committee considered this proposal, but was not in agreement therewith, as it represented a substantial departure from the principle of a powerful independent Commission. Accordingly, this provision reflects the Technical Committee's alternative suggestion of Special Appeal Tribunals to hear appeals from the Special Electoral Tribunals. The present provision may need to be amplified, and has been inserted at a late stage in the drafting of the Act, in order to reflect the present views of the Technical Committee, which is also concerned to preserve the "sovereignty" of the Commission itself.

⁵³ The special status accorded to members of the present judiciary does not meet with the approval of one member of the Technical Committee.

- 20.4 The Commission may prescribe by Regulation rules and procedures to be followed by the Electoral Appeal Tribunals in the conduct of their proceedings.
- 20.5 The Electoral Appeal Tribunals shall determine their own procedure with a view to the speedy and effective resolution of the matter in issue with due regard to the principles of justice.

CHAPTER 9

CERTIFICATION OF ELECTION RESULTS

21. CERTIFICATION⁵⁴ OF ELECTION RESULTS

- 21.1 Upon completion of the ballot, the Commission shall be required as expeditiously as possible, but in any event within a period of ten (10) days of the close of the Poll, to determine and certify the results of the Elections, and to declare whether, and, if so, then to what extent, it considers that such elections have been conducted in a manner which was substantially free and fair.
- 21.2 In effecting such determination, the Commission may accept or reject the result of the poll as a whole, or it may accept or reject such results in respect of a particular SPR Legislature, or geographic district or region for the purposes of voting.
- 21.3 The acceptance and certification of the results of the Elections, or any portion thereof, as substantially free and fair, shall not be of force and effect unless a majority of the members of the Commission eligible to vote, representing at least seventy-five percent (75%) thereof, shall have concurred in such finding.

⁵⁴ The term "certification" appears to be preferable to "adjudication".

- 21.4 In the event of such results, or any part thereof, being not accepted and certified as aforesaid, the Commission shall determine and cause to be implemented such steps (including the organisation, conduct and supervision of new elections) as it may deem appropriate in the circumstances, in order to achieve a substantially free and fair election result, and with due regard to the needs and exigencies of the Constitution⁵⁵.
- 21.5 Notwithstanding the foregoing, the result of an Election shall not be rejected merely by reason of some untoward occurrence, mistake, or non-compliance with the provisions of this Act, or of the Electoral Code of Conduct, if it appears to the Commission that the Elections were conducted substantially in accordance with the prescribed requirements, and that such occurrence, mistake or non-compliance was unlikely to have materially affected the result.
- 21.6 The Commission's determination, certification and evaluation of the Election results, and its further decisions in terms of Section 21.4 shall be final and not subject to appeal or review to any Court.

(Previous Section 20)

⁵⁵ The Technical Committee is aware of the extremely difficult situation which could arise in the event of the Election being "substantially free and fair" in most areas of the country, but being subject to conditions that are unacceptable in certain limited areas. The implications of such a situation in a Proportional Representation system are extremely difficult to deal with. In respect of an SPR Election, one can envisage that new elections could be called in respect of that particular legislature. Moreover a "remedy" systems is available of Proportional Representation which have "multi-member" constituencies. However, the implications of such a situation in respect of a simple unified system of Proportional Representation are extremely problematical. The Technical Committee notes these concerns, and awaits advice from the Technical Committee on Constitutional Affairs with regard to their specific proposals in relation to the system of Proportional Representation. In due course, consultation will be necessary between the two Technical Committees in order to consider this difficulty.

CHAPTER 10

MISCELLANEOUS PROVISIONS

22. JURISDICTION

There shall be no appeal from any decision by the Commission, but its proceedings shall be subject to review direct to the Appellate Division⁵⁶. Any such review shall be conducted on an urgent basis, and shall be disposed of by the Courts as expeditiously as possible. *(Previous Section 21)*

23. SUCCESSORS TO THE FORUM

In this Act, where rights and prerogatives are conferred upon the Forum in terms of this Act, such rights and prerogatives shall be assumed by the Transitional Executive Council, or appropriate Sub-Council thereof, as from the date of its establishment in terms of the Transitional Executive Council Act, 1993. Upon dissolution of the Transitional Executive Council, such rights and prerogatives shall thereafter devolve Parliament and/or by the relevant SPR Legislature, in respect of Elections or Referenda to be conducted for Parliament and/or the SPR Legislature concerned, as the case may be⁵⁷.

(Previous Section 22)

⁵⁶ It is proposed that any review of the proceedings of the Commission, should be directed to the Appellate Division, and not to a Provincial Division as previously envisaged. Although the present version reflects the majority view, there are two members of the Technical Committee who feel strongly that reviews of the Commission should be directed to a specially constituted Court, rather than to the Appellate Division.

As indicated, the Technical Committee was unanimous in its disagreement with the provision suggested by the Ad Hoc Committee of "an Appeal Court" to which decisions of the Commission itself might be appealed. This concept of a "super Commission" appeared to devalue the status of the Commission with reference to matters in respect of which the Technical Committee believed that its decision and discretion should be final. There is also agreement concerning a right of review. Appeals could result in significant delays and dislocation of the electoral process.

⁵⁷ An addition has been made at the end of this Clause to make provision for the rights and prerogatives of SPR Legislatures.

