



## **Institute for Accountability in Southern Africa**

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2 May 2013

The Chairperson, Independent Electoral Commission  
Election House  
Riverside Office Park  
1303 Heuwel Avenue, Centurion 0157

Via email [tlakulap@elections.org.za](mailto:tlakulap@elections.org.za)  
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For Attention : Adv. Pansy Tlakula

Dear Chairperson

RE: Fair elections in South Africa

1. The exchange of correspondence during the months of February to April between our respective offices refers.
2. We have carefully considered your invitation to take the matter up with parliament and must regretfully decline to do so.
3. The reason for declining is that our impression is that parliament is a much weakened institution and that the players in it, with notable but insignificant exceptions, are unlikely to do anything that is not pre-ordained by political party bosses, unelected persons who are found in Luthuli House and elsewhere, none of whom, in all major parties, have any intention or desire to pass the remedial legislation that is so urgently required if the next election in SA is to be a substantively fair one. The ID, which is on its last legs, is the only party to take a firm stance on the matter and it has achieved nothing positive. We do not rate our chances of doing better along the route you point us to because we have even less political influence than the ID. When the ID is swallowed up by the DA it will perforce be obliged to toe the DA line which is for all practical purposes indistinguishable from that of the governing alliance, save where it comes to getting funding from SOEs and parastatals or from engaging with the state in respect of rights that are its to dispense, such and mining and prospecting rights and other licences. Only the ANC has a Chancellor House to raise funds for it in nefarious ways.
4. Having taken the trouble to review the correspondence that has passed between us on these thorny issues, it appears to us that we may be miscommunicating on two fronts.

*Patron: Archbishop Emeritus Desmond Tutu  
Trustees: S Christie; M de Swardt, SC.; B King; G Williams  
Directors: D. Groeneveldt; P. Hoffman, SC.; Adv G Lloyd-Robert; Adv C Shone*

5. Firstly, and this is our fault, it is not sufficiently clear from the correspondence that our complaint to you is based on the obvious need to ensure substantive fairness of elections. We have no gripe about the technical and procedural fairness of the process as managed by the IEC staff. Our problem lies with the issue of substantive fairness.  
We respectfully contend that it would be a retrograde step to construe the mandate of the IEC in such a way as to suggest, as the correspondence seems to do, that its sole function in relation to fairness of elections is a procedural one. This can never ensure the substance of elections is fair. When you regard your mandate as purely one of management of elections you are perhaps understating the content or at least underplaying the substantive obligation that is yours and yours alone under the enabling provisions of the Constitution which, as you know, oblige you to ensure free and fair elections. The phrase is unqualified and cannot, in our respectful submission, be limited to matters of procedure, which is apparently how you construe your mandate. This is too narrow an interpretation and is unlikely to withstand judicial scrutiny.
6. The matter of substantive fairness is fundamental to the proper functioning of the rule of law. The words of Ngcobo J, as he then was, in the Mapethla case are instructive as was the speech of the late Chief Justice, Arthur Chaskalson, at the first World Justice Forum. On that occasion, in Vienna in July 2008, the learned Chief Justice said of the apartheid version of the rule of law: *“What was missing was the substantive component of the rule of law. The process by which the laws were made was not fair. And the laws themselves were not fair. They institutionalised discrimination, vested broad discriminatory powers in the executive and failed to protect fundamental rights. Without a substantive content there would be no answer to the criticism, sometimes voiced, that the rule of law is ‘an empty vessel into which any law could be poured’.”*
7. The substantive component of your constitutional mandate is to ensure that elections are fair, substantively so. To construe the mandate in any other way is to fall back into the way of thinking that informed the apartheid era and to contradict the founding values of the supremacy of the Constitution and the rule of law as enshrined in section 1 of Chapter One of the Constitution. We are sure that this is not your intention and we accordingly persist in asking you to take appropriate steps to “ensure ... fair elections” substantively so, as the Constitution requires you to do. It is a wholly inadequate response to the proper discharge of your mandate to attempt to fob us off with a suggestion that we speak to parliament. Our information is that IDASA, until its recent demise, and other civil society players, most notably the Open Society Foundation, have patiently been engaging in the manner you suggest for years and to no discernable effect at this stage. You simply cannot sit on your hands when the situation is as sketched in our first letter to you back in February, and we cannot, if we are to be true to our mandate to exact accountability from, inter alia, you, allow you to do so. We urge you to reconsider your stance in the light of the amplification of our complaint set out above.
8. Secondly, there is the question of the illegal way in which the governing alliance goes about securing funding for itself, done in collusive deals that reek of conflict of interest and with complete impunity thus far. This second complaint is set out in sufficient detail in our first letter to you and is not repeated here. We suggest that you have not dealt with this aspect in any shape or form in the ensuing exchanges between us and we must now insist that you do so in the interests of creating a more level playing field for the political parties that are active in our multi-party democracy under the rule of law. If you do not, it is simply a matter of time before you will find that the opposition parties will be ploughed under and your successors in office will manage one party elections, for whatever they may be worth.

Already SA is described as a “dominant party state” by some academic observers. This is not healthy, it is not multi-partyism as embraced in the founding provisions of the new order, and it will not lead to the realisation of the lofty goals set in 1994 when the national accord was encapsulated in the form of constitutionalism now in place.

9. We stress the urgency of the matter; we cannot continue to correspond at a leisurely pace. There are elections next year and there is work to be done, by you, to ensure their substantive fairness.
10. If you are not prepared to see your mandate in the way we interpret it in this correspondence, and we explain our construction of it above with reference to the applicable law, you leave us with little alternative but to seek other avenues to hold you to account.
11. In this regard we have already reserved the right to litigate, a step which we will not resort to lightly or ill-advisedly.
12. On reflection, it seems to us that the nature of our complaint against you is one of maladministration. We suggest to you, for your consideration, that it is indeed maladministration to deny –at least by implication – that your constitutional mandate does not include a component to ensure that elections are substantively fair, something that simply cannot occur with the lack of regulation and the preparedness to raid the public purse on the part of the governing alliance which is so much in evidence at present. Multi-party democracy does not stand the proverbial snowball’s chance in hell in the circumstances you are allowing to prevail in the electoral arena on your watch. We do not need to remind you of your obligation to act without fear, favour or prejudice.
13. Accordingly, if we do not receive a substantive response to all of the points we have set out in this letter by 15 May 2013, it is our intention to either complain formally to the Public Protector about your maladministration of your mandate to ensure substantively fair elections, or to seek relief from the courts against you. Kindly be guided accordingly.

Yours sincerely,



**Paul Hoffman** SC  
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