24. DELEGATION

Save in respect of its duty to certify the Election results in terms of Section 21, the Commission may delegate any power or duty conferred upon it hereunder, to any person or other body, or authorise such person or other body, including the State, to perform any duties assigned to it hereunder; provided⁵⁸ that such power or duty may not be further delegated without the prior consent of the Commission, which shall not be divested of any such power as it may legitimately delegate in terms of this provision.

(Previous Section 23)

25. OBSTRUCTING PROCEEDINGS AND OFFICERS

Any person, including a Party⁵⁹, who wilfully obstructs the Commission, its Directorates, or any of their respective agents and officers, in the execution of their duties, or who prevents or impedes any acts or procedures taken in terms of this Act, or who wilfully obstructs or interferes with any person appointed by the Commission in the exercise of their duties, shall be guilty of an offence and liable on conviction to a fine not exceeding One Hundred Thousand Rand (R100 000,00), or to imprisonment for a period not exceeding five (5) years, or to both such fine and such imprisonment.

(Previous Section 24)

26. INFRINGEMENT OF SECRECY⁶⁰

26.1 Every member of the Commission and all its officers, employees and agents, shall maintain, and aid in maintaining, due secrecy concerning all matters affecting their official duties and responsibilities hereunder, and shall not communicate except for some legitimate purpose authorised by law, any information likely to cause advantage or prejudice to any Political Party, or candidate, or which is likely to place in jeopardy the impartiality of the Commission, or of its acts and decisions.

⁵⁸ This proviso has been inserted in order to deal with certain concerns expressed in the Negotiating Council.

⁵⁹ The reference to a Party (as defined) has been included to broaden the scope of the offence.

⁶⁰ A typographical error in the title has been corrected.

26.2 Any person who, in the exercise of powers or the performance of duties in terms of this Act, has obtained knowledge as to the affairs of any Political Party, candidate or voter, shall not disclose such knowledge to any person, other than as required in the course and scope of her/his duties or in response to a question lawfully put in the course of proceedings in any Court.

26.3 Any person who contravenes, or fails to comply with, any provision of this Section, shall be guilty of an offence and liable on conviction to a fine not exceeding One Hundred Thousand Rand (R100 000,00) or to imprisonment for a period not exceeding five (5) years, or to both such fine and such imprisonment. *(Previous Section 25)*

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27. EXEMPTION FROM DUTIES, TAXES AND FEES

Notwithstanding anything to the contrary contained in any other law, no duty, tax or fees shall be payable by the Commission to the State in respect of anything done or any transaction entered into under this Act, or in respect of any document required in connection therewith. *(Previous Section 27)*

28. REGULATIONS⁶²

28.1 The Commission shall be empowered to make regulations providing for such matters as are specifically, or by necessary inference, contemplated, and generally for achieving the objects and purposes of this Act.

28.2 Such regulations may prescribe penalties for the contravention or failure to comply therewith, not exceeding Forty Thousand Rand (R40 000,00) or imprisonment for a period of two (2) years.

⁶¹ The former provision dealing with the prohibition of opinion polls has been removed from this Statute and transferred to the new Electoral Act in the course of preparation.

⁶² This Clause has been sub-divided and amplified in order to define inter alia the penal limits of offences created by Regulation.

- 28.3 The Commission may likewise prescribe the form and content of any document or form which may be required for the carrying out of the provisions of this Act. *(Previous Section 28)*

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29. APPLICATION OF THE ACT TO A REFERENDUM

Upon the advice of the Forum, or its Successors in terms of Section 24, or upon the advice of an SPR Legislature, the State President may by Proclamation in the Gazette declare that the provisions of this Act shall apply to the holding of a Referendum, and in such circumstances may require that the Commission utilise the powers and discretions conferred upon it hereunder, for the purposes of organising and conducting appropriate Referenda, either nationally or within any particular region/s, or in respect of any specified population group, or any specified issue/s.

(Previous Section 30)

30. SHORT TITLE

This Act shall be called "The Independent Electoral Commission Act, 1993".

(Previous Section 31)

⁶³ The former provision dealing with the Electoral Code of Conduct has been removed from this Act and will form part of the new Electoral Act in the course of preparation.

EXPLANATORY MEMORANDUM

FOURTH DRAFT

INDEPENDENT ELECTORAL COMMISSION BILL

25 AUGUST 1993

General Comment

This Memorandum accompanies the Fourth Draft of the Independent Electoral Commission Bill, which has been prepared by the Technical Committee with the assistance of Mr J.H. Bruwer, Deputy Chief State Law Adviser.

This latest draft has been prepared in great haste at the special request of the Planning Committee, and represents a substantial revision of the Technical Committee's earlier submissions, although there are a limited number of changes which involve matters of principle. The primary purpose of the redraft has been to place the document in a form suitable for presentation to Parliament.

As a consequence of discussions held between the Technical Committee and the Special Ad Hoc Political Sub-Committee appointed by the Council to consider certain clauses, and the instructions and advice received from the delegated members of the Planning Committee, a number of clauses in the Third Draft have been substantially amended and others deleted.

A schedule of old and new clause numbers is being prepared for the assistance of members. In the meanwhile a brief commentary follows with regard to a number of provisions which have been altered in order to draw members attention to salient changes, viz:

Clause 1

There has been a general revision of the definitions with the addition of the following newly defined terms, viz:

- "Appeal Tribunal"
- "candidate"
- "committee"
- "director"
- "Media Commission"
- "member"
- "National Assembly"
- "prescribed"
- "Secretariat"
- "Senate"
- "Special Electoral Court"
- "Supreme Court"

Clause 2(2)

Provision has been made for the application of the Act to the holding of a referendum. This will in turn necessitate some consequential amendment to the Referendums Act, No. 108 of 1983.

Clause 3(2)

The State President is to be bound not only by the advice of the Forum (as in previous drafts), but also in appropriate circumstances by advice of the (SPR) legislature.

Clause 4(2)

The formulation of the objects has likewise been amended in terms of the discussions and instructions received.

Clause 5(1)

In itemising the appropriate qualifications of members of the Commission, reference is now also made to persons "who do not have a high party political profile". This latter phrase replaces the former clause 7.2.4, which has now been deleted, and which gave rise to a great deal of concern and debate.

Clause 5(3)(a)

After careful consideration, the Technical Committee has retained the provision for the appointment of a single chairperson and vice-chairperson. The proposal with regard to co-chairpersons did not seem practicable, particularly in the light of the need for a casting vote.

Clause 6(1)(iii)

Council may wish to give this clause further consideration. Strong divergent views have been expressed with regard to this provision, and the draft has not been further amended pending clarification by the Council.

Clause 6(2)(f)

Attention is also directed to the prohibition on the acceptance of other remuneration or benefits, except with the authority of the State President acting upon the advice of the Forum

Clause 8(3)(a)

As instructed, the Technical Committee has now reflected the two thirds' majority required in respect of a decision by Parliament to re-appoint members to a new Commission in respect of further elections.

Clause 8(3)(b)

In this particular instance, the role of the Appellate Division has been retained, more particularly in view of the fact that the proposed Special Electoral Court may not have been constituted at the relevant point in time when the issue arises.

Clause 11(1)

The proper forum for determination of an application for the removal of a member of the Commission is now specified as the Special Electoral Court to be constituted in terms of section 31. In earlier drafts the proper forum was reflected as a full bench of the Appellate Division.

Clause 12(3)

As instructed, the required quorum for meetings of the Commission is stated as 75% of the (voting) members; save and except for the final determination and certification of the election results, in respect of which the quorum shall be all members, save for those unable to attend for reasons outside their control.

Clause 12(4)

Subject to the provisions of section 13(4), the required majority for ordinary decisions of the Commission is a simple majority. The final determination and certification of the results as free and fair, requires the decision of at least 75% of the members present constituting the required quorum.

Clause 13

The Commission's powers, duties and functions are set out in detail. Subsection 4 constitutes a new provision which empowers the Commission to hear appeals from decisions of the directorates and to give binding instructions to the directorates and their substructures.

Clause 14

This provision now contains an itemization of the powers, duties and functions of the Commission.

Clause 15

This clause has been reformulated in order to provide for the mechanism of appropriations by Parliament, and for the agreement of the TEC during its lifetime and thereafter for a special discretion vested in the Special Electoral Court in the event of Parliament refusing to vote the funds which the Commission deems necessary.

Clause 16

This clause has been amended in terms of advice received from the Department of State Expenditure.

Clause 17

This clause reflects inter alia that the Commission's determination, certification and evaluation of the election results, and its further decision in the event of elections not being free and fair, shall be final and not subject to appeal or review.

Clause 20

As instructed, the Act now reflects the powers, duties and functions of the Administration Directorate. The clause provides for appeals from decisions and actions taken by any substructure to the relevant directorate; and further states that the directorate shall operate independently of the Monitoring Directorate and the (Adjudication) Secretariat; that it shall be under the supervision of the Commission, and bound to carry out the Commission's instructions.

Clause 23

Similarly, the powers, duties and functions of the Monitoring Directorate have been set out in detail, and similar provisions providing for appeals by substructures, for the independent operation of the directorate, for supervision by the Commission, and for the Commission's power to issue instructions have been reflected.

Clause 26

Insofar as the Secretariat is concerned, its powers, duties and functions have likewise been defined, and provision is made for its independent operation, for the supervision by the Commission, and for the Commission's right to issue instructions.

Clause 27

Provision is made for the establishment of Special Electoral Tribunals to deal with matters constituting electoral irregularities and infringements of the Code of Conduct.

Clause 29

Provision is made for the establishment of Electoral Appeal Tribunals which shall hear and determine appeals and reviews from the Special Electoral Tribunals.

Clause 31

In terms of instructions received, the Technical Committee has now made provision for the establishment of a Special Electoral Court comprising five persons being:

- (i) a judge of the Appellate Division;
- (ii) two other judges of the Supreme Court;
- (iii) a person with suitable legal experience; and
- (iv) some other suitable person, appointed initially by the Transitional Council.

Clause 32

The powers, duties and functions of the Special Electoral Court are defined. They include the power to review any decision of the Commission, other than a determination and certification in terms of section 17. Provision is also made for such court to deal with matters that may be assigned to it in terms of the Transitional Executive Council Act or other legislation.

Clause 34(2)

The power of the Commission to delegate is restricted in respect of certain matters, and in particular, with reference to the making of regulations, the determination and certification of election results and certain other stated matters.

Clause 35

This clause provides for an appeal from substructures to their Directorates; from directorates to the Commission; and it provides for reviews from the Commission to the Special Electoral Court. Further provision is made for appeals from the Electoral Tribunals to the relevant Appeal Tribunal. Decisions of the Appeal Tribunals and Special Electoral Court are final and not subject to either appeal or review.

Clause 41

The Commission's power to make regulations has been expanded. The Council may wish to give further consideration to the proposed obligation to disclose as a matter of public record the receipt and source of any contribution to electoral expenses in excess of R10 000.00.

(Schedule of comparative clause numbers to follow at a later stage)

**EMBARGOED UNTIL TABLING IN
THE NEGOTIATING COUNCIL**

FOURTH DRAFT

INDEPENDENT ELECTORAL COMMISSION ACT

25 AUGUST 1993

BILL

To make provision for the conduct of free and fair elections for the National Assembly and any other legislature contemplated in the Constitution of the Republic of South Africa Act, 1993; to make provision for the conduct of free and fair referenda; and to provide for matters in connection therewith.

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:-

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CHAPTER 1

Interpretation and Application of Act

Definitions

1. In this Act, unless the context otherwise indicates -

- (i) **"Administration Directorate"** means the Election Administration Directorate established by section 18;
- (ii) **"Appeal Tribunal"** means an Electoral Appeal Tribunal established in terms of section 29;
- (iii) **"candidate"** means any person whose name appears on a list of nominations by any registered party as defined in section 1 of the Electoral Act to be a member of the National Assembly or any other legislature in terms of the Constitution and the Electoral Act;
- (iv) **"Chief Executive Officer"** means the person appointed to that office by the Commission in terms of section 14(1);
- (v) **"Commission"** means the Independent Electoral Commission established and constituted from time to time by or in terms of this Act;
- (vi) **"committee"** means a committee of the Commission established under section 9;
- (vii) **"Constitution"** means the Constitution of the Republic of South Africa Act, 1993;
- (viii) **"directorate"** means a directorate established by this Act;
- (ix) **"election"** means any election conducted in terms of the Electoral Act for the National Assembly or any other legislature, and includes any referendum conducted in terms of section 2(2);
- (x) **"Electoral Act"** means the Electoral Act, 1993;
- (xi) **"Electoral Code of Conduct"** means the Code of Conduct for Political Parties contained in Schedule 1 to the Electoral Act;
- (xii) **"Electoral Tribunal"** means a Special Electoral Tribunal established in terms of section 27;
- (xiii) **"Forum"** means the body so designated as part of the structure of the Multi-Party Negotiating Process, and includes its successors referred to in section

33;

- (xiv) **"international member"** means any person appointed as a member of the Commission under section 5(2)(a);
- (xv) **"international observer"** means any person appointed as a representative of the United Nations, the Organization of African Unity, the European Community, the Commonwealth and any other inter-governmental organization or foreign government accredited for that purpose by the Subcouncil on Foreign Affairs of the Transitional Council during its term of office, and thereafter by the Department of Foreign Affairs, in order to observe and report on the electoral process;
- (xvi) **"judicial office"** means any appointment as a judge of the Supreme Court, whether permanent or on an acting basis;
- (xvii) **"legislature"** means any legislature contemplated in the Constitution, excluding the National Assembly and Senate;
- (xviii) **"Media Commission"** means the Independent Media Commission established by section 2 of the Independent Media Commission Act, 1993;
- (xix) **"member"** means a member of the Commission appointed under section 5(1);
- (xx) **"monitor"** means any person appointed as such in terms of section 23(1)(a);
- (xxi) **"Monitoring Directorate"** means the Election Monitoring Directorate established by section 21;
- (xxii) **"National Assembly"** means the National Assembly as contemplated in the Constitution;
- (xxiii) **"observer"** means any observer registered with the Monitoring Directorate in terms of section 23(1)(b);
- (xxiv) **"Parliament"** means Parliament as contemplated in the Constitution;
- (xxv) **"party"** means any registered party as defined in section 1 of the Electoral Act, and includes any party, organization or movement of a political nature which publicly supports or opposes the policies, candidates or cause of any first-mentioned party, or which propagates non-participation in any election or the non-acceptance of its results certified by the Commission;
- (xxvi) **"political office"** means any executive appointment or elected office, including any elected or nominated public representative of a party, whether involving remuneration or not, or any other paid office, in the service of a party;
- (xxvii) **"prescribed"** means prescribed by regulation;
- (xxviii) **"public office"** means any appointment or position in the service of the State,

or any corporate or other body, institution or concern, owned or controlled, whether directly or indirectly, by the State, and includes any such appointment or position in the legislative, executive or judicial organs of the State at any level of government, but excludes any appointment to judicial office and any academic appointment at any university or tertiary educational institution;

- (xxix) **"referendum"** means any referendum conducted under the supervision of the Commission in accordance with the provisions of section 2(2);
- (xxx) **"regulations"** means any regulations made under section 41;
- (xxxi) **"Republic"** means the Republic of South Africa, including any of the Republics of Transkei, Bophuthatswana, Venda or Ciskei which formally adopted the provisions of this Act and the Electoral Act as part of its municipal law;
- (xxxii) **"Secretariat"** means the Election Adjudication Secretariat established by section 24;
- (xxxiii) **"self-governing territory"** means a self-governing territory as defined in section 38(1) of the Self-Governing Territories Act, 1971 (Act No. 21 of 1971);
- (xxxiv) **"Senate"** means the Senate as contemplated in the Constitution;
- (xxxv) **"State"** means the Republic;
- (xxxvi) **"Supreme Court"** means the Supreme Court of South Africa, including the Supreme Court of the Republic of Transkei, Bophuthatswana, Venda or Ciskei if such Republic formally adopted the provisions of this Act and the Electoral Act as part of its municipal law;
- (xxxvii) **"Special Electoral Court"** means the Special Electoral Court established by section 31;
- (xxxviii) **"Transitional Council"** means the Transitional Executive Council established by section 2 of the Transitional Executive Council Act, 1993;
- (xxxix) **"transitional legislation"** means the legislation to be enacted in consequence of the Multi-Party Negotiating Process, including the Constitution, the Electoral Act, the Independent Media Commission Act, 1993, the Independent Broadcasting Authority Act, 1993, and the Transitional Executive Council Act, 1993; and
- (xl) **"this Act"** includes the regulations.

Application of Act

2.(1) The provisions of this Act shall apply in respect of the first elections to be conducted for the National Assembly and all other legislatures in terms of the Constitution and the Electoral Act, and thereafter in respect of all subsequent elections for the National Assembly and all other legislatures, or any of them, and in respect of any referendum conducted under the supervision of the Commission in terms of subsection (2).

(2) Upon the advice of the Forum or any legislature the State President shall by proclamation in the Gazette declare that the provisions of this Act shall apply in respect of the holding of any referendum, and in such case such provisions shall apply mutatis mutandis in respect of the holding of such referendum, whether nationally or within any particular geographical region, or in respect of any specified issue.

Act binding on State and State President

3.(1) This Act shall be binding upon the State, including its various legislative, executive and judicial organs at all levels of government, and to the extent that its provisions may conflict with the inherent powers of the State, or with the provisions of any other law, it shall have precedence over such powers and provisions, save for that of the transitional legislation, in so far as such powers and provisions relate to the conduct and supervision of elections and the other matters dealt with in this Act.

(2) This Act shall be binding upon the State President who shall be obliged to act in accordance with the advice of the Forum or any legislature.

CHAPTER II

Independent Electoral Commission

Establishment and objects of Commission

4.(1) There is hereby established a juristic person to be known as the Independent Electoral Commission.

(2) The objects of the Commission shall be -

- (a) to administer, organize, supervise and conduct, whether directly or indirectly, free and fair elections for the National Assembly and all legislatures;
- (b) to regulate the conduct of all persons, parties, candidates, departments and other organs of State, including local governments, in so far as their acts and decisions may affect such elections;
- (c) to promote conditions conducive to free and fair elections; and
- (d) to determine and certify the results of elections and to declare to what extent such elections have been free and fair, and to take the necessary actions in consequence of its declaration.

Constitution of Commission

5.(1) The Commission shall, subject to subsection (2), consist of no fewer than seven and not more than 11 members who shall be appointed by the State President upon the advice of the Forum, and who shall be impartial, respected and suitably qualified men and women, who do not have a high party political profile, are themselves eligible voters, and represent a broad cross-section of the population.

(2)(a) The State President may, upon the advice of the Forum, appoint not more than five persons (not being citizens of the Republic) from the international community as members of the Commission in a non-representative capacity.

(b) Such international members shall have the same rights and powers as other members, excluding the power to vote, and shall not constitute part of any quorum in terms of this Act.

(3)(a) The State President shall, upon the advice of the Forum, designate two members as Chairperson and Vice-Chairperson of the Commission, respectively.

(b) In the absence of both such Chairperson and Vice-Chairperson, the remaining

members shall by simple majority nominate another member as acting Chairperson of the Commission.

(c) The international members shall not be eligible to serve as Chairperson, Vice-Chairperson or acting Chairperson.

(4) The State President shall, upon advice of the Forum and subject to subsection (1), appoint additional members to the Commission.

Conduct required of members

6.(1) Every member of the Commission shall -

- (a) be appointed in her or his individual capacity, and shall, notwithstanding any personal opinion, preference or party affiliation, serve impartially and independently and perform her or his functions in good faith and without fear, favour, bias or prejudice;
- (b) serve in a full-time capacity to the exclusion of any other duty or obligation arising out of any other employment, occupation or the holding of any other office;
- (c) within 30 days of her or his appointment to the Commission, submit to the Forum a written statement setting out -
 - (i) all assets owned, whether directly or indirectly, by such member, including all benefits of a pecuniary nature, whether actual or contingent;
 - (ii) (aa) the aggregate of all income received by or accrued to; and
(bb) all offices and appointments held by, such member during the 12 months period immediately preceding her or his appointment to the Commission.

(2) No member of the Commission shall -

- (a) during her or his term of office be eligible for appointment or nomination to any political or public office, whether involving remuneration or not, and such ineligibility shall, in respect of such public office, continue for a period of 18 months reckoned from the date upon which such term of office shall have terminated;
- (b) whether directly or indirectly, in any manner give support to, or oppose, any of the parties or candidates participating in the elections, or any of the issues in contention between such parties or candidates;

- (c) by her or his membership, association, statement, conduct or in any other manner, place in jeopardy her or his perceived independence, or in any other manner damage the credibility, impartiality, independence or integrity of the Commission;
- (d) make private use or profit from any confidential information gained as a result of her or his appointment and functions as such member;
- (e) divulge any such information to any third party save in the course and scope of her or his official functions and with the concurrence of the Commission;
- (f) accept any remuneration, emolument or benefit, of whatsoever nature, arising from any other employment, occupation or the holding of any other office, unless specifically authorized thereto by the State President, acting upon the advice of the Forum;
- (g) be interested or concerned, whether directly or indirectly, in any company, close corporation, business, concern or organization which has a direct or indirect beneficial interest in transactions entered into by the Commission, unless specifically authorized thereto by the State President, acting upon the advice of the Forum;
- (h) during her or his term of office be eligible to serve as a member of the Forum, the Transitional Council, Parliament or any other legislature, and such ineligibility shall continue for a period of 18 months reckoned from the date upon which such member shall have ceased to be such member;
- (i) after having served as such member, be eligible to serve as a member of the Parliament or other legislature for which that Commission was responsible to conduct elections, during the term of such Parliament or legislature.

Independence of Commission

7.(1) The Commission shall function without political or other bias or interference and shall, save as may in this Act be expressly otherwise provided, be independent and separate from the Forum, the Transitional Council, any party, any government and its administration or any other functionary or body, whether directly or indirectly representing the interests of government.

(2) Any power of any of the entities referred to in subsection (1), in so far as it relates to the administration, organization, conduct and supervision of any election shall be subject

to the powers of the Commission, to which such entities shall be accountable for such of their acts and decisions as may, in the opinion of the Commission, influence or affect any election.

Term of Commission

8.(1) In respect of every election the Commission shall, subject to subsection (3), be constituted upon a date to be fixed by the State President by proclamation in the Gazette, which date shall be determined upon the advice of the Forum, and thereafter the Commission shall, subject to subsection (2), continue until it has completed its mandate and has been dissolved by the State President by proclamation in the Gazette.

(2) In respect of every election the Commission shall not be dissolved -

(a) save upon the advice of the Forum; and

(b) until the last-occurring of -

(i) the certification of such election as having been substantially free and fair, including similar certification in respect of any further election as may have been ordered by the Commission under section 17(3); or

(ii) the final determination of all issues and disputes arising from such election, as may have been referred for determination in terms of this Act.

(3)(a) If further elections are called in terms of the Constitution, the Commission shall be constituted and the consequent selection and appointment of the members, including, if deemed appropriate, international members, shall be effected by the State President by proclamation in the Gazette upon the advice of Parliament acting in terms of a motion which shall be passed by a two-thirds, majority.

(b) If such motion is not supported by the required majority in Parliament, the constitution and the consequent selection and appointment of the members of that Commission shall be effected by the State President by proclamation in the Gazette in accordance with an order of a full bench of the Appellate Division of the Supreme Court which shall include the Chief Justice or acting Chief Justice at the relevant time.

(c) In the case of a vacancy arising or the removal from office of a member of the Commission referred to in paragraph (b), the provisions of section 11(3) shall apply mutatis mutandis, and in such application any reference in that section to the advice of the Forum shall be construed as a reference to the order of the full bench of the Appellate Division of the Supreme Court constituted as contemplated in that paragraph.

(4) All assets, moneys and liabilities of the Commission shall on its dissolution in terms

of subsection (1) devolve upon the State.

Establishment of committees

9.(1) The Commission may establish such number of committees, whether as standing or special purpose committees, as it may consider necessary for the effective exercise and performance of its powers, duties and functions.

(2)(a) A committee shall consist of such number of persons as may be determined by the Commission.

(b) A committee may include persons who are not citizens of the Republic.

(c) In appointing members of a committee, the Commission shall endeavour to involve a broad cross-section of the population, including women.

(3) The Commission shall designate a member of the Commission as the chairperson of a committee.

(4) The majority of the members of a committee shall form a quorum for a meeting of the committee.

(5) A committee shall, when required, submit a report to the Commission for consideration.

(6) The Commission may on receipt of a report referred to in subsection (5) -

(a) refer the matter back to the committee for such further inquiry as may be determined by the Commission;

(b) make such further inquiry as it may deem necessary or desirable; or

(c) confirm, vary or set aside any decision taken by the committee.

(7) For the purposes of the performance of its functions a committee shall have the same powers as those conferred upon the Commission in terms of this Act for the performance of its functions.

(8) Any member of a committee who is not in the full-time employment of the State shall receive such remuneration and allowances, if any, as the Commission may determine after consultation with the Minister of State Expenditure and with the Subcouncil on Finance of the Transitional Council during its term of office.

Conditions of service, remuneration and allowances of members of the Commission

10. The conditions of service, remuneration, allowances and other benefits of members of the Commission shall be determined by the Forum after consultation with the Minister of

State Expenditure.

Vacation of office, removal from office and filling of vacancies in Commission

11.(1) A member of the Commission may be removed from office by order of the Special Electoral Court on an application lodged by or on behalf of -

- (a) the State President;
- (b) the Transitional Council;
- (c) Parliament or any other legislature; or
- (d) any party as defined in section 1 of the Electoral Act and eligible to participate in the relevant election, or at least 1 000 eligible voters: Provided that no such application by such party or such voters shall be heard save with the prior leave of the Chairperson of the Special Electoral Court, who shall first satisfy herself or himself as to the existence of probable cause, and who may impose such conditions upon the grant of leave, including the imposition of time limits for the institution of any such proceedings, as she or he may deem appropriate,

if the Special Electoral Court is satisfied as to the existence of good and sufficient reason therefor as contemplated in subsection (2).

(2) In considering any such application the Special Electoral Court shall determine that good and sufficient reason exists for the removal from office of a member of the Commission, in the case of -

- (a) serious misconduct;
- (b) unfitness or incapacity, including continued ill health;
- (c) a material contravention or failure to comply with the provisions of section 6(1)(a), (b) or (c) or (2)(a), (b), (c), (d), (e), (f) or (g); or
- (d) any other reason which the Special Electoral Court may consider material and inconsistent

with such member's continuance in office.

(3) If a member of the Commission dies, tenders her or his resignation in writing to the State President or is removed from office in terms of this section, the State President shall, upon the advice of the Forum, either -

- (a) allow such appointment to lapse, provided there remains at least the minimum number of members provided for in section 5(1); or
- (b) appoint some other suitably qualified person as a member for the unexpired portion of the term of the Commission.

Meetings of Commission

12.(1) The Commission may meet at any place in the Republic determined by the Chairperson for the purpose of performing its functions.

(2) Meetings may be convened at any time at the instance of the Chairperson or Vice-Chairperson, or at the instance of any two other members, and shall be convened at such intervals as circumstances may require.

(3)(a) Subject to paragraph (b), a quorum for a meeting of the Commission shall be 75 % of the members.

(b) In respect of the determination and certification of the results of an election as having been substantially free and fair, or otherwise, in terms of section 17, the quorum for the meetings of the Commission shall be all the members, excluding such members as may be unable to attend by reason of serious illness, disability, incapacity or other compelling circumstance.

(4)(a) Subject to paragraph (b), and section 13(4) the decision of the majority of the members present at a meeting of the Commission shall be the decision of the Commission.

(b) In respect of the determination and certification of the results of an election as having been substantially free and fair, or otherwise, in terms of section 17 the decision of the Commission shall not be of force and effect unless at least 75% of the members present at the meeting of the Commission shall have concurred in such decision.

(5) The Commission may determine its own procedures to be followed at its meetings.

Powers, duties and functions of Commission

13.(1) The Commission may exercise the powers and shall perform the duties and functions conferred upon or assigned to it by this Act or any other law.

(2) The Commission shall -

- (a) assume sole responsibility for the administration, organization and conduct, whether directly or indirectly, and the supervision of the administration, organization and conduct of any election called from time to time in terms of the Constitution and the Electoral Act;
- (b) take such measures as it may consider necessary for the prevention of intimidation of voters, candidates and parties as defined in section 1 of the Electoral Act;
- (c) be responsible for the education of voters concerning -
 - (i) democratic principles and values;

- (ii) the electoral process and mechanisms;
- (iii) the right to free political canvassing and campaigning;
- (iv) secrecy of voting; and
- (v) any other relevant matter,

by means of -

- (aa) literature and the use of other media, including distribution and publication of suitable literature, advertisements and dissemination through radio, television and the public print media, having due regard to the variety of languages spoken and varying levels of education throughout the Republic; and
- (bb) workshops, seminars and meetings, as it may consider appropriate.
- (d) register and regulate the activities of observers;
- (e) facilitate and assist the role of international observers; and
- (f) submit monthly written reports concerning its functions, which reports shall be delivered simultaneously to the Forum and the State President, and such reports shall be public documents.

(3) The Commission shall have such executive and regulatory powers as may be necessary for the achievement of its objects, including but without limitation thereto -

- (a) all powers necessary for the promotion of conditions conducive to the conduct of free and fair elections, which, in respect of the first elections referred to in section 2(1), shall be exercised in conjunction with the Transitional Council; and
- (b) all powers necessary for the enforcement, whether directly or indirectly, of the Electoral Code of Conduct and the regulation of the conduct of all persons, candidates, departments of State and all organs of any government, including the security and defence forces, in so far as such conduct may promote or inhibit the conduct of free and fair elections.

(4) The Commission shall have power -

- (a) to hear and determine appeals from decisions or actions of the directorates in respect of prescribed matters, which decisions or actions may on appeal be confirmed, varied or set aside : Provided that they may only be varied or set aside by a two thirds' majority; and
- (b) to give binding instructions to the directorates and their sub-structures in respect of matters concerning their functions, which power may be exercised either upon request from the directorates or of its own accord: Provided that such instructions may only be given by a two thirds' majority.

Administration and staff of Commission

14.(1) The Commission shall appoint a Chief Executive Officer who shall perform the functions assigned to him by this Act and the Commission.

(2) The Commission may, for the effective exercise and performance of its powers, duties and functions -

- (a) establish and co-ordinate the necessary functional structures and regulate their powers, duties and functions as it may deem appropriate;
- (b) make provision for the co-option, employment or assistance in such structures, the directorates and the Secretariat of legal experts and other suitably qualified or experienced persons, including persons who are not citizens of the Republic;
- (c) appoint and dismiss staff in respect of its own structures, the directorates and the Secretariat, and generally specify terms of employment as it may consider reasonable and appropriate: Provided that it shall endeavour to appoint men and women representing a broad cross-section of the population;
- (d) fix remuneration and determine emoluments and other benefits after consultation with the Minister of State Expenditure and the Subcouncil on Finance of the Transitional Council during its term of office;
- (e) purchase, hire or otherwise acquire movable or immovable property;
- (f) enter into agreements with any person, including the State, for the performance on its behalf of any specified act or function or the rendering of any service;
- (g) insure itself and its members, staff, visitors and the public generally against loss, damage, risk or liability which may be suffered or incurred;
- (h) open and operate bank accounts with the South African Reserve Bank or any other registered financial institution approved for that purpose by the said Reserve Bank; and
- (i) in general, perform such acts and do such things as may be necessary or expedient for the achievement of its objects.

Expenditure of Commission and guarantee by State

15.(1) The expenditure in connection with the exercise of the Commission's powers and the performance of its duties and functions shall be paid out of money appropriated by

Parliament then existing for such purpose.

(2) Subject to section 16(1), Parliament then existing shall, in respect of the first elections referred to in section 2(1) on request by the Commission vote the necessary funds to enable the Commission to exercise its powers and perform its duties and functions effectively.

(3) Subject to section 16(1), Parliament shall, in respect of any further elections called in terms of the Constitution, on request by the Commission vote the necessary funds to enable the Commission to exercise its powers and perform its duties and functions effectively: Provided that if the Commission is of the opinion that the funds so voted by Parliament is insufficient for that purposes it may submit the matter for final determination to the Special Electoral Court.

(2) The State shall guarantee, where required, all commitments and liabilities of the Commission incurred in the exercise of its powers or the performance of its duties and functions.

Accountability and finance

16.(1) The Commission shall determine and submit for approval by the Forum estimates and, if necessary, additional estimates, of expenditure anticipated in the exercise of its powers or the performance of its duties and functions covering such periods as coincide as far as possible with the financial year as defined in section 1 of the Exchequer Act, 1975 (Act No. 66 of 1975).

(2) The financial affairs of the Commission shall be dealt with as a particular portion of a vote whereof accounts are kept separately, as contemplated in section 15A(1) of the Exchequer Act, 1975, by one or more employees of the Commission designated for that purpose by the Chief Executive Officer.

(3) The Chief Executive Officer shall -

- (a) be charged with the responsibility of accounting for the financial affairs of the Commission and for all State moneys received and payments made by it;
- (b) be deemed to have been assigned by the Treasury as defined in section 1 of the Exchequer Act, 1975, all of the powers and duties referred to in section 15(2) of that Act under section 15A(2) of that Act;
- (c) ensure that accounts of the financial affairs of the Commission are kept in

accordance with Treasury Instructions issued in terms of the Exchequer Act, 1975;

- (d) ensure that the Commission keeps full and proper records of all its income and expenditure, and all of its assets, liabilities and financial transactions, and that monthly financial statements are prepared in the format required by the Auditor-General; and
- (e) ensure that all reasonable management measures are adopted so that assets, services and resources are obtained, safeguarded and utilized in the most economic, efficient and effective manner, and that the requirements of the Auditor-General are duly satisfied.

(4)(a) The Auditor-General shall have the same powers, duties and functions contemplated in the Auditor-General Act, 1989 (Act No. 52 of 1989), in respect of all accounts maintained by the Commission.

(b) The estimates and accounts of the Commission shall be subject to audit by the Auditor-General who shall report thereon to the Forum and to Parliament then existing.

Determination and certification of election results, and declaration

17.(1) Upon completion of the ballot, the Commission shall as expeditiously as possible, but in any event within a period of 10 days of the close of the poll, determine and certify the results of the election, and declare whether, and if so, to what extent, it considers that such election has been conducted in a manner which was substantially free and fair.

(2) In effecting such determination, the Commission may accept and reject the results of the poll as a whole, or it may accept or reject such results in respect of any particular legislature or geographic district or region for the purposes of voting.

(3) In the event of the results of the poll as a whole, or any part thereof, being rejected by the Commission, the Commission shall determine and cause to be implemented such steps, including the organization, conduct, administration and supervision of a new election, as it may consider appropriate in the circumstances, in order to achieve a substantially free and fair election result, having due regard to the provisions of the Constitution.

(4) Notwithstanding the provisions of subsections (2) and (3), the results of the poll as a whole, or any part thereof, shall not be rejected merely by reason of some untoward occurrence, mistake or non-compliance with the provisions of this Act, the Electoral Code of Conduct or the Electoral Act, if it appears to the Commission that the election was conducted substantially in accordance with the legal requirements, and that such occurrence,

mistake or non-compliance was unlikely to have materially affected the result.

(5) The Commission's determination, certification and evaluation of election results, and its further decisions in terms of subsection (3), shall be final and not subject to appeal to or review by any court or the Special Electoral Court